INVESTIGATIONS BY EXTERNAL ADMINISTRATORS

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Strange as it may seem, the first point that needs to be made when discussing investigations by external administrators is that, strictly speaking, there is no such thing as an external administrator.

The phrase "external administrator" is not used or defined in the Corporations Law (the Law). [1] Nor is it a phrase, office or agency that has been considered by the courts. It is merely a convenient way of collectively referring to liquidators, administrators of companies (under the voluntary administration regime) and receivers.

Because there is really no such thing as an external administrator, the Australian Securities Commission's (ASC) Practice Note on reporting obligations, Practice Note 50, "External Administrators - Reporting Matters and Lodging Documents", issued in April 1994, is, in some respects, misleading.

The main offender is the ASC's statement that "an external administrator must undertake reasonable inquiries in order to determine whether a report (of suspected contraventions, negligence or misconduct) ... may need to be lodged". [2] The trouble with this statement is that in many important areas -- and, as I will argue in this article, particularly in the area of investigation -- the powers and duties of liquidators, as stated in the Law and as judicially defined, are considerably different from the powers and duties of receivers and company administrators. Also, the same sorts of distinctions exist between receivers and company administrators. [3] On top of that there are distinctions within classes. For example, the powers and duties of court-appointed liquidators may differ a little from the powers and duties of liquidators appointed voluntarily.

REPORTS OF SUSPECTED CONTRAVENTIONS, NEGLIGENCE OR MISCONDUCT

When discussing the nature, content and timing of reports of suspected contraventions, negligence or misconduct, the phrase "external administrators" is justified, because the duties of liquidators, company administrators and receivers (set out in ss 533, 438D and 422 of the Law respectively [4]) are virtually identical.

Each must notify the ASC where it appears to that person that an officer, past or present, may have been

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1 The Law does, however, find the phrase "external administration" a convenient label for Ch 5 of the Law, which contains most of the legislation on liquidators, receivers and managers. And elsewhere the phrases "externally-administered company" and "externally-administered body corporate" are defined (see ss 206BB and 6 respectively).

2 The quote is from para 23 of ASC Practice Note 50. The complete paragraph states: "External administrators must undertake reasonable inquiries in order to determine whether a report specified in paras 19 or 20 above, or a supplementary report as specified in paras 33 to 36 below, may need to be lodged." Paragraphs 19 and 20 refer to reports to the ASC of suspected offences, the misapplication of property, negligence, default, breach of duty or breach of trust. Paragraphs 33 to 36 discuss the associated obligation to furnish the ASC with such information as it requires, and the expectation that where the external administrator obtains further significant information, he or she will lodge a supplementary report bringing that information to the notice of the ASC. This article is primarily concerned with the first-mentioned report.

3. In Practice Note 50 the expression "external administrator" occasionally also embodies controllers and managing controllers, and provisional liquidators -- see pars 3 and 18.

4. Corporations Law ss 533(1)(a) and (b), 438D(1)(a) and (b) and 422(1)(a) and (b).

 Published September 1995, (1995) 13 C&SLJ page 368.

guilty of an offence in relation to the company. [5] The same duty to report exists where it appears that a person who has taken part in the formation, promotion, administration or management of the company may have:

(a) misapplied or retained money or property of the company;
(b) become liable or accountable for money or property of the company; or (c) been guilty of negligence, default, breach of duty or breach of trust in relation to the company.

Offences in relation to the company, together with events (a), (b) and (c), will be referred to collectively as "misdeeds".

However, it seems clear from the wording of these sections that the duty to report only arises where "it appears" to the external administrator that such misdeeds have occurred. The ASC's statement that external administrators must undertake inquiries "in order to determine whether a report ... may need to be lodged" seems to suggest that in addition to the duty to *report* apparent misdeeds (or perhaps in order to comply with it), external administrators must *inquire into whether such misdeeds may have occurred*.

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[5]. The offences that liquidators, voluntary administrators and receivers should report are offences against **any** law of the Commonwealth or a State or Territory, not only the Corporations Law (ss 9, 422(1)(a), 438D(1)(a) and 533(1)(a)). Note, however, the stipulation that the alleged offence must be "in relation to the company". Although the Corporations Law is the main source of corporate offences, there are several others including the crimes legislation in each State; the *Trade Practices Act* 1974; the *Tax Administration Act* 1953; the *Income Tax Assessment Act* 1936; and the common law rules. Where the reported breach involves a law which it is not the ASC's responsibility to enforce, it will refer the matter to the relevant authority.

 Published September 1995, (1995) 13 C&SLJ page 368.

DUTY TO LOOK FOR MISDEEDS

Practice Note 50 does not cite any direct authority for this alleged duty to inquire into whether any misdeeds may have occurred.

The only case cited in the whole Practice Note is *Clasquin SA v AAR International Pty Ltd* (1989) 7 ACLC 284. This case involved a court-appointed liquidator. The question to be decided was whether the liquidator had to take possession of the company's books and records. Cohen J found that on the particular facts before him the liquidator (who was without funds) was justified in not incurring the expense that task would entail. [6] Of particular relevance in his Honour's deliberations was the fact that the books had been examined by the company's receivers and by representatives of the Corporate Affairs Commission.

It must be said that in parts of the judgment his Honour's words (in particular those quoted below) are capable of being construed as support for the notion that liquidators should inquire into the existence of misdeeds:

> "Section 418 (the predecessor of s 533), of course, requires a report by the liquidator on a number of matters and normally where the books are available it would be necessary for him to consult those books". [7]

> "I think that in general it is the duty of the liquidator to get in the books and records and to use them for the purpose of making such reasonable investigations as he can do". [8]

However, against such an interpretation are expressions used in the concluding parts of the judgment. There, his Honour speaks of an "investigation of assets and liabilities"; an "investigation of the availability of assets"; an "investigation to some extent of the assets and the records"; "an examination of the books and records"; and "an investigation is likely to reveal further assets". [9] Such words seem to suggest that his Honour thought the focus of a liquidator's investigation is on assets and liabilities.

Clearly, his Honour believed that liquidators have a duty to investigate. But the question is, does a liquidator, as the ASC seems to suggest, have a duty to inquire into the existence of misdeeds? If the decision in *Clasquin's* case is equivocal on the issue, is there any other authority for such a proposition? Is there any legislation which imposes such a duty? Is it a duty imposed by common law or custom? And even if it is a duty required of liquidators, is it also a duty required of company administrators and receivers?

Australian Law Reform Commission

In 1988 the Australian Law Reform Commission (ALRC) addressed some of these questions in its report on the law and practice relating to the insolvency of individuals and companies. [10] Its statement regarding

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6. *Clasquin SA v AAR International Pty Ltd* (1989) 7 ACLC 284 examines the equivalent at the time of s 545 of the Corporations Law. Section 545 limits a liquidator's liability to incur expenses in relation to the winding up of the company unless there is sufficient available property.

