Association of Independent Insolvency Practitioners
By the Practitioner, For the Practitioner

Address: Suite 2, Level 16, 60 Carrington Street, Sydney NSW 2000
Phone: 02 9194 4000 Email: info@aiip.org.au

5 February 2020

Submission of the Association of Independent Insolvency Practitioners (AIIP) on the ALRC Discussion Paper – Corporate Criminal Responsibility: Discussion Paper 87

The AIIP is a professional body comprising as its members registered liquidators and trustees in bankruptcy.

Its details and the work done by its liquidator members in dealing with directors of insolvent companies under the *Corporations Act* 2001 are at attachment A.

Those companies are mostly in the SME sector. Directors of companies have legal obligations to assist the liquidator, to provide a report of the company's liabilities and assets[1] (s 475), to hand over company records, and otherwise assist (s 530A). Breaches are criminal offences of strict liability. Nevertheless, there is often significant non-compliance, resulting in the liquidator being hampered and delayed in administering the winding up.

The proposed law reform

We propose a penalty points system for breaches of certain Corporations Act offences by directors of insolvent companies as a means of securing compliance; and of identifying on-going recalcitrant directors.

Past proposals

We initially draw your attention to the fact that the Explanatory Memorandum to the Insolvency Law Reform Bill 2015 canvassed a number of options to deal with recalcitrant directors of insolvent companies.

One option was disqualification as a director. This would come to an end upon the director complying; upon the completion of the insolvency administration; or after three years of non-compliance: [9.334]. The Memo explained that [9.57] where a director fails to provide a corporate insolvency practitioner with the RATA and the company's books and records there is 'a negative impact on the practitioner's ability to properly conduct the administration', this being a 'perennial issue' [9.58].

But [9.369] 'directors were strongly critical of the measure relating to the disqualification of directors [who] failed to provide the corporate insolvency practitioner with the company's books,

[1] Report as to Affairs, under s 475 Corporations Act; now called a Report as to Company Operations and Property (ROCAP).

records or a RATA on the grounds that it was unjustifiably harsh. That proposal was removed from the draft Insolvency Law Reform Bill 2014'.
The outcome was that little was changed but a review after 5 years was to be conducted by Treasury, Attorney-General's Department, ASIC and AFSA. We may be raising this separately with those agencies.

Details

Offence reporting

Liquidators are required to report offences in relation to the insolvent company to ASIC: s 533, and they have a right of private prosecution: s 534.

Liquidators report over 8,000 'offences' to ASIC each year under s 533 and related sections, mainly under the Corporations Act and committed by directors. Use of the criminal law does support liquidators ensure compliance but at the SME end of the market, it is not very useful.

An example is that under s 533 a liquidator reports a director to ASIC for failure to lodge a ROCAP,[2] for which offence 60 penalty units may be imposed: s 475. If ASIC decides the matter warrants prosecution, the liquidator is then required to give assist by giving evidence – in NSW at the distant Sutherland Local Court - at considerable time and expense to the creditors, or the liquidator personally.

ASIC expects liquidators to pursue these matters: see ASIC's *Information Sheet 53 (*INFO 53) - *Providing assistance to external administrators - Books, records and ROCAP*, ASIC saying that 'failure to provide a ROCAP or to disclose and deliver up books and records as a serious breach of the Corporations Act. Penalties imposed by the court may include fines of over $10,000 or imprisonment for breach of certain obligations by an officer'.
We are in fact not aware of any such fines anywhere near that amount being imposed.

What we propose is 'a diversionary tool that prevent[s] the criminal justice system being overwhelmed by low-level prosecutions'. The majority of minor regulatory contraventions that are currently criminal offences would become CPN provisions and be removed from the court system.

The present reporting of offences by liquidators under section 533 of the Corporations Act has failed to give confidence to liquidators that enough is achieved by this process. And unfortunately, we can see the repeat performance of directors with some with no real legal restrictions placed on their behaviour.

However, our aim is to ensure co-operation by directors, not to prosecute them.

