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# Official Committee Hansard

## JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

**Reference: Australia's insolvency laws**

WEDNESDAY, 17 SEPTEMBER 2003

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**JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES**

**Wednesday, 17 September 2003**

**Members:** Senator Chapman *(Chair)*, Senator Wong *(Deputy Chair)*, Senators Brandis, Conroy and Murray and Mr Byrne, Mr Ciobo, Mr Griffin, Mr Hunt and Mr McArthur

**Senators and members in attendance:** Senators Brandis, Chapman, Murray and Wong, Mr Byrne and Mr Ciobo

**Terms of reference for the inquiry:**

To inquire into and report on:

The operation of Australia's insolvency and voluntary administration laws, including:

(a) the appointment, removal and functions of administrators and liquidators;

(b) the duties of directors;

(c) the rights of creditors;

(d) the cost of external administrations;

(e) the treatment of employee entitlements;

(f) the reporting and consequences of suspected breaches of the *Corporations Act 2001*;

(g) compliance with, and effectiveness of, deeds of company arrangement; and

(h) whether special provision should be made regarding the use of phoenix companies.

**WITNESSES**

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**Committee met at 4.36 p.m.**

**HARMER, Mr Ronald Wilson (Private capacity)**

**CHAIR**—Today the committee continues its public hearing program into its inquiry into Australia's insolvency laws. This afternoon the committee is taking evidence from Mr Ron Harmer, who was commissioner in charge of the Australian Law Reform Commission inquiry into Australia's insolvency laws in the 1980s. The work was completed in 1988 with the publication of Australian Law Reform Commission report No. 45, better known as the Harmer report, on which the 1993 Australian reforms of corporate insolvency laws were based. Mr Harmer is now in the United Kingdom, and we join him via a phone link-up. On behalf of the committee, Mr Harmer, may I thank you for taking the time to talk to us and allowing us to draw on your wealth of knowledge and understanding of insolvency laws.

Before we commence taking evidence, I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to evidence provided. Parliamentary privilege refers to the special rights and immunities attached to the parliament or its members and others necessary for the discharge of parliamentary functions without obstruction and fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before the parliament or any of its committees is treated as a breach of privilege. I also wish to state that, unless the committee should decide otherwise, this is a public hearing and as such all members of the public are welcome to attend. Mr Harmer, do you have any comments to make on the capacity in which you appear?

**Mr Harmer**—I am presenting information to the committee on my private behalf. I am a private consultant and also a visiting fellow at University College, London.

**CHAIR**—Thank you. As I indicated a moment ago, this is a public hearing and therefore the committee prefers that all evidence be given in public, but should you at any stage wish to give any part of your evidence in private you may request that of the committee and we would consider such a request to move in camera. I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

**Mr Harmer**—Thank you. I should mention that I have not lived in Australia for the last seven years and I would not feel competent to give an opinion on the actual operation of the voluntary administration regime. I think that should be left to those who are practising in it on a day-to-day basis. I do have a continuing interest in what is happening in Australia, largely fuelled by the fact that my work has taken a more international and comparative aspect such that, among other things, I have been engaged by the World Bank, the Asian Development Bank and lately the European Bank for Reconstruction and Development on the development and assessment of insolvency law regimes. I have worked in a number of countries as a result of that work.

Secondly, I have been closely involved with the work of UNCITRAL, the United Nations Commission for International Trade Law, in the development of a model law on cross-border insolvency and lately the development of legislative guidelines for a modern insolvency law. I have also worked with the World Bank in respect of the preparation of their principles for a

modern insolvency law. I can at least view the Australian system in the light of my broader international and comparative knowledge.

**CHAIR**—Thank you, Mr Harmer. The voluntary administration procedure, which was largely based on your report, has now been in operation for some 10 years. That might not be a long time in relation to insolvency practice; nevertheless, from your international perspective in particular, are you able to comment on what you see as the relative strengths and weaknesses of the voluntary administration procedure over that 10-year period of operation?