7. Ibid at 286. His Honour is referring to s 418 of the Companies Code, which is the same as s 533 of the Corporations Law.

8. Ibid at 287.

9. Ibid.

10. Australian Law Reform Commission, *Report No 45, General Insolvency Inquiry* (AGPS, Canberra, 1988).

 Published September 1995, (1995) 13 C&SLJ page 368.

liquidators is worth repeating in full:

> "The current law requires a liquidator in a preliminary report to comment on whether further inquiries should be made into the promotion, formation, conduct of the business or insolvency of the company. A liquidator is not, however, under any obligation to actively conduct an investigation into whether there has been misfeasance by the directors or officers of an insolvent company or whether offences have been committed. Such an investigation is to be distinguished, of course, from the due inquiry which may be expected of a liquidator when it comes to examining claims against directors and other officers (eg companies legislation s 229) which may yield a greater fund from which the claims of creditors may be satisfied. Plainly such inquiry is inextricably bound up with an investigation concerned with identifying misfeasance on the part of a company's officers. The liquidator's obligation is to report on matters that come to notice. There is no formal requirement to conduct a detailed investigation. If, however, the liquidator considers offences may have been committed, further reports must be furnished." [11]

Section 229 of the (then) companies legislation provided a means by which the company might receive financial compensation where an officer failed to act honestly or with reasonable care an diligence. In other words, the section was a potential source of property available to the liquidator.

As to the investigatory functions of other external administrators, such as receivers, the ALRC did not, unfortunately, make any comment.

A detailed examination of investigations

Since two federal government commissions hold conflicting views on whether a liquidator has a duty to look for misdeeds, it seems a detailed examination of the subject is necessary.

Besides, it is an issue which often causes considerable uneasiness in those who take on appointments as external administrators. Those liquidators who find themselves appointed to a company which seems to have no assets wonder how much unremunerated work they should do. Even those who have plenty of company assets at their disposal sometimes question whether they should look closely at the behaviour of directors, or, instead, avoid the cost of doing so and pass the savings on to creditors.

Naturally, where there are assets, the issue is of interest to creditors. If they think an investigation will lead to a prosecution, some may be pleased to see "their" money spent on investigating the behaviour of directors. But others, probably most, would prefer to have the money in their bank accounts.

For these reasons this article will attempt a detailed examination of the duties of liquidators, receivers and company administrators to investigate. Initially, and primarily, it will continue its focus on whether or not there is a duty to look for misdeeds. However, as this alleged duty and the well-established duty to look for assets can be "inextricably bound up" with one another, that duty, and others, will also be examined.

LIQUIDATORS

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[11]. Ibid, par 952.

Court-appointed liquidators [12]

Under s 476 of the Law a liquidator appointed by the court is required to lodge "a preliminary report". In the report, which is to be lodged within two months, or such longer period (if any) as the ASC allows, after the liquidator receives a Report as to Affairs, [13] the liquidator must report:

> "(a) in the case of a company having a share capital -- as to the amount of capital issued, subscribed and paid up;
> (b) as to the estimated amounts of assets and liabilities of the company;
> (c) if the company has failed -- as to the causes of the failure; and
> (d) as to whether, in his or her opinion, further inquiry is desirable with respect to a matter relating to the promotion, formation or insolvency of the company or the conduct of the business of the company."

In an earlier life, [14] this provision directed that the report be filed with the Court. Today reports must be lodged with the ASC, and the ASC places them on its public database of corporate information. [15]

It would appear that this obligation on court-appointed liquidators (or "official liquidators" as they are often called) is the reason for the following statement in *McPherson's The Law of Company Liquidation*:

> "One of the primary functions of the liquidator is to investigate the affairs of the company, including its promotion and formation, and the conduct of its business in the past." [16]

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12. When a court makes an order for the winding-up of a company it appoints an official liquidator to be liquidator of the company - s 472(1) of the Corporations Law. An official liquidator is a registered liquidator who has been registered by the ASC as an official liquidator - see ss 9 and 1283.

13. Section 476 refers to reports received pursuant to ss 475(1) and 475(2). Under s 475(1) the directors and secretary of the company are required to make out and submit to the liquidator a report in the prescribed form. The prescribed form (Form 507 - Report as to Affairs) is essentially a list of the company's assets and liabilities and their values. Under s 475(2) the liquidator may demand such a report from officers of the company and certain other persons.

14. *Uniform Companies Act*, s 235.

15. ASC Practice Note 50, par 46. Because the reports are available to the public the ASC advises liquidators not to include in the report detailed information of suspected misdeeds.

16. J O'Donovan, *McPherson's The Law of Company Liquidation* (3rd ed, The Law Book Company Ltd, Sydney, 1987) pp 255 and 432. The commentary at page 255 continues:

> "This must be done not only for the reason that it is necessary in order to enable him to discharge his duty of locating and collecting the assets of the company, but also because it may lead to a public examination or prosecution of delinquent officers of the company which it is part of the liquidator's duty to set in motion."

However, while the truth of the first of these reasons is easily demonstrated, the same cannot be said of the second, i.e. a liquidator's alleged duty to set in motion a public examination or prosecution of delinquent officers. Unfortunately the author does not point directly to any other authority for this proposition. He does, however, refer in his general comments on public examination and prosecutions (pp 429-430) to a statement by Street J in *Re Allebart* (see the main text of this article).

A relevant case cited elsewhere in *The Law of Company Liquidation* [17] is *Re Allebart Pty Ltd*. [18] The reference is to the following passage from the judgment of Street J:

> A court winding up involves more than a mere realisation of the assets and distribution of the proceeds. The Official Liquidator is an officer of the Court, and as such he has public responsibilities to investigate past activities connected with the company, and, in appropriate cases, to initiate further proceedings, civil or criminal connected therewith as the circumstances may dictate. It is his duty to discover not only breaches of the Companies Act but also conduct falling short of the requisite standards of commercial morality. In every instance the winding up of an insolvent company pursuant to an order of the Court is attended with these obligations resting on the Official Liquidator. The due course of such a winding up involves his taking such steps in relation thereto as are necessary to discharge the duties and obligations resting upon him." [19]

That passage has been cited with approval in other cases involving official liquidators, most notably *Re Brian Cassidy Electrical Industries Pty Ltd* [20] and *Brian Cassidy Electrical Industries Pty Ltd (in Provisional Liquidation) & Anor v Attalex Pty Ltd (No.2)*. [21]

Prima facie it seems that in order to fulfil the duty to make a s 476 report, the court-appointed liquidator would need to carry out a comprehensive investigation. The causes of failure (s 476(c)) will not normally be revealed during an inquiry into assets and liabilities. That would require greater thought and effort, and different techniques. Similarly, an inquiry into assets and liabilities will not normally divulge sufficient information upon which to form an opinion about the standard of the company's promotion, formation, insolvency and business conduct (s 476(d)). That too would require a widespread examination of the company's affairs, including interviews with directors, other officers and past employees.

