

10 July 2008

National OHS Review Secretariat
Department of Education Employment and Workplace Relations
64N11
GPO Box 9880
Canberra ACT 2601
By email

Submission to National Review into Model OHS Laws

1 The Insolvency Practitioners Association (IPA) is making this submission on behalf of its members, who are insolvency practitioners who take on appointments in various capacities including as liquidators, administrators and receivers, and trustees in bankruptcy, under either the *Corporations Act 2001* or the *Bankruptcy Act 1966*. These appointments are to insolvent companies and individuals, as well as to partnerships, trusts and other entities. In many cases the insolvent companies to which our members are appointed are employers with occupational health and safety obligations. For example, the company in liquidation may be an engineering plant with many employees and significant OH&S issues. OH&S issues mostly arise in relation to corporate insolvency, and we do not address situations where a trustee in bankruptcy is running a bankrupt's business.

2 This submission is made in general terms and hence we have not attempted to fit our comments within the suggested template. The purpose of the submission is to alert the Panel to certain issues concerning insolvency practitioners and to make some general suggestions as to the content of the proposed laws.

3 As insolvency practitioners, our members are aware, when appointed as corporate insolvency administrators (that is, as a company liquidator, administrator or receiver), that they have serious responsibilities under law in relation to the employees of a business in circumstances where that business continues to employ staff during the period of appointment. This employment will arise if the insolvent business is still trading, or, even if not, if staff remain engaged in ongoing maintenance at the site whilst the business operation is sold.

Role of an insolvency administrator

4 In that respect, we wish to explain the particular role played by a person who is appointed as an insolvency administrator to a failed entity. An insolvency administrator is usually appointed to an insolvent business or individual by a court with no real notice of the nature or size of that business; he or she will simply receive notification on the day of the appointment. This will arise when a creditor applies to the Court (the Federal or Supreme Courts) for the winding up of the company usually for an unpaid debt. The Court orders the winding up (or liquidation) of the company under s 459A of the *Corporations Act*. The liquidator is



then appointed on that day and assume full control of the company's business. Similar prompt appointments are made as administrators and receivers.

5 The insolvent business may have only three employees or three hundred. Whatever the size or nature of the business, on appointment, the insolvency administrator immediately takes the place of the company management and becomes responsible for the company's operations, including the company creditors, assets, contracts, and its employees. An insolvency administrator has significant powers and responsibilities under the *Corporations Act* and other legislation to realise the assets, contracts and other property of the business in order to try to pay creditors of the entity.

6 A duty of the insolvency administrator is to carry on the business of the insolvent entity but only so far as is necessary for the sale or winding up of that business: s 477(1)(a) *Corporations Act*. In many cases, an administrator appointed to a failed business will make an early decision that the business will realise more money for creditors if it is sold as a going-concern, rather than sold piecemeal through sale of stock, plant and premises etc. If that decision is made, the insolvency administrator will wish to continue to engage the company's employees to retain what viability there is in the business for the purposes of sale. That of course is to the potential benefit of the employees, and the creditors.

OH&S responsibilities

Benbow v Scales

7 An example of a circumstance where an insolvency practitioner has been held responsible for OH&S issues is *Benbow v Scales*.¹ Mr Scales was appointed as a receiver and manager of a company under a mortgage debenture. His appointment commenced on 22 February 2000 and the offending conduct (an accident at the work premises of the company) took place on 27 March 2000. He was charged under s 50(1) of the NSW *Occupational Health and Safety Act 2000* which makes company officers liable for company breaches subject to the defence of "due diligence".

8 In making its decision, the Court accepted that, prior to the incident, Mr Scales had lawful power to carry on the business of the company (all other directors had resigned) under the debenture and the legislation. Mr Scales carried on the business operations of the company for the purpose of attracting potential purchasers, and he had total control of the company's business operations.

9 The Court accepted that Mr Scales used due diligence to perform his duties, but that he failed to use all due diligence. The failure related to Mr Scales not arranging for OH&S risk assessments of the premises to be undertaken on his appointment. In his decision Chief Industrial Magistrate Miller noted that:

A factor raised by [Defendant's counsel] was the impact of a conviction upon receivers generally. [Defendant's counsel] suggested that a conviction in a matter such as this may lead to persons refusing to act as receivers/managers. Another potential impact upon receivers is that receivers in a situation of a company with problems may make a

¹ [2002] NSWCIMC 184



preliminary decision to shut the business down to reduce the potential risk for receivers being exposed to obligations under the Occupational Health and Safety Act. The impact of closing businesses down would impact on employees and cause damage to the business with consequent impact upon creditors and employees.

I place little weight upon these later submissions because quite clearly it is a situation where receivers/managers must obey the occupational health and safety laws. This can be simply met by them applying all due diligence to the performance of their duties.

10 The decision in *Benbow v Scales* was a reminder to IPA members of the implications of the responsibilities of an insolvency administrator in trading-on a business. The principle that our members have taken from that decision and have applied is that the obligation to discharge their responsibility to comply with the occupational health and safety laws 'can be simply met by them applying all due diligence to the performance of their duties'.

11 More particularly, the IPA accepts they should have a general level of understanding of the provisions of the OH&S legislation within the State of which they practise and, on being appointed, they should take various initial steps to be satisfied that there are no significant health and safety issues that need attention. This would involve inspecting the premises, assessing existing arrangements and arranging a risk assessment as necessary and attending to any risks identified.