**Mr Harmer**—On an international or comparative level there is little doubt that in terms of the important fundamentals the Australian model meets every fundamental requirement. I think its greatest strengths are that it is an efficient and relatively easy procedure to invoke. Cost wise, I think it compares more than favourably with similar regimes in other countries. It has the great benefit of flexibility and, above all, it does truly enable the possibility of the rehabilitation or rescue of a corporation that is in financial difficulty. Whether that is actually occurring in practice is something that, as I said earlier, I do not think I am competent to talk on, but when I look at the type of statistics that are available, it becomes apparent that it must be working in a fairly favourable way.

It is also clear, although one will not necessarily read it, that the recent changes to the insolvency regime of England and Wales have quite clearly been influenced by a review and a consideration of the Australian voluntary administration regime. From the English amendments, which are now in force—I think they came into force a couple of days ago—it is quite clear that there is a distinct following of the Australian model. It stands well in an international comparative sense.

As far as weaknesses are concerned, any rehabilitation or rescue regime must have some inherent weaknesses because advantage will be taken of any such regimes, maybe in hope and expectancy but without, in some cases, a real prospect of rescue or rehabilitation. That is something of the price you have to pay for offering a system that is workable and can be easily applied. In summary, that is what I would say about the regime.

**CHAIR**—Some of the submissions that we have received with regard to our inquiry have argued that Australia's current insolvency laws do not encourage sufficiently early intervention in the affairs of companies in financial difficulty and have also argued that the time within which an administrator must devise a plan for the company's rescue is too short. They also claim that most deeds of company arrangement fail. Some of these submissions have suggested that Australia ought to adopt a version of debtor in possession business rescue regime, along the lines of a US chapter 11 code. What is your view of whether Australia should adopt a regime along similar lines to the US chapter 11, either as an alternative to or a replacement of our voluntary administration procedures?

**Mr Harmer**—I am aware from what I have read that there have been some suggestions about the desirability of a regime modelled on the United States model. You perhaps can correct me if I am wrong, but my understanding is that suggestions were made that, in respect of at least two administrations—I think Ansett was one and another concerned I think a mining company—had the affairs of those corporations been dealt with under a regime similar to chapter 11 of the United States bankruptcy code, rehabilitation would have resulted. I am puzzled by that

suggestion. I have yet to read or have somebody point out to me in what way a chapter 11 type of regime might have been able to effect some miraculous rehabilitation of those companies.

I am, of course, familiar with the chapter 11 regime. I doubt that it is well suited to Australia, primarily because it relies upon the development that has come in America of a kind of market-force process. The American regime strikes me as one which is almost like Economics 101. It is a matter of supply and demand. It is a matter of the involvement of market forces. So on the one hand you have the debtor, involving the shareholders, the management, and on the other hand you have the various groups of creditors with particular interests that are motivating them, particular interests that they seek to have enhanced or protected. Into that melting pot these interests come together in order to broker some type of deal.

That has been practised in the United States now for some 25 years and possibly longer. It is something to which they are used. It favours their view that insolvency is not the end of the world. For their purposes I am sure it works reasonably well. I would find it difficult to see it working as well in Australia. One major reason for that is that this country has been long used to the idea of an independent person who is interposed, as it were, between the competing interests and is primarily there to benefit, as a whole, those interests. For Australia to do away with that would be certainly breaking new ground. I do not think I can say that it would not work, but there is some doubt that it would work as well and as practically speaking as the Americans claim their chapter 11 works.

**CHAIR**—Another group of submissions that we have received has claimed that the voluntary administration procedure is being misused as a means of placing a company into liquidation rather than as a means of enabling a company to continue in existence. The insolvency practitioners have suggested that this could be overcome by allowing creditors with the administrator's consent to resolve to place a company in liquidation at the first meeting of creditors. In your view, does that process of initiating a winding up take sufficient account of the rights of creditors and shareholders? Would it fundamentally alter the current method for initiating a creditors' voluntary winding up? Indeed, would there still be a role for the voluntary winding up provisions if that suggestion was adopted?

