



ASIC

Australian Securities & Investments Commission

ASIC insolvency update

December 2010

An update for registered liquidators

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Welcome to the December 2010 issue of ASIC's insolvency update.

There continues to be a strong public focus on the insolvency profession, following the release of the report by the Senate Economics References Committee's inquiry into liquidators and administrators on 14 September 2010 (the Senate Inquiry Report). ASIC welcomes community discussion about the issues raised in this report.

The Senate Inquiry Report outlines 17 key recommendations including recommendations that a new body be responsible for the regulation of insolvency practitioners, insurance requirements and the remuneration of liquidators. The report is available from

http://www.aph.gov.au/senate/committee/economics_ctte/liquidators_09/report/index.htm

An ASIC taskforce headed by me has been established to review the recommendations of the Senate Inquiry Report, and to work with Treasury and the Government in implementing any response it has to the Inquiry's recommendations.

ASIC's Insolvency Practitioner Liaison meetings were held in November 2010 in Perth, Melbourne, Adelaide, Sydney and Brisbane. The release of the Senate Inquiry Report provided a range of feedback from the meetings. We also provided the meetings with an update on ASIC's recent insolvency activities. These are included in this update. We thank those participants who provide valuable feedback and input in these forums. Of course, feedback outside of these meetings is always welcome. Details of our team members, by state, are provided at the end of this update.

I also recently announced the resignation of Stefan Dopking from his role as Senior Executive Leader of the Insolvency Practitioners and Liquidators (IPL) team at ASIC. Stefan is well known to many of you, and his significant contribution to ASIC and the IPL team is acknowledged. The role has been advertised and we expect to announce the new appointment early next year.

Finally, best wishes to everyone for a happy and safe festive season.

- **Regional liaison meetings**

The recent meetings gave IPL the opportunity to provide an update on ASIC's insolvency activities and receive feedback from practitioners.

Matters raised by practitioners:

- It was generally commented that the Senate Inquiry Report recommendation for relaxing the experience and educational criteria for registration of liquidators (aimed to increase competition and hence reduce costs) was likely to lead to greater risk being borne by creditors and would require substantial regulatory oversight.
- Practitioners were of the opinion that the profession needs to do more work to educate the public about the role of insolvency practitioners.

- There was general support from practitioners for increased guidance from ASIC in relation to independence disclosure requirements, as application of the law still remained somewhat unclear and the revised IPA Code of Conduct was yet to be released.
- General feedback on ASIC's regulatory guide for directors¹ was positive and several practitioners indicated they had used the guide when providing advice to directors, including boards of directors for large entities, on insolvent trading implications. Practitioners considered the guide was particularly useful for directors of SME companies and should be further promoted to that segment.
- Practitioners considered it would be timely for ASIC to take a number of insolvent trading actions in relation to SME businesses to back up ASIC's recent report² and guidance about insolvent trading and to send a clear message that ASIC is acting against breaches of the duty to prevent insolvent trading.
- Some practitioners mentioned that the risks faced by them (e.g. trading risk, OH&S, environmental) were greater than the rewards being received. They believed the public perception about excessive fees was unfounded and is caused by an expectation gap between the level of risks being taken by practitioners and creditors' understanding of the actual work required.
- Practitioners generally felt that an increase in insolvency activity in the SME market was expected in the short term given the recent increased debt collection activity by the ATO, increasing interest rates and existing low level of bank lending post GFC.

- **Liquidator compliance activities**

Given ASIC's focus in the area of liquidator compliance, we are continuing to undertake a number of projects to assess liquidator compliance with their legal obligations and to assist them to improve overall industry performance. A summary of this work follows:

- a) **Monitoring of Declaration of Relevant Relationships and Indemnities (DIRRIs)**

IPL commenced a pilot project in September 2010 to monitor DIRRIs prepared by practitioners for voluntary administrations and creditors' voluntary liquidations. The project is aimed at testing ongoing compliance with statutory disclosure requirements and providing guidance to liquidators in this area.

The early identification of the DIRRIs maximizes the opportunity to take early remedial action if inadequate disclosure is identified.