However, there is considerable ambiguity in the language of s 476, and this has had important practical consequences. To begin with, the description "a preliminary report" seems to be at odds with the required content. And, although hard evidence is not readily available, these words appear to have led many liquidators to regard the s 476 report as of minor importance and requiring only a superficial investigation. [22] Secondly, the phrase in subs (c), which asks for a report "as to the causes of the failure", gives rise to varying interpretations. Some liquidators argue that it demands no more than a recitation or summary of the directors' views on why the company failed. Finally, subs (d), which asks the liquidator to report "as to whether, in his or her opinion, further inquiry is desirable", is regarded by some liquidators as one which may be satisfied by reporting in very general terms, or even by advising that the liquidator is not yet in a position to decide whether further inquiry is needed.

As a result of these ambiguities and attitudes, thorough investigations are seldom carried out for the purpose of complying with s 476. Where such an investigation is done the aim is more likely to be to discover company property, or to comply with what the liquidator believes is her or his duty under s 533.

Liquidators appointed voluntarily [23]

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17. Ibid, pp 429-430.

18. (1971) 1 NSWLR 24.

19. Ibid at 26-27.

20. (1984) 2 ACLC 628 at 630 and 631 per McLelland J.

21. (1984) 2 ACLC 752 at 773-774 per McHugh J.

22. There is plenty of anecdotal and other evidence of this attitude. The best hard evidence of this attitude would be the s 476 reports that have been lodged with the ASC. Op cit n 71: Mr Blackwell is the IPAA's National Secretary.

23. In certain circumstances a company may resolve that it be wound up voluntarily. Where it does so after a declaration by the directors that the company will be able to pay its debts in full within 12 months, the liquidator is chosen by the company. Where it does so without

Section 476 appears to be the only provision in the Law which requires (at least in theory) a liquidator to undertake inquiries for the specific purpose of making a report to the ASC. Therefore, for other liquidators to have the same duty to look for misdeeds as, it seems, do court-appointed liquidators, they would need to be subject to s 476 of the Law, or, alternatively or in addition, have a function analogous to that described by Street J in the abovementioned extract from *Allebart's* case.

The relevance of s 476 in voluntary liquidations can be quickly disproved. The only hurdle is a declaration in the Law that, except so far as the contrary intention appears, the provisions regarding winding-up apply irrespective of whether the company is being wound up by the court or voluntarily. [24] But it is well established, [25] and openly acknowledged in Practice Note 50, [26] that s 476 only applies where the company is being wound up by the court.

It becomes necessary, therefore, to compare the two types of liquidation. But first s 533 warrants some further consideration.

Section 533 revisited

Earlier in this article it was argued that for present purposes s 533 is irrelevant, because although it requires reports of misdeeds and certain other events, it requires such reports only where these events become apparent to the liquidator during the winding-up. As the ALRC said in its report: "The liquidator's obligation is to report on matters that come to notice". [27]

Even so, the mere existence of s 533 has at least on one occasion been interpreted as adding weight to a liquidator's duty to investigate. In *Re Brian Cassidy Electrical Industries Pty Ltd*, McLelland J quoted the abovementioned statement by Street J in *Allebart's* case, and immediately after doing so said:

> "The obligations of a liquidator to investigate possible misconduct are reinforced by the reporting obligations enacted in sec. 418 of the Code". [28]

Section 418 is the predecessor of s 533. McLelland J was considering an application for the Court's approval of a scheme of arrangement. His Honour refused to approve the scheme. But significantly his Honour said:

> " ... this general ground of objection to a scheme of this nature is given added force by the spectacular and unexplained failure of this company at the expenses of outsiders dealing with it, during the short period of its trading life, a failure which, prima facia, calls for a thorough investigation, for which winding up is clearly the most appropriate vehicle." [29]

These words suggest that s 418 probably played a minor, perhaps insignificant, role in his Honour's

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making such a declaration, the company's creditors may nominate a person to be liquidator: see ss 490 to 499 inclusive.

[24]. Section 513 of the Corporations Law. The phrase "wound up in insolvency" refers to an order by the Court that an insolvent company be wound up - see ss 459A to 459T inclusive.

[25]. See, for example, *The Law of Company Liquidation*, op cit n 16, pp 256 and 432. The placement of s 476 in a division titled "court-appointed liquidators" and its connection to s 475 (which only applies where the company is wound up by the court), appear to display the necessary contrary intention.

[26]. Paragraphs 42 and 43.

[27]. Op cit n 10 at paragraph 952.

[28]. *Re Brian Cassidy Electrical Industries Pty Ltd* (1984) 2 ACLC 629 at 631.

[29]. Ibid at 630.

deliberations. His Honour's principal concern appears to have been the court's duty to take into account questions of public interest, such as were enunciated by Street J in *Allebart's* case. And, as I have already argued, those public interest issues seem to emanate from s 476.

While on the subject of public interest another case should be mentioned, because in it McLelland J's comments on the need for a thorough investigation were discussed. *FC of T v All Suburbs Car Repairs Pty Ltd & Anor* [30] was a case in which the Commissioner of Taxation had sought an order terminating a deed of company arrangement. The presiding judge, Davies J, endorsed McLelland J's remarks. However, his Honour found they did not apply to the case before him:

> "there is nothing in the facts before the Court which suggests that All Suburbs failed for any reason other than poor management. There are accounts in evidence which indicate that proper accounts were kept. Nothing appears in those accounts to show that the losses occurred other than through the carrying on of the ordinary business of the company. There is no suggestion that undue amounts were paid to directors. And the report to the creditors discloses that the shareholders put in substantial funds of their own in an attempt to overcome the trading losses. *In these circumstances, there would be no public interest in an investigation into the affairs of the company and its management*." [31] (Emphasis added).

Are both types of liquidators identical?

If s 533 does not require a liquidator to undertake inquiries for the specific purpose of making a report to the ASC, it becomes necessary to consider whether the investigative functions of the two types of liquidators are the same.

A distinction often made between the two types of liquidators is that a court-appointed liquidator is an officer of the court, whereas a liquidator appointed voluntarily is not. [32] Hence, it could be argued that a court-appointed liquidator has a greater duty to the public than does a liquidator appointed privately. It could also be argued that the statutory creation of a special class of liquidators (official liquidators) from which the court makes its appointments, indicates that there is something special about a court liquidation. However, there appears to be no definitive statement on these issues.

Perhaps a significant sign is the repeated use of the phrases "court winding up", "official liquidation" and the like in the judgment of Street J in *Allebart's* case quoted earlier. If his Honour regarded the public interest element of both types of liquidation as identical, he could have left out the words "court" and "official". But, by contrast, the judgment of *Fullagar* J. in *Commonwealth of Australia v O'Reilly & Ors*, [33] a case which examined the actions of a liquidator appointed voluntarily, contains several statements about the duties of a liquidator, none of which suggest that his Honour thought the method of appointment made any difference. [34] Further reference to this case is made below, under the heading "Assetless Companies".

