

CPA Australia Podcast

Transcript – Episode 51

Intro: Hello, and welcome to the CPA Australia podcast, your weekly source for business, leadership, and public practice accounting information.

John Purcell: The podcast focuses on key matters highlighted in ASIC Periodic Corporate Insolvency Updates and ASIC's 2016 Annual Report, a regulation of registered liquidators. This podcast deals with some reflections on leading ASIC insolvency practitioner's team and illegal phoenixing. We also address insolvency practitioner remuneration and other matters dealing with ASIC's supervision including complaints handling. I'm joined here today by Thea Eszenyi and Adrian Brown. Thea is new Senior Executive leader of the Insolvency Practitioner's Team at the Australian Securities and Investment Commission. Adrian, you remain at ASIC as a Senior Executive in ASIC, having stepped back from the leadership role in September.

An important announcement was made in October in ASIC Corporate Insolvency Update Issue 5, that, Adrian, for personal reasons you have stepped back from your full-time role as the team's leader. I was wondering if you would like to reflect upon your past six years in the role as leader of the Insolvency Practitioner Team, such thing as major reforms, the current state of practitioner oversight, your economic, business, and legal efficiency with which corporate insolvency is conducted, major trends, and the like.

Adrian Brown: Thanks, John. It's great to be here. When I came to ASIC in March 2011, after over 20 years in the insolvency profession, ASIC and the profession had just seen the Senate inquiry's report into liquidators and ASIC's regulation of it. It was a very difficult time for both the profession and ASIC. Clearly, there was a great deal of work to do for all of us to build trust and confidence, not only in the profession but also in ASIC's regulation of the profession. We have come a very long way in the last six years, further building our credentials as a competent and effective regulator. We think we now have an enforcement record that's highly credible, reflecting some 60 enforcement outcomes involving various degrees of registered liquidator misconduct, compared to 12 in the five years before I came on board.

We also used our tools of surveillance, guidance, policy work, and stakeholder liaison to build our credentials, address harms in the market, and improve market behaviour. There's still a great deal of work to do, and we're particularly focused on those liquidators who are seriously disengaged from what the law requires of them. You raised law reform, John, and I think that we are very much in a dynamic law reform environment. We've seen the Insolvency Law Reform Act that the government passed and we implemented on the 1st of

March this year, that's the first tranche, and the second tranche on the 1st of September this year.

We've seen the new Safe Harbour legislation. We've seen an industry funding model for ASIC, and it's important to point out there that that covers not only registered liquidators but the other 40 odd sectors in the market. We've seen government recently consult on illegal phoenix activity and the reform initiative there. We have also seen the government's mooted changes to the Fair Entitlements Guarantee Scheme to push back against what are called sharp practices in gaming that scheme. We've seen the government engage on the whistleblower work and the Professor Ian Ramsay-led work on the ASIC Enforcement Review.

It might be that government is minded to do more besides the Insolvency Law Reform Act to streamline the winding up process, but like all law reform, that is definitely a matter for government. In terms of my transition out of the leadership role and handing over to Thea, I've been absolutely privileged to work with and lead a great team at ASIC. I turn 60 in February this year, and it's time after over 40 years of full-time work to spend more time on other aspects of my life. I love what I do, don't get me wrong. I'm very, very happy that our commission does support very much a diverse and flexible working environment at ASIC, and that allows me then to hand the reins to Thea and support the team in a part-time role as a senior executive that is specially focusing on the illegal phoenix activity.

John Purcell: Yeah. And, look, I must say, Adrian, from CPA Australia's perspective, it has been a great honour and pleasure to be able to work with you on some quite serious issues over your span and time at ASIC. And I think from the accounting profession perspective, we are certainly beneficial of your dedication within the role and [crosstalk 00:05:36].

Adrian Brown: Thanks, John.

John Purcell: So, Thea, your thoughts as to the future?

Thea Eszenyi: Thank you, John. As Adrian mentioned, registered liquidators have operated in an environment of significant change over the past few years, and having been an active practitioner for the last 30 years and right up until very, very recently, I actually understand the impact these issues have on people's businesses and they're continuing to have on registered liquidators as well as the wider accounting profession who have been touched by it more often. In simple terms from my perspective, I see my role as ensuring that ASIC continues our enforcement activity and works with registered liquidators and, importantly, other key stakeholders such as your members to help focus on continued improvement, such that ultimately less enforcement is actually required in the sector.

