A PRIMAL SKETCH OF AN INSOLVENCY OMBUDSMAN

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I INTRODUCTION

Australia and the United Kingdom (UK) have commenced a discussion on the introduction of an insolvency ombudsman or an independent insolvency complaint body. In early 2010, the Australian Federal Parliament's Senate Economics References Committee ('the Committee') conducted an inquiry into the regulation, registration and remuneration of insolvency practitioners (administrators and liquidators) and the role of the corporate regulator, the Australian Securities and Investments Commission (ASIC). The Committee's inquiry was motivated, inter alia, by creditor dissatisfaction with the egregious behaviour of one insolvency practitioner, Mr Stuart Ariff.[1] As part of its inquiry, the Committee analysed how insolvency practitioners are regulated and

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1 *ASIC v Ariff* [2009] NSWSC 829; BC 200907495. For commentary see Christopher Symes, 'Is Ariff an Aberration?' (2009) 10 (2) *Insolvency Law Bulletin* 25.

how creditors' complaints are managed.[2] Evidence to the Committee[3] demonstrated a frustration on the part of creditors with the existing regulatory framework which requires them to complain to ASIC. As part of its supervisory role of insolvency practitioners, ASIC may refer disciplinary matters to a statutory body known as the Companies Auditors and Liquidators Disciplinary Board ('CALDB').[4] Independent of ASIC and CALDB, accounting professional bodies[5] self-regulate their members who practise as insolvency specialists. Professional bodies will investigate creditor complaints lodged with them and may impose sanctions ranging from admonishment to cancellation of membership. However, it was the Committee's view that aspects of the regulatory framework could be improved.[6] The Committee's Report, published in September 2010, recommended the establishment of an insolvency regulatory authority, while contemplating that if this move did not result in handling complaints promptly and effectively, then an insolvency ombudsman should be seriously considered.[7] In June 2010, the Office of Fair Trading in the UK released its report on the market for corporate insolvency practitioners and recommended the creation of an independent compliant handling or appeal body.[8]

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2 The Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the Case for a New Framework* (September 2010) Canberra, [4.1] – [4.12], [6.1] – [6.48].

3 Ibid [5.40], [5.48] - [5.52], [6.34] – [6.46].

4 Jeffrey Fitzpatrick, Vivienne Brand and Christopher F Symes, ''Fit and Proper': The integrity requirement for Liquidators' (2010) 24 *Australian Journal of Corporate Law* 244, 253-255.

5 Institute of Chartered Accountants (CA), Certified Practising Accountants (CPA Australia) and Insolvency Practitioners Association of Australia (IPA).

6 The Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the Case for a New Framework* (September 2010) Canberra, [5.58].

7 The Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the Case for a New Framework* (September 2010) Canberra.

8 Office of Fair Trading, *The Market for Corporate Insolvency Practitioners*: *A Market Study* (June 2010), <http://www.oft.gov.uk/shared_oft/reports> at 18 October 2010.

In an initial letter to the Committee we[9] contributed to raising the notion of an insolvency ombudsman in the following manner:

> 'Perhaps it is time to adopt the Ombudsman concept in insolvency. Many other areas affecting the Australian community such as banking, employment and health are supported by an independent office that receives complaints and investigates behaviour. The decreased reliance on professional body membership as an indicator of fitness for liquidators might suggest there is room for the creation of an independent monitoring body, an Insolvency Ombudsman, to monitor compliance more actively through response to public complaint. Whistle-blowing can be more effective in bringing misconduct to light than extensive compliance and monitoring programs, and a dedicated industry ombudsman, whether under the aegis of ASIC or not, may facilitate this regulatory mechanism. An Office of the Insolvency Ombudsman would therefore be perfectly placed to assist ASIC and the CALDB in their quest to have all registered liquidators satisfy the fit and proper requirement.'[10]

We amplified the notion of creating an insolvency ombudsman's office in our written submission to,[11] and in evidence as witnesses before,[12] the Committee. The possibility of having an insolvency ombudsman was further explored by members of the Committee

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9 The submission and evidence presented to the Committee by Dr Christopher Symes and Mr Jeffrey Fitzpatrick was made with Dr Vivienne Brand, Senior Lecturer in Law, Flinders Law School, Flinders University, South Australia.

10 Letter from Dr Vivienne Brand, Mr Jeffrey Fitzpatrick and Dr Christopher Symes to Mr John Hawkins, Secretary, Senate Economic References Committee, Parliament of Australia, Canberra, 27 January 2010, Submission No. 06, <http://www.aph.gov.au/Senate/committee/economics_ctte/liquidators_09/submissions.htm> at 20 January 2011.

11 Jeffrey Fitzpatrick, Vivienne Brand and Christopher Symes, *'Fit and Proper': An Integrity Requirement for Liquidators in the Australian Corporate Legal Framework*, Sub No. 06, 20, <http://www.aph.gov.au/Senate/committee/economics_ctte/liquidators_09/submissions.htm> at 20 January 2011.