As part of this project, and in addition to its other compliance activities, IPL has reviewed over 30 DIRRI's (involving in excess of 50 practitioners) of which in excess of 75% have resulted in replacement declarations being issued so as to provide better disclosure to creditors. The most common

¹ Regulatory Guide 217: Duty to prevent insolvent trading: Guide for directors – released in July 2010

² Report 213: National Insolvent Trading Report – released in October 2010

reasons requiring improved disclosure stem from a lack of disclosure of the:

- nature and extent of pre-appointment dealings with persons including directors, their advisors or major secured creditors;
- reasons why the practitioner believes a relationship(s) does not result in a conflict of interest or duty;
- identity of an indemnifier and or the nature and extent of the indemnity arrangements.

General feedback received from practitioners to date has indicated ASIC's guidance in this area has been welcomed for improving disclosure and has led to updated precedents and staff development training in this area.

We will continue to monitor DIRRIs and intend to provide a report on the outcomes of the project in 2011.

b) Insurance Project

The aim of the insurance project is to test compliance by liquidators with section 1284 of the *Corporations Act 2001* (the Act), which requires all registered liquidators to maintain adequate and appropriate professional indemnity and fidelity insurance, and with ASIC's *Regulatory Guide 194: Insurance Requirements for Registered Liquidators* (RG 194).

Correspondence has recently been sent to all registered liquidators requiring the production of their relevant insurance policies, together with a request for completion of a short voluntary questionnaire.

This area of focus was foreshadowed in IPL's Forward Program³ and its newsletter to insolvency practitioners in June 2010.

It is anticipated that ASIC's review will provide:

- an increased awareness of the requirements of the Act and RG 194 for both registered liquidators and insurance providers;
- ASIC with a better understanding of registered liquidators' compliance in this area; and
- ASIC with an understanding of what issues might be taken into account for any future revision of RG 194.

c) Liquidator surveillance

Practice visits

ASIC has continued to undertake surveillance visits of registered liquidators with the aim of improving practice and industry behaviours. Since April 2010, we have conducted 18 practice reviews nationally. These reviews focus on the following compliance areas:

- practitioner independence;
- remuneration disclosure and approval;
- quality of investigations;
- reporting to creditors and to ASIC;

³ Refer to ASIC's March 2010 submission to the Senate Economics References Committee's inquiry into liquidators and administrators

- asset realisations; and
- adequacy of practice systems.

Where material misconduct is identified, ASIC is considering whether to pursue further action, including the possibility of making applications to the Court or to the Companies Auditors and Liquidators Disciplinary Board (CALDB).

Transaction reviews

In addition to the specific practice visits, since 1 January 2010, the IPL team has dealt with, or is dealing with, in excess of 90 transactional reviews.

Transaction reviews typically involve ASIC acting upon complaints received from the public or other sources of information in relation to a practitioner's conduct in respect to a specific external administration. Outcomes of transaction reviews can include:

- writing to the liquidator and obtaining an explanation of possible concerns identified by ASIC;
- taking action due to the seriousness and immediate nature of the conduct (e.g. independence/conflict concerns, capacity concerns);
- commencing a surveillance visit where it appears, on available information, that a liquidator's conduct may be of a serious or systemic nature;
- deciding to take no further action where the liquidator has taken steps to address ASIC's concerns and/or it appears, based on available information, the liquidator is adequately and properly performing their duties.

d) Remuneration project

As previously notified, in April 2010 ASIC commenced a compliance project to assess the profession's compliance with the law and industry standards.

ASIC's review involved the selection of a mix of practitioners varying in state, size and complexity. We have now written to all practitioners involved in the remuneration project.

We published an article about the findings of the remuneration project in the IPA's Australian Insolvency Journal, December 2010 quarterly edition. These findings included identification of sound remuneration practices such as:

- well-documented files with sufficiently detailed timesheet entries;
- timely and well documented practitioner review procedures to assess reasonableness and write-off time which was unreasonable or unnecessary; and
- regular reviews of administrations within the first 6 months to ensure timely and efficient completion of tasks.

We also found instances where conduct required improvement, including:

- drawing remuneration beyond approval limits;
- drawing pre-appointment remuneration;

- inadequate narrations for time charged;
- non disclosure of a summary description of the major tasks likely to be performed;
- non disclosure of proposed capped and prospective remuneration in the notice of meeting to creditors.

