INSOL INTERNATIONAL

Collection of Practical Issues Important to Smaller Practitioners

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SMALL PRACTICE TECHNICAL PAPER SERIES

CONTENTS

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Acknowledgement

INSOL International is pleased to present a new technical paper under its Small Practice Technical Paper Series. This paper falls under the theme of "Practical Issues Important to Smaller Practitioners" and concentrates on Australia as the relevant focus jurisdiction.

The paper was written by Alan Scott, Stuart Otway, Travis Olsen, Claire Muecke, Stuart Starr, Andrew Allemand, Matthew Hudson and Mike Gavriel of SV Partners, Australia.

INSOL International sincerely thanks the authors for their time and expertise in preparing this paper, which will be a very useful contribution for our global membership.

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Collection of Practical Issues Important to Smaller Practitioners

By Alan Scott, Stuart Otway, Travis Olsen, Claire Muecke, Stuart Starr, Andrew Allemand, Matthew Hudson and Mike Gavriel of SV Partners, Australia*

1. How to find information about IPs

1.1 How are practitioners organised?

Insolvency practitioners (IPs) are highly regulated and bound by legal duties and professional rules when carrying out their work. Interestingly, in Australia, liquidators and trustees are predominately accountants (only some are lawyers). This is in contrast to a number of other jurisdictions, including Singapore and the United States, where IPs are predominantly lawyers.

IPs may operate in either personal insolvency (as a bankruptcy trustee) or in corporate insolvency (as a liquidator, voluntary administrator, receiver or small business restructuring practitioner).

Practitioners, while registered personally with the relevant government agencies, are employed by firms or companies operating either as specialised insolvency practices or among several accounting divisions within the firm.

The IP's duties are outlined in the Corporations Act 2001 (Cth) for corporate insolvency and the Bankruptcy Act 1966 (Cth*)* for personal insolvency, alongside duties applied by various professional bodies.

In personal insolvency, registered trustees are listed on the online register of trustees available on the Australian Financial Security Authority (AFSA) website.

In corporate insolvency, liquidators are listed on the online insolvency statistics registered liquidator lists available on the Australian Securities and Investments Commission (ASIC) website.

1.2 What are the associations to contact and what do these associations do?

IPs are usually members of the Australian Restructuring, Insolvency and Turnaround Association (ARITA).

ARITA Professional Members and Fellows comprise accountants, lawyers, lenders and investors, academics and other professionals with an interest in restructuring, insolvency and turnaround. ARITA currently represents over 80% of the insolvency industry in Australia.

There are also other professional associations, such as the Personal Insolvency Professionals and the Association of Independent Insolvency Practitioners (AIIP), in Australia.

* The views expressed in this article are the views of the authors and not of INSOL International, London.

1.3 Where do you go to get the information either when you are looking for someone, or looking for a solution?

- SV Partners has a free resource website dedicated to personal and corporate insolvency in Australia.
- There are a number of publicly available search registers (with documents available for a small fee) such as Equifax or Creditor Watch.
- Law firms and accounting firms that operate in the insolvency industry provide resources with specialist insolvency information available on their websites.
- Insolvency practitioner associations such as ARITA also have insolvency information available on their websites.

1.4 Are there lists of (qualified / certified) IPs available? How can these lists be accessed?

A registered liquidator is an individual who is registered as a liquidator under the Corporations Act. A liquidator is allocated a Registered Liquidator Number and their name and number appear on ASIC's public register of liquidators together with details concerning whether they are restricted to accepting certain appointments, whether there are conditions attached to their practice and whether they operate in specific locations.

A registered trustee is an individual who is listed as such under the Bankruptcy Act with AFSA. They are allocated a Trustee Registration Number, and firm details, preferred contact details and any conditions on registration appear on a Register of Trustees.

Insolvency practitioners undertake to be bound by the Accounting and Professional and Ethical Standard (APES) 330 in the provision of insolvency services, and further undertake to remain personally bound by APES 330.

Members of ARITA are also bound by a more stringent code of professional practice which can be accessed on the ARITA website.

There is also a listing of deregistered trustees as a result of the Inspector-General's disciplinary action. Similarly, there is a listing of deregistered / disciplined liquidators.

Most insolvency associations also provide a listing of registered practitioners.

2. Cross-border issues important to smaller practitioners

2.1 Information about available insolvency laws that apply to cross-border cases

The Cross-Border Insolvency Act 2008 (Cth) brings to Australian law the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency (Model Law). This Model Law consists of a framework of principles designed to harmonise cross-border bankruptcy and insolvency cases.