John Purcell:

Good. Now, it's also mentioned, Adrian, that your focus will include ASIC's role in the ATO-led Phoenix Taskforce. I'm interested in hearing your insights as to the issues and the nature of the mischief being targeted, and also are you able to give our listeners an outline of what you see as the key elements in the consultation launched by Minister O'Dwyer in September of this year?

Adrian Brown:

Sure, John, I can do that. It is a topic in which I have a great amount of interest and passion. I think it's a tremendously important material issue that government seeks to address with a comprehensive law reform package, and I'll come to that shortly, but also assuring your membership that ASIC and the other agencies are bringing a whole of government approach to combating this illegal activity. But together with Warren Day, our Regional Commissioner for Victoria, I represent ASIC on the ATO-led Phoenix Taskforce, and we work internally with others who represent ASIC on the Serious Financial Crime Taskforce. We've recently also contributed to the Black Economy Taskforce, which is reported to government. As I said, it's tremendously interesting and rewarding work.

We have an internal governance as well with an ASIC Phoenix working group where we oversee ASIC's strategic approach to illegal phoenix activity, and under that a working party where that party implements then our operational plan. And you can go to our website and see our two-page summary of our work on illegal phoenix activity. I encourage members to see that and also have a look at the Phoenix Taskforce website on the ATO's own website. But you asked why is this work important. Based on a PwC report in 2012, it was shown that illegal phoenix activity is costing the economy somewhere between \$1.8 billion and \$3.2 billion. Of that, the Commonwealth misses out on hundreds of million dollars of revenue, which could if collected could fund health, education, and other federal government programmes.

Personally, I think, and I'm not alone here, that it's a disgrace that some accountants, including some registered liquidators, lawyers, and other advisors, see fit to facilitate illegal activity. It's clear that it's a material problem. Government and its independent agencies, including ASIC and the ATO, continue to address it in a formative and comprehensive way. But it very much goes to trust and confidence in the market about having a level playing field. If you've got one set of operators out there who know that they can or anticipate that they can operate their business without paying their taxes, and they're in competition with others who are doing the right thing and doing that, then there's a clear unfairness about that.

But some out there that simply don't want to work within the rules, and they think it's okay to take funds that simply don't belong to them and which should go to the benefit of all Australians. And I'm not quite sure what it says about us as a country that where that sort of conduct is seen by some as being acceptable. I know we very much have the support of ARITA, that is the industry body for insolvency professionals, in pushing back on this activity.

John Purcell: Ultimately, from their perspective they would see initiative in these areas as very much around the idea of their role ensuring optimum return for unsecured creditors and the like.

Adrian Brown: Absolutely. And of course one of the largest if not the largest creditor in the country is the ATO.

John Purcell: Hence their leadership in this particular area?

Adrian Brown: Absolutely, together with government of course, absolutely leading this work. They lead the Phoenix Taskforce. They're also in the AFP, the Australian Federal Police-led Serious Financial Crime Taskforce, a principal participant in that. Which you asked about that, the reform package, this is something I think we all should be excited about. It's something that some would say has been a long time coming but it's now on the table where government's consulting on principal reforms around establishing specific phoenix offence, establishing a dedicated phoenix hotline to provide the public with a single point of contact for reporting illegal phoenix activity. Although if government is minded to go ahead with that particular proposal, it's not clear which agency is probably the best one to run that.

Preventing directors from backdating their resignations to avoid personal liability. This goes to issue of what are known as dummy or straw directors. There's also the proposal to prevent sole directors from resigning and leaving a company effectively rudderless, or where simultaneously several directors resign at the same time with the same effect, prohibiting related entities to the phoenix operator from appointing the liquidator. This is aimed to push back against that sharp practice where-

John Purcell: Collusion.

Adrian Brown: ... they collude for a creditors meeting and related parties are able to retain what might be known as a friendly liquidator who will facilitate the interests of those related parties to the detriment of all creditors. And that might also sort of hide other illegal conducts, such as the transfer of the company's business and assets prior to the liquidator's appointment, and then what we would see as and call as being willful blindness of the liquidator when they come to administer the company.

I haven't touched yet on the tax-related changes. There are some very good ones in there around stronger powers for the ATO to recover security deposit from suspected phoenix operators, and that can be used then to cover outstanding tax liability should they arise. Making directors personally liable for dues to liabilities as part of the extended director penalty provisions.