Remuneration will continue to be a key focus area for ASIC. We will continue to work closely with the IPA and other stakeholders to ensure that practitioners continue to improve their remuneration and communication practices for the benefit of all creditors.

We received positive feedback from the profession suggesting, despite the fact that the reviews unearthed some significant issues for particular practitioners, our response was balanced and measured.

e) Late lodgements

The aim of the late lodgement project is to seek an improvement in the timeliness of information lodged in ASIC's database. In the first quarter of 2011 we will be writing to in excess of 130 registered liquidators who we have identified as having received initial late lodgement fee assessments totalling in excess of \$7,000 over the past 5 years or in excess of \$3,000 over the past 2 years.

We will be requesting:

- an explanation as to the reasons why the late lodgements have occurred;
- an explanation as to what systems have been put in place to ensure timely lodgement of documents in the future;
- confirmation that all late fees paid have not been met out of external administration funds; and
- confirmation that the practitioner has undertaken a review of all existing administrations and, where relevant, lodged all outstanding documents identified from that review.

f) Aged external administrations

The aim of this project is to raise the awareness of registered liquidators to complete external administrations in a timely manner.

Early this year we wrote to 351 registered liquidators (53% of population) with 2,957 (11.6% of population) external administrations aged four years or more (prior project was >5 years) as to why they had not been finalised. In particular we sought the following:

- estimated date of completion of the administration, or, where a reliable estimate cannot be provided, the reasons why an estimate cannot be provided;
- for liquidations, whether a s533 report is required and, where a report is required, confirmation it has been lodged, and if not, an expected date of lodgement;
- identification of the factors which have protracted the completion of the administration.

As a result of the project, in excess of 50% of the aged administrations in question have either been finalised or are expected to be finalised by the end of 2010. Full details of the outcomes of the project will be communicated to the profession during the first quarter of 2011.

Registered liquidators have a duty to complete external administrations in a timely fashion. Failure to do so can add to the costs of the administration and/or delay distributions to creditors and is not in stakeholders' interests generally.

This is the second time this project has been undertaken by IPL. As part of the first project, we wrote to 332 practitioners in November 2007 who were identified as having 2,504 external administrations over 5 years old.

g) Non-lodgement of receipts and payments

As of 31 December 2007 statutory reform to the Act resulted in all types of external administrators being required to lodge their Presentation of Accounts and Statement (Form 524). Prior to the amendments to the Act, voluntary administrators and deed administrators were not required to lodge these forms with ASIC.

The aim of the project was to ensure registered liquidators were complying with the amendments to the Act and also in an attempt to change the behaviour of those registered liquidators who exhibited evidence of systemic failure through non-lodgement of forms.

We identified forms that had been outstanding for a period of more than six months. In March 2010 we wrote to 172 registered liquidators (26% of the population at the time) in respect of 517 external administrations out of a total population of approximately 25,000 companies in external administration at the time.

The project achieved a high response rate of 95%. Practitioners acknowledged that they had omitted to lodge the forms for more than 50% of the external administrations in question. We are monitoring the subsequent lodgement of these forms. Full details of the outcomes of the project will be communicated to the profession during the first quarter of 2011.

We expect that all registered liquidators will comply with the Act and lodge forms with us within the required timeframes. During the winding up of a company, the availability of timely information to interested parties is an important part of maintaining the integrity of the Australian insolvency regime.

- **Regulatory Guide 217: Directors' duty to prevent insolvent trading: Guide for directors**

ASIC's Regulatory Guide 217 Directors' duty to prevent insolvent trading: Guide for directors was released in July 2010. We released this guide to assist directors, particularly those of SMEs who may be in financial difficulty, to fully understand their duty to prevent insolvent trading. ASIC also outlines the factors it considers when assessing whether there has been a breach of the insolvent trading laws.

A link to the guide can be found on ASIC's website as follows:

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument#201>

ASIC also considers the guide to be a useful tool for insolvency practitioners when discussing with directors their obligations in this area.

- **Report 213: National Insolvent Trading Program**

ASIC released a report in October 2010 on the key messages and outcomes of its National Insolvent Trading Program, a program conducted by ASIC to encourage directors to seek professional advice at an early stage to address their company's solvency concerns.