Comparison with a purchaser

12 In that respect, there are fundamental differences between an insolvency administrator and a purchaser as at the time they each take charge of a business. An insolvency practitioner 'comes in cold' to the operations of the business and has obviously undertaken no due diligence that a purchaser would have done. On the day of being appointed, say by the Court, the insolvency practitioner immediately takes on the risk of the insolvent company's business and there is a need to quickly come to grips with the company's operations and then make decisions about what the on-going position will be.

13 In contrast, there is no excuse for a purchaser of a solvent business to not have conducted appropriate due diligence on OH&S issues prior to purchase. As well, the nature of an insolvent business is often that its affairs are in some disarray, not only financially, but also in relation to OH&S and other regulatory requirements.

Realities of lack of funding

14 We point out another particular reality of an insolvency, that there are limited or no funds available. The extent to which money of the company in liquidation needs to be spent by the liquidator in order to address any outstanding OH&S issues is often determinative of whether the insolvency administrator decides to trade-on the company's business, and retain the employees, at all. This decision has to be made by the practitioner in light of their overriding legal duty to act in the best interests of the creditors of the company. Of course the OHS issues of the employees are an important factor and the immediate termination of the company's business by the liquidator may be necessarily both financially, and in light of continued inattention by the company to its OH&S responsibilities.



15 In light of that explanation of the general approach of our members, we consider that any laws should recognise that while the IP has responsibility for OH&S issues, the IP is not in the same position as a normal employer, nor in relation to a purchaser of a business, where entirely different considerations apply.

Specific guidelines etc for insolvency administrators?

16 In that respect, the IPA considers it would be beneficial for specific OH&S guidelines to be prepared for insolvency administrators. For example under Victorian Act, they may be regarded as a 'class of persons' under s 12 of the Act; or that an insolvency appointment may be regarded as a 'set of circumstances'. Such guidelines could require that a methodical approach be adopted by an insolvency administrator that includes:

- Conducting hazard identification and risk assessments of premises, equipment and other assets under the control of the insolvency administrator;
- Coordinating with management and those staff who have responsibilities regarding health and safety including health and safety representatives and OH&S committees;
- Reviewing relevant OH&S information and other documentation of the business;
- Taking any appropriate action as a result of the identification of hazards and/or risks and recommendations made by those qualified to carry out the risk assessments.

17 These issues are particularly important if the insolvency administrator proposes to continue trading the company's business and retain its employees. We mention that many of our members' firms already have checklists and such like for these purposes, based on those listed in *Benbow v Scales* and other cases.

General comments

18 The IPA simply raises the issue for the Panel at this stage without offering further detail. But the detail would address the realities of insolvency practice which we have discussed above.

19 The IPA has on its work program the development and publication of an IPA practice note for its members, nationally, to complement existing OH&S regulations. That note will attach any settled checklist as we may jointly prepare or one prepared by the IPA. The IPA is concerned to ensure the continued education of its members on OH&S issues and to advise them on changes in the law and regulations. We do this by way of information on our website – www.ipaa.com.au – and in regular training and discussion groups conducted by the IPA. The IPA has an extensive education program ranging from university level to basic training. We are also contemplating periodic practice reviews of the files of IPA members where attention to OH&S issues would be of high priority. It may be that the Panel's report could offer some guidance on how such issues could best be addressed in the insolvency field. It seems to us that it is in the joint interests of both IPA members and the community generally that OH&S issues are not compromised by the insolvency of the business. Clear guidance to insolvency administrators will assist those joint interests.



20 In earlier discussions of the IPA with Worksafe Victoria, in relation to their legislation,² the IPA had raised concerns about the impact of the 2007 Regulations on insolvency practitioners. Worksafe Victoria explained that their regulations and the Act did not, and nor were they intended to promote a situation in which plant must *immediately* meet the prescribed definition of compliance. The test there was to have regard to what was "reasonably practicable" for an insolvency practitioner (or, for that matter, and ordinary employer) to do in all the circumstances, before making a determination as to whether or not they have breached the law as a result of their failure to take appropriate OHS compliance action in a workplace.

21 The IPA had extensive discussions with Worksafe Victoria about their legislation and the possible issue of guidelines for insolvency practitioners. We would be pleased to have discussion in the context of this review if such are contemplated.

22 Given that the issues paper does not address the issues of an insolvent, or financially distressed, company at all, we reserve more detailed comments on the law for any later submissions. We simply note these points, that, as to issues of 'control', that may be an appropriate point in which to give a definition or explanation of the particular nature of the control exercised by an insolvency administrator. Also, as to penalties, if such penalties imposed on a company are given the status as 'fines or penalties imposed by a court in respect of an offence against a law', they are not a provable claim against a company in the event of its liquidation; the fine is not payable: s 553B *Corporations Act*.

23. If you have further queries about this submission, we would be pleased to assist. Our Legal Director, Mr Michael Murray, can be contacted on 02 9080 5826 or mmurray@ipaa.com.au.

Paul Cook

President

Insolvency Practitioners Association

² The *Occupational Health and Safety Act 2004 (Vic)* and the 2007 Regulations