12 Evidence to Senate Economic References Committee, Parliament of Australia, Adelaide, 9 April 2010 (Dr Vivienne Brand, Mr Jeffrey Fitzpatrick and Dr Christopher Symes) E2, E3, E13, E14, E15, <http://www.aph.gov.au/Senate/committee/economics_ctte/liquidators_09/hearings/index.htm> at 20 January 2011.

when hearing evidence from other witnesses who appeared before it.[13]

This article provides a primal or preliminary sketch on the meaning, model, governance, role and regulatory power of an insolvency ombudsman in an Australian setting.[14] The idea of an insolvency ombudsman has not been the subject of any substantial investigation, nor is there any legislative framework in place or judicial commentary. However, if the idea of an insolvency ombudsman was implemented it would provide a complaints hearing and dispute resolution process outside of the courts, the professional bodies[15] and ASIC. It may also be a catalyst for change by providing insolvency law and practice with a pre-emptive investigator able to assist in forestalling corporate insolvency maladministration.

II THE MEANING OF 'INSOLVENCY OMBUDSMAN'

A *What is an 'ombudsman'?*

The word 'ombudsman' is derived from *umbuds man*, an old Nordic word for 'representative'.[16] The dictionary definition of the term 'ombudsman' (which derives from the Swedish for 'legal representative') centres on the concept of an official appointed to investigate the complaints of individual citizens or subjects against public authorities. For example, the Oxford English Dictionary Online describes an 'ombudsman' as 'an official, usually appointed

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13 Ibid (Kate Spargo) E35; 13 April 2010 (Donald Magarey) E7; (Geoffrey F McDonald) E44; 23 June 2010 (Tony D'Aloisio) E41.

14 Constitutional implications of implementing an insolvency ombudsman across Australia are beyond the scope of this paper.

15 Presently there exists a professional body, the Insolvency Practitioners Association of Australia (IPA), whose national office handles many complaints and provides a dispute resolution function.

16 Commonwealth Ombudsman, 'About us – our history' <http://www.ombudsman.gov.au/pages/about-us> at 18 October 2010.

by the government or parliament, responsible with representing the interests of the public or a particular group by investigating complaints against maladministration by a particular category of organization or in a particular area of public life, such as local authorities, hospitals, or pensions'.[17] The term 'ombudsman' is not gender specific and when used in its broader sense may refer to a complaints-handler, mediator or spokesperson for a particular group.

The modern parliamentary office of ombudsman originated in Sweden in 1809, with the first *justitieombudsman* ('justice ombudsman') appointed by Parliament to protect against the abuse of power by government and the civil service. The office of general parliamentary ombudsman has subsequently been adopted (with modifications) by the governments of many countries, some of the earliest being Finland in 1919, Denmark in 1954, Britain in 1967 and New Zealand in 1961.[18]

B *The Genesis of an Insolvency Ombudsman*

In the United Kingdom the Insolvency Committee chaired by David Graham QC released a report in 1994 which recommended that 'the rationalisation of the complaints system and the appointment of an Insolvency Ombudsman should be speedily carried out.'[19] In the Annual Report of Justice for 1995, it stated that there was a need to introduce an insolvency ombudsman to 'provide speedy and cheap machinery for an independent review and redress for injustice arising from insolvency cases.'[20] These early references to an insolvency ombudsman in the English setting are to be distinguished

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17 Oxford English Dictionary Online, 'Ombudsman', <http://dictionary.oed.com> at 18 October 2010; Commonwealth Ombudsman, 'About us – our history' <http://www.ombudsman.gov.au/pages/about-us> at 18 October 2010.

18 Oxford English Dictionary Online, 'Ombudsman', <http://dictionary.oed.com> at 18 October 2010.

19 Justice, *Insolvency Law: An Agenda for Reform* (1994) 31.

20 Justice, *Annual Report* (1995) 23.

from the office of the insolvency ombudsman in Finland where the role is more akin to a corporate regulator or public administrator.[21]

As already indicated above, both Australia and the UK have commenced a discussion on the introduction of an insolvency ombudsman or an independent complaint body. Neither country has attempted to provide a detailed definition. A recent Law Commission Report stated that 'there is no set ombudsman model for the UK',[22] and then made observations on statute-based public sector ombudsmen.[23] These generalist public sector ombudsmen[24] investigate complaints about the administrative actions of public bodies.[25] There are also 'hybrid' ombudsmen, such as the Independent Housing Ombudsman, which deal with complaints from both private and public bodies, and intermediate bodies such as housing associations.[26] Generally, the public sector ombudsmen can 'undertake large-scale investigations into systemic issues and make findings and recommendations that can effect widespread

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21 The office of Bankruptcy Ombudsman in Finland is found in the Act on the Supervision of the Administration of Bankrupt Estates and is the overall supervisory authority. It does not shed light onto the present discussion. See also <http://www.insolvencyreg.org> at 18 October 2010.