The Model Law aims to address the complexities concerning cross-border insolvencies, enable international trade in goods and services, and integrate domestic financial systems with international financial systems. It also aims to streamline the process by Australian courts when a company with assets or debts in Australia and abroad becomes insolvent. It is only procedural and is not intended to alter Australia's substantive insolvency laws.

Other than streamlining the way international insolvencies are conducted is the determination by the court of the location (jurisdiction) most relevant to the insolvency appointment at hand. This determination requires the court to decide whether foreign proceedings are "foreign main proceedings" or "foreign non-main proceedings". This depends on where a company's "centre of main interests" (COMI) lies.

Australian courts are required to cooperate to "the maximum extent possible" with foreign courts and foreign representatives (insolvency practitioners) regardless of the COMI. Typically, we find that this only automatically applies where the originating country has previously recognised the proceedings.

In the event the proceedings have not been previously recognised, the court will consider a broad range of discretionary factors in assessing whether to provide assistance and relief.

2.2 How to enforce claims abroad / how to do it / whom to get advice from?

The Model Law allows for a foreign representative (i.e. an overseas liquidator) to apply to a court to obtain recognition of a foreign insolvency proceeding in which the foreign representative has been appointed. Recognition allows a foreign representative to seek a range of court orders to help it in carrying out a cross-border reorganisation, or liquidation of a corporation or an individual debtor's assets.

Lawyers specialising in insolvency law or insolvency practitioners are the recommended persons to contact for advice in this area.

2.3 What are the key criteria to consider when tracing and recovering assets in a foreign jurisdiction?

- Whether the specific country has adopted the Model Law.
- Jurisdictions.
- Access to courts.
- The commerciality of pursuing any such claims.
- The likelihood of successful recovery.

2.4 What rights and / or powers does a foreign insolvency officer have to act directly (without any enforcement proceeding) in a third (target) country?

Each case is very much dependent upon the facts at hand and Australia recognises both common law and equitable jurisprudence. This may provide a basis for substantive rights in a given case. However, it is recommended to seek advice from a local insolvency practitioner.

2.5 Are there State aid supported proceedings available that foreign IPs can use?

None that we are presently aware of.

3. Marketing of smaller practices

3.1 What are the marketing strategies that are used by the practitioners?

Traditionally, inbound work is acquired through referral networks or, with respect to some personal insolvency appointments, through AFSA. Conflict of interest checks are completed prior to new appointments, with the requirement for practitioners to complete a Declaration of Independence, Relevant Relationships and Indemnities (DIRRI) to ensure transparency when identifying relationships to creditors.

More recently, digital tools have allowed firms to engage with the market directly, with an increase in the number of appointments resulting from direct enquiry from SMEs or personal insolvency clients. Initiatives such as academic publications, thought leadership discussions, webinars, seminars and social media tools further aid firms in raising brand profile, promoting insolvency related services and driving business. The advent of online advertising has also driven an increase in competition among IPs.

A modern, engaging and accessible website further enhances a firm's presence and provides a platform for educating the general public on insolvency, promoting the capabilities of IPs and providing resources and an additional channel for enquiries from prospective clients.

Social functions arranged with other target firms and business associates provide a casual environment to further explain the importance of the work and need for engagement with IPs, however consideration must also be given to the appropriateness of particular events and ethical standards by which IPs are governed.

Further, engagement with relevant industry bodies assists in building brand integrity and provides an effective avenue for driving inbound work from members.

3.1.1 Advertising

Where advertising needs to be undertaken in respect of an administration, the ARITA Code of Professional Practice for Members provides clear guidelines as to how such advertising should occur. An ARITA Member must not use statutory advertising to market the Member's professional services and must not include slogans, logos or claims.

The inclusion of a firm's logo in non-statutory advertisements placed in an administration are permitted provided the logo does not take prominence.

3.1.2 Inducements

In accordance with the ARITA Code of Professional Practice, an inducement, whether monetary or otherwise, must not be offered under any circumstances to any entity in order to secure an appointment to a new matter.

3.2 How do IPs raise and manage the cost of marketing?

In multi-disciplinary practices, it is anticipated that marketing costs for IPs are generally accounted for in the general marketing budget of the respective firm. For specialist insolvency firms, marketing budgets are generally allocated on a per partner basis, forming part of the larger marketing budget of the firm.

Careful consideration is given to each initiative to ensure the cost vs benefit is appropriate and ultimately provides a good return on investment.

3.1 What are the effective marketing tools?

The aforementioned tools are all effective dependent on the intention and application of each and provided consideration is given to their appropriate use.