**Mr Harmer**—First, it is inevitable that, as I think I said earlier, any regime that is designed to encourage rescue or rehabilitation will, of necessity, have a number—indeed, probably a fairly high percentage—of failures. I can recall during my work at the commission we thought, 'Maybe if you can save just 10 per cent of all insolvent or near insolvent corporations then you are going to be at least nine per cent in front'—in front of what was then happening. It is inevitable that you are going to get not so much abuse of the system, but you are going to get directors and companies invoking something like voluntary administration, perhaps with some faint hope or expectancy that there might be something to be rescued or retrieved.

The fact that the creditors ultimately determine that that corporation should be wound up is I do not think necessarily a reflection on the quality of the regime itself. The regime anticipates that, which is the very reason it gives the creditors the right to reject any particular proposal or plan and to resolve for the company to be wound up. You might save time in some cases. You might save some expense by enabling that type of decision to be taken at an earlier point in time. But I wonder whether there is such a huge degree of cost and inefficiency by enabling that

process to take place in a fairly short time after the whole process commences. So I would not be in favour of the idea.

**Senator WONG**—I have a few questions. While we are on this issue, I entirely agree with your comments regarding the importance in the Australian system—and I think it is widely accepted—of having that independent administrator as opposed to a debtor in possession regime. We have had a reasonable amount of criticism that the voluntary administration scheme has problems in two particular areas. One is that there is not sufficient early intervention and the fact that the majority of companies which enter into deeds of arrangements do fail. The second issue that I wanted to raise on that is that one of the submissions particularly says that the voluntary scheme is being used, or abused I suppose is the better term, as a fast-track way of getting a company to a liquidation process rather than in a genuine attempt to allow the company to try to trade its way out of its financial circumstances. Do you have any comments on those two areas?

**Mr Harmer**—Yes, certainly. First, on the suggestion or on the view that intervention is not early enough—I would understand by that people are saying that companies do not come forward when financial trouble starts to emerge; they are leaving it too late—there is some deep-rooted financial difficulty. If that happens then the prospect of rescue or rehabilitation is consequently greatly reduced.

**Senator WONG**—Do you think that there would be any benefit in having different sets of obligations on directors such that would facilitate an earlier intervention?

**Mr Harmer**—We endeavoured to do that in the report by doing two things—firstly, offering this type of system and, secondly, imposing what we hoped would be a more compelling personal liability on directors if they failed to take relatively early and remedial steps. That was the so-called stick and the carrot was the user-friendly system.

**Senator WONG**—Are you referring there to the obligation on directors not to knowingly trade while a company is insolvent?

**Mr Harmer**—Exactly, yes. You can keep on imposing duties on directors. Whether or not that is going to necessarily get them to invoke procedures early, I do not know. But in the hands of responsibly minded directors, the system is there. I am not too sure about whether imposing further duties on directors is necessarily going to get the result. Senator Wong, concerning the second issue you raised, the suggestion that the administration is being used or abused because the majority of company arrangements fail, again, that is a statistic that would bear pretty good comparison with most other systems.

It is my understanding from both what I have read and in discussions with American colleagues that there is a much higher percentage of failure under the American system than there is under the Australian system. Indeed, that has sparked off a considerable criticism and inquiry into the operation of chapter 11 for that very reason. In a pragmatic sense, though, the fact is that, sure, you are going to get a percentage of failures. It is more important that the focus be upon the percentage of successes, or at least that there are successes in this system. I think you have to ask: what harm does it really do? A high percentage of companies go into voluntary administration only to be liquidated. Is it really harming anyone? Is it causing people to be

injured, affected or what? I would more myself be inclined to concentrate on the positives rather than on the negatives.