22 The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, House of Commons, 25 May 2010, [5.49].

23 The Law Commission Report in the UK divided the various mechanisms of redress currently available for individuals aggrieved by public bodies into the following four broad pillars of administrative justice: - (1) internal mechanisms for redress (such as formal complaint procedures); (2) external non-court avenues of redress (such as public inquiries and tribunals); (3) the public sector ombudsmen; and (4) private law (court action). See, The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, House of Commons, 25 May 2010, [1.14].

24 In the United Kingdom context, these include the Parliamentary Commissioner for Administration, the Commissioner for Local Administration, the Health Service Commissioners, and the Public Services Ombudsman for Wales. The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, House of Commons, 25 May 2010, [5.1].

25 The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187, 17 June 2008, [3.59].

26 The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187, 17 June 2008, [3.58]; The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, House of Commons, 25 May 2010, [5.1].

administrative change. Consequently, the ombudsmen can play a crucial role in improving administrative action to the benefit of both public bodies and claimants.'[27] Furthermore, these 'ombudsmen have a wide discretion to recommend financial compensation where they think this is appropriate'.[28]

There is no insolvency ombudsman in the UK. Since 1986, the UK has regulated insolvency practitioners by the government approving (currently) seven different Regulatory Professional Bodies ('RPBs'). These bodies are the main accountancy and law society bodies in England and Wales, and Scotland, and the Insolvency Practitioners Association.[29] The UK Office of Fair Trading has recently recommended the creation of an independent complaint handling body with the ability to review complaints and assess fees.[30] This body, to be funded by the insolvency practitioners' profession, would possess sufficient sanctioning powers to daunt would-be transgressors. For example, if this body discovered that a practitioner was overcharging, it could penalise the wrongdoer and order that the amount of money gouged be returned to the hapless clients.[31]

Australia has statutory-based ombudsmen at the Commonwealth and State levels for various public services. For example, there is a Commonwealth Ombudsman to investigate complaints about the actions and decisions of Federal government departments, agencies and private contractors. The Commonwealth Ombudsman is also the

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27 The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, House of Commons, 25 May 2010, [1.26], [5.3].

28 Ibid [5.5].

29 David Brown, *Supplementary Submission to Senate Inquiry on Liquidators*, Sub No. 402 <http://www.aph.gov.au/Senate/committee/economics_ctte/liquidators_09/submissions.htm> at 25 May 2011.

30 Office of Fair Trading, 'The market for corporate insolvency practitioners', (June 2010) 7. This was cited by the Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the Case for a New Framework* (September 2010) Canberra, [11.20].

31 Ibid.

Defence Force Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman, Taxation Ombudsman, Law Enforcement Ombudsman, Overseas Students Ombudsman, and Australian Capital Territory (ACT) Ombudsman.[32] All States and the Northern Territory (NT) have an ombudsman with similar investigative powers over government departments and authorities. There are also industry ombudsmen across Australia. For example, the Telecommunications Industry Ombudsman (TIO) may investigate complaints about the provision or supply of telephone or Internet services.[33] In the financial industry, the Financial Ombudsman Service (FOS) investigates complaints concerning financial service providers, such as banks, credit unions and building societies.[34]

With regard to the prospect of an insolvency ombudsman the Committee's Report,[35] released in September 2010, recommended the formation of the Australian Insolvency Practitioners Authority (AIPA).[36] However, the Report noted:

> 'If a new regulatory insolvency agency is established and the government considers that it is *not* handling complaints promptly and effectively, then the committee believes that an Insolvency Ombudsman should be seriously considered' (emphasis added).[37]

The Committee gave no further explanation of what could be interpreted as an insolvency ombudsman. The question of whether the Committee's recommendations will ever be implemented is uncertain given the Federal Treasurer Wayne Swan's post-2010 election statement that there is no need to change the regime supervising liquidators.[38]

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32 <http://www.ombudsman.gov.au/> at 25 May 2011.

33 <http://www.tio.com.au/> at 25 May 2011.

34 <http://www.fos.org.au/> at 25 May 2011.

35 The Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the Case for a New Framework* (September 2010) Canberra, [1.9].

36 Ibid [11.9].

37 Ibid [11.22].

38 Reported widely, see eg, Rebecca Urban, 'Strip ASIC of insolvency role', says Senate Committee', *The Australian* (Sydney), 15 September 2010,

III AN INSOLVENCY OMBUDSMAN 'MODEL'[39]

Our contemplation of an insolvency ombudsman model is on three levels. First is the bedrock level of foundation precepts governing the 'shape' of the practical functions which an insolvency ombudsman would perform. Second are those practical functions themselves. Third is the limit of the functions of an insolvency ombudsman.