4. Financing options for small businesses

4.1 Are there viable financial options for smaller businesses from conventional financing sources?

Various conventional financing sources are available to small businesses, each with varying levels of risk. The following sources are among the most common for small businesses in Australia:

- **Primary funders**

  These consist of banking institutions and credit unions. These organisations will generally undertake a high degree of due diligence to assess eligibility and will usually require security over assets of the business and / or its directors. Banking institutions may also offer overdraft accounts, credit lines and leasing facilities to attract small business owners.

- **Second and third tier lenders**

  These are financiers who are not larger banking organisations / credit unions. Where small businesses are unable to obtain finance from more traditional finance sources, they will turn to these lenders. There is usually a higher interest rate charged by the lender to compensate for the additional risk and loans may be secured or unsecured. It is highly likely that if the borrower is a company, the lender will require security taken against the director's (or their spouse's) own home.

- **Commercial leasing companies**

  There are a large number of commercial leasing companies who will provide asset finance over specific items. Usually, the interest rate is not dissimilar to that of primary funders, with security taken specifically against that asset. In some instances, the leasing company may also seek security against the assets of the company generally, the director personally or both.

- **Debt factoring**

  Otherwise known as invoice financing, this occurs where a business sells its debtor / receivable invoices to a third party at a discounted price to enable faster payment for products and services the business has provided to customers.

- **Business angels**

  Business angels are generally wealthy individuals who directly invest in private businesses that are usually in their start-up phase. This is not a common method of finance for small businesses in Australia, but it may be available to the right business.

- **Family funds**

  These funds are provided by the family of the business owner to assist with working capital and this is a common form of funding for small businesses in Australia. Such finance is usually interest free, with limited to no documentation and without security being taken against the business assets.

5. How do insolvency practitioners get remunerated?

5.1 What are the available models to determine fees – percentage or time based?

An IP in Australia has four methods by which remuneration can be calculated and charged. These methods are:

- **Time based hourly rates**

  This is the most common method used by an IP on both corporate and personal insolvency jobs. The total fee is based on the hourly rate charged for each person who carried out the work multiplied by the number of hours spent by each person on each of the tasks performed. The rates charged depend on each staff member's qualifications and seniority in the firm.

- **Fixed fee**

  This method is based on a total fee, which is normally quoted at the commencement of the appointment and is the total cost for the administration. A fixed fee may also be used in order to finalise an appointment where there is minimal or little work remaining. This method is often used for smaller jobs, such as members' voluntary liquidations, where less complex work is carried out, there is less risk associated with the appointment and there is a more certain outcome to be achieved.

- **Percentage**

  The total fee charged is based on a percentage of a particular variable, such as the gross proceeds of asset realisations. The percentage in corporate insolvency is up to the appointee, however in personal insolvency the maximum percentage is limited by legislation.

- **Contingency**

  The fee is structured to be contingent on a particular outcome being achieved. This is rare in Australia.

  In all insolvency administrations, both corporate and personal, approval must be first obtained either from creditors of the insolvent, a committee of creditors (called a committee of inspection), a secured creditor (if there is a private receivership), a relevant court (in corporate appointments) or the Inspector-General in Bankruptcy (in personal appointments).

  The relevant legislation makes it clear that an IP is entitled to be remunerated only for necessary work properly performed by the IP in relation to the external administration. It should also be noted that Australian courts consider the proportionality of the remuneration against the recoveries when approval is sought via the time-based hourly rate method.

  In both personal and corporate appointments, there is a statutory minimum amount that may be paid where no approval is necessary. The maximum rate that may be paid without approval is presently AUD $5,725 in both personal and corporate matters.

6. Litigation and funding litigation

6.1 Funding causes of actions

Various funding avenues are available to an IP to meet litigation costs and fees incurred in realising assets for the benefit of creditors. The following sources of funding are available to an IP:

6.1.1 Government funders

ASIC

ASIC administers the Assetless Administration Fund (AAF), which was established by the Australian Government. The AAF may provide funding to a liquidator to conduct further investigations where limited funds exist in the administration. In certain circumstances, the AAF may also provide funds to enable a liquidator to recover assets, especially where fraudulent or illegal activity is suspected.

Fair Entitlements Guarantee (FEG)

An IP can apply for funding under the FEG Recovery Programme, where FEG advances have been made in relation to employee entitlements. FEG is a scheme which provides

for the payment of certain employee entitlements where there are insufficient funds in an administration to meet them. The program is administered by the Department of Employment and Workplace Relations (DEWR) within the Australian Government. Where payments are made via FEG, DEWR is entitled to lodge a claim in the insolvency administration in place of the employee who received the payment. When assessing applications for funding, FEG will have regard to the funds advanced in the administration against the prospects of success, the risks of proposed actions, and whether the proposed defendants have the financial means to satisfy a judgment debt.

