Association of Independent Insolvency Practitioners
By the practitioner, For the practitioner

21 February 2023

Dr Sean Turner, Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

By Email: corporations.joint@aph.gov.au

Dear Dr Turner

Parliamentary Joint Committee on Corporations and Financial Services – Corporate Insolvency in Australia

Thank you for your letter of 23 December 2022 requesting a response to additional questions. Please find below our responses where appropriate.

Questions Specific to the AIIP
QI Proposal for MyGov app at page 16

The proposal emerged from a blog of Michael Murray at: -
https://murrayslegal.com.au/blog/2022/11/27/tip-the-insolvency-portal-or-big-data-room/

A majority of the questions presented are considered in a preliminary manner in the blog.

The purpose of the App is to provide a platform for information sharing between relevant parties throughout the entirety of the life of a corporate entity. It's not currently angled toward personal insolvency, however there may be an opportunity to extend the App toward inclusion of personal data, subject to privacy issues.

Technologies need to be fast and intuitive. Information needs to be accessible.

The proposal is in its infancy stage, and further information will be provided as we formulate the idea.

Development and maintenance of leading technologies is a journey rather than a destination. As they evolve, there need to be safeguards against cyber issues, phoenixing, and poor behaviour.

General Questions

Q1 Root and branch review

We agree that there should be a comprehensive and thorough examination of corporate insolvency in Australia.

Some of the immediate areas requiring review in our opinion are:

- Modification of SBR legislation,
- Fixing Corporations law for trusts
- Enhanced harmonisation of personal and corporate insolvency,
- Registration and regulation of pre-insolvency advisors,
- Pre-packaging for micro and small business, using the UK and Asian experience,
- PPSR amendments regarding the removal of security interest for corporates in external administration, and
- Other remedies and solutions to restructure and turnaround micro/small businesses and provide a sound framework.

The current review appears to be robust. There have been many submissions. It is obvious that the members of the Parliamentary Joint Committee have personally invested significant time to read the many Submissions.

This enquiry may only be a first step on the road to comprehensive reform. Given the breadth of coverage and relatively short timeframe for submissions and also for the report, the enquiry is likely to identify a number of issues and potential areas for reform or further investigation. However, we expect it will likely require further additional reviews to develop comprehensive proposals to properly address those issues and reform areas.

Through the course of previous reviews and consultations, recommendations have emerged for amendments which would have clear benefits in reducing costs and complexity but have not yet been actioned by government. These amendments could potentially be implemented relatively quickly to deliver real benefits.

The key goals of our insolvency law should be considered and determined. The lack of data on the current operation of Australia's insolvency system is a constraint.

Thought leadership over a longer timeframe about the insolvency system as a whole and how it should be repositioned for the longer terms should occur, akin to a Harmer report.

Overseas examples include US and Singapore. In Singapore a major overhaul of its restructuring and insolvency legislation was the culmination of a process that was ongoing for approximately 10-years, including participation by a cross section of stakeholders with relevant specialist skill to review the existing law to determine its effectiveness relative to consideration of the fundamental policy questions on what the key goals of our insolvency law should be, and what sorts of processes are needed in order to achieve these goals.

The Harmer process and report was successful in achieving an overhaul of the insolvency system. The experience in US and Singapore demonstrates the value of diverse specialist stakeholders undertaking study of both the operation of the current regime and potential reforms, and key goals of Australian insolvency law.

Q2 Purpose of Australia's insolvency laws.

The purpose or object of Australia's insolvency laws is substantially absent in the legislation for corporations and individuals.