John Purcell: So, that's similar to other areas of combating behaviour of errant directors in relation to other-

Adrian Brown: That's right.

John Purcell: ... monies retained and-

Adrian Brown: That's right, by extending it, it again it goes to this issue of removing the incentive in the first place, and a major incentive for the phoenix operators is to avoid the tax. Government's also consulting on how best to identify the high risk individuals in this practice, and then make them subject to new preventative and early intervention tools. And they'll include a next cab off the rank for appointing registered liquidators to what might be known as high risk phoenix operators, allowing the ATO to retain tax refunds, and allowing the ATO to commence immediate recovery action following the issuing of a director penalty notice.

John Purcell: Another initiative we understand is around director identification numbers. We understand that other jurisdictions, New Zealand perhaps, are considering this. I was wondering, Thea, what your thoughts are about the strength and the object of this initiative.

Thea Eszenyi: Thank you for that, John. You're right, government is progressing that initiative separately to the package that Adrian's been talking about. There's really two parts to the director identification number. The first part's around ensuring a person who says they are Fred is indeed Fred. There's a lot of issues that we see, and certainly as I said, when I just recently been in practice you might find one director who, because he's been through a series of accountants or different documents have been lodged, quite innocently is recorded three or four or five times. So, it's important that we actually understand who that person is.

The old idea of 100-point check is really quite antiquated now. There's digital transformation, biometrics, those types of things, but this is a start down that path. And then essentially create the identity, so how do you create the identity for this person? So, and the second part is allocating and identifying, number two, that identity. So, it's really in two parts, are you who you say you are, and then how do we make sure we track that through the director identification number.

John Purcell: So you're able to see an individual who both registers a company, de-registers a company, registers multiple companies, would be able to track their directorship across a number of entities?

Thea Eszenyi: Yeah, that's right. So, that would enable agencies such as ASIC or the ATO to map and track those serial phoenix offenders that Adrian was talking about. We can also use data analytics work to actually really hone in on what should be identified and who we should be looking at and where those harms are being caused.

Adrian Brown: That's right, Thea. There's a great deal of work going on with the data analytics between the ATO and ASIC in particular. We anticipate early next year having the results of a trial, which will help us see who the facilitators are will give us a great window into the market and then be able to, in conjunction with the director identification number, when that comes in, track these individuals in as close to real time as we can.

John Purcell: Yeah. Now, certainly from a public practitioner's perspective, this will have quite a number of touch points in terms of what they do in advising companies in terms of registration, set up companies, so yeah, look, we'll be very interested in further liaison from further communication of ASIC and the government's initiative on this particular area as it unfolds.

Adrian Brown: That's great, John.

John Purcell: Now, accountants in public practice can be touched by or swept up in the dilemma of company phoenixing in a number of ways. It can be either as creditors, advisors, both internal and external to a failing company and through referral of clients to purported experts. I was wondering, Thea, whether you could elaborate on the nature of these dilemmas and the alarm bells which sound or signal caution.

Thea Eszenyi: Thank you, John. You're right. And on the outset, though, I'd like to say we do want to encourage your members to consider the financial health of their clients, and if they see financial stresses, which may or may not lead to insolvency, to seek appropriate assistance at an early stage through reputable, recognised sources. So, our website, the ASIC website, provides details of all registered liquidators, and it's a really good place to start. Unfortunately, if you google liquidation or insolvency, you may in fact be directed to somebody who's paid to have their ad put towards the top. So, going to the ASIC website is a good place to start. And remembering that corporate insolvency is a very specialised area, and all too often the advice might be sought too late or from the wrong avenues.

Your members can find themselves involved in illegal phoenix activity. They might be the accountant for a party, they might be a tax agent, they could be an ASIC-registered agent, or indeed the registered liquidator. And they might find themselves advising clients in a way that aids and abets the client's contravention of law. They could be creditors themselves, and they might also be advising other clients who are creditors of a particular entity, and obviously, they might in some cases refer work to registered liquidators. And it's the last one that I really want to talk a bit more about. We actually have seen some accountants who work hand in hand with some registered liquidators to basically put assets beyond the reach of creditors.