AFSA section 305 funding

An IP undertaking a personal insolvency appointment (bankruptcy trustee) may obtain Commonwealth funding assistance under section 305 of the Bankruptcy Act to initiate proceedings or conduct investigations into certain matters. Like the ASIC AAF, the assessment of funds to be provided will usually be considered on the basis of whether the matter is in the public interest.

Australian Taxation Office (ATO)

An IP is able to submit requests for indemnities to assist with litigation and other investigations. Once an application is received, the Deputy Commissioner of Taxation assesses the risks, merits and prospects of recovery associated with the request. Like ASIC and AFSA, the ATO will also consider the public interest in determining whether to provide the funds requested by the IP. Where an indemnity is granted and recoveries are made, the indemnity, at a minimum, is to be repaid to the ATO as a priority in the administration.

6.1.2 Private financing

Legal firms acting on a speculative basis

Commonly, an IP may engage solicitors to act on a speculative basis, so that the solicitors undertake work in relation to the proceedings on behalf of the IP who may have insufficient funds in the administration, and they do not get paid unless funds are recovered. In the event of a successful outcome, the solicitor may be entitled to be paid with an agreed uplift percentage on their standard fees.

Commercial funder

Australian courts have allowed commercial funders to fund litigation conducted by an IP. The primary consideration of a commercial funder is receiving a commercial return on their investment. This may include recovery of all funds plus an additional agreed percentage of the recoveries received. In corporate appointments, these funding agreements are required to be approved by creditors or by a court.

Creditor funding

An IP may seek funding from one or more creditors of the insolvent to litigate claims or conduct detailed investigations into potential recovery actions. The court may make

orders in relation to funds recovered in favour of creditors who provided funding to an IP to meet the costs of pursuing the actions for the benefit of the creditors generally.

6.2 Are there alternatives to litigation, for example arbitration or mediation?

Australian courts generally favour directing parties to take all necessary steps to resolve matters prior to going to a trial. The following avenues are available to an IP as alternatives to litigation:

- **Informal mediations / settlement conferences**

  The parties agree to meet, usually with their solicitors present, to discuss and resolve any disputes on commercial terms. In such circumstances, there is rarely a mediator present.

- **Formal mediations**

  Courts will often direct that the parties hold a formal mediation with a qualified mediator controlling proceedings. This is a structured process, whereby an independent person, known as a mediator, assists parties to identify and assess options and negotiate a settlement to resolve their dispute.

6.3 Enforcing judgments – local and foreign

6.3.1 Local enforcement options

There are a number of options available to a judgment holder in order to enforce their judgment. It is relevant to note that some actions may differ between the various States and Territories of Australia:

Charging order

Commonly used against real property which will provide the creditor with a priority over other unsecured creditors in the event that the property is sold. The court may also make orders preventing the sale of the real property.

Warrant of sale

The court may authorise the seizure and sale of a judgment debtor's real or personal property. This is conducted by the Sheriff of the court.

Garnishee order

In certain jurisdictions, the court may make a garnishee order that any money owed to or held by the judgment debtor (e.g. held in a bank account) is paid directly to the judgment creditor. There are a number of protections provided to the judgment debtor and the court may take into account the needs of the judgment debtor before making such an order.

Court appointed receiver

The court may appoint an IP as a court appointed receiver and provide such powers as are necessary for the realisation of the judgment debtor's real or personal property.

Investigative summons

The court may make an order requiring the judgment debtor to attend the court and provide such information for the court and judgment creditor to determine the judgment debtor's means of satisfying the judgment sum. In certain jurisdictions, the court may also be able to order the payment of the judgment sum via instalments.

Winding up

The holder of a judgment against a company may issue a statutory demand providing the judgment debtor with 21 days to pay the judgment debt. In the event that the judgment debtor fails to pay the debt within the 21 days, the judgment creditor may apply to the court to wind up the company.

Bankruptcy

The holder a judgment against a personal debtor may apply to AFSA for the issuing of a bankruptcy notice providing the judgment debtor with 21 days to make payment of the debt the subject of the judgment. Should the judgment debtor fail to pay the debt within the 21 days, the judgment creditor may apply to court for a sequestration order against the estate of the judgment debtor.

6.3.2 Enforcing international judgments

Foreign judgments can be enforced in Australia by one of 2 methods:

Foreign Judgments Act 1991

This Act enables the registration and enforcement of judgments obtained in a superior court of another country where there is "substantial reciprocity". Those superior courts of other countries with "substantial reciprocity" are set out in schedule 1 of the Foreign Judgments Regulations 1992.

There are a number of countries on this list, but notably China and the United States are not included.