The Harmer report includes the following commentary at Part One – Introduction and general issues:

*"**5. Principles of contemporary insolvency law**. The following principles guided the Commission in formulating its specific recommendations:*

- *The fundamental purpose of an insolvency law is to provide a fair and orderly process for dealing with the financial affairs of insolvent individuals and companies.*
- *The insolvency law should provide mechanisms that enable both decor and credit or to participate with the least possible delay and expense.*
- *An insolvency administration should be impartial, efficient and expeditious.*
- *The law should provide a convenient means of collecting or recovering property that should properly be applied toward payment of the debts and liabilities of an insolvent person.*
- *The principle of equal sharing between credit doors should be retained and in some areas reinforced.*
- *The end result of an insolvency administration, particularly as it affects individuals, should, with very limited exceptions, give effective relief or release from the financial liabilities and obligations of the insolvent.*
- *Insolvency law should, as far as convenient and practical, support the commercial and economic processes of the community.*
- *As far as is possible and practical, insolvency laws should not conflict with the general law.*
- *An insolvency law should enable ancillary assistance in the administration of an insolvency originating in a foreign country."*

*"**7. Information and statistics.** Better statistical information is needed, particularly relating to corporate insolvencies . . ."*

The above commentary remains relevant. There should be the addition of narrative to indicate that the objective of the insolvency regime should be to provide a genuine opportunity for restructure for economically viable businesses, and if restructure is not possible, the insolvency system should aim to provide an expedient and inexpensive, effective and orderly process for the winding up the company.

There should not be room or incentives for inappropriate behaviour by directors and officers, debtors and or creditors. Directors must be able to readily understand their obligations with respect to insolvency and their options when businesses experience difficulties.

Creditors must be able to easily understand their rights in relation to recovering the monies owed to them.

Q3 Major reforms

Directors can be appointed without any education in respect of their duties and responsibilities. There needs consideration whether prerequisites exist and operate successfully in other countries. The current law is neither simple nor accessible to directors for small and medium businesses.

Government should abandon the ASIC Administration Fund (AAF), and provide default amounts for assetless (unfunded) external administration. Funds from AAF are only available following application for funds. The AAF is a Grant. Fund applications, anecdotally, are often rejected and the work required to make applications is disproportionate to benefit.

Government should abandon the current method of generating revenue via ASIC Statutory Levy, and instead use a superior method similar to the model used by AFSA for bankruptcies.

Inefficiencies by regulators and government agencies including Australian Taxation Office result in substantial delays and costs. There is an absence of statistical data to measure their current and

ongoing efficiency by relevant criteria. The service standards including access to, and time to consider matters are low, relative to their resources.

The lack of data, and sharing of data, is an opaque process which results in delays and costs.

We refer to the matters raised above in question 1 for areas that we consider need review.

Q4 Public interest aspects of Australia's corporate insolvency laws.

A large part of the corporations work performed by our members is in the public interest and unfunded.

Our members would like to continue to perform the work for the benefit of public interest. However, that work should be funded out of the public purse by Government rather than to be paid from funds for creditors, where such funds are available. That cost to Government would be mitigated via use of a funding model that is currently applied in bankruptcy by AFSA. The current funding models applied by ASIC, and also the AAF should be abandoned for better regimes.

Improved collection and analysis of data by ASIC, and the availability of data without charge to registered liquidators is required.

Analysis is required of the thousands of companies that are abandoned via deregistration following failure to lodge an annual return. There is no investigation of those companies prior to deregistration by ASIC.

Further harmonisation of the corporations law and bankruptcy law is required.

In the absence of data, we are unable to opine whether an Official Receiver for corporations matters will result in efficiencies.

We also consider that the public interest is not best served by the ever-increasing cost of post-appointment litigation to insolvent entities. In the past, it was only relevant to large administration, or a matter with a specific issue that ended up in litigation. These days it appears, increasingly so, that litigation is commenced at the drop of a hat, effectively burning creditor returns for no value, or there is the threat of litigation that results in some form of negotiated settlement simply to avoid costly litigation and potential personal costs order. By no means do we wish to make insolvency practitioners a "protected species" and we see the need for accountability and responsibility of insolvency practitioners, but the ability of claimants to commence action against practitioners puts potential returns to creditors at risk.

Q5. International best practice.

There are many lessons that could be learned from review of international best practice of insolvency law. Any review of insolvency law should consider international best practice for micro and small to medium enterprises, and separately for larger enterprises, and finally, for assetless companies.

