

## Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Corporate Insolvency in Australia

### Question:

What is the accounting bodies' oversight of persons providing pre-insolvency advice? Please advise how many are operating out of sight of supervision, have been deregistered for unethical practice and how carefully you are watching that space. Please provide the scope of where your reach goes to and what you think the scale of the problem is outside your reach.

### Answer:

Our collective members who provide advice, including pre-insolvency advice, are required to hold what is known as a public practice certificate. If they hold such a certificate, they are subject to periodic quality reviews by their respective professional accounting body. We only have oversight of our respective members who do provide regulated pre-insolvency advice.

As our professional accounting bodies do not have regulatory oversight of other persons that offer pre-insolvency advice, it is difficult to provide the Committee with the number of unregulated pre-insolvency advisers. We would suggest the Committee reaches out to the [Phoenix Taskforce](#), which brings together federal, state and territory agencies, and requests that they interrogate the data held to identify people named as pre-insolvency advisers.

Only professionals that are licensed and regulated by the Australian Securities and Investments Commission (ASIC) are registered liquidators. Registered liquidators may provide general pre-insolvency advice and are the only professionals who may accept appointments under the *Corporations Act 2001* to assist a business to restructure, administer it back to financial health or exit the market. Registered liquidators are considered officers of the court and have fiduciary duties to achieve the best outcome for the company to which they are appointed.

We refer the Committee to ASIC's Regulatory Guide 258 Registered liquidators: Registration, disciplinary actions and insurance requirements. This guide sets out the requirement that to become a registered liquidator, which, amongst a variety of conditions, applicants must have completed at least 4,000 hours of relevant employment at a senior level in the five years immediately preceding the day on which the application is made. A person must also have adequate professional indemnity insurance.

As many registered liquidators are also a member of one of our professional accounting bodies, in addition to regulation by ASIC, they must also meet the specific ethical, conduct and professional requirements of their membership body and the Accounting Professional and Ethical Standards ('APES') issued by the APES Board.<sup>1</sup>

Prior to appointing a registered liquidator, a director or company may receive "pre-insolvency" advice which can broadly be divided into two categories – regulated and unregulated. Regulated advice is from practitioners defined in the *Corporations Act 2001* and includes a *lawyer*, a duly qualified legal practitioner, and a *qualified accountant*, being a member of one of our professional accounting bodies. As stated above, our members must adhere to the requirements placed on them by their respective professional accounting body and may be subject to disciplinary action for breaches of these. The advice being provided by these trusted advisers ranges from turnarounds of corporate entities, taxation, financing, legal, safe harbour and solvency.

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<sup>1</sup> <https://apesb.org.au/>

Our members must, in addition to their tertiary studies, undertake further professional studies to become full members entitled to provide public accounting services. They must also undertake a minimum 120 hours of professional development each three-year period.

Our members are required to comply with Accounting Professional and Ethical Standards ('APES') issued by the APES Board, including APES 110 *Code of Ethics for Professional Accountants*. Specifically for insolvency, APES 330 *Insolvency Services* mandates independence and ethical behaviours both for our general members when providing pre-insolvency advice, and for registered liquidators before accepting, and during, an appointment. There are similar APES standards for the other accounting services.

Our members in public practice are periodically reviewed by our organisations for conduct and adherence to the professional accounting requirements prescribed by APES. If a complaint against a member is lodged, our organisations may run hearings to determine the outcome. Outcomes are published and can include the loss of membership.

As at March 2023, ASIC disclosed that it regulates 654 registered liquidators. As part of this regulation, ASIC can refer registered liquidators to a disciplinary committee under s40-50 of Schedule 2 of the *Corporations Act 2001*. Since the committee's inception in March 2017, they have had 11 matters referred to it, of which 5 registered liquidators retained their registration, 4 registered liquidators either had their registrations cancelled or suspended and 2 matters are awaiting a decision.

ASIC collects data annually from registered liquidators on a variety of professional information including staff numbers, professional indemnity insurance and adherence to fit and proper requirements. This data from ASIC should give the Committee an accurate assessment of the number of staff working for registered liquidators supporting insolvency appointments.

Unregulated pre-insolvency advisors are often found by directors, companies, creditors and/or individuals from an internet search or cold calling of companies in distress. The promise of making debts disappear is attractive and the business is not qualified to recognise if, in fact, its actions may result in illegal phoenix activity or otherwise unfairly compromise the rights of creditors, including employees. This advice can often encompass financial, legal, tax and restructuring, without the licensing and educational requirements that our members undertake. These "advisers" operate without the regulatory oversight of ASIC or any other regulator. Often, this advice promises a pre-determined outcome and the costs of the service are considerably higher than if the advice was sought from a regulated professional.

We believe the first step to removing unregulated advisers giving pre-insolvency advice from the market is to identify them. For example, in personal insolvency, an individual is asked to complete Form 1219 which includes a *Statement of Affairs*. At Question 17 it asks if the bankrupt received any advice before completing the form and, if they did, to provide the name of the person providing the advice, their company name and how much they paid for the advice. A registered trustee must also ask an individual if they received advice and record the person that provided such advice. This intelligence gathered by Australian Financial Security Authority (AFSA), combined with the intelligence from matters handled by the Official Receiver, can identify unregulated advisers.

Regulators can also utilise insights taken from reports provided by registered liquidators, the general public and other agencies, such as the Australian Taxation Office, AFSA and the Australian Financial Complaints Authority to determine who these unregulated advisers are and to take action against them, say, for providing financial advice without an Australian Financial Securities Licence or tax advice without being a registered tax agent.

We are concerned about the practices of some of the unregulated pre-insolvency advisers.

CPA Australia and the Institute of Public Accountants recommend to the PJC that it is in the public interest that the sector be regulated and what form such regulation should take is a matter for discussion. One option is to follow the model of the Tax Practitioners Board (TPB) – an independent government body responsible for the registration and regulation of all entities providing tax advice. The TPB is also responsible for ensuring compliance with the law including a statutory Code of Professional Conduct.

An 'Insolvency Practitioners Board' could be an independent government entity responsible for registering and regulating all those who provide insolvency advice including pre-insolvency advisers and registered liquidators. There could also be a statutory Code of Conduct to lift the standards of those they regulate who do not already have the oversight that our members have.