Common law

In order to enforce a judgment in Australia from a jurisdiction not covered by the Foreign Judgments Act, new proceedings are required to be entered into within Australia and the following principles apply:

- the parties are the same;

- the foreign court had jurisdiction to make the order;

- the judgment is for a fixed or readily calculable sum (cannot be a penalty or revenue debt); and

- the judgment is final.

It should be noted there are also exceptions to the above, including (but not limited to) where the foreign judgment was obtained by fraud or the judgment debtor was denied natural justice before the foreign court.

7. Licensing and regulation of IPs

7.1 How are IPs regulated?

As qualified accountants, the vast majority of IPs are members of professional accounting bodies. The two primary professional accounting bodies are Chartered Accountants Australia and New Zealand (CAANZ) and CPA Australia (CPA), both of which provide a Code of Ethics and adhere to APES standards to oversee the activities of IPs. Disciplinary action is rarely taken by CAANZ or CPA against IPs, which is usually carried out by more specific insolvency regulatory bodies.

As noted above, ASIC acts as the primary regulator for IPs in relation to corporate matters. AFSA undertakes the statutory role in personal insolvency matters.

ARITA has oversight of IPs through the application of a Code of Professional Practice which focuses primarily on independence and impartiality of practitioners.

7.2 Who can become an IP or which professionals regularly work with IPs?

To offer formal insolvency services, IPs are required to be appropriately licensed and registered. For corporate insolvencies, IPs must be a registered liquidator with ASIC. Since January 2021, IPs can register as either full registered liquidators, or become licensed to conduct only small business restructures. In the case of registered liquidators, IPs are required to have a tertiary qualification in accounting, current membership of a relevant accounting body and at least 10 years of relevant insolvency experience, with significant hours at a senior level.

Additionally, IP applications must meet strict "fit and proper person" requirements. These requirements are extensive and are particularly important to ensure the confidence of vulnerable people engaging in insolvency services.

IPs are also required to hold and maintain appropriate professional indemnity insurance cover to provide security for potential compensation liability.

Applicants for registered trustee status are subject to similar requirements and standards and are bound by the regulatory framework of the Bankruptcy Act.

Although solicitors are currently unable to become IPs, they play a crucial role during insolvency appointments. IPs regularly work with solicitors to reach commercial solutions in relation to debt recovery, income tax considerations, uncommercial transactions and

sales of businesses. Solicitors may become members of ARITA by completion of an additional post-graduate course.

7.3 What kind of work is carried out by IPs in Australia?

As referred to in sections 7.1 and 7.2, IPs may operate in either the personal insolvency sector or in the corporate insolvency sector, or both. Most registered trustees, of which there are approximately 220 in Australia, are also registered liquidators, who number approximately 650 in Australia.

The vast majority of bankruptcies in Australia are carried out by the Official Trustee, a functionary of AFSA.

In the personal insolvency industry, the following work may be carried out by IPs:

- **Personal insolvency agreements (Part X)**

  A trustee is appointed to take control of a debtor's property and puts to creditors the debtor's proposal to settle debts owed to creditors. Should sufficient creditors formally agree to the proposal, the proposal binds all creditors. Any such offer may be paid by instalments or a lump sum.

- **Debt agreements (Part IX)**

  A legally binding agreement between a debtor and their creditors, whereby a debt agreement administrator will negotiate a percentage of total debt to be repaid to creditors over a period of time.

- **Bankruptcy**

  A process whereby the property of a debtor vests in a bankruptcy trustee. The bankrupt is released from bankruptcy after three years from the lodgement of their bankruptcy form. However, this period may be extended as a result of the bankrupt's non-cooperation or committing any offences.

In the corporate insolvency sector, IPs regularly carry out the following types of appointments:

- **Court-appointed liquidations (CL)**

  A liquidator is appointed by the court as a result of an application to wind up the company, generally by a creditor. The liquidator commences a process to realise the company's assets and distribute available funds to creditors in accordance with the priorities afforded by the Corporations Act. The liquidator also has a duty to conduct statutory investigations into the company's affairs and report any offences to ASIC.

- **Creditors' voluntary liquidations (CVL)**

  A process where a company's members resolve to place the company into liquidation to allow for the realisation and distribution of the company's assets to

creditors. The same creditor priorities apply as in a CL, and liquidators are required to perform the same investigatory procedures.

- **Members' voluntary liquidations (MVL)**

  A solvent liquidation, whereby a company is wound down and a liquidator is appointed to distribute the assets to its creditors and members. A MVL provides extra measures of security to a company and its members than a normal deregistration process.