A *Foundation Precepts*

Foundation precepts upon which the office of an insolvency ombudsman could be built include independence, funding, fairness, accessibility, accountability, efficiency, effectiveness, and ensuring compliance with outcomes.[40]

<http://www.theaustralian.com.au> at 23 March 2011; Rob McKay, 'Reform in Doubt Despite Senate Insolvency Report', *Queensland Business Review* (Brisbane), 15 September 2010, <http://www.qbr.com.au> at 23 March 2011; Rebecca Urban, 'Watchdog suffers a crisis of confidence', *The Weekend Australian* (Sydney), 18-19 September 2010, <http://www.theaustralian.com.au> at 23 March 2011.

39 The contents of the following discussion are an amalgamation and adaption from consumer dispute resolution and banking ombudsman functions found in the discussions of Gregory Burton, 'A Banking Ombudsman for Australia' (1990) *Journal of Banking and Finance Law and Practice* 29; Michael J Oborn, 'Procedures Adopted by Australian Banks for the Resolution of Customer Complaints and the Role of the Australian Banking Industry Ombudsman' (1992) *Journal of Banking and Finance Law and Practice* 268; Wendy Harris, 'Consumer Disputes and Alternative Dispute Resolution' (1993) 4 *Australian Dispute Resolution Journal* 238; Tania Sourdin & Louise Thorpe, 'How do financial services consumers access complaints and dispute resolution processes?' (2008) 18 *Australian Dispute Resolution Journal* 25.

40 Sourdin and Thorpe, above n 39.

1 *Independence*

The decision-making process and administration of an insolvency ombudsman would need to be independent of insolvency practitioners and their professional bodies. The Committee recommended that an insolvency ombudsman should not be subject to direction from either 'the regulator' (ASIC) or 'the disciplinary board' (the CALDB).[41] The insolvency ombudsman must stand apart from those who make up the insolvency industry, yet at the same time 'descend' into the arena to take up the fight. The challenge in reality would be to maintain the impartiality of the office of an insolvency ombudsman while dealing with the competing vested interests of insolvency practitioners, company creditors and members.

2 *Funding*

A government-funded office of an insolvency ombudsman, along similar lines to those existing ombudsmen services operating in Australia and described above, would be perceived as inherently more independent and therefore more credible, compared with a scheme privately financed by the small number of practitioners in the insolvency profession in Australia.[42] Assumedly, a publicly-funded insolvency ombudsman would be less self-interested and more able to balance competing vested interests.

3 *Fairness*

An insolvency ombudsman would have to be capable of making decisions which were not only fair, but perceived to be fair. Such an outcome could be achieved through an insolvency ombudsman's strict observance of natural justice and the rules of procedural fairness, decision-making based on the information discovered, and

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41 Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the Case for a New Framework* (September 2010) Canberra, 151.

42 664 registered liquidators in 2009-2010: ASIC, *ASIC Annual Report 09-10*, 80 <http://www.asic.gov.au> at 7 April 2011.

having specific criteria upon which to base those decisions. Fairness could be incorporated into the office of an insolvency ombudsman by making it a statute-based scheme. This would not detract from the voluntary self-regulatory complaints management schemes of the professional bodies.

4 *Accessibility*

Access is a key requirement. An insolvency ombudsman would need to be readily available to complainants by promoting knowledge of his or her existence, being easily accessible and having little or no cost barriers.

5 *Accountability*

An insolvency ombudsman should publicly account for his or her operation by publishing determinations and information about the complaints. An insolvency ombudsman should also highlight systemic industry problems. Of course, there may be occasions where the identity of complaints and/or insolvency practitioners would have to remain anonymous for privacy reasons.

6 *Efficiency*

An insolvency ombudsman could operate efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate persons or fora, and regularly reviewing performance to facilitate prompt complaint resolution.

7 *Effectiveness*

Effectiveness could be ensured by an insolvency ombudsman having appropriate and comprehensive terms of reference, and a periodic independent review of his or her performance.

8 *Ensure compliance with outcomes*

There should be a correlation between the perceived benefit of complaining (in terms of having the complaint resolved), and the actual lodgement of a complaint. An insolvency ombudsman should aim to satisfy complainants within a reasonable time and at minimal expense. Complaint resolution should be perceived as efficient, unbiased and procedurally fair.

B *The Practical Functions of the Office of Insolvency Ombudsman*

1 *Nature of complaints heard*

The terms of reference of an insolvency ombudsman could be broadly delineated in the legislation establishing their office. Generally speaking, an insolvency ombudsman could have responsibility for the resolution of complaints from any creditor or member of a company under the administration of an insolvency practitioner. The traditional requirement of complaints to be made in writing could be either supplemented or supplanted by a general advice line, [43] either by telephone, text or email or even other forms of electronic communication, such as internet-enabled iPhone.