We understand that there's legitimate ways of restructuring and they're trying to protect their client, but sometimes they go a little bit too far, and they're actually breaking the law and exposing their client and themselves to a legal and

commercial sanction. So, it's really important that they understand that. In a case that ASIC ran last year where a registered liquidator, because of their behaviour, entered into an enforceable undertaking with ASIC, the undertaking actually required that liquidator not to take work from a particular professional accountant. So, they had to sign up to not take work from that referrer because the relationship was, shall we say, toxic.

So, as Adrian said earlier, ASIC and the ATO are working with the data analytics to actually better identify these things, and we anticipate that as we go forward those data analytics are going to allow us to be much more highly effective in identifying parties who may be some of your members who play in that illegal phoenix space.

John Purcell: Look, certainly, I would think that the vast majority of our members in public practice of course work well within the black letter and the intention of the law. Nevertheless, for those who want to work close to the margin, are we getting a bit more of a bright line now as to what is acceptable and what is not acceptable? Is it becoming more clear-cut, do you think?

Adrian Brown: John, I think there always has been a clear-cut view about what's in and what's out. I suspect the new Safe Harbour legislation is certainly going to highlight the issue of what's in and what's out. But I think it's as much a cultural issue as anything else. Once a behaviour becomes established in the market, and other players see somebody getting away with it, or think they're getting away with it, that it becomes common practice, and that's a very worrying trend with illegal phoenix activity.

John Purcell: Yeah, and I think very much in a co-regulatory environment, there is an obligation and expectation that the professional bodies consistently reinforce this idea around what is ethical conduct, [and okay, going 00:22:42] to look at those who may seek to work at the margins, certainly the accounting profession's ethical pronouncements have been strengthened in recent times with more enhanced rules around reporting non-compliance with laws and regulations. So, yeah, the profession is very mindful of these challenges.

Thea Eszenyi: I think that the point around ethics is a very good point you make, John. That in the end of the day you can't legislate ethics. Ethics are behaviours, but it's really important that members actually do stand back and remember that as well as complying with the law.

John Purcell: Okay.

Adrian Brown: And, John, you made the point about co-regulation. I just want to make a point about this. ASIC works in both regulating registered liquidators and works with registered liquidators, and we do recognise the contribution made in regulation by registered liquidators, the vast majority of who are doing the right thing, and in your membership the vast majority who are doing the right thing.

John Purcell: Yeah. Yeah, pardon me.

Adrian Brown: And putting aside our work in regulating registered liquidators for a moment, we use the Assetless Administration Fund to fund liquidators of companies with little or no assets to investigate company failures, including those where they are indicia of illegal phoenix activity. So, we work very closely with registered liquidators who, through the fund, can then finance things like public examinations and further investigations and report to ASIC, which then allows ASIC then to either take action or add to the market intelligence and swap that intelligence with other agencies. So, we very much recognise the fact that the profession must work with ASIC in helping to deal with this scourge.

John Purcell: That's probably a useful segue into some more general discussions. Wanted to have a look at Issue 4 of your regular update. Now, Issue 4 addresses in some detail practitioner remuneration. I was wondering, Ad, if you could outline for our listeners what makes remuneration such a specifically fraught issue in insolvency administration and say in comparison with other areas where remuneration is central, audit fees, professional service fees sectors. So, what is it around the corporate failure and insolvency environment which makes remuneration a contentious issue?

Adrian Brown: That's a great question, John, and it's the hoary old chestnut of the profession. The issue's been around for a long time now, and there's a tremendous tension that comes about because of the relationship between the registered liquidator and the body of creditors from whose funds the liquidator is paid. So, there's a completely different relationship dynamic at play here between creditors and a registered liquidator compared to, say, the relationship between a client and an auditor. You know, creditors find themselves often in this relationship where they didn't ask for the relationship.

Often, it's the director who chooses the liquidator under the law, noting the creditor's right to replace the liquidator, but we talked a bit earlier about that reform that's seeking to restrict related party voting, which can often thwart that legal right. So, where an auditor's client will ordinarily understand what the auditor undertakes and they do that year upon year, within the requirements of rotation, that's not the case for many creditors who come to an administration cold, it might be the first time that they have been involved in insolvency administration, and on the other side of the fence, you've got well-versed professionals who understand the processes and what's involved, what they have to do under the law, and so on.