**Senator WONG**—Can I move to a different area, and that is the area of deeds of company arrangement. We have had a reasonable amount of evidence in relation to such deeds and some criticism in the evidence particularly of discriminatory deeds, meaning deeds that would alter the position of creditors from that which it would otherwise be under the act. We have had some evidence from a range of perspectives saying that if a deed were to alter the priority arrangements for creditors there should be some safeguards in the legislation in relation to such deeds. One option that has been suggested is that if you are going to ameliorate the rights of a particular group the majority of that group might need to agree. As a matter of practice, most of the evidence of the practitioners before us is that they would shy away from proposing such deeds, but equally we have also had evidence where there have been deeds where the priority has been altered, particularly in respect of employee entitlements. The first question is: do you think the current legislation regulates to any reasonable extent the content of a deed of arrangement? If not, should it and what form should that take?

**Mr Harmer**—The reason or the motivation for not imposing in a mandatory way the normal order of priorities that you would see in a liquidation was, as I recall it, again, to provide greater flexibility. But there would be instances where, for whatever reason, employees, for example, might agree that their priority was not maintained or was reduced or modified in some particular way possibly as a means to preserve their employment and to enable them to continue to be employed and so forth. That was a basic thinking. It was felt that if the priorities were changed or not provided for in the deed and a group of creditors was thereby considerably affected, then the remedy would lie in a court reviewing the deed and determining whether or not it had been transacted in good faith and to the benefit of creditors generally and when viewed as classes. I do not think that there should be any mandatory requirement that priorities as laid out elsewhere in the law should necessarily be followed.

Maybe some strengthening is necessary to require, for example, that the members of a class who would otherwise be entitled to priority should be seen to approve of the modification to their priority rights, but I do not think I would go so far as imposing that priority right in every case.

**Senator WONG**—But you do see some merit in the proposition that an affected class of creditors might be given greater weighting when considering a deed that altered their position in relation to the company?

**Mr Harmer**—I am going to say yes to that, but there is another small point I want to raise in connection with that.

**Senator WONG**—Before you do that, Mr Harmer, you made the point—we have had some evidence on this—that if someone has a problem with a deed they can be reviewed by the court. Obviously there is always the distinction between what might be one’s legal rights and the ability of people to access them. My recollection of the evidence from some of the legal practitioners in this area is that the consideration by the courts of this issue is quite reasonable in terms of the rights that the courts have suggested such creditors have. But equally, these legal practitioners made the point that that is not necessarily reflected in the legislation. For that

reason, I wonder whether there would be some benefit in making some positive statement in the legislation as an indication to administrators about what sorts of arrangements need to be considered when developing such deeds.

**Mr Harmer**—I understand. This touches upon something that is fairly relevant to a consideration of the distinction between the Australian and the American regimes. The American regime clearly provides for creditors to be put into classes. That includes creditors entitled to priority and so forth. The American legislation is quite strong in requiring, to the extent that it is desirable, those particular class rights not to be affected, prejudiced or otherwise. By the same token, the American scheme enables a court, even though a majority of a class has voted against the proposal, in effect to overrule that class in the greater interests of the thing.

We were quite deliberate in not providing for what you might term class warfare in the Australian legislation. We thought this would evolve, that maybe in given cases a wise administrator would clearly create a class of creditors who would otherwise be entitled to priority—class of secured creditors, class of least creditors and so forth. The fact that we did not was simply designed to encourage flexibility in that area and not to get involved in the American manner of dealing with those things. When it comes down to whether the legislation could say more with regard to the particular rights of various types of creditors, maybe that is the case, but I think once you start along that track you almost have to go the whole way and in effect adopt the American system.

**Senator WONG**—Do you not think there is anything between our position and theirs?

**Mr Harmer**—I doubt that there is a halfway house. If you are going to do anything in respect of one particular class of creditors others are going to say, 'What about this class of creditors; what about that class of creditors?' In a generic way, ultimately you are going to be faced with the consequence that your legislation will say, 'If any class of creditors is injuriously affected by the provisions of a deed, the consequence is as follows.' As to what that might be I would not speculate, but I would think that would have to apply across the board. If you just single out employees as a particular class, there may be some social policy that would justify that, but it seems to me that, if you were going to follow that policy line, inevitably you would have to make whatever type of provision available to any class of creditor.