- **Voluntary administrations (VA)**

  An alternative to liquidation, where a company may be able to continue trading during the appointment of the administrators. The process aims to resolve the future of a company, and the company's directors or other parties may propose an arrangement with creditors (known as a deed of company arrangement). If the arrangement is accepted, the control of the company is returned to the directors. Should creditors not accept the arrangement, the company is placed into liquidation.

- **Receivership**

  A procedure whereby a receiver is appointed by a secured creditor to administer a particular item of property. The receiver takes possession of the assets which are covered by the registered security agreement under which the receiver is appointed and investigates the best course of action to enable repayment of the secured creditor's debt.

In January 2021, largely due to the ongoing implications of the COVID-19 pandemic, the Australian Government introduced a number of insolvency reforms for eligible incorporated small business. Those reforms introduced the following two appointment types for IPs:

- **Small business restructuring process**

  This process attempts to assist small businesses with their financial stress, while avoiding liquidation. Directors and management remain in control of the company, and a restructuring practitioner is appointed to supervise the company's affairs and work with the directors to propose a plan to repay creditors.

- **Simplified liquidation**

  This is a form of CVL available to small businesses meeting a certain set of criteria. The simplified process reduces the time and cost associated with a normal liquidation, providing faster relief for directors and creditors.

  In Australia, IPs can provide services beyond formal appointments. These services include consulting and advisory work such as negotiating debt settlements and restructuring and turnaround advice. IPs may also provide directors with advice on how to minimise personal liability risks, including director penalty notices and

potential claims for insolvent trading, but not when related to the formal appointment to which the IP is acting as the trustee or liquidator.

7.4 Who appoints an IP?

The appointment process of an IP is subject to the type of work carried out as detailed in section 7.3.

In relation to corporate work, IPs are commonly appointed through the following methods:

- upon resolution of a company's members;
- through the court following an application to wind up the company (usually by a creditor);
- a liquidator or provisional liquidator of the company; or
- by a secured creditor holding a qualifying charge, usually by way of mortgage or loan.

Directors and other individuals may also approach IPs directly to obtain more general insolvency advice regarding their company or personal financial position.

7.5 Is an IP who gets court appointments as an administrator allowed to do advisory work as well?

An administrator appointed by the court is generally permitted to conduct advisory work, however not for the company under which they are appointed, or its associated entities. Advice provided to an insolvent entity prior to formal appointments is generally restricted to the financial situation of the entity, the solvency of the entity, the consequences of insolvency and alternative courses of action available to the entity.

Further, IPs are unable to provide specific advice to the directors regarding their personal obligations arising from specific actions taken during or prior to a formal administration. IPs advise directors to seek their own legal advice in relation to matters that may impact their personal financial situation.

8. Compliance issues

8.1 Tax requirements relevant to smaller practices

The ATO assesses and collects the income tax of businesses in Australia. Businesses are subject to strict tax legislation and must comply with a range of requirements, such as lodging business activity statements, lodging an annual income tax return and keeping sufficient records for tax purposes.

In Australia, IPs of smaller practices face the same tax requirements as larger practices. There are a number of considerations for IPs when conducting formal insolvency appointments, and when trading on a business they are bound by the specific tax

requirements of that business (i.e. payroll tax, goods and services tax (GST) and wine equalisation tax (WET)). IPs should address common GST issues that occur in daily trading tasks and recognise GST adjustments when paying dividends to creditors.

IPs must also consider their own GST reporting obligations and meet all single touch payroll (STP) and pay as you go (PAYG) withholding obligations.

8.2 Money laundering and financial crimes

Money laundering offences are set out in part 10.2 of the Criminal Code (Cth) and encompass a wide range of criminal activity.

Sections 400.3 to 400.8 of the Criminal Code make it an offence to deal with money or property that is the proceeds of crime or intended to become an instrument of crime. Section 400.9 of the Criminal Code applies to dealings with money or property which is reasonably suspected to be the proceeds of crime.

Various sections in the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) are also often used in prosecuting money laundering. This Act, along with the Anti-Money Laundering and Counter-Terrorism Financing Rules, aim to prevent money laundering and the financing of terrorism by imposing a number of obligations on the financial sector.

The Australian Transaction Reports and Analysis Centre (AUSTRAC) is the Australian Government agency responsible for ensuring compliance with the Act.

8.3 The right to access information

The Freedom of Information Act 1982 (Cth) gives any person the right to access copies of documents (except exempt documents) held by government authorities.

This right is particularly important for IPs who are required to access information about incapacitated entities. This information, obtained from the ATO, AFSA, ASIC and other statutory bodies, is often essential to an IP's investigations, particularly in relation to insolvent trading.