During the program, IPL:

- visited over 1,530 companies displaying solvency concerns during the period 2005-2006 to 2009-2010;
- provided an awareness of director duties and ASIC's expectations of professional advisers when companies are experiencing financial difficulties;
- facilitated positive outcomes as a consequence of directors seeking professional advice and/or taking steps to improve the financial performance and position of the company (e.g. improving financial information, fundraising, restructuring and refinancing);
- encouraged directors to seek advice from an insolvency professional regarding the appointment of an external administrator where significant insolvency indicators were identified;
- noted the positive impact of the program on director behaviour given 15% of the companies reviewed were subsequently placed into external administration, mostly by the directors.

The messages for directors are aligned with the messages in *RG:217: Directors duty to prevent insolvent trading: Guide for directors*. A director is less likely to breach their duties under the Act if they take into account the following key principles in carrying out their role:

1. maintain appropriate books and records;
2. identify insolvency concerns and assess available options;
3. seek professional advice; and
4. act in a timely manner.

Report 213 is available from the ASIC website via a link as follows:

<http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Reports#2010>

- **Assetless Administration Fund**

Since the Assetless Administration Fund (AA Fund) allocation was fully utilised in the 2009/2010 financial year, the participation rate for this current financial year has decreased. Of the \$3.45m grant allocated for the AA Fund for 2010/11, only \$1.8m has been paid and committed for funding.

ASIC encourages liquidators to utilise the AA Fund where liquidators have identified possible misconduct in accordance with RG109: *Assetless Administration Fund: Funding criteria and guidelines*.

All funds committed under the AA Fund are required to be published on ASIC's website. A full list of allocated grants is available under Grant Reporting from

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Assetless+Administration+Fund?openDocument>.

As at 22 November 2010, the firms (on a national basis) utilising the majority of grants under the AA Fund for the period from 1 January 2008 are as follows:

Firm	Grants \$	No of Matters
Worrells Solvency & Forensic Accountants	1,189,915	55
Deloitte	858,320	14
PPB	644,204	42
Pitcher Partners	522,588	23
Lawler Partners	331,230	24
Ferrier Hodgson	319,147	22
Hall Chadwick	243,740	33
Rodgers Reidy	185,038	20
SV Partners	169,407	11
PKF	159,500	17

In order to qualify as an assetless administration, a liquidation must have less than \$10,000 of net realisable assets at the time of making the application to ASIC (i.e. fees, disbursements and other outlays of the administration in excess of \$10,000 may have been drawn prior to making the application).

In our June 2010 newsletter we provided an update in relation to some of the important regulatory and deterrence outcomes which have been achieved by ASIC with the assistance of the AA Fund involving cases of alleged insolvent trading and misappropriation of funds. Recent outcomes assisted by funded reports by liquidators include:

- A Melbourne director was sentenced to 4 months imprisonment (wholly suspended) and banned from managing a corporation for 20 years for carrying on a financial services business without holding an Australian financial services license and for managing a corporation while disqualified. [Media advisory](#).

- A Sydney director charged with dishonest conduct involving investor funds worth more than \$2.7 million. [Media advisory](#).

For further information about the AA Fund, go to www.asic.gov.au/aafund.

- **ASIC involvement in recent court cases**

When considered appropriate, ASIC will intervene in Court cases as amicus curiae (friend of the Court) to provide advice to the Court around certain aspects of insolvency law and practice. Recent examples of ASIC's intervention include:

Willmott Forests Limited (Administrators Appointed) ('Willmott')

On 6 September 2010, a sole practitioner in Melbourne accepted an appointment as voluntary administrator to Willmott, a large managed investment scheme group.

The secured creditors sought to have the practitioner removed by the Federal Court. ASIC supported the removal of the sole practitioner on the grounds of capacity to perform the functions required of a voluntary administrator in these circumstances. A group of investors also supported his removal. ASIC was concerned that the practitioner did not have adequate professional indemnity insurance, lacked requisite managed investment industry experience, had insufficient human resources to conduct adequate investigations and assess the viability of various managed investment schemes and did not have information technology systems to enable effective communication with stakeholders. The Court made orders on 26 October 2010, that the practitioner be removed from office and appointed alternative practitioners subject to various conditions designed to ensure their independence and monitor the fees they charged. We anticipate the reasons for the judgment will be released shortly.