In some areas the Law itself distinguishes between the two types of winding up. We have already seen one such difference in s 476. Another of these areas was highlighted in a recent judgment by Young J. Section 486A gives the court power to, inter alia, prohibit a company officer from leaving Australia without the court's consent. The court may make such an order on the application of the company's liquidator. In *ERS Engines Pty Ltd* [35] his Honour found that "in the light of the specific words referring to a court winding up",

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30. 94 ATC 4712.

31. Ibid at 4,715.

32. *The Law of Company Liquidation,* op cit n 16, p 212.

33. (1984) VR 931.

34. See in particular the statements ibid at 943-944. His Honour's main interest was that the investigation be carried out by a completely impartial liquidator.

35. (1994) 12 ACLC 886 at 892.

this section did not apply where a company was wound up voluntarily. In other words, the power to apply for such an order is given to court-appointed liquidators but not to liquidators appointed voluntarily. An identical restriction applies to the court's power to issue a warrant of arrest under s 486B: it is not available where the company is being wound up voluntarily.

The Law also distinguishes between the two in the degree to which creditors and members are involved, or given a role, in the winding-up. For example, in a creditors' voluntary winding-up, but not in a court winding-up, creditors may authorise the liquidator to destroy the company's books before the expiration of the standard minimum period. [36] And in a creditors' voluntary winding up, but not in a court winding-up, the liquidator must call annual meetings of creditors and members, plus final meetings when the affairs of the company are fully wound up, and present to those meetings accounts of her or his acts and dealings. [37]

The second of these special rules is also noteworthy because of its contrast with the requirement that court-appointed liquidators, but not liquidators appointed voluntarily, must lodge a report with the ASC under s 476. Taken together, these contrasting requirements seem to support the view that a creditors' voluntary liquidation is primarily the concern of creditors and members, whereas in a liquidation ordered by the court, the public interest element plays a bigger role, necessitating a special, public report, touching on issues such as the causes of the failure.

Duty to look for property

I turn now to a consideration of the duty of liquidators - both official and voluntary - to look for property and what this involves.

By its very nature, the winding-up of a company entails the collection of the company's assets. The Law gives voice to this function by imposing a duty upon the court-appointed liquidator to "cause the company's property to be collected and applied in discharging the company's liabilities". [38] In a voluntary winding-up the same duty exists, although it is expressed differently: "the property of a company shall, on its winding up, be applied in satisfaction of its liabilities". [39]

In order to comply with this duty, the liquidator must inquire into what property the company owns. This raises the question of what property may be *available* to the company and/or its liquidator. Naturally there is likely to be property of the conventional type, such as land, buildings, vehicles, trade debts, cash at the bank, et cetera. However, property -- which is defined in the Law as "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action" [40] -- may exist in many other forms, including:

- voidable transactions; [41]
- liability of holding company or directors for insolvent trading; [42]
- liability of person managing the company while disqualified; [43]

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36. Section 542(3).

37. Sections 508 and 509.

38. Section 478.

39. Section 501.

40. Corporations Law, s 9.

41. Sections 588FA to 588FJ inclusive. I include in this category amounts received by a creditor that may be recoverable under s 569.

42. Sections 588G to 588Y inclusive.

43. Section 588Z.

- an entitlement to compensation for loss or damage suffered as a result of fraud, negligence, default, breach of trust or breach of duty; [44] and

- an entitlement to compensation for loss suffered as a result of a contravention of a civil penalty provision. [45]

("Voidable transactions" include payments (or transfers of property) to unsecured creditors which have the effect of giving the creditors a preference; "uncommercial" transactions; transactions entered into for the purpose of defeating creditors; and "unfair" loans to the company.)

The obvious inference to be drawn from uniting this description of property with the liquidator's statutory duty to collect the company's property, is that a liquidator has a duty to undertake a thorough investigation, not merely one designed to discover (or uncover) conventional property. If the liquidator does have such a duty, then he or she does, in effect, have a duty to look for misdeeds, because the discovery of misdeeds may give rise to an entitlement to compensation.

However, there are other factors which must be entered into the equation. For example, it seems the duty to realise property is conditional, in that the liquidator need only realise "so much of (the company's) property as can in his or her opinion be realised without needlessly protracting the winding up". [46] Moreover, with certain exceptions, "a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property". [47] This second modification is discussed below, under the heading Assetless Companies.

Practice standards

Any discussion of the duty to investigate must have regard to the views of liquidators themselves and the standards set by their profession.

First there are the professional associations. Almost all registered liquidators and official liquidators belong to at least one of the two main accounting bodies -- the Australian Society of Certified Practising Accountants (ASCPA) and the Institute of Chartered Accountants in Australia (ICAA). Most also belong to the Insolvency Practitioners' Association of Australia (IPAA). [48] In *Quality Control Management in Accounting Practices - A Guidance Manual for Practitioners*, a joint publication of the ASCPA and ICAA, [49] the section on insolvency engagements states:

> "Investigations are conducted for the purpose of locating and recovering assets; explaining to interested parties the circumstances leading to the debtor's current state of affairs, and to enable the practitioner to report to the relevant authorities (where applicable) whether there have been any offences committed under the relevant legislation. Other matters requiring consideration are whether business assets have been transferred or sold preferentially (ie not at market value) to related persons

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44. Section 598. An entitlement to damages or restitution may also exist under common law.

45. Sections 1317HA to 1317HD.

46. The words are from s 480, which specifies what a court-appointed liquidator must have done before he or she may apply to the court for his or her release.

47. Section 545.

48. The ASCPA and the ICAA have jointly issued a Statement of Insolvency Standards (APS 7). Unfortunately the Standard does not comment on what is expected of an insolvency accountant when it comes to investigations. The IPAA has issued a Code of Professional Conduct as a guide to the standards of practice and professional conduct expected of members, but here too the subject of this article is not addressed.