2 *Informality*

The complaint resolution process should be kept at an informal level and not become hidebound by the laws of evidence. If an insolvency ombudsman was to have the power to instigate investigations of their own volition without first having received a complaint, safeguards would be needed to avoid capriciousness or 'fishing expeditions'.

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[43] The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, House of Commons, 25 May 2010 [5.50].

3 *Complaint management system*

A complaints management system should promote policies and processes to deal with complaints as part of a continuous quality improvement program. This system should be accessible, easy to use and encourage feedback. Additionally, the system should monitor complaint response time, assess all complaints to determine appropriate response, ensure responses are attuned to the sensitivity of individual complaints, and investigate and resolve complaints in a competent and fair manner. The flow of information should be managed so that relevant facts and decisions are communicated while maintaining confidentiality and protecting individual privacy. At a macro-level, a data-bank of all complaints could be used to identify trends and risks, and report on improvements. In that way a complaints management system could be used to continually improve the quality of services provided and regularly evaluate the performance of the insolvency ombudsman.

4 *Assess appropriate dispute resolution alternatives*

An insolvency ombudsman could assess the complaint resolution process to determine whether to use mediation or other alternative dispute resolution processes. In doing this, the insolvency ombudsman would not necessarily be bound by the previous decisions of their office. Any party involved in a complaint would be free at any time to opt-out to pursue other avenues of dispute resolution. In order to monitor progression towards a speedy complaint resolution however such opting-out would best be done with the permission of the insolvency ombudsman, who could then monitor whether or not a resolution was actually achieved by those alternative means.

5 *Sanctions*

In order to avoid being perceived as ineffectual, an insolvency ombudsman would need to possess the power to impose sanctions for non-compliance with his or her orders or dispute resolution

decisions. Such sanctions would need to be deemed to be enforceable as if they were a court order to compel compliance.

6 *Information dissemination*

Information dissemination on the operations of an insolvency ombudsman would be a seminal practical function. An insolvency ombudsman could conduct publicity campaigns to ensure that the public was aware of his or her existence and terms of reference. As well as utilising more traditional media outlets such as radio, newspaper and television, an insolvency ombudsman should maintain a user-friendly internet website. This could facilitate complaint lodgement and the tracking of the progress of complaint resolution. Websites of insolvency practitioners could carry a compulsory link to the insolvency ombudsman's webpage. It could be deemed a requirement that insolvency practitioners, when appointed as administrators or liquidators, must inform creditors and members of the existence, role and functions of the insolvency ombudsman.

An insolvency ombudsman would publish an Annual Review to inform the Australian community of his or her activities. The Annual Review should contain statistical summaries detailing the type and nature of complaints, the number of resolutions achieved within a reporting year and any appeals that are on foot.[44]

7 *Recommendations to ASIC, referrals to the CALDB and feedback to professional bodies*

An insolvency ombudsman could make recommendations to ASIC as they relate to insolvency law and practice. An insolvency ombudsman could refer particular insolvency practitioners to the CALDB where there may be the suspicion of behaviour warranting disciplinary action. An insolvency ombudsman could provide

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[44] See, eg,, the Financial Ombudsman Service releases an Annual Review: see <http://fos.org.au/annualreview/2009-2010/Index.html> at 23 March 2011.

practical feedback to professional bodies, such as the Insolvency Practitioners Association of Australia (IPA), regarding suggested amendments to, and updating of, their codes of professional practice.

C *The Limit of the Functions of an Insolvency Ombudsman*

1 *Complaint parameters*

The complaints handled by an insolvency ombudsman could be subject to certain parameters. For example, to ensure progression toward the resolution of complaints, a time limit would need to be imposed on how long complainants had to lodge their grievance with the insolvency ombudsman. An insolvency ombudsman may be precluded from considering a complaint if the act or omission giving rise to that complaint first occurred six years or more before the applicant initiated the complaint. An insolvency ombudsman may not deal with a complaint if it is subject to pending legal or other arbitration proceedings, or if it is frivolous or vexatious, or if the insolvency ombudsman considered it could be more appropriately dealt with by a court or other body. A monetary limit might be placed on complaints: for example, an insolvency ombudsman might not be able to hear matters where the amount of money involved was more than, say, two million dollars.

2 *Review of the insolvency ombudsman's decisions*

All decisions of an insolvency ombudsman would be subject to judicial review. If the office of the insolvency ombudsman was established under Commonwealth legislation, any party who disagreed with a decision could go on appeal to the Administrative Appeals Tribunal (AAT) or the Federal Court of Australia.[45]

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[45] The administrative law implications, such as whether the AAT could review a decision not to act by the insolvency ombudsman, are beyond the scope of this paper.

