Watchdog suffers a crisis of confidence

An inquiry report wants ASIC to be stripped of powers to oversee the insolvency industry

REBECCA URBAN
REGULATION

IT was well into the evening of June 23 this year when Nationals senator John Williams, the politician behind the latest inquiry into the insolvency industry, reeled off a long list of complaints.

Williams was in Canberra for one of several public hearings into the issue. Before him sat Australian Securities & Investments Commission chairman Tony D'Aloisio, whose government-funded organisation was being accused of sitting idle while dodgy practitioners, such as the notorious Stuart Ariff, wreaked havoc on investments, businesses and livelihoods.

"I do not intend to make this into an ASIC-bashing session," Williams apologised, before pointing out that the public's perception of the agency was poor.

"Certainly one does not like — even if it is late at night — to get a catalogue of those sorts of statements," D'Aloisio replied. "But what you are saying is that that is the perception. And we as an organisation have to deal with that perception."

Unfortunately for ASIC, the release of the Senate Economics Reference Committee's 190-page report into the regulation, registration and remuneration of the insolvency industry this week is unlikely to improve its image.

Overburdened. Passive. Slow. Unsatisfactory. They were just some of the terms used to describe the regulator and to justify calls for it to be stripped of its oversight of an industry that has risen to prominence as corporate insolvencies jumped 25 per cent in Australia between 2007 and 2009, courtesy of the financial crisis.

And while the industry itself has acknowledged there might be benefits in establishing a dedicated regulator and new licensing provisions, D'Aloisio appears adamant that the current system of overseeing the 662 insolvency practitioners registered in Australia is sufficient.

The same goes for the funding his organisation receives from the federal government — $307m in the 2009 financial year, according to its latest annual report — to undertake a growing list of responsibilities, including regulating more than 1.7 million companies, 4800 financial services business as well as the financial markets.

"We feel that we are working well and achieving our goal within the resources that we have allocated," D'Aloisio told the inquiry. "We have not asked government, at this point, for additional resources."

Try telling that to the dozens of people who lodged submissions with the Senate committee.

People such as South Australian winemaker Andrew Garrett, a discharged bankrupt, who alleges that his family and business had suffered at the hands of the profession. Or Steve Koci, who has had the misfortune of being a shareholder in three failed companies, including car parts maker ION, which collapsed in 2004 and is still in administration.

And then there are the various victims of Ariff, who was banned four years after complaints were first made about him stripping millions from businesses for personal use, such as holidays, lavish restaurant bills and limousines. He is facing 19 criminal charges brought by the Commonwealth Department of Public Prosecutions.

According to the evidence of Bill Doherty, a former director of one of 16 companies affected by Ariff's misconduct, he personally voiced more than 50 complaints to ASIC and various industry associations, and it was only after the matter was aired in the media that any action was taken.

"If you make a complaint against ASIC, you get on their website and fill in a complaint form and hope for the best. I did that three times. Nothing really happened except that I was going to get added to their database again and again," Doherty said.

Williams had not heard of Ariff when he called for the inquiry, but he receives complaints about the insolvency profession frequently, ranging from the fees charged, perceived conflicts of interest and the lack of transparency.

However, a recurring gripe appears to be ASIC's purported inaction. In fact, it's a significant theme of the Senate committee's report, leading some to surmise that the regulator lacks the resources to acknowledge the receipt of complaints, let alone investigate them.

"Frankly I'm very disappointed in ASIC, in the way it has carried out its job," Williams told *The Australian* this week.

"ASIC is there on behalf of the government and the people. I wish, looking back on history, that the system had worked a lot better."

Unlike financial services representatives, liquidators are not required to be licensed. Instead, they register — a process that D'Aloisio himself has conceded carries a lower barrier to entry.

Liquidators are required to take out insurance, but there are no checks to ensure that their insurance remains current. Nor is there a concerted program to keep an eye on practitioners in a similar fashion to that of the Insolvency and Trustee Service Australia, which oversees personal bankruptcy cases and conducts scheduled and surprise checks of its trustees.

The Senate committee is asking that ITSA's powers and resourcing be bolstered so it can take over the corporate insolvency role.

The ASIC chairman declined several interview requests this week. However, he did pen an opinion piece for one newspaper, defending his organisation. He particularly took issue with the Senate report's suggestion that ASIC was not proactive.

"This does not fairly set out what ASIC does," D'Aloisio wrote.

> 'Frankly I'm very disappointed in ASIC'
>
> JOHN WILLIAMS
> NATIONALS SENATOR

"Since July 2006, ASIC had undertaken 179 insolvency-related investigations, which examined practitioners' independence, their remuneration or reporting matters. Critically, more than half of these reviews, 56 per cent, were originated by ASIC's own market intelligence.

"ASIC continues to undertake a program of compliance visits for insolvency practitioners. This is standard practice."

While that might sound reassuring, ASIC's submission tendered in March revealed it had 10 practice surveillances scheduled to take place by the end of the calendar year. Australia has 273 insolvency firms.

Pushed by South Australian senator Nick Xenophon during one hearing, D'Aloisio admitted that if regular surveillance was introduced, the regulator's "ability to pick problems" would improve.