49. Published in May 1993.

> or entities and whether any preference payments have been made.
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> There is no standard for the conduct of statutory investigations. In relation to liquidations the ASC has issued a practice note for the contents required in their reports. The extent of an investigation will be governed by an administrator's assessment of his initial findings and the attitude of the interested parties such as the creditors and the ASC." [50]

In a submission to the ALRC's General Insolvency Inquiry, the ASCPA and ICAA said:

> "It is the duty of all administrators, whether they be liquidators or trustees, to conduct sufficient inquiries to ascertain whether there are other assets which may come under their control, whether funds may be recovered through preference actions, neglect of fiduciary duty, or fraud, and to ascertain the cause of the debtor's or company's failure." [51]

But perhaps the best guide to the profession's ideals is *Australian Insolvency Management Practice* (the Reporter), a large commercial publication used extensively throughout the profession. [52] The Reporter stresses the importance of a liquidator's duty to ascertain the assets and liabilities of the company, [53] referring to the discovery of assets as the "prime objective" of an investigation. [54] In this regard the Reporter refers to the need to look for potential claims or asset recoveries, such as might arise from "unusual events, offences or transactions". [55] Its list of potential recoveries comprises: "invalid charges by secured creditors ... ; damage claims against officers for breach of duty or breach of trust or other misfeasance"; and five categories of "voidable transactions". [56]

In addition, the Reporter contends that a liquidator has a "responsibility to report on matters that may interest creditors/members, or that in his opinion he should bring to the notice of the Commission or the Court". [57] This duty is also characterised as explaining "to interested parties the circumstances leading to the company's liquidation", and "the reasons for the liquidation". [58] Hence, according to the Reporter a secondary objective of a liquidator's investigation is compliance with these duties. [59] Referring to the statutory requirements

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50. Ibid, section 8, p 4.

51. Op cit n 10, par 953.

52. Taylor, Ferrier, Hodgson and Fisher, *Australian Insolvency Management Practice* (looseleaf, CCH Australia Ltd). According to its introductory note: "This Reporter derives from pooling the professional expertise of partners of the Ferrier Hodgson Group of chartered accountants, all of whom practise insolvency management. The information contained in the Reporter stems from: the authors' experience; the practical procedures and precedents adopted by members of the Ferrier Hodgson Group; study of legislation and judicial decisions affecting insolvency management; discussions with other accountants practising insolvency management ... ; the very small number of publications by other authors dealing with insolvency law."

    The copy used in writing this article included all reports up to 6 April 1995 (release 48).

53. Ibid, ¶¶ 32-170, 43-000, 43-020, 43-030 & 43-040.

54. Ibid, ¶ 43-020.

55. Ibid, ¶¶ 32-170 and 43-000.

56. Ibid, ¶ 32-170.

57. Ibid, ¶ 32-170.

58. Ibid, ¶¶ 43-000 & 43-030.

59. Ibid, ¶ 43-030.

(reports under ss 476 and 533), the Reporter concludes:

> "Both of these statutory reports will require the liquidator to investigate:
> - company transactions;
> - the conduct and dealings of corporate officers/employees;
> - the cause of the liquidation; and
> - the books, accounts and records kept by the company." [60]

When the Reporter discusses investigation procedure, it recommends its own eight-page investigation guide which, it says, "sets out the minimum recommended requirements". [61] By anybody's definition, the programme described in the Reporter's investigation guide comes very close to being that which is required for a comprehensive investigation. For the most part the investigation programme concentrates on measures designed to discover property and grounds for action against officers and others connected with the company. The guide also recommends:

- an inquiry into the history of the company and the nature of its business;
- a comparison and analysis of financial statements for the 3 years prior to liquidation; and
- the preparation of a "deficiency account", to ascertain and explain why the company became insolvent.

Significantly, the guide in the Reporter does not recommend a specific inquiry into the possible existence of offences. [62]

The Reporter suggests that after the initial inquiries described in its guide, the investigation may be broadened and become more detailed if circumstances warrant; although it points out that the possibility of fuller investigations will depend to a large extent on the attitude of creditors and the assets available.

Duty to report to creditors

As shown under the previous heading, the Reporter says that liquidators have a responsibility to report on matters that may interest creditors/members, and to explain to interested parties the circumstances leading to the company's liquidation. As also shown, a similar statement is made in *Quality Control Management in Accounting Practices - A Guidance Manual for Practitioners*

This view needs to be examined, for if it is correct, it could be argued that, for this reason alone, liquidators have a duty to look for misdeeds.

Liquidators do have certain legal obligations to report to creditors. For example, in a creditors voluntary winding-up the Law requires the liquidator to convene meetings and lay before them accounts of the liquidator's dealings. [63] In a compulsory winding-up there is no such provision; but the power that creditors have to fix a liquidator's remuneration [64] effectively imposes a requirement to convene a meeting and report to creditors (except where the company has no property).

Regardless of the specific statutory reporting requirements, liquidators know that creditors have a vital interest in the liquidation and so will report to creditors out of courtesy if nothing else. Also, liquidators will

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60. Ibid, ¶ 43-040.

61. Ibid, ¶ 43-080. The Reporter's Corporate Investigation Guide is at ¶ 92-204.

62. The investigation guide does mention offences, but only briefly at the end of a section headed "Transactions with Directors, Members and Associated Companies". The principal aim of the work described in that section is to discover voidable transactions, causes of action for damages, etc.

63. Sections 508 and 509.

64. Section 473(3).

usually want to consult creditors, or their representatives on a committee of inspection, on matters "involving large sums of money, or presenting peculiar features, or on which some general policy direction is thought to be necessary". [65] This too will entail a report to creditors. [66] In any case, because, under s 476, court-appointed liquidations have a duty to get information about the causes of failure, they may think it makes good sense to pass that information on to creditors.

Perhaps it is these customary practices that the authors of the abovementioned publications have in mind. If not, and if by "responsibility" and "duty" the authors mean something higher than a moral obligation, their assertions in this regard seem to be unsupported.

Assetless companies

Early in this article reference was made to special considerations that arise when a liquidator discovers, as often happens in court liquidations, that he or she is administering a company which has no assets. These special considerations arise through s 545 of the Law, the purpose of which is to relieve a liquidator from incurring any expenses in relation to the winding-up of a company if there is insufficient available property, except where the court or the ASC directs the liquidator to incur a particular expense. [67] This section does not, however, relieve the liquidator "of any obligation to lodge a document (including a report) with the Commission". [68]

Section 545 needs to be considered when examining a liquidator's duty to investigate. In Practice Note 50 the ASC says it considers that the general effect of the section is "to relieve the external administrator from incurring expenses other than those of a minor nature which are required in order that he or she may carry out a statutory duty to conduct reasonable inquiries into the affairs of the company and to prepare and lodge reports with the ASC". This view is drawn from the decision by Cohen J. in *Clasquin's* case, [69] which the ASC summarises as follows:

> "If an external administrator is unfunded, then generally he or she would be expected to secure the books and records of the company, to use them for the purpose of making all *reasonable investigations* and to lodge reports as required, except where this requires the expenditure of large sums of money at a personal expense to the external administrator." (Emphasis added.) [70]

In *Clasquin's* case Cohen J effectively exempted the liquidator from the duty to investigate. But his Honour did so only because:

- there had already been an investigation by the company's receivers;
- the Corporate Affairs Commission had examined the books and records;
- it was "quite unlikely that an investigation is likely to reveal further assets other than those already brought to light";
- there were no funds and no indemnities from creditors; and
- the liquidator would be required to incur "what would be considerable expense to him without any prospect of being reimbursed".