**Senator MURRAY**—The Harmer report of 1988 became the act in 1993, but there were elements of that report which were not carried through to the act. With hindsight and with the benefit of 10 years of the act itself, are there any elements of your original report which you regret were not taken up?

**Mr Harmer**—I think all of those who were involved in the work leading to the report would be disappointed, for example, that as yet there is no provision in the legislation for the administration of assetless companies. You might recall that in the report we suggested that a fund be established to enable every company to at least be reported on and investigated up to a particular point. That is certainly a disappointment. We would also be a little disappointed that nothing further was done with regard to the commission's recommendations concerning insolvency administrators. We were looking to the establishment of a very early system of, hopefully, self-regulation. We also looked to a system of adequate licensing and determination of skills so that those handling voluntary administrations would come from the more skilled of

practitioners and not just from everyone who managed to be registered as a liquidator, and so forth. They are the two main areas where some disappointment would be felt.

**Senator MURRAY**—There is one in my memory—that is, the related company provisions.

**Mr Harmer**—Yes. I recall the commission was not as powerful as it could have been on that. One is still searching around for desirable and effective systems in other countries, but there is very little to be found I am afraid. Certainly we did recommend that there be a possibility of a pooling of assets and so forth, and that is another area that we would have liked to have seen followed through.

**Senator MURRAY**—Mr Harmer, as you know, there is a great move towards the international harmonisation of systems—financial taxation, intellectual property and all sorts of corporations systems. How important is it that Australia's insolvency laws connect into and are harmonised as far as possible with those of leading countries of the OECD or even our own area?

**Mr Harmer**—I think it is very important, considering the prospect of a multinational failure. By 'multinational' one is not nowadays referring to the great corporations of the world; one is often simply referring to small- and medium-sized companies that have some assets or some interest or whatever it might be in more than one country. It is important that there be a degree of harmonisation of the insolvency laws, particularly of neighbouring countries with which there is a fair degree of trade and commerce. However, the absence of harmonisation—the absence of a semi-universal theme flowing through each of the insolvency regimes of those countries—is not as important as providing for the recognition of and assistance with cases of cross-border insolvency.

Those of us who have been involved in looking at the international aspects of insolvency—the comparative regimes and so forth—concluded a long time ago that harmonisation is just not going to happen. There are too many different influences that prevent that from being an ideal system. We only have to look at the EU to see that that became an impossible dream. So a degree of harmonisation is entirely desirable—in particular, that there are rehabilitation or rescue regimes provided for in the domestic legislation of as many countries as possible. The manner in which those regimes might be initiated and now they might be applied must be left to each individual country. The important thing is for there to be a basis for recognition and assistance based upon the possible application of their respective laws. I am not sure whether that answers your inquiry, but that is what I took it to be leading towards.

**Senator MURRAY**—It does. I should tell you what is in my head, which is whether the committee should—not so much in a motherhood sense but in a far-seeing sense—recommend to the government that they initiate or participate in moves for the international examination of insolvency laws for an eventual more harmonised outcome. As you know, this committee is heavily involved in watching that process happen with accounting standards, and there are many areas to do with Corporations Law where that kind of discussion is going on. I am not particularly well informed, but I am not really aware of anything of that sort happening in the insolvency field.