So, it becomes this asymmetry of knowledge and information, where the creditors come from a poor understanding often, compared to the liquidator who's trying to do his or her job. For creditors, it's often a rude shock that a company they've been dealing with fails and won't pay the creditors. In a real way, they're actually forced into that relationship, and therefore, there's a great deal of trust that has to be placed in the liquidator to act in the creditor's interests. In circumstances where the creditors are largely in the dark about why

the company failed and why they're not going to get paid, it's a really important point to make that the registered liquidator is dealing with other people's money.

They act as fiduciaries, and this goes to ASIC's emphasis on registered liquidators being gatekeepers in our financial system. So, registered liquidators, as fiduciaries, are held very much to the high standards of a fiduciary to account for the money of other people that they're dealing with. And therein lies that problem, the clear problem where there's a tension between the interests of the liquidator as a fiduciary, they're running a commercial practice, and the interests of those on whose behalf they act. The liquidator is then tasked with communicating that effectively to creditors, you know, what they do, what they must do under the law, the cost of doing it, and importantly, the value to the creditors of why they're doing it.

Some liquidators are really good at that and others, quite frankly, are pretty ordinary. The underlying remuneration structure of firms, based predominantly on hourly rates, rewards time and time spent rather than value added. There's an inbuilt incentive to maximise that time and thus fees. And we all understand the dynamics of partnerships and the way that they run. Often, your creditors won't understand, and this is from the other side of the fence, the creditors won't understand what the liquidator does, why they must do it. And this is a primary reason why it's so important for the liquidator, as I said, to communicate effectively. Won't solve all the problems there, and you're never going to satisfy everybody, but it's the 80/20 rule.

If you can communicate effectively, you're going to actually reduce the number of complaints. And the creditors are going to say, "Yeah, I get that, and I understand why we need to pay for that." I think also in the part of the question that goes to recent court decisions, it has been a real focus of the courts, particularly in New South Wales in recent times. To my mind, there's a couple of main points to draw out. And I'm sitting here-

John Purcell: What are the judges telling us about remuneration?

Adrian Brown: Well, John, I'm sitting here with my bush lawyer hat on as I answer that question, but we did appear, ASIC appeared as a friend of the court in the recent appeal case of Sakr Nominees Proprietary Limited in liquidation against Sakr in New South Wales. It's an important decision. It sets out what a court will do in determining a practitioner's remuneration under the Corporations Act. So, a couple of things that came out of that. First, that a court's entitled to determine a liquidator's remuneration on a time basis, that's the hourly rates, or ad valorem, what's the value? That is the value that the liquidator added.

Second, a liquidator must do more than simply produce work in progress reports for the court, "Here's the person who worked on it, here's their rate, times number of hours equals my remuneration claim." That doesn't wash. A liquidator's got to submit evidence about the reasonableness of the

remuneration claim. And the Corporations Act sets out a number of factors that the liquidator must address in showing the court the reasonableness of that remuneration.

John Purcell: So, for our listeners, if they're interested in the subject matter, the section in the Act which they'll want to go and read?

Adrian Brown: 473.

John Purcell: 473, thank you.

Adrian Brown: ... is the section. Sets out all of those factors. And the appeal court in *Sakr Nominees* opines about that section, its import, and what it means. But reasonableness, this is the key. It's a key issue. It's the absolutely critical question for the liquidator. Third, the issue of or the element of proportionality. It's a well-recognized element that a court will consider. It's relevant because even if a liquidator establishes that the work undertaken is necessary and carried out reasonably in a timely fashion, the court will then look at proportionality, what were the assets you had to deal with, the timeliness in which you dealt with them, the complexity of the issues, and the factors that are set out in that section that I referred to.

So, they might look at seeing the fund that the liquidator created and compare the fees as a percentage of that, even if it's only as a check on the remuneration that comes about as a result of the hourly rates. Look, we're really keen to see the profession take the court's guidance and adopt best practice. I think there's a tremendous learning out of that particular case, and the cases that preceded that one as well over the last few years. We think there's one of the underlying issues, I think, that makes this so fraught, in fact, there's two. One is the tension that I referred to earlier between the interests of the liquidator as a fiduciary in doing their job and, two, the interests of the creditor. Two is one that's far more structural. It's the way the firms are structured.