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65. Op cit n 16, pp 231 - 232.

66. Of course, every liquidator is required to file half-yearly accounts of receipts and payments with the ASC (s 539 and form 524). These may be inspected by creditors.

67. The court or the ASC may make such an order on the application of a creditor or contributory, but such an order will only be made on condition that the creditor or contributory indemnifies the liquidator (s 545(2)).

68. Section 545(3).

69. *Clasquin SA v AAR International Pty Ltd* (1989) 7 ACLC 284.

70. ASC Practice Note 50, paragraphs 24 and 25.

The phrase "reasonable investigations" means reasonable in the circumstances. In *Clasquin's* case, the relevant circumstances were the first three in the list shown above. [71]

Although not cited in *Clasquin's* case, the judgment in *Commonwealth of Australia v O'Reilly & Ors* [72] contains several remarks which are similar to the sentiments expressed by Cohen J. The liquidator in *O'Reilly's* case (Mr O'Reilly) had been appointed voluntarily to four companies which had been stripped of their assets in a tax avoidance scheme. He did not carry out an investigation into their affairs. In due course the companies were dissolved. The Commonwealth asked the court to make the dissolutions void, remove Mr O'Reilly from office and appoint another liquidator who, with the support of funds supplied by the Commissioner of Taxation, would conduct an investigation with a view to bringing proceedings against certain persons. In making those orders Fullagar J said:

> "I am satisfied that there was long before and at the time of the final meetings, and that there is now, a set of apparent circumstances requiring, subject to availability of funds, an impartial investigation by an impartial liquidator ... The liquidator was not, I think, bound to spend his own moneys upon enquires for the benefit of a creditor of a company with no immediately available assets, but from now on the liquidator will be bound to pursue the appropriate enquires and other actions to the extent funded by the creditor, who will certainly put him in funds ... Where the history of the company shows a likelihood of some misfeasance, he should investigate, so far as the assets allow, to see whether officers or former officers have infringed the requirements of the law ... If the assets available (pending any recovery for misfeasance etc) do not allow of full compliance with the relevant duties, the liquidator should report the circumstances, with his opinion of the likelihood, and the reasons for his opinions, to the interested creditors and to the Corporate Affairs Commission ... A liquidator is not obliged to spend his own money to further a winding up if the company has no funds immediately available to him for this purpose. The liquidator is not being removed in this case because he failed to spend his own money on enquires." [73]

The problem of assetless companies was considered by the ALRC in its General Insolvency Inquiry. [74] In its definition of an assetless company the ALRC referred to "assets immediately available to the liquidator". These were described as "assets such as cash, bank deposits, plant and equipment and other assets control of which can immediately pass to the liquidator". It distinguished these assets "from claims which either the company or the liquidator may have and which may need to be litigated". Although the ALRC's report did not discuss the degree to which liquidators are obliged to investigate assetless companies, it did emphasise the importance of investigating all insolvent companies. To this end the ALRC recommended that an Assetless Companies Fund be established and that liquidators of assetless companies be able to obtain from this fund a prescribed amount "for the costs of inquiry into the business, property and affairs of the company and reporting to creditors". (The ALRC's proposal for an Assetless Companies Fund has not been adopted in the Corporations Law.)

COMPANY ADMINISTRATORS

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71. There may have been other relevant circumstances too. Mr Blackwell, the liquidator in this case, informed me that at the time of the hearing he had lodged with the Corporate Affairs Commission a s 376 (s 476) report and a s 418 (s 533) report. However, he said the s 376 report contained very little information and the s 418 report was perfunctory.

72. *Commonwealth of Australia v O'Reilly & Ors* (1984) VR 931.

73. Ibid at pp 941 to 944.

74. Op cit n 10 at paragraphs 337 to 358.

The voluntary administration regime (Pt 5.3A of the Law) creates two different types of administrator: the administrator of a company (referred to here as a "company administrator") and the administrator of a deed of company arrangement. It is only the company administrator who has an express duty to investigate. [75]

Duty to form an opinion

Section 438A provides:

> "As soon as practicable after the administration of a company begins, the administrator must:
> (a) *investigate the company's business, property, affairs and financial circumstances*; and
> (b) form an opinion about each of the following matters:
> (i) whether it would be in the interests of the company's creditors for the company to execute a deed of arrangement;
> (ii) whether it would be in the creditors' interests for the administration to end;
> (iii) whether it would be in the creditors' interests for the company to be wound up." (Emphasis added.)

The Explanatory Memorandum tabled when the legislation was introduced said "the primary task for an administrator will be to investigate the financial position of the company". The purpose of the investigation is to ensure that the company administrator's recommendations are based on "a full understanding of the company's financial position". [76]

On their ordinary meaning -- and especially when read together with the remarks in the Explanatory Memorandum -- the words "investigate the company's business, property, affairs and financial circumstances", suggest that
a thorough and wide-ranging investigation is required. But these words should also be read in conjunction with the accompanying requirement to report to creditors. For although the company administrator's report is described as a report "about the company's business, property, affairs and financial circumstances", [77] the actual form prescribed is simply a detailed list of assets and liabilities (a Report as to Affairs - Form 507). [78] Therefore, *if this was the only report required*, the company administrator's investigation could probably be confined to an examination of the company's books and records in a search for assets and liabilities of the conventional type. It might even be acceptable to limit the investigation to an audit of figures shown in the directors' Report as to Affairs. [79]

However, a Report as to Affairs is *not* the only report required. The administrator must also draft a statement setting out his or her opinion on the matters referred to at (b) above, and his or her reasons for those

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[75]. The reference in ASC Practice Note 50, paragraph 3, to "administrators under a deed of company arrangement" is obviously a mistake, because the only "administrators" required to lodge reports of suspected contraventions, etc, are company administrators -- see s 438D of the Law.

[76]. Corporate Law Reform Bill 1992, Explanatory Memorandum, paragraphs 495 and 551.

[77]. Section 439A(4) of the Corporations Law.

[78]. See Corporations Regulation 1.03 and Schedule 1. The same expedient has been used to provide a form of report for Managing Controllers - as discussed in the main text of this article under the heading "Receivers".