**Mr Harmer**—Except for this, Senator Murray, and that is the work of UNCITRAL, the United Nations Commission for International Trade Law, which I mentioned my involvement with early in this submission. UNCITRAL is about to complete—and will complete by the middle of next year—model legislative guidelines for a modern insolvency law. That has been the product of the 50 or so nations that form part of the working group. Australia has been represented by Andrew Sellars of the Treasury, and that work is designed to be used as a guide for both the development and the reform of insolvency law by enabling legislators in countries to recognise what are regarded as being highly acceptable and highly recommended provisions of an insolvency law. In some cases they are as broad as they are long; nonetheless the principles are slowly but surely being established. It is hoped that in time that will bring about or attempt to bring about harmonisation of the type that you have been talking about.

**Senator MURRAY**—Last question: is there an interim report or anything of that sort that the committee could latch onto as an influence on its own findings?

**Mr Harmer**—Yes, indeed. There is an UNCITRAL web site, where all of the up-to-date papers of the working group would be available. Armed with those—which I think now run to about 230 pages—I think you will be able to see what is coming out of UNCITRAL. As I said, it has reached almost the point where it is to be included, and most of the recommendations are fairly firm. So that would certainly be available. There is probably no better person to direct the committee to as a source, than Andrew Sellars, who is in Treasury.

**Senator WONG**—Mr Harmer, can I just clarify one thing? In answer to a question from Senator Murray, when he asked you about aspects of your report which had not been implemented, I think you referred to a system of self-regulation, which I understood to be in relation to administrators. Is that right?

**Mr Harmer**—That is correct, yes.

**Senator WONG**—The independence of administrators is an issue that has been raised with us. Some of the suggestions include the requirement to provide statements of independence and giving some legal sanction to a code of ethics and so forth. In brief, do you have any suggestions to make about how the system might be changed to ensure the independence of administrators and, more importantly perhaps, the perception of their independence?

**Mr Harmer**—Certainly. I think there should be a positive requirement to make a declaration at the very beginning. That should be a continuing requirement, so that if any circumstance arises that will immediately impose an obligation for a further declaration. It might be strengthened by providing for greater sanctions where there has clearly not been a disclosure. Rather than the possibility of having your appointment terminated, I think it should be carried further, at least in the professional body that ultimately regulates insolvency practitioners. That is where some greater sanctioning should lie.

**Senator BRANDIS**—Mr Harmer, I know that your submission is directed to corporate insolvency, but I was wondering if I could ask you a broader question. We heard some evidence on an earlier occasion from Professor Keay. He advocated very strongly that laws regarding corporate and personal insolvency should, allowing for obvious differences, as nearly as possible be made uniform. Do you have a view about the wisdom of that?

**Mr Harmer**—When you say ‘uniform’, do you mean in the sense—

**Senator BRANDIS**—I think what he contemplated was a single insolvency code that would allow for different situations for the more complex issues concerning corporate insolvency, rather than having a set of bankruptcy laws and a set of corporate insolvency laws which, whilst having obvious commonalities, were nevertheless two different bodies of law—that there ought to be a uniform body of law.

**Mr Harmer**—You might recall that in the commission’s report we touched upon that and then left it. There were a number of us who very much wished to make a very strong recommendation to government for a single insolvency law.

**Senator BRANDIS**—Is that still your view, Mr Harmer?

**Mr Harmer**—Certainly.

**Senator BRANDIS**—Just so we can get this down on the record, can you give us a brief synopsis of the principal reasons that you embrace that view?

**Mr Harmer**—First, there are a sufficient number of fundamental concepts of insolvency that are common to both the corporate arena and the personal arena. It seems absurd to have two separate acts—two separate pieces of legislation—directed at precisely the same thing. The underlying sense of what it means to be insolvent or in financial difficulty—even going to the point of looking at what a debtor or creditor might do in that situation—there is a degree of commonality between the two systems in a number of fundamental areas.

Secondly, it would enable areas in which there has been, up to now, some different treatment to be made uniform, in particular in the area of the avoidance of antecedent transactions. This is an area that has always bedevilled Australian insolvency law and practice because of the attempted application of those provisions of the Bankruptcy Act to Corporate Law. Corporate Law has its own antecedent transactions thing, which is different from what is now in the Bankruptcy Act and so forth. Again, it is striking a blow for uniformity and for not having two separate sets of laws where there is a very good argument for uniformity.

