

The Insolvency Litigation Market

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Introduction

Insolvency practitioners have always had the capacity to seek funding for litigation from creditors and the opportunity to sell many of the causes of action of the companies and estates they administer (the "Actions"). In this respect they are exceptional. The ancient rules of champerty¹ and maintenance² restrict all other Australians from liquidating causes of action either with financial assistance of others or by sale.

Until recently, however, practitioners with negligible administration funds have taken limited advantage of this privilege because they:

- (a) could not raise awareness in the general market place of the value of the Actions; and
- (b) were limited to dealing with creditors, directors and other parties with a direct interest in the administration.

The character and size of the market (the "Market") for these Actions is now changing with the introduction of sophisticated funders and purchasers ("Funders").

- (a) capable of assessing the value of the Actions; and
- (b) with resources to complete the transactions and litigate the Actions in a professional manner.

The economic ramifications for insolvency practitioners are discussed below.

Structure of the Insolvency Profession

The profession, as a result of the services it offers, is cyclical in nature and designed to be adaptive to the ebbs and flows of demand. Core human resources and skills are maintained when the economy is buoyant and other resources are mustered when the economy falters.

Participant firms often target their marketing strategies towards either secured creditors or the insolvent entities. Relatively few firms target unsecured creditors as these creditors' capacity to group and thereby control creditors' meetings has, to date, been limited.

Accountancy firms have been en-

hancing their capacity in respect of the provision of litigious services, including:

- (a) the identification of the Actions in their administration; and
- (b) the liquidation of those Actions.

The development of the Market introduces service opportunities for accountancy firms.

Liquidation of Rights Which Previously Would Have Wasted

The Market enables practitioners to have the value of Actions in their administrations identified by the Market at little cost to them. If the Actions have sufficient value, the Funder is likely to need the practitioner to assist in the liquidation of the Actions, including the provision of expert opinion on solvency, quantum, etc³. Some experts in this field will also have an enhanced demand for their services from other insolvency practitioners, Funders, etc.

Brokerage/Arbitrage Services

Some practitioners will seek out funding/purchaser opportunities in the Market, identify their value and facilitate agreements for transaction based fees. The long term involvement of practitioners in this area of the Market will be limited due to its complex nature and the extent of the losses associated with inappropriate funding decisions.

Marketing Strategy

Accountancy firms have already commenced to develop, as a market differentiator, their knowledge of the Market and their capacity to access it effectively. This strategy will have the most success with unsecured creditors in achieving appointments as administrator for sale in the Market.

Risks and Rewards in the Market

The risks in the Market are currently, almost exclusively, assumed by the Funders. The only risk assumed by the accounting profession is the value of their time in presenting the Actions to the Market.

The risks undertaken by the Funders determine the rewards. The risks include:

- (a) the defendants being unable to honour any judgment debt;
- (b) the supportive evidence proving too weak or the defence's evidence too strong;

- (c) the legal issues being judged in favour of the defendants;
- (d) the quantum of the judgment being negligible; and
- (e) the legal, expert and accounting fees (the "Transaction Costs") being too high.

The costs of these risks eventuating to the Funder include the purchase price, the Transaction Costs and the adverse costs order liability.

The rewards created by the assumption of these risks include:

- (a) the Funder receiving a share of the settlement/judgment proceeds;
- (b) the insolvency practitioners receiving payment of their fees; and
- (c) the creditors receiving the balance of the settlement/judgment proceeds.

Short/Long Term Perspective/Involvement

As with many other markets, the Market will develop and enhance their capacity to:

- (a) identify Actions in their administrations;
- (b) understand and access the Market;
- (c) provide expert witness services
- (d) assist other practitioners/Funders access the Market; and
- (e) lastly, but certainly not least, assist creditors maximise their returns from administrations.

The predominant Funders in the Market will develop and enhance their capacity to:

- (a) access investment opportunities;
- (b) qualitatively and quantitatively assess these investment opportunities;
- (c) minimize Transaction Costs;
- (d) provide security for costs; and
- (e) lastly, but not least, only enter into transactions which assist creditors maximize their returns from administrations.

Creditors, therefore, will be the predominant beneficiaries from the

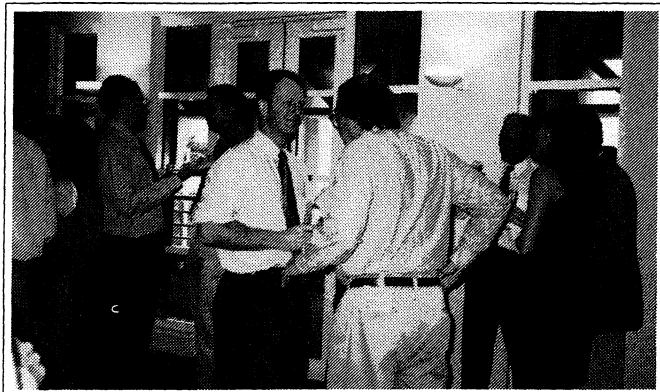
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Peggy Cheong, shares her delight at winning the dinner for two at *Chez Colette* with colleagues



Post-lunch frivolity from David Anderson, Michael McCallum and Liquor Commissioner, Peter Allen



The profession gathers for pre-lunch drinks

FOUND

**At the Law Week
Lunch, Parliament
House -**

**- a pair of
reading
glasses, silver
frames, half-
glass style.**

**If you can't read this,
it may be that they
are yours!**

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development of the Market in the longer term. Any participants who do not appreciate this will not survive in the Market.

FOOTNOTES

1. Maintenance is defined in Halsbury's Laws of Australia Vol 6, paragraph 110-7135 as "assistance or encouragement by a person who has neither an interest in the litigation nor any other motive recognised as justifying the interference to a party to litigation".
2. Champerty is defined in paragraph 110-7140 as "particular form of maintenance, namely maintenance of a promise to give the maintainer a share of the proceeds or subject matter of the action".
3. Currently Funders are agreeing to pay practitioners for these services without contingency based on IPAA recommended rates.