They run almost invariably client-based systems on hourly rates. So, internally, they'll keep their time sheets, they'll record their time, the backend administration system works out the number of hours with the person at the particular level of seniority, times their rate equals the amount of remuneration claimed. As Justice Ferris said in the *Mirror Group* case, it's not meant to be an indemnifying your cost, it's to reward work that's reasonably and properly done. And again, I'd say I think it's a case that is quite instructive in all of this, and I think it's well worth a read. So, John, I might finish there on that point, but I can assure you that Thea and I will continue to focus on that aspect of our work, and continue to promote the profession to taking up what we believe is best practice.

John Purcell: Thank you. Now, want to expand out the conversation a bit more widely now. Issue 4 of your update advises of ASIC's regulation report of registered

liquidators for the 2016 year. I was wondering if I could discuss with you just a few results from a very comprehensive report, which I think CPA members along with the wider business community may find interesting. The report notes that reports of alleged misconduct arising from external administrations conducted by registered liquidators has remained stable at 3% of the total reports received during the financial years 2014/15 and 2015/16.

I was wondering, Thea, could you explain the source of alleged misconduct and is the stability in rate grounds for confidence in the overall conduct of external administrations?

Thea Eszenyi:

Thank you, John. We get reports of misconduct largely from creditors, but we also get them from registered liquidators about other registered liquidators who might be doing the wrong thing. So, that's an interesting avenue where we get that reporting. But generally, it's from creditors who are involved in a company failure. I'm not really sure if there's a direct correlation between the rates of reports of misconduct and confidence, because in any year you might have a very high profile external administration, which creates a wave of complaints, which might result ... they might all be educational outcomes because the parties involved who are making those complaints just simply don't understand how liquidation works.

So, there really isn't a misconduct, it's a misunderstanding, but there might be a significant group of stakeholders. But I think it's fair to say that the majority of registered liquidators actually do the right thing. It's a highly ethical group of people who do the right thing. So, any one time the registered liquidator population of about 700, because there is only about 700 of them, actually control around 24,000 external administrations, which involves hundreds of millions of dollars under their control, and it's hundreds of millions of dollars, remember, of other people's money. So, I think the market actually can take some confidence from the statistic that it is actually quite low.

As I said, the alleged misconduct might actually arise because of a misunderstanding about what the liquidator actually does and what their role is.

John Purcell:

The same sort of misunderstanding about the nature of remuneration and whose money it is, et cetera, yeah?

Thea Eszenyi:

That's exactly right.

John Purcell:

Yeah. Turning to some of the more detail within the 2016 report, figure one shows three-year trends in inquiries and reports of alleged misconduct. Could you explain the nature of the three types of matter addressed, educational, procedural, and conduct, and what the trends are showing?

Thea Eszenyi:

As I mentioned, the educational matters involve circumstances where the outcome or resolution of the inquiry or allegation of misconduct educates the

person, and as I said, it's usually a creditor, and they're educated about the applicable law or practice, or provides information about the normal practice of an insolvency process. So, creditors may only ever interact in their whole business lifetime once with an insolvency, and so they're not necessarily as informed as they could be. There is a lot of resources on the ASIC website, and certainly there's a requirement for registered liquidators to provide information, but there's often a gap there. So, the query often is simply dealt with by educating the complainant. And that's a relatively constant matter that we come across.

Then there are procedural matters. And this involves circumstances where a registered liquidator might have, by an inadvertent act or omission, failed to do something, but it's less significant than a conduct matter. And sometimes it might be that the creditor hasn't received a notice, and so they ring up to complain they haven't received a notice. And it might simply be the registered liquidator had the wrong address or missed a list. So, it's not a particularly significant matter. But then, finally, there's the conduct matters. And these actually involve allegations of deliberate or conscious acts or omissions by the registered liquidator, which might have significant ramifications for the complainant or other stakeholder.

So, those are the most serious end of the scale, and that's where we've certainly had more enforcement outcomes over the last five years in addressing some of those issues.

John Purcell:

Okay. Fantastic. Also, within the 2016 report is figure six. Now, figure six identifies and analyses trends for the three years in finalised transaction reviews. I was wondering also, Thea, could you explain the nature and trends in some of the headline categories such as independence, remuneration, and adequacy of investigation, and reporting to creditors?

Thea Eszenyi:

Yeah, those are the really key three trends that come out. So, independence, competence, and improper gain, which improper gain is largely remuneration issues, and they are our key focus. So, project work a couple of years ago, together with the ongoing work such as our education and our involvement in high profile independence cases such as Walton Constructions, which was 2014, and the recent Channel Ten matter where we acted as friend of the court, have actually meant a better understanding by the market about what the law requires. So, the publicity around those matters has actually helped inform the market about those things.

