PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Corporate Insolvency in Australia

Wednesday 1 March 2023

Evidence of Mr Michael Murray in relation to his joint submission number 18 with Professor Jason Harris

Question on Notice about Restructuring and Insolvency Advisors

CHAIR: Mr Murray, in your submission you talk about how the new procedure in part 5.3B involves three phases: the restructuring phase, the acceptance phase and the plan implementation phase. We've had some evidence to suggest that there should be a separation in the insolvency space between those who are dedicated to the task of restructuring and those who are dedicated to the phase of the insolvency in practice. It's quite appealing to me, given the level of mistrust that there is in the sector, that it might give some freshness to people who did want to push past the stigma of 'My business is failing' to say, 'I need to remodel my business and I can get some assistance.' What are your views about the technical and sociological elements of that proposal?

Mr Murray: That's a very big question and an interesting one. I can give only a broad answer. In fact, I've heard about that suggestion only through this inquiry. I would be reluctant to split up professional advice between one group and another. For the sake of independence is one reason it might be suggested. I'd really have to give some thought to that on notice, if I may.

CHAIR: Absolutely. We'd be very happy to receive that from you on notice. Is there anything from Professor Taylor or Dr Mason? Your heads are shaking; okay. Could I go then to the acceptance phase. ….

Response - Professional groups

The question is whether there should be a separation of professional groups between those who advise on the financial position of the company and its business and its insolvency, and those who are then appointed in some capacity – as liquidator or administrator - to administer the company's formal insolvency. We do not think there should be a legally defined separation but the issues and the options are not clear. These comments may assist.

In many professional contexts the person advising also becomes the person implementing the advice, such as a surgeon doctor recommending surgery or a lawyer recommending litigation, without there being seen to be a conflict of interest.

The position in insolvency is different because an insolvency practitioner, unlike other professionals, is, once appointed, occupying a statutory role independent of the person appointing them and independent of the creditors. This is because a large part of the insolvency practitioner's role is to investigate why the company failed and whether any potential offences have been committed (including by the directors and executives). Insolvency practitioners also investigate whether there are any voidable transactions involving directors and creditors (or others) that can be challenged in court. The insolvency practitioner must be, and be seen to be, independent of all parties. If the practitioner has given prior advice to the company or the director on a certain course of action in respect of the company's assets or financial affairs in order to try to resolve the company's financial difficulties, it is not possible for the practitioner to then take an independent appointment as the liquidator or administrator.

Nevertheless, the law allows, and common sense requires, the insolvency practitioner to gain some knowledge of the affairs of the company from the directors before agreeing to take the appointment. This is evident from the case law: see the *Advance Housing* decision discussed in *Keay's Insolvency* at [10.200].

If there is some concern about the prior role of the appointed practitioner as to a particular issue or transaction, there is the possibility of appointing a 'special purpose liquidator' (or administrator) who can be tasked with conducting an independent investigation into that issue or transaction, reporting to creditors and potentially managing litigation in place of the appointed liquidator or administrator. This was used in the Network 10 administration to report to creditors on the pre-appointment work and fees charged by the formally appointed administrators' firm: see *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 914. Such appointments are now quite common: see *Keay's Insolvency*, 11th ed at [10.215].

There are circumstances which often apply where the insolvency practitioner explains the options to the individual director and suggests for example that their company should be liquidated. The relevant code and the law do not see that as impinging upon their independence. It is when that advice goes further and involves dealings in company assets that problems would arise. The law and case law are explained at [10.200-10.220] of *Keay's Insolvency*, 11th ed.

The company director's viewpoint

From a director's viewpoint, a reality of the current environment is that if the director goes to a liquidator asking for advice about the company's financial affairs, the liquidator will generally only give certain limited advice about restructuring or insolvency options lest it prevent the liquidator taking the formal appointment. That in itself seems unsatisfactory. The question asked suggests that there should be a body of advice that focuses on improving a struggling business rather than focusing on options for its potential demise.

What is suggested is that there be a body of insolvency professionals, who are not liquidators, who can give that advice more fully and freely, and without the 'stigma' of the director

seeking advice from an insolvency practitioner. An insolvency practitioner, separately, would then take any formal appointment as liquidator or administrator arising out of that advice.

Options

We note that there is already a body of professionals who provide turnaround and restructuring advice that does not necessarily lead to formal insolvency appointments. These persons may be members of professional associations such as ARITA or the TMA, or law or accounting bodies.

As we note in our main submission, this are of the industry could be better regulated because there are no rules that govern who can market themselves as a turnaround advisor, and some of these advisors are marketing inappropriate and illegal advice on how to avoid paying debts, particularly tax debts. We suggested in our main submission that increased regulatory guidance on who can serve as a safe harbour advisor and on practitioner registration requirements may assist with this. Further expanding the scope of who can serve as a restructuring practitioner in a Part 5.3B restructuring would also assist as at present we understand there have been only two persons who were not otherwise registered liquidators that have been approved to act as restructuring practitioners under Part 5.3B since 2021.

What may also be useful in facilitating better outcomes from small business restructuring (and for small business insolvency in general) would be to implement the ASBFEO's recommendation for a small business viability voucher to make access to financial advice for small businesses more easily accessible and to discourage business owners from obtaining advice from untrustworthy advisors. For example, a register of accredited small business viability advisors could be established and maintained by ASIC.

While we acknowledge that there are some unsatisfactory aspects to the current arrangements, we do not fully support the concept of some legally defined separate group of professional advisors. It would also be difficult to legally define 'untrustworthy advice'. Also, we have referred to the fact that the law allows some flexibility in the insolvency practitioner to gain some necessary knowledge of the company's affairs before to taking the formal appointment.

While to some extent the current law and practice leaves a vacuum which can be filled inappropriately by unauthorised pre-insolvency advisors, most professions suffer from those persons 'on the edge' offering 'alternative' advice. Law regulating directors dealing with company assets in advance of insolvency already exists, including in regulating others being 'involved'[1] in such actions. We are not convinced that there should be new law that seeks to both define what is valid pre-insolvency advice and proscribe advice beyond that.

Also, to some extent in theory at least a valid group of pre-insolvency advisors already exists, being accountants and lawyers familiar with insolvency. However, apart from those who are members of particular insolvency associations or who have a particular insolvency expertise,

[1] Section 79 Corporations Act

it seems that in practice the advice or knowledge of both lawyers and accountants is often inadequate to deal with matters of any complexity.

Bear in mind also that good advice will cost money and that can be a limitation on the company seeking proper advice at an appropriate time. There is also the inherent behavioural reluctance of directors to seek early advice generally. For that reason, we do support the views of the Ombudsman about increasing the accessibility of business to financial advice.

Another option may be to review the laws of independence of insolvency practitioners. That would require careful consideration and would best be achieved through legislative change. At the same time, the need for the practitioner to be seen as independent, given the strong powers and authority they have, is important, and any watering down of that perception might have unwanted consequences in terms of the integrity of the insolvency process.

The better remedy overall may be that both lawyers and accountants and other relevant professionals should improve their capacity to give sound insolvency advice.

We are available to discuss these issues further if required.

M Murray

Michael Murray

J Harris

Professor Jason Harris

22 March 2023