ASIC has estimated that to undertake a similar level of monitoring of liquidators to that of the ITSA surveillance model, it would require an additional 65 full-time staff. That would constitute a tripling of staff in its corporate insolvency area. However ASIC commissioner Michael Dwyer, who appeared alongside D'Aloisio at the hearings, told the committee that, given the cost, it was questionable as to whether a change in policy would be appropriate.

"The cost benefit of those additional resources as against the impact of annual or biannual reviews of practitioners would be fairly line-ball," he said. "I am not saying it would not have an impact; it would. It is a question of whether that cost is justified."

But what price for public confidence? As the insolvency industry has pointed out, the inquiry identified no widespread wrongdoing in the profession. Instead, as various professionals have argued, it appears that the industry's reputation has been tainted by the actions of a few. Ferrier Hodgson's Steve Sherman, an insolvency specialist of more than 30 years' experience, has dismissed the inquiry for being driven by a "disaffected minority group".

"The complaints about one or two individuals created a lot of noise in an industry where there are over 650 registered liquidators. It is not the industry that is at fault; there are just one or two bad apples," he said this week.

Sherman's argument carries weight when looking at the outcome of complaints that ASIC has referred to the Companies Auditors and Liquidators Disciplinary Board for adjudication.

Since July 2006, there have been 14 matters referred from ASIC's insolvency and liquidators team to CALDB and the courts. Since then there have also been nine other disciplinary outcomes relating to misconduct from investigations commenced before July 2006. These include the suspension or ban of seven practitioners.

While these actions appear sparse, they also appear in conflict with the spike in the number of complaints against insolvency practitioners to ASIC from 352 in 2008 to 633 in 2009. Academics that contributed to the inquiry, including Flinders University law lecturer Vivienne Brand, believe further research is required before conclusions can be drawn as to the state of the industry.

"There has been general consensus before the committee that we have a very good system in Australia that largely works well. There has to be a reason why there are so many really upset creditors," she told the inquiry.

"My gut feeling . . . is we are not picking up a number of people who are not operating so well — not a lot, but enough that might explain why there are so many unhappy creditors."

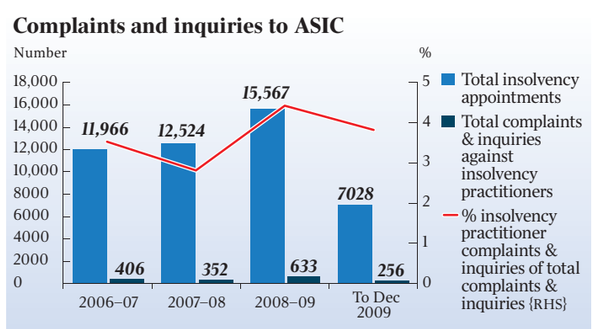
Williams said he was disappointed with some of the reaction to the report. He is also concerned about the noncommittal response from Treasurer Wayne Swan, who said via a spokesman that he had no plans to amend the framework for supervision of the insolvency industry.

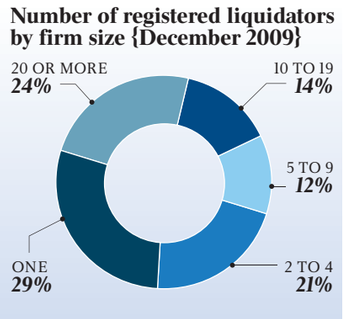
But the NSW senator has promised that the issue will not go away.

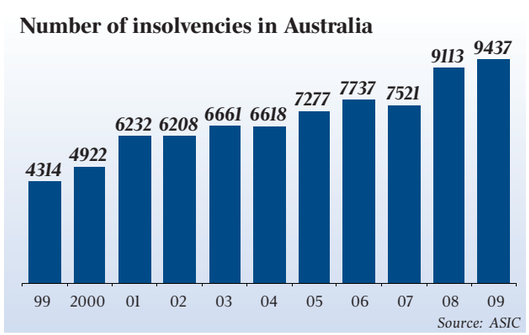
"I'm not prepared to sit back and lay idle," he said.

"This is the seventh inquiry in 20 years into the industry. Obviously something needs to change."

Overburdened, passive, slow and unsatisfactory are just some of the terms used to describe ASIC and to justify calls for it to be stripped of its oversight







Margins heading way of the Dodo

Dodo says ISPs will feel the pressure once the NBN is ready

MITCHELL BINGEMANN
BROADBAND

CUT-PRICE telco Dodo believes it is in the perfect position to jump into the new national broadband world, but has warned other internet providers to be ready for a rude shock if they expect to maintain the margins they have enjoyed in the current telecoms landscape.

Ten years ago, Dodo was one of the nation's up-and-coming telcos with a fast-growing customer base and diversified product offerings. But backlash from its poor record in customer service and the company's decision to remain on expensive Telstra and Optus wholesale deals when all its competitors started to build out their own infrastructure left Dodo behind the pack.

"We started 10 years ago when there was only Optus and Telstra and a couple of other smaller side players. But over the past couple of years my co-challengers have all become the big boys," Dodo chief executive Larry Kestelman told *The Australian*.