IV GOVERNANCE

To sketch an outline of an insolvency ombudsman, it is essential to consider aspects of governance and independence for both the operation of the office and the incumbent. The insolvency ombudsman's office should be created by statute that has both a statutory board of management and an individual office-holder. The alternative to the office of an insolvency ombudsman as a statutory persona could be a company limited by guarantee. Either way, the board would operate under a constitution.

A *Governance Board*

A suggested composition the office of the insolvency ombudsman's board could be three representatives from the insolvency industry, three creditor representatives appointed after a national call for nominations, two government officials, two academics specialising in insolvency and an independent chair, such as a retired judge. The proposed board could exercise management powers, such as having oversight of the scheme and the appointment of an individual to perform the tasks of the insolvency ombudsman.

B *Insolvency Ombudsman Appointment*

The appointment of an individual to perform the role of the insolvency ombudsman is an extremely crucial governance issue. Essentially there would be a need for the appointee to be familiar with dispute resolution procedures, the general law, and insolvency law and practice. Logically, the appointee would most likely be an insolvency lawyer. Other possible profiles may include either an experienced insolvency practitioner, a highly specialised accountant, or a senior member of the public service with experience in insolvency regulation. In speculating on these desirable criteria for an insolvency ombudsman we are following the example of the Financial Services Ombudsman, where there is a requirement that the incumbent has no past or present employment or similar

connection with a participating bank or other financial institution. As observed by Burton,

> 'Given the need for familiarity with dispute resolution procedures, the general law and banking law and practice, the favoured group from which an ombudsman is likely to be appointed appears to be experienced banking and finance lawyers!'[46]

The independence of an insolvency ombudsman would be paramount. He or she must be able to make adverse comments about the insolvency industry without fear of reprisal. Such protection could be provided by means of statutory immunity where the insolvency ombudsman, or any member of their staff, would not be subject to liability to an action, suit or proceeding for, or in relation to, any act done or omitted to be done in good faith in exercising their power or authority.[47] As already discussed, government funding would assist in the independence of the insolvency ombudsman.

The appointment of an insolvency ombudsman would be subject to approval by the relevant Government minister. The statute would determine the term of office of the incumbent.

C *Good Governance of the Insolvency Ombudsman*

An insolvency ombudsman could play a vital role in modelling good governance. As noted above, there could be a statutory requirement upon the office of the insolvency ombudsman to produce an Annual Review that may illuminate systemic failings in the insolvency industry. In this way, the insolvency ombudsman could provide valuable diagnostic and feedback functions which might lead to an improvement in insolvency procedure, practice and public perception.

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46 Gregory Burton, 'A Banking Ombudsman for Australia' (1990) 1 *Journal of Banking and Finance Law and Practice* 29, 34.

47 See also *Ombudsman Act 1976* (Cth) s 33; *Ombudsman Act 1974* (NSW) s 35A; *Ombudsman Act 1972* (SA) s 30.

While there would be no need in Australia for the government to produce a good practice guide for insolvency - as this has been done by the IPA with its Code of Professional Practice - an insolvency ombudsman could be a major contributor to the periodic reform of this Code. This input would assist an insolvency ombudsman fulfil the governance role, as one who is privy to the complaints, responses and remedies of the insolvency industry.

V THE ROLE OF AN INSOLVENCY OMBUDSMAN

A *The Five Facets of an Insolvency Ombudsman*

Ombudsman-type roles have evolved to protect persons against any violation of rights, abuse of power, error, negligence, unfair decisions and maladministration. The office of an insolvency ombudsman may touch upon aspects of these wrongs, particularly maladministration. Maladministration encompasses a broad range of administrative failure, including 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude [and] arbitrariness'.[48] The role of an insolvency ombudsman could include, giving voice to aggrieved persons; mediation and dispute resolution; reviewing and commenting on evolving professional standards; assessing and reviewing practitioners' fees; and educating the public.

1 *Giving voice to aggrieved persons*

The first step in the process of airing grievances from aggrieved persons would be to listen to the nature of those complaints.

[48] The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187, 17 June 2008 [3.65].

'Aggrieved persons' could encompass creditors, directors, debtors or other interested parties.[49]

Creditors could be aggrieved over a myriad of matters such as the glacial speed of the administration. Such grievances could be aired by the office of the insolvency ombudsman having direct contact with them or by the insolvency ombudsman having a statutory right to attend creditors meetings of any insolvent companies. Directors could be aggrieved because occasionally the insolvency practitioner may have ignored them or adopted an antagonistic stance toward them. Such grievances could be voiced by directors making contact with the insolvency ombudsman and that office conducting a mandatory annual survey of directors of insolvent companies. This survey could include questions pertaining to the performance of the insolvency practitioner. An aggrieved debtor or other interested person could make their complaint known to the office of the insolvency ombudsman using any of the lines of communication previously described.

An insolvency ombudsman would have direct contact with ASIC and the CALDB, and, with permission from the complainant, be able to discuss with these bodies the nature of the grievance.