[79]. Under s 438B(2) the directors must give the company administrator a statement "about the company's business, property, affairs and financial circumstances". The prescribed form is a Report as to Affairs (Form 507). The directors' Report as to Affairs and the company administrator's Report as to Affairs are both to be made out as at the same date, namely the date of the administrator's appointment (refer Directions on the final page of the Form 507).

opinions. And in setting out his or her opinions, the company administrator "must specify whether there are any transactions that appear to the administrator to be voidable transactions in respect of which money, property or other benefits may be recoverable by a liquidator under Pt 5.7B of the Corporations Law". [80]

Arguably, the inclusion of a specific requirement, that the company administrator look for "voidable transactions", *could* mean that when arriving at an opinion, he or she is *not* required to look into other areas where benefits may be recoverable, such as under the laws which attach personal liability for insolvent trading; [81] and an entitlement to compensation for loss or damage suffered as a result of fraud, negligence, default, breach of trust and breach of duty. [82]

Whether the courts will take this view remains to be seen. The decision in *Re Bartlett Researched Securities Pty Ltd (administrator appointed); Re Nova Corp Ltd (administrator appointed)* [83] suggests that they may take a liberal approach. In this case Derrington J said that "the degree (of investigation) required would depend on the circumstances of the case". [84] A major creditor, Farrow Mortgage Services Pty Ltd (Farrow), applied to the court to have the deed of company arrangement disallowed. Under the deed Mr Bartlett, the leading shareholder and director of the companies, was to inject approximately $205,000 for the benefit of creditors. Farrow argued, inter alia, that the administrator did not make inquiry in a number of areas sufficient to justify his recommendation of the arrangement. In regard to some of those areas his Honour found that:

> "the spectacular fall of the company and its associates and the wholesale liquidation of its assets, mainly by secured creditors but sometimes by the company itself under stress, would warrant a sufficient review and then profound scrutiny where necessary of the disposition of assets where they have been sold well below their apparent value, particularly to Mr Bartlett's interests. Moreover it would not be unreasonable to expect that some inquiry should be directed to the advantages to Mr Bartlett of keeping the company out of liquidation in order to determine whether the amount of his contribution was suitable to that benefit". [85]

Duty to look for misdeeds

It appears, then, that when conducting an investigation for the purpose of making a recommendation to creditors, the company administrator does have a duty to look for misdeeds of the type that could, if successfully prosecuted or challenged, recover money, property or other benefits for creditors. This is particularly so where the company's failure has been "spectacular".

Of course if any such misdeeds become apparent, the company administrator is, like a liquidator or receiver, required to lodge a report with the ASC. This is so regardless of the nature or degree of the company's failure, and even where the company has not failed. [86]

Assetless Companies

It is hard to envisage a situation in which it would be appropriate for an assetless company to appoint a

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80. Section 439A(4) and *Corporations Regulation* 5. 3A. 02. "Voidable transactions" are covered by Divisions 1 and 2 of Part 5. 7B.

81. Divisions 3 to 6 of Part 5. 7B (ie. ss 588G to 588Y).

82. Section 598.

83. (1994) 12 ACSR 707.

84. Ibid at 710.

85. Ibid at 710 - 711.

86. Section 438D.

company administrator. [87] Nevertheless, it should be noted that the law applicable to voluntary administration makes no provision relieving an administrator from incurring expenses in relation to the administration where the company's available property is insufficient.

RECEIVERS

Before considering whether a receiver has a duty to investigate, it is necessary to look briefly at what or who is a receiver.

The Corporations Law does not define the term "receiver". Therefore, the ordinary meaning applies. In relation to companies, a receiver is one who is appointed to enter into possession or assume control of all, or part of, the income or assets of a company. (As a rule, the term "receiver" only applies where the person is appointed to be the agent of the company.) [88]

Other relevant definitions

For the purpose of imposing duties on receivers (of all types) and granting powers to them, the Corporations Law has introduced the terms "receiver of property", "receiver and manager", "controller", and "managing controller".

"Receiver of property" is a term used to exclude receivers of income. A "receiver and manager" is a receiver of property of a company who manages, or has power to manage, affairs of the company. [89]

A "controller" is a receiver, or receiver and manager, of company property; or "anyone else who (whether or not as agent for the corporation) is in possession, or has control, of that property for the purpose of enforcing a charge". [90] According to the ASC, the definition includes "those who enforce mortgages or charges registered at the Land Titles office, the ASC, or otherwise, and those who enforce unregistered charges. The mortgage or charge may relate to only a small part of the assets of the company." [91] The reference to "anyone else" is designed to include a mortgagee who takes possession itself, or who takes possession through a person who acts as its agent. A "managing controller" is a receiver and manager, or any other controller "who has functions or powers in connection with managing the corporation". [92]

Managing Controllers

Under s 421A, a managing controller must prepare "a report about the corporation's affairs that is in the prescribed form".

This provision was introduced in 1993, as part of the reforms recommended by the ALRC. The original idea was that the report would cover:

"(a) the events leading up to the appointment or the entry into possession or assumption of control, so far as the receiver or other person is aware of them;
(b) the disposal or proposed disposal of property of the corporation;
(c) the carrying on, or proposed carrying on, of any business of the corporation;

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87. The object of the voluntary administration legislation is to provide for the administration of an insolvent company in a way that, at least, "results in a better return to the company's creditors and members than would result from an immediate winding up of the company" (s 435A).

88. Op cit n 10, pars 184-187.

89. Sections 9 and 90.

90. Section 9.

91. ASC Practice Note 50, paragraph 5.

92. Section 9.

(d) the amounts of principal and interest payable by the corporation to the chargee who appointed the receiver ... ;
(e) the amounts payable to preferential creditors of the corporation as at the date of the appointment of the receiver ... ; and
(f) any amounts likely to be available for payment to other creditors."

It was also to include a summary of the statement of affairs submitted to the receiver or other person and a summary of her or his comments (if any) on it. [93]

In this form the legislation closely resembled the statutory duty that is imposed on administrative receivers in the United Kingdom by s 48(1) of the Insolvency Act.

However, when the ALRC's recommendation was turned into legislation, the detailed description of the report's contents was replaced with the phrase "in the prescribed form". Presumably it was intended that a special form would be designed, and that it would request the information recommended by the ALRC. [94] But it appears that in the rush to draft Regulations by the deadline set for commencement of the main legislation, there was no time for this task. Therefore, the Regulations decree (as they do for company administrators) that the report be a Report as to Affairs (Form 507).

Consequently, to satisfy s 421A the managing controller's investigation could probably be confined to an examination of the company's books and records in a search for assets and liabilities of the conventional type. It might even be acceptable to limit the investigation to an audit of figures shown in the directors' Report as to Affairs. [95]

But the matter does not end there. Managing controllers, and receivers of all types, must fulfil their obligations to the persons who appoint them. In certain cases they also have a statutory duty to pay particular unsecured liabilities in priority to the appointor's debt. These aspects are discussed below, under the heading "General duty to investigate".

Receivers and Receivers and Managers

Under s 422 the "receiver of property of a corporation" has a duty to report to the ASC any misdeeds that appear to the receiver to have occurred. [96] For these purposes "receiver" includes "receiver and manager". [97] However, as I have already argued, the requirement to make such a report does not give rise to a duty to inquire into whether it appears any misdeeds may have occurred.

Controllers who are not Receivers or Receivers and Managers

As not all controllers are receivers or receivers and managers, s 422 does not apply to a controller who is not a receiver or a receiver and manager.