IPs also require the books and records of the company or individual from the entity's accountant or other external advisor. The Corporations Act gives IPs power to request all information held on behalf of the entity under administration. In these cases, the advisor has a semi-active role in the administration of a company or individual by way of providing true and fair financial records, and other relevant historical information to assist an IP with their investigations.

8.4 Corporate governance

Unlike many other jurisdictions, Australia does not have a corporate governance code that binds all companies. Listed companies, however, are encouraged to adopt the relevant ASX principles, which have been designed to ensure that listed companies operate in a way that meets the expectations of shareholders.

Prior to an insolvent company entering an external administration, the directors are essential to that company's operations and management. Those directors continue to play a limited role once the company enters external administration. Directors are essential components of corporate governance and the responsibility each director holds in relation to the structure, management and future of a company should not be overlooked. The significant role of directors has an impact on the wider community, not just employees and creditors.

Once a company enters a formal insolvency regime, the final decisions of the company rest with the IP. However, it is important for directors to have a semi-active role in relation to communicating with the IP on investigations into the company's affairs.

At a general level, directors are responsible for the oversight of management and operations of a business. Beyond this, however, directors have specific duties they must comply with in relation to exercising reasonable care and skill, acting in good faith in the best interests of the company and acting and for proper purpose. In an insolvency context, it is relatively common for a breach of directors' duties to be litigated.

8.5 Regulatory authorities

As noted in section 7.1, ASIC is the primary regulator for registered liquidators in Australia and more enforcement activity has been commenced in recent years. In administering legislation, ASIC issues consultation papers, which seek feedback from stakeholders on relevant matters that ASIC is considering, and regulatory guides, providing direction on how ASIC exercises specific powers under legislation and describing the key principles underlying their approach to law interpretation.

ASIC may only register as liquidators only natural persons who satisfy certain criteria and who are not disqualified by division 20 of the Insolvency Practice Schedule (Corporations).

To be registered, liquidators must be fit and proper, which is assessed against criteria in relation to honesty, integrity, good reputation and personal solvency.

AFSA undertakes a regulatory role over personal IPs. AFSA's primary purpose is to maintain confidence in Australia's personal insolvency system. AFSA regularly monitors the activities of practitioners to ensure compliance with the Bankruptcy Act, and reviews decisions made by Trustees, as well as their remuneration, issuance of objections to discharge and certain other statutory notices.

As a professional association, ARITA also has oversight of the majority of Australian IPs through a Code of Professional Practice. Further information regarding the Code is provided in section 9.6 below.

8.6 Disciplinary matters and the complaints system in operation

ASIC, as the regulator of corporate IPs in Australia, handles any complaints relating to misconduct of those IPs. Anyone can lodge a complaint about an IP who is alleged to be acting unprofessionally, improperly or unethically.

In relation to personal insolvency, AFSA is responsible for monitoring the standard of personal IPs under the Bankruptcy Act 1966. Anyone may submit a complaint regarding the conduct of a personal IP to AFSA, which investigates the matter with an aim to reach a resolution.

Both ASIC and AFSA have the ability to remove a liquidator's or trustee's registration in instances of poor conduct.

Additionally, a similar system is in place for ARITA, whereby complaints can be made against ARITA members in relation to their non-compliance with the Code of Professional Practice.

9. Best practices

9.1 Client money rules

In accordance with the provisions set out in division 65-1 of the Insolvency Practice Schedule (Corporations), IPs who are appointed as external administrators over a company must comply with the following guidelines in relation to money handling:

- promptly pay all company money into an account (called an administration account);
- promptly deposit instruments such as securities with a bank;
- keep the account separate and not pay any money that is not company money into the account; and
- only pay money out of the account if it is for a legitimate purpose.

Similar processes are outlined in the Insolvency Practice Schedule (Bankruptcy) and the Insolvency Practice Rules (Bankruptcy) for IPs appointed as trustees over individuals.

There are strict liability penalties for various breaches of the above guidelines, including failing to pay money into an administration account and paying money out of an administration account for an unauthorised purpose.

The imposition of strict liability is necessary to reduce non-compliance and assists both ASIC and AFSA in maintaining public confidence in their regulatory processes.

In line with record keeping guidelines, IPs are also required to keep true and correct records relating to all reportable money held in administration accounts.

9.2 IT security

In the course of their work, IPs obtain various confidential and sensitive information from debtors and creditors. IPs have a duty to ensure this information is protected by proper systems and processes that reduce security risks and ensure confidential information is kept safe.

Neither the Bankruptcy Act nor the Corporations Act provide guidelines on how practitioners should keep and maintain their records. As we move towards a more modern professional era, IPs have focused on using advanced cloud-based software to increase security and prevent the misuse of information.