ACN 068 895 585 Pty Ltd (formerly Waterman Collections Pty Ltd)

This matter involved whether a former liquidator had an entitlement to have some additional remuneration fixed by the Court. The former liquidator's claim related to remuneration that had not been approved by creditors prior to him ceasing to act as the liquidator.

ASIC made submissions as to whether the former liquidator:

- had standing to apply as a creditor for monies owed under s511(1) of the Act; and/or
- should be treated as a liquidator for the purposes of s511 and s504 of the Act.

The Federal Court determined that the former liquidator was a creditor of the company (as he had an entitlement to some additional remuneration) and had standing to apply as a creditor under s511.

The Court also held that the machinery for fixing remuneration under s499(3) of the Act was not available in this case, as that section only permits the fixing of a current liquidator's remuneration.

Crisp v ACN 069 859 585 Pty Ltd (formerly known as Waterman Collections Pty Ltd) [2010] FCA 1370

- **Liquidator assistance**

ASIC continues its Liquidator Assistance Program (LAP) to assist liquidators by taking actions to ensure that directors of companies in external administration comply with their obligations, or are prosecuted for their failure to do so.

Insolvency practitioners are asked to notify ASIC as early as possible if directors do not comply with their obligations, for example, where they fail to:

- provide a Report as to Affairs or the books and records;
- attend meetings; or
- assist as required, for example, providing the location of assets or passwords to computer programs.

Year to date statistics to 30 November include:

Requests for assistance received	550
Compliance outcomes	91
Charges issued	250
Successful individual prosecutions (378 offences)	216
Fines and costs	\$389,016

Compliance outcomes generally involve activities (including court proceedings) that resulted in voluntary compliance by directors in submitting Reports as to Affairs and/or producing a company's books and records to the liquidators.

Successful prosecutions predominantly concern convictions obtained for failure to submit a company's Reports as to Affairs and/or books and records. In some of these cases, the directors subsequently complied by assisting liquidators.

- **Report 225: Insolvency statistics: external administrators' reports 1 July 2007 – 30 June 2010**

Earlier this week we released Report 225 *'Insolvency statistics: External administrators' reports 1 July 2007 – 30 June 2010'*.

It is the second report ASIC has released on statistical data compiled from statutory reports lodged by external administrators.

Access to the statistical data contained in the report, including industry specific data for the five largest industry classifications and 6 years' of data comparison from 2004 to 2010 is also available from ASIC's website.

The Report provides data for the first time on opinions expressed by external administrators about possible misconduct by company officers. ASIC revised Regulatory Guide 16 *External administrators: reporting and lodging* in July 2008 to improve data collection in this area. Whilst a relatively large number of possible offences were reported to ASIC,

external administrators only recommended ASIC undertake further enquiries in relation to a small portion of those matters. Our latest annual report⁴ indicates that the number of matters referred for further action or to assist with ongoing inquiries has increased, from 17% in 2007-2008 to 33% in 2009-2010.

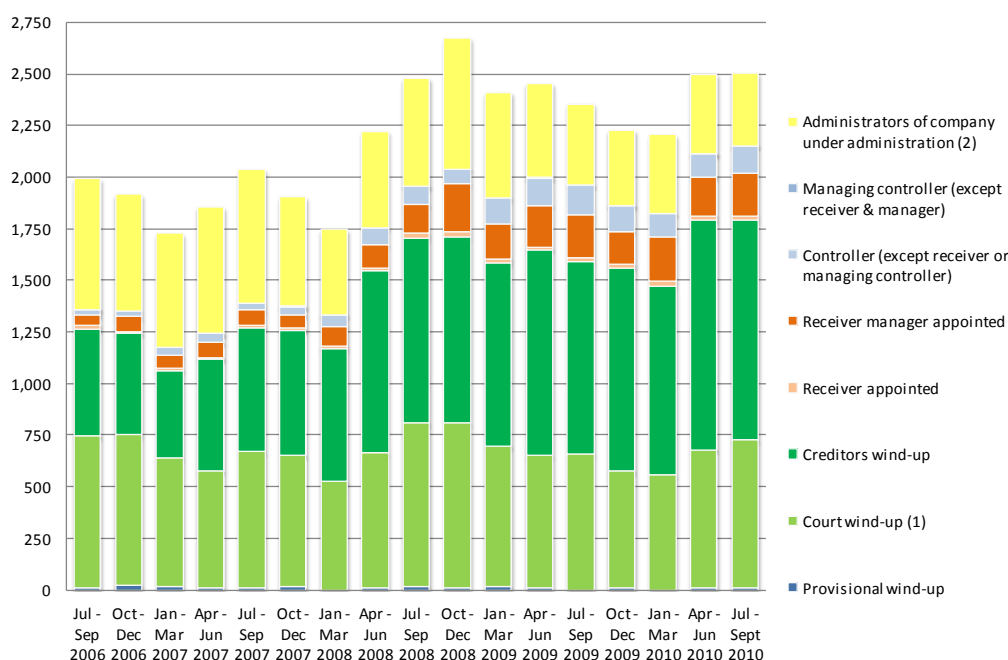
As you are aware, the financial information provided in statutory reports reflects external administrators' estimates and opinions at the time they lodge their reports. Therefore the data contained in the Report does not represent an account of the actual outcomes of those administrations. Provided this and the other limitations of the data contained in the Report are understood, the statistics provide a broad picture of corporate insolvencies in Australia.