An insolvency ombudsman should be able to deal with the media and general public. This may take the form of assisting the aggrieved person to raise awareness of matters or providing newsworthy information on the allegation, the insolvency ombudsman's findings and their solutions.

The mere existence of an insolvency ombudsman may lead to minor matters being settled between a complainant and insolvency practitioner. The threat to take such a matter to the insolvency ombudsman by an aggrieved person may provide sufficient deterrent to insolvency practitioners.

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[49] Justice, *Insolvency Law: An Agenda for Reform* (1994) 25.

2 *Mediation and dispute resolution*

Possibly the most important and essential role of an insolvency ombudsman would be to hear and settle complaints through a mediation and dispute resolution process. Currently, under the IPA Code, all member insolvency practitioners should have complaints management system in place.[50] As a safety net, the insolvency ombudsman should attempt to mediate where it is obvious that the complaint is unlikely or unable to be resolved expeditiously by insolvency practitioners. The process could be, in the first instance, mediation to facilitate a mutually acceptable outcome for all parties. If that failed, the process could allow for the insolvency ombudsman to make an arbitrary decision to settle the dispute.

An insolvency ombudsman would be free to investigate any relevant matter. It would be unwise to try and enunciate what these matters could be. An insolvency ombudsman's investigation may require that evidence be collected from the company, creditors, directors and other officers, ASIC, the CALDB, other government officers, other insolvency practitioners, the professional associations, auditors, shareholders and any other persons affected. An insolvency ombudsman investigation could lead to the satisfaction, settlement or withdrawal of a complaint by way of a negotiated agreement, a recommendation, compensation or such other expeditious outcome.

3 *Reviewing and commenting on evolving professional standards*

An insolvency ombudsman should be an agent of reform. The activities of an insolvency ombudsman would provide a unique insight into the insolvency industry and therefore, the role could encompass reviewing and commenting on professional standards, from both an individual and profession-wide perspective.

[50] IPA, *Code of Professional Practice for Insolvency Practitioners* (2008) 81.

Firstly, individual practitioners' performances could be reviewed by an insolvency ombudsman, in cooperation with ASIC, as a prerequisite for ongoing registration. The finding of this review should be made available to the insolvency practitioner. Secondly, an insolvency ombudsman could have standing to bring disciplinary proceedings against insolvency practitioners if required. Thirdly, an insolvency ombudsman should advise the professional associations on appropriate contemporary amendments to codes of professional conduct. Fourthly, an insolvency ombudsman would be well placed to provide expert evidence in litigious matters concerning practitioner performance. Fifthly, an insolvency ombudsman may open an investigation without requiring a complaint and, after conducting a thorough investigation, make appropriate recommendations.

4 *Assessing and reviewing practitioners' fees*

An insolvency ombudsman could hear complaints pertaining to practitioners' fees and investigate, negotiate and make recommendations to resolve fee disputes. The assessment and review of fees would be particularly helpful for first-time creditors who may need assistance to understand whether fees represent value for money.

5 *Public education*

Part of the role of an insolvency ombudsman could be to promote the informed participation of creditors, debtors and other interested persons in the insolvency industry. This educative role could use 'roadshow' presentations to target particular audiences regarding the functions of the insolvency ombudsman's office. Multi-media advertising could be used to educate the creditors and others on various aspects of insolvency law and practice, especially pertaining to the reasonableness of fees.

VI REGULATORY POWER

A *Statutory Creation of the Insolvency Ombudsman's Office*

The model, role and governance of an insolvency ombudsman should be enshrined in legislation. All participants in the insolvency industry would subject to that law. The remedies offered by an insolvency ombudsman could be articulated. This statutory base would empower an insolvency ombudsman to make recommendations to resolve specific problems, improve systemic deficiencies, provide explanations to complainants, expedite actions, and order financial remedies.

B *Demarcation Between an Insolvency Ombudsman and the Courts*

An insolvency ombudsman could address minor matters deemed to be inappropriate for the court. For example, complaints about delays in work in progress may amount to maladministration but are not necessarily illegal or negligent. An insolvency ombudsman would not have jurisdiction to adjudicate on points of law, nor engage in an action which was before the court.

One issue that has been identified is the suspension of insolvency practitioners' registration to practice. The Committee recommended that registration be changed to a licensing system and ASIC have the power to suspend an insolvency practitioner's licence without going to court if a matter was of sufficient concern to warrant suspension.[51] Given the proposed role of an insolvency ombudsman described above, he or she would be well-placed to assist ASIC exercise of that power because of the ombudsman's intimate knowledge of the insolvency industry. However, it would not be appropriate for an insolvency ombudsman to have a role as a quasi-disciplinary tribunal to the insolvency profession, as this might comprise the independence of the office.