In Practice Note 50 the ASC draws attention to this distinction, but asks the controllers who are not obliged

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93. Op cit n 10, Vol 2 (draft legislation) pp 57 and 58. For further information see pars 206-209 of Volume 1 of the same report, and pars 146 and 147 of the ALRC, *Discussion Paper No 32*.

94. Further support for this view can be found in s 426, which gives qualified privilege to a controller in respect of a report lodged under s 421A. If from the start the legislation had intended that the controller's report would be merely a statement of assets and liabilities (that is, a Report as to Affairs), such protection would not have been required.

95. Under s 429(2) the directors ("reporting officers") must give the controller a Report as to Affairs (Form 507). But, it might conceivably be made out as at a different date.

96. Section 422.

97. Section 416.

to report misdeeds to do so anyway. [98] In making such a report the ASC is apparently disregarding the very point which led the ALRC (and presumably the Parliament) to exempt such controllers -- known as "mortgagees in possession" and "agents for mortgagees in possession" -- from this requirement. The ALRC had concluded that a requirement to report misdeeds would be inappropriate in such situations: "it is not within the province of a mortgagee to report to the (ASC) on the conduct of the mortgagor company or the company's officers under (s 422) of the companies legislation". [99]

General duty to investigate

A receiver's primary duty is to his or her appointor. Essentially, the role of a receiver of property is to take possession of, and protect, those assets covered by the charge under which he or she is appointed, and to realise them for the benefit of the appointor. Where an immediate sale of the assets is not in the best interests of the appointor, the receiver who has power to manage the company's affairs might decide to carry on the company's business for a limited period.

To ascertain precisely what assets are covered by the charge, to locate, recover and value those assets, and, where relevant, to reach a decision on whether to continue trading, the receiver will need to conduct a limited investigation. For example, he or she will need to take detailed inventories of physical assets and examine the company's records. Ordinarily, the receiver's appointor would take it for granted that all competent receivers would, as a matter of course, carry out such investigations.

Also, where the receiver has a statutory duty to pay preferential liabilities, such as wages, leave or retrenchment pay, there is an implied duty to examine the relevant company records. [100]

But, beyond that, any investigation by the receiver will be done through choice, rather than duty. He or she is not likely to conduct further investigations unless the appointor stands to gain financially from the work and cost involved. And for there to be any chance of a gain, there would first need to be a shortfall between the net realisable value of the assets covered by the charge and the value of the appointor's debt.

Where a shortfall exists, and the appointor is in favour of further investigations, then, provided he or she has the power, [101] the receiver might look for property that could be recoverable directly or indirectly. Included in this category are damages for misfeasance, breach of duty and breach of trust. [102]

Practice standards

Reference has already been made to the significance of *Australian Insolvency Management Practice* (the Reporter) [103] as a guide to the practices of insolvency practitioners. In its section on investigations by receivers, the Reporter takes the view summarised above under "General duty to investigate". For example, it says:

> "The receiver is responsible for ascertaining and securing the property which he or she is entitled to 'receive' ... Particularly, where he or she has responsibility for carrying on business, he or she will

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98. See paragraphs 18 and 20: "The Law does not require a person who is a controller or managing controller, who is not a receiver, or a person who is a provisional liquidator, to report suspected contraventions of the Law or the matters referred to in this paragraph. However, it would assist the ASC if these administrators considered lodging a report in these circumstances".

99. Op cit n 10, par 187.

100. Section 433.

101. Section 420.

102. For further details see *Australian Insolvency Management Practice*, op cit n 52, ¶ 67-180.

103. Ibid.

> find it necessary to investigate the affairs of the company as an aid to the future conduct of the business ... A receiver must be cautious not to undertake work strictly outside the purpose of his or her appointment. He or she may, for example, be able to repay the debenture holder appointing him or her and leave most investigatory action to a liquidator." [104]

The Reporter then briefly considers the impact of the duty -- imposed by s 422 of the Corporations Law to report to the ASC any misdeeds he or she finds. It concludes that:

> "These factors will require an investigation by the receiver who will concern him or herself with any unusual events, offences or transactions which might give rise to potential claims or asset recoveries."

It is not clear from the structure of this sentence whether the phrase "which might give rise to potential claims or asset recoveries" attaches to "transactions" only, or to "unusual events" and "offences" as well. In as much as the Reporter suggests that an investigation into misdeeds is required because of the need to report to the ASC, I must disagree. For it was such an assertion by the ASC in Practice Note 50 that prompted me to undertake this inquiry and write this article.

CONCLUSION

The external administrator's duty to investigate, as discerned in this study, may be summarised graphically as follows:

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[104]. Ibid at ¶ 65-390.

Duty	Official Liquidator	Voluntary Liquidator	Company Admin-istrator	Receiver
1. Conduct a limited inquiry into assets and liabilities: (a) if company has property (b) if company is "assetless"	 Yes Yes	 Yes Yes	 Yes N/A	 Yes N/A
2. Conduct a thorough inquiry into assets and liabilities, including misdeeds of the type that may recover property or funds: (a) if company has property (b) if company is "assetless"	 Yes Doubtful	 Yes Doubtful	 Perhaps N/A	 N/A N/A
3. Because of ss 533, 438D or 422, conduct an inquiry into whether any misdeeds may have occurred	Doubtful	Doubtful	No	No
4. Because of s 476, conduct an inquiry into whether any misdeeds may have occurred	Probably	N/A	N/A	N/A
5. Because of common law, conduct an inquiry into whether any misdeeds may have occurred	Probably	Doubtful	N/A	N/A
N/A = Not Applicable				

N/A = not applicable

As can be seen, there are many areas of doubt. In practice this often means that investigations which should be carried out are not, and, conversely, some unwarranted inquiries are undertaken.

By treating the different types of external administrators as one, the ASC's Practice Note on reporting requirements may have added to this doubt and confusion. Also, by declaring that administrators must undertake inquiries in order to determine whether a report needs to be lodged, the ASC could be imposing unnecessary costs on companies and their creditors. For these reasons the Practice Note should be amended.

However, the best way of removing doubt would be to amend the Corporations Law. As to company administrators and managing controllers, the nature of their duty to investigate would be much clearer if the prescribed form of the report required of them (under ss 421A(1) and 439A(4) respectively) reflected the apparent intention of the legislation. As to liquidators, a good starting point for change would be to eliminate the doubts and ambiguities surrounding s 476. For example, is the required report supposed to contain the *liquidator's* estimate as to the amount of assets and liabilities and the *liquidator's* opinion as to the causes of failure? Does its description as a *preliminary* report mean that the investigation need only be superficial?

Above all the Corporations Law needs to contain clear statements about the duties of the various classes of external administrators to investigate. Without such statements the debate over whether and to what extent such duties exist, turns on the interpretation of provisions dealing with other duties.

ENDNOTES