IPs also focus on adequate training for their staff to ensure they are aware of common cyber scams and attacks, and when to report suspicious activity. Appropriate back-up plans should be in place in the case of a cyber-attack or software crash and appropriate insurance should be maintained.

9.3 Licensing requirements

As detailed in sections 7.1 and 7.2, IPs in Australia are required to meet a strict set of criteria in order to be eligible to be registered as an IP. Those requirements are governed by the Corporations Act and the Bankruptcy Act and are overseen by ASIC and AFSA. The process involves the applicant presenting before a committee comprising of a representative of either ASIC of AFSA, a representative of the Minister responsible for either ASIC or AFSA and a representative of ARITA, for what can be a three-hour verbal examination of the applicant's worthiness.

9.4 Insider dealing

Australian insider trading laws prohibit a person from trading securities while in possession of non-public, price-sensitive information. Specifically, section 1043A of the Corporations Act defines insider trading as prohibited conduct.

IPs are often exposed to non-public information, particularly when offering pre-insolvency advice or consulting work, and laws around insider trading are particularly important to IPs during the course of their investigations. All IPs are encouraged to promote a compliance culture within their firms.

ASIC considers insider trading to be a serious offence which undermines the integrity of financial markets, and which may result in criminal prosecution.

9.5 Local employment law requirements next page?

Employment law in Australia is governed by the Fair Work Act 2009 (Cth), which provides the minimum terms and conditions for the majority of employees in Australia. Contained within the Fair Work Act are the National Employment Standards (NES), which provide the minimum entitlements for employees in the private sector.

Many employees in Australia are employed under Modern Awards, which set out minimum terms and conditions of employment on top of the NES. Modern Awards are industry based and cover employees within those particular industries. Employers in Australia are unable to provide employment conditions to any employees that are less favourable than either the NES or the applicable Modern Award.

Australia is also governed by various other workplace relations legislation, such as state and federal anti-discrimination laws, the Work Health and Safety Act 2011 (Cth) and the Disability Discrimination Act 1992 (Cth). These laws are implemented to protect

employees from discrimination and harassment relevant to their employment, and to promote the health, safety and welfare of individuals within the workforce. Workers' compensation is a form of compulsory insurance for all employers in Australia, providing protection to workers in the event they suffer a work-related injury. The insurance provides compensation payments to employees to cover medical expenses and rehabilitation, as well as wages if they are unable to work.

Under Australian law, employees have the right to bring claims against employers relating to workplace disputes. These disputes are usually resolved through involvement of the Fair Work Commission or employee unions. However, some more complicated matters, such as unfair dismissal claims, may require a mediation.

Superannuation is compulsory for all people working and living in Australia and is a percentage of income set aside by employers to assist in retirement from work. Australian employers are required to pay a minimum amount based on the superannuation guarantee rate (10.5% as at 1 July 2022) of ordinary earnings into their employees' superannuation fund. Individuals are automatically able to access their superannuation when they reach preservation age (between 55 and 65 depending on their date of birth), and strict government rules prevent early access to funds except in very limited circumstances.

9.6 Codes of ethics

CAANZ and CPA Australia have oversight of insolvency practitioners primarily through their Codes of Ethics which apply to all members.

More specifically, the ARITA Code of Professional Practice has been established as the standard for professional conduct in the Australian insolvency industry.

The Code provides a number of principles that IPs must act in accordance with at all times, including integrity, competence, objectivity and impartiality. These principles are in addition to IPs' obligations to comply with the law and inform and educate members as to the standards of conduct required by them. All IPs are required to act according to their powers and duties under the relevant legislation, act honestly and impartially and notify relevant parties of actual or potential conflicts of interest and take appropriate steps to avoid them.

The Code also provides guidelines about the IP's firm to ensure that each IP has adequate expertise and resources – thereby contributing to effective quality assurance, compliance management, risk management and complaints management.

9.7 Time management for IPs

Time recording for IPs and their staff is generally broken down into intervals of commonly five or six minutes in order to avoid overcharging. The time recorded by IPs and the review processes concerning that time must be adequate and all work performed must be able to be explained with reference to working documents.

Charge-out rates for IPs should be comparable to market standards and the allocation and seniority of staff should be appropriate in relation to the tasks undertaken. IPs

should take extra care in ensuring their costs and expenses incurred are in proportion to amounts claimed during recovery actions.

The court is increasingly focused on the proportionality of time charged and IPs can be subject to strict scrutiny of the appropriateness of their costs and expenses incurred.

INSOL INTERNATIONAL

GROUP OF THIRTY-SIX

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Alvarez & Marsal
Baker McKenzie
Baker Tilly
BDO
Brown Rudnick LLP
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