Thirdly, one of the more important points relates to those who administer insolvency matters, both privately and in the public sector. We have never had in the corporate sector anything like the office of the official trustee, public trustee or whatever you would like to call it. If we had a uniform act, then it may be that the problem of the ‘assetless’ company could be solved by having the office of the official trustee, or whatever name it is given, able to handle, investigate and report on those cases. From the point of view of the public office administration of insolvencies, be they corporate or individual, I think there is again a strong argument for uniformity. I think they are the kinds of essential areas that I would be inclined to focus on.

**Senator BRANDIS**—Against that view it is said that, on the winding up of a corporation, one is governed only by considerations of commercial policy but, when one is dealing with personal insolvency, one is concerned not only with matters of commercial policy but also with what might very broadly be described as matters of social policy—that is, you are dealing with a human being who, at the end of this process, is going in a personal and commercial way to be

rehabilitated. To deal with that situation exclusively on the basis of considerations of commercial rationality fails to meet appropriate social policy needs. What do you say about that?

**Mr Harmer**—I do not see why they cannot be met regardless of whether you have separate pieces of legislation, separate government regulatory departments or whatever. It works perfectly well in a federated system such as ours in Australia. There is room for the development of social policy on the personal side of bankruptcy or insolvency. At the same time, there is nothing to prevent the development of the commercial side when you look at corporations. I do not think that the fact that it might cause divisions within that legislative framework is an argument against it. I agree that there are some considerable different interests to be reviewed, but I cannot see why they cannot be accommodated, even under one uniform legislative enactment and under one regulatory or semiregulatory body.

**CHAIR**—One of the issues that has been raised is the concern about the prevalence of fraudulent phoenix companies, especially in the building and construction industry in Australia. That has also been reinforced by the findings of the Cole royal commission. Currently the Corporations Act allows ASIC to disqualify a person from managing a corporation for up to five years. From your international experience, are you aware of any alternative approaches in other countries to deterring the activity of phoenix companies?

**Mr Harmer**—Other than the disqualification mechanism, not really, no—certainly none that offer any better way.

**CHAIR**—Another issue that has been raised in submissions is the capacity of an administrator to exercise a casting vote at the first meeting of creditors. It has been claimed that this leaves too much power in the hands of an administrator, particularly if there is a tied vote to remove the administrator and the administrator has the casting vote. Do you have any concerns about the method of voting by creditors under voluntary administration? Would it adversely affect the conduct of administration if the administrator's right to a casting vote were to be removed?

**Mr Harmer**—It certainly was not a recommendation of the report that the administrator have a casting vote. Rather, it was suggested, as I recall, that in the event of some type of deadlock perhaps the court would have to decide. In retrospect that is probably not a terribly sensible suggestion, because the court is then going to have to become embroiled in decisions of commercial interest and so forth. That might be an unfair burden to impose upon the court. Quite frankly, I do not know how to solve it. I am certainly not encouraged to the view that the administrator should have this casting vote. Perhaps there is nothing inherently wrong in terms of a casting vote as to whether a deed or liquidation is the way forward. When it comes to the possible removal of that person or things to do with that person's remuneration, there is a degree of difficulty. Maybe one answer is to have a meeting chaired by someone other than the administrator and give the casting vote to the person in the chair.

**CHAIR**—There being no further questions, Mr Harmer, I thank you for your appearance before the committee, particularly as it is relatively early in the morning over there. We have certainly appreciated your evidence. As you can see, we have gone on for quite some time, so your answers to our questions certainly have been useful from our point of view. It has been very

valuable in terms of our inquiry. On behalf of the committee I thank you for your contribution to our work.

**Mr Harmer**—It is a pleasure to be able to communicate, even though there is this huge distance separating us. Thank you for the opportunity.

**Committee adjourned at 5.39 p.m.**