Q6. Data and research.

Australia lacks good quality data on the operation of Australia's insolvency system. It is a failure of the regulators. ASIC's ability to provide data on deregistrations, and also, analytics on investigation reports submitted, is unsatisfactory.

Annual and interim reports by regulators, including their plans, are self-serving.

By reference to the transcript of the Inquiry on the first day of hearings, the inability of the ATO and ASIC to have available at the Inquiry (or at other times) information in connection with their respective operations was sub-optimal, and ultimately causes costs, delay and adverse outcomes for the economy. Their turnaround times, or 'service standards' in the case of the ATO, are inefficient relative to the speed with which decisions are or should be made.

There is an absence of thought leadership by government agencies, or alternatively, non-preparedness to provide thought leadership on process and outcomes, and efficiencies including data and research.

At present, the company data that registered liquidators require from ASIC, and also, PPSR data, needs to be purchased by the registered liquidator, regardless of whether matters are funded or unfunded.

The information is required for liquidators to satisfy their role in investigating matters of public interest.

Q7. Harmonisation of corporate, personal, trust and partnership insolvency law.

The Harmer report includes the following commentary at Part One – Introduction and general issues:

*"**4. A single Act**. The integration of individual and corporate insolvency into a single Act may be more efficient and result in cost savings through the use of common procedure. A single statutory scheme, controlled by one government, would also allow better control of policy and changes to the legislation could be made more expeditiously. On the other hand, there are many areas peculiar to individuals and corporations which may make complete fusion difficult, if not impossible. The issue of which courts would exercise jurisdiction would also need to be resolved. There does not appear to be any overriding need for unity. Substantive reforms in particular areas of insolvency law are more important. However, it is desirable to promote uniformity of the substance of the provisions relating to individual and corporate insolvency."*
There is no data available to determine whether further unification of legislation will result in material net benefits relative to time and costs, and other potentially higher priorities that could be pursued. The requirements under corporations and bankruptcy should be similar wherever possible, regardless that there is separate legislation.

We consider this commentary is still relevant some 30 years later.

Q8. COVID-19 emergency reforms.

We have no comments to make in relation to this question.

Q9. Recent reviews.

Recommendations in the main should be implemented for Whittaker Statutory Review of PPSR, and also, The Insolvent Trading Safe harbour statutory review.

Q10. Small business restructuring and simplified liquidation reforms.

These procedures were introduced in haste by Government without adequate time for reasonable consultation.

The insolvency industry is currently divided between those that have adopted the new reforms, and others that have not engaged and find them to be risky and complex.

In part, this polarisation is a symptom of the lack of understanding by stakeholders as to the Parliament's intentions. The legislation needs to make clear that the directors are responsible for the proposal put forward for creditor consideration, and the registered liquidator will not be held responsible for directors that mislead their creditors. More education for stakeholders impacted by the new reforms, in particular the ATO who is often the largest creditor, will result in determining the scope of work required by the registered liquidator and allow for better cost efficiencies, increasing the uptake by directors, and registered liquidators alike.

Q11. Regulation of pre-insolvency advisors.

Pre-insolvency advisors is assumed to be a reference to persons that supply insolvency advice, and particularly phoenixing advice. It is an unfortunate label for an area that is beneficial to stakeholders, and can be serviced by our members.

Unfortunately, many who provide advice in this area are neither lawyers nor registered liquidators. Pre-insolvency advisors are and remain unregulated and the advice that arises from these firms and individuals ranges from woeful to outright illegal.

It is an enigma in a financial services environment where so many other financial services are highly regulated.

Q12. Recommendations in submissions and timing of reforms.

Arising from reviews and inquiries, there are reforms recommended, which are effortless to implement and ready to go, subject to process through Parliament. These changes will result in efficiencies.

Conclusion

Thank you for this opportunity to further provide our experience, thoughts and opinions in relation to corporate insolvency.

Yours faithfully
Association of Independent Insolvency Practitioners Limited

Suelen McCallum
Director