"They have all consolidated and bought and merged and we are at a place where there are four big guys and we have been left standing as the largest private telecommunication company."

Mr Kestelman said the decision to remain a wholesale-only customer played a prominent role in his company's stagnating market position but in the paradigm of the NBN, he now believed Dodo was perfectly positioned to reinvent its brand and capture new customers.

"It was a good business decision on their part to invest in infrastructure and it's definitely hurt us, especially in metropolitan areas where we have not been able to be as aggressive as we would have liked," he said.

"But for us this is just one battle, not the war, and without a doubt the NBN is a much more positive result for us than our competitors because they will be left with stranded assets while the NBN for us is just another network that we will hop on to and use."

Mr Kestelman said Dodo's position as a wholesale buyer meant it was used to operating on tighter margins than its competitors. He said the wholesale-only nature of the NBN and its plans to offer universal prices to access-seekers could see margins for ISPs slashed by 50 per cent in metropolitan areas.

"I'd be surprised if their cost of access in metro areas did not double. These publicly listed ISPs with their own infrastructure are used to very fat margins on their networks. Now the question is what are they going to do when the NBN is ready for them. They are going to have to get used to dealing, like ourselves, on tighter wholesale margins," he said.

Mr Kestelman plans to position Dodo as a multi-service, multi-product supplier on the NBN. The telco already sells security monitoring services and holds licences to sell electricity and gas to customers. It's now eyeing IPTV as the next service it wants to offer consumers.

"For us it's all about bringing multiple services to one household. We want customers to be able to make a call to us and then we can come and supply all the services they need: broadband, TV, electricity, gas and so on," he said.

Hard choices for hardwood plantations mismanaged by investment schemes

Some have sold, but others languish

ANDREW MAIN
AGRIBUSINESS

PICTURE an Australian timber plantation 68km by 68km, and think of the amount of sweat and money that's gone into creating it over the past 20 years.

It's all for sale, or has been sold, by administrators and liquidators in the past year, even though it's never been burnt out, or had significant numbers of trees die because of drought.

This is because the plantations were all in rural managed investment schemes (MIS), an investment model that has been comprehensively demolished by the fact that all the biggest players in the business have collapsed since April last year, taking about $4.2 billion of investors' monies with them.

The trees are all still there, mostly blue gums, accidentally doing their bit for carbon capture, but essentially put there to be harvested when mature, reduced to woodchips and shipped offshore for paper manufacture.

They went broke because they weren't actually self-sustaining. Once upfront fees of 10 per cent were paid to investment advisers, promoters overpaid for leases and the various other costs were taken out, even after the trees were harvested there was less money being earnt than spent.

The 68km by 68km area represents the 463,000 hectares that were managed by the biggest four companies, now defunct, operating in the MIS space.

Timbercorp collapsed in April 2009 with 98,000ha under plantation, followed a month later by Perth-based Great Southern Plantations with a whopping 240,000ha. Forest Enterprises Australia of Tasmania added another 72,000ha in April this year and then on September 6, Willmott Forests, a Melbourne-based operator that had been going for 30 years, added another 53,000ha to the total. They've caused nightmares for about 75,000 grower investors, who put money into what were often called "June 30" schemes. They were allowed to claim immediate upfront deductibility in one year for money that would be spent in the following year.

What's remarkable about the schemes is how long they lasted. In 2007, the government had to stipulate that deductibility would only apply to schemes where 70 per cent or more of the money was actually spent on forestry, suggesting that before then, the schemes would have been lucky to see much more than 50 per cent.

The key to the longevity is what the cynics have been calling the Ponzi scheme element. Until two years ago the inflow of funds every June gave a transfusion to the schemes, leaving new investors dreaming of the trees they were going to own and previous investors unwittingly collecting their smaller-than-expected exit payout from the new investors.

Although the tax deductibility still exists, the MIS schemes' inflows were hit in 2007 by a dispute with the Tax Office about deductibility of other schemes, such as grapes and almonds.

While some grower investors thought, incorrectly, that it would also apply to timber schemes, they were then hit by the global financial crisis in 2008, greatly reducing the amount of income seeking a tax break, and the flow of new "June 30" money dropped in many cases by more than 80 per cent.

That's when the collapses began and it then emerged that some plantations had been sown more because the money was coming than they could make good returns in future.

Management consultant Doug Parsonson said yesterday that "let's say more than 30 per cent of the areas planted today would not be replanted in future because the trees simply haven't grown enough".

He added that in other cases, such as the Tiwi Islands off Darwin, the trees had grown well, but the absence of a suitable port had added to transport costs.

More reassuring is the news that not only are a number of reputable timber groups, such as Gunns, picking up the management responsibility for schemes, thus giving investors the chance of some money when the trees are eventually harvested, but a number of institutional investors are looking closely at buying the land the trees are on, and in some cases the land plus the trees.

David Brand, managing director of the Sydney-based New Forests Group, made it clear there are buyers around for plantations in Australia that are "well positioned in coastal regions, with proximity to ports". He says they are looking to new markets such as China and India for both hardwoods and woodchips.

#7 *the* **perpetual punter**

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