We also publish monthly insolvency statistics about the number and type of corporate insolvency appointments. We have made improvements to the presentation of this data, which is now available from our [website](#) in an easy to use format, allowing for easier manipulation and trend analysis.

- ## Monthly insolvency statistics

The graph below shows the number of companies recorded as having entered into external administration for the first time during the periods indicated.

Companies entering external administration



(1) Will not include companies previously identified as being in provisional liquidation

(2) These companies will not be included again after the creditors resolve to appoint a liquidator, or a deed of company arrangement is proposed.

Excludes Scheme Administrator and Foreign/RAB wind-ups

⁴ ASIC Annual Report 09-10, page 40

Monthly, April to September 2010

2010	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	Total
April	302	198	148	29	44	10	1	5	737
May	372	229	208	27	61	3	2	12	914
June	337	204	196	32	63	5	4	7	848
July	385	220	159	40	41	8	2	11	866
August	370	240	160	29	58	4	3	6	870
September	318	207	155	19	47	10	4	6	766

Note: These statistics show the number of companies entering into a form of external administration for the first time, broken down according to the initial form of administration. The numbers provided are based on documents lodged with ASIC for the given period.

- **Key ASIC contacts**

IPL – Acting SEL		Maria Duta	(03) 9280 3465
IPL – Managers	NSW/ACT/QLD	Carl Sibilila	(02) 9911 2994
	VIC/TAS/WA/SA	Adrian Sagggers	(08) 9261 4065
IPL – Specialists		Marc Robinson	(07) 3867 4714
		John Laird	(02) 9911 2127
		Adrian Furby	(07) 3867 4840
IPL	NSW/ACT	Angela Mantas	(02) 9911 5348
		Suzie Davies	(02) 9911 2109
	VIC/TAS	Paul Davine	(03) 9280 3448
		Ben Conrad	(03) 9280 3405
	QLD/NT	Matthew Jesse	(07) 3867 4922
		Meaghan Brooks	(07) 3867 4728
	WA	Alan Ashford	(08) 9261 4166
	SA	Hywel Thomas	(08) 8202 8573
		Steven Barnett	(08) 8202 8586
Liquidator Assistance Program requests and Complaints against external administrators	NSW	Adrienne Whitby	(02) 9911 2099
		Amelia Aversa	(02) 9911 2379
	ACT	Bruce Pittard	(02) 6250 3821
	VIC/TAS	Nicholas Roper	(03) 9280 3206
		Davis Zhang	(03) 9280 3353
	QLD	Ritesh Patel	(07) 3867 4718
	NT	Helen Crafter	(08) 8943 0913
	WA	Cherie McMullan	(08) 9261 4108
	SA	David Mead	(08) 8202 8461
EXAD portal	Nationally	James Sykes	(03) 5177 3733
Liquidator registration	Nationally	Steven Ween	(08) 8202 8519
Insolvency statistics	Nationally	Catrina Orr	(08) 8202 8570
Change of contact details for emailing list	Nationally	Catrina Orr	(08) 8202 8570