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[51] Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the Case for a New Framework* (September 2010) Canberra, 152, 154 Recommendations 5, 10 and 14.

Another issue is director maladministration. It would be appropriate for the court to continue to adjudicate on maladministration cases. An insolvency ombudsman could assist by being given standing to make application[52] for the court to consider disqualifying a person from managing a corporation. In addition, an insolvency ombudsman could have power to lodge an abbreviated report alleging director maladministration.[53]

C *Distinguishing the Functions of the Court from those of an Insolvency Ombudsman*

There is clearly overlap between the functions of the court and of an insolvency ombudsman. As has been observed in the UK, a particular set of facts may give rise to both a claim in law and a complaint of maladministration, capable of being pursued either through the courts or by the ombudsmen.[54] Again, in the UK, demarcation of their respective jurisdictions has caused considerable difficulty.[55]

A complainant must be able to commence proceedings in the appropriate forum, in our context, whether it is in the court or in the office of an insolvency ombudsman. If a complaint commenced in the court and it transpired that it would be more appropriately dealt with by an insolvency ombudsman, it should be able to be transferred expeditiously. The complaint parameter of $2 million mentioned above would put a ceiling on the monetary amount involved in matters that could be resolved by an insolvency ombudsman. Within that complaint parameter, the cost of legal fees could influence whether the complainant would choose to take their complaint to the insolvency ombudsman or to the court.

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52 *Corporations Act 2001* (Cth) s 206D.

53 *Corporations Act 2001* (Cth) s 533 requires a report by the insolvency practitioner on each administration.

54 The Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187, 17 June 2008 [3.70].

55 Ibid.

Where the *Corporations Act 2001* (Cth) provides a procedure for a particular grievance to be heard by, or application to be made to, the court, the matter should be pursued accordingly. However, if the office of the insolvency ombudsman was instituted in Australia, the *Act* would need amending to give standing to that body.[56]

D *The Insolvency Ombudsman, ASIC and the CALDB*

The Committee stated:

> 'If an Insolvency Ombudsman is created, it is important to establish a clear delineation between its powers and responsibilities and those of the regulator and the disciplinary board. While an Ombudsman must not be subject to direction from either the regulator or the disciplinary board, there would need to be some level of coordination between these bodies.' [57]

Additionally, the Committee contemplated that an insolvency ombudsman should have the power to obtain information from ASIC and be able to refer a matter it has investigated to the CALDB for disciplinary proceedings. ASIC should be able to refer a matter to an insolvency ombudsman where it is deemed appropriate. Both ASIC and the insolvency ombudsman should be able to obtain information on matters that the other has investigated. An insolvency ombudsman should have an unconditional right to make public reports and statements on the findings of investigations and on issues giving rise to complaints. The harmonisation of regulatory power between ASIC, the CALDB and an insolvency ombudsman would require amendments to the *ASIC Act 2001* (Cth), *Corporations Act 2001* (Cth) and any legislation pertaining to that office.[58]

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56 See, eg, *Corporations Act 2001* (Cth) s 1317J(1),(4).

57 The Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the Case for a New Framework* (September 2010) Canberra [11.23].

58 ASIC's future role in the regulation of insolvency practitioners was the subject of recommendation of the Committee. The Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: the Case for a New Framework* (September 2010) Canberra, Recommendation Number 1, [11.6], [11.9].

VII CONCLUSION

There are many reasons for considering an office of the insolvency ombudsman. Such a body could provide a voice for complainants, promptly review and resolve many of the mostly smaller disputes, perform an educative role with regard to insolvency practitioner conduct and fees, assist in maintaining community confidence in the insolvency regime, and contribute to the understanding of systemic shortfalls.

An insolvency ombudsman should strive to be a catalyst for change, a champion of good practice, a source of excellence in insolvency dispute resolutions and assist the insolvency industry in terms of credibility and image. The existence of an insolvency ombudsman should reduce the existing regulator's role and also assist the professional bodies by taking some of their complaint 'traffic'.

Evidence provided to the recent inquiry into the insolvency industry in Australia could be seen as a call for help and the idea of an insolvency ombudsman seems to offer a guardian for creditors. This article has made a primal attempt at sketching some of the considerations for a potential new player in insolvency, an insolvency ombudsman.

Postscript

Following the completion of the above article but prior to its publication, the Australian Government has released a paper canvassing options for improving the regulation of both the corporate and personal insolvency professions in Australia.[59] This paper is in response to the Committee's inquiry into the role of liquidators and administrators, which has been described in above article. The paper speculates on the establishment of an insolvency ombudsman and expresses a number of ideas that are convergent with views expressed in the above article.[60]

[59] Commonwealth, Parliamentary Secretary to the Treasurer, Attorney-General's Department, Insolvency Trustee Service Australia and Australian Securities and Investments Commission, *Options Paper: A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia*, June 2011.

[60] Ibid 97-99.