One of the other things was our project around publishing and lodgement obligations of registered liquidators has helped to improve practitioner standards and send a clear message that getting these basic obligations right does matter. So, it's the old take care of the pennies and the pounds will look after themselves. If you practice processes and procedures and your staff training and your self-education around a lot of these changes to the law, if

you're on top of that, you'll actually be lodging all of your forms correctly, which will lead to practice improvement in all the other issues.

Adrian Brown: And on that point, Thea, ASIC has been very vocal about the need to improve culture. Some see this sort of work by ASIC as being somewhat picky and administrative. It might be, so we understand why it might be seen like that. But what we've done in entering into voluntary undertakings with certain firms is making a turn of that undertaking that they undertake staff training and they drive cultural change from the top. And it does start at the top. If the partners, who are generally or predominantly the registered liquidators, drive that sort of culture from the top, it filters down, it trickles down through the firm. It then means that the market, whilst it might be perceived as a small issue, helps build that trust and confidence.

You know, you don't really want to be seeing reports of misconduct coming out because of systemic failure to lodge documents, because it then says to the market, "Well, if they can't even get that right-

John Purcell: What else is there?

Adrian Brown: ... what else is there?" And in that work, it was interesting that, Thea, when we actually ran that project, you would scratch the surface from the lodgements and find underneath that there was actually far more serious misconduct going on. So, it's been a particularly, I think, good project work, and largely, too, very educative for the practitioner. We've actually had practitioners say, "Look, thanks for that. We really appreciate that, ASIC." These things might have fallen to the wayside for personal reasons. They might be health, might be mental reasons, might be marital breakdown, and things like this. So, helps them get back on their feet and get back on track.

The other thing, Thea, in terms of the educational, procedural, and conduct matters, John, you also referred to the trends. It's been recently stable over time where the educational outcomes are around 70% of the complaints, the procedural ones are about 15%, and the remaining 15% are conduct matters, and they're the ones that generally get referred into the team and we work them with our enforcement colleagues and our chief legal office, then, to formulate what sort of enforcement action we should take.

John Purcell: Now, Adrian, this has been a, to me at least and I hope to our listeners, incredibly interesting discussion spanning a wide area of subject matter. To wrap things up, I'd like to just hand back over to you for any sort of concluding comments you'd like to make.

Adrian Brown: Thanks, John. Look, I appreciate the opportunity, both of us do. I think it's great to be able to get this contact with your membership. There is one last point I'd like to raise around communication. It's such a central theme. Communication can help address independence issues, communication can help address

remuneration issues, communication can help influence the number of complaints. And when you've got an Insolvency Law Reform Act that impels creditors to ask for information, make reasonable request for information, it's fertile ground for dissent amongst the creditors if the practitioner doesn't communicate that well.

So, I really think getting that communication right gives you a real chance of reducing complaints and helping us build that trust and confidence in the profession. I know the leadership role is in very good hands with Thea. I respect Thea's background, her expertise, and what she brings to ASIC. I do encourage all your members to engage with ASIC and support us in our work. Again, I'm going to harp on it, but it is one of our strategic priorities to build trust and confidence in the market. You build that, people will then engage in enterprise, and they'll respect the profession, and they will respect ASIC's regulation of it.

Thea Eszenyi: Thank you, Adrian. And I'd just like to thank Adrian for his ongoing work with the registered liquidator population and the insolvency practitioner team, but also echo his words and encourage your members, whether they're registered liquidators or potential users of registered liquidator services or simply impacted by an external administration, to consider the wider market implications of the work they do and always work with the law rather than seek to go around it. And your point around ethics earlier, is always consider these things around an ethical perspective.

John Purcell: Look, and I think we're certainly on the same page with many of these things. As a professional body, we're vitally interested in appropriate communication to our members in relation to such matters of law reform, which touches many aspects of their day-to-day work. And clearly, our common interest is around transparency and efficiency in markets. So, look, I would like to thank you both very much for this fantastic contribution to this podcast.

Adrian Brown: Thanks so much, John.

Thea Eszenyi: Thank you.

Outro: Thanks for listening to the CPA Australia podcast. To download the transcript and to find more information on today's episode, visit www.cpaaustralia.com.au/podcast/51