Our proposal

Our recommendation is that a liquidator may lodge with ASIC a notice of non-compliance with s 475, with a copy sent to the director. That would activate one 'point' against the name of the director, recorded against the director's identity number (DIN, as to which, see below).

A strict option would be to have that single point of non-compliance being enough to then disqualify the person as a director. A 'softer' option is that if the director accumulates say 3 points, then there is an automatic disqualification as a director.

[2] See footnote 1.

As we say, our aim is to ensure compliance, not to have directors prosecuted for non-compliance, although that may be necessary in some cases. We consider that an accumulated points system, not unlike that operating in relation to traffic offences, provides a sufficient prompt and deterrence for directors to act.

This would not involve any 'evaluative judgment' by the liquidator. CPNs also have the advantages of not requiring either the regulator or the liquidator to go to court.

The accumulating demerit points based upon a CPN should be available for public search, certainly by liquidators. On appointment to a liquidation, the liquidator will want to know any history of the directors in relation to previous insolvencies, in particular is there has been or remains failures to assist prior liquidators.

In that respect, the AIIP is also represented on the Modernising Business Registers Business Advisory Group. You will be aware that this federal government project now includes the development of a unique Australian Director Identification Number (DIN) for all persons wanting to hold a directorship. Both will assist in liquidators' investigative work.

In relation to this submission, we consider that this is an opportune moment to consider linking any CPNs with the DIN register.

Comparison with bankruptcy trustees

Many liquidators are also trustees in bankruptcy where have more power over the bankrupt, and others, than they do as liquidators over directors. The duties of a bankrupt are comparable with the duties of a director – to provide a list of assets and liabilities and other information to assist the trustee: for example, s 77 *Bankruptcy Act*.

If a bankrupt does not co-operate with the trustee or is found to have not disclosed assets, or failed to comply with the law in other respects, the trustee may decide to lodge an objection to discharge with AFSA, the dramatic legal effect of which can be to extend the period of the person's bankruptcy from 3 years up to 8 years: s 149A. That is a reviewable decision.

The ability to extend a period of bankruptcy, with the financial, business and social impacts involved, including the continued prohibition on being a director (s 206B(3) *Corporations Act*) is a greater power than is available to a liquidator.

In these contexts, we recommend a more administrative and enforceable process for ensuring compliance by directors, comparable to bankruptcy.

The ALRC reference generally

While your reference is in relation to corporate criminal responsibility, the AIIP's focus is on criminal responsibility of the directors when the company enters insolvency, imposed on the directors personally and not through the corporation. Nevertheless, the winding up of the corporation by our members, and their investigation of any misconduct including criminal, depends on the directors' compliance with the law.

We therefore respond to 3 of your proposals:

Proposal 1 We agree that Commonwealth legislation should be amended to recalibrate the regulation of corporations into three categories - criminal offences; civil penalty proceedings and civil penalty notice provisions (CPNs). Our focus here is on the CPNs although other 'insolvency' offences warrant criminal or civil penalty sanction.

Proposal 4. On the issue of a CPN, we agree that the law should specify the penalty with a mechanism for a director contravenor to make representations to the regulator for withdrawal of the CPN, there should be a mechanism for a director to challenge the CPN in court.

Proposal 17 We agree that the Corporations Act should be amended to provide that a court may make an order disqualifying a person from managing corporations if that person was involved in the management of a corporation that was 'dissolved' ['deregistered' is the correct term – see Ch 5A *Corporations Act*] in accordance with a sentencing order.

Insolvency generally

We draw your attention to the impact of insolvency generally on criminal penalties, both in corporate and personal insolvency. In particular for example, certain penalties are not provable debts: s 553B Corporations Act, s 82(3) Bankruptcy Act. The law is explained in detail in [2002] ALRC 95 at Ch 32 - *Insolvency*.

Contact

Thank you for allowing us some more time to make this submission.

Please contact Stephen Hathway if we can assist with more information or explanation.

Stephen Hathway
AIIP – President

CONTACT DETAILS
AIIP – Association of Independent Insolvency Practitioners
Association Registration Number: INC1601771


GPO Box 52, SYDNEY NSW 2001

(02) 9194 4000

info@aiip.org.au