PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

Corporate Insolvency in Australia

Wednesday 1 March 2023

Evidence of Mr Michael Murray and Professor Rosalind Mason

Question

Senator SCARR: Just on that point, how long did the Harmer report process take, in terms of process and then implementation? I should say we've received some testimony that some of the recommendations in the Harmer report, particularly with respect to trusts, haven't been implemented at all, and that's an area which needs to be looked at. But how long did that process take, and how long do the witnesses envisage that a Harmer 2.0 process would take in the current context, especially if it were to look at personal insolvency and corporate insolvency?

Dr Mason: I'm not quite sure how long it took, though my memory is that it was something like five years. I do remember hearing Ron Harmer talk about 1993 and the big changes that came through there with the discussions with the tax office et cetera, and with voluntary administration coming in. As far as I'm aware it would be at least five years for some of the most significant reforms, but Mr Murray may be able to help you with more detail.

Mr Murray: I have the Harmer report here. I'd be happy to take that query on notice, if you like, and find out when it was first commissioned, when the report was handed down and then, following that, when the laws were introduced.

Senator SCARR: I'd be very pleased for you to take that on notice … If you could take that on notice I'd find that timetable to be very useful as the committee forms its views. If any of the other witnesses have views with respect to the timing and process of any root and branch review, I'm happy for them to take that on notice as well.

Response

The Harmer Report

In November 1977 the Law Reform Commission published Report no 6 – "Insolvency: The Regular Payment of Debts" - in which it was suggested that a general reference on insolvency be given to the Commission.

On 20 November 1983, the Attorney-General, having regard to Report no 6, referred to the Law Reform Commission "the law and practice relating to the insolvency of both individuals and bodies corporate …".

The Commissioner in Charge was Mr RW Harmer, hence the common name of the final report is the Harmer Report.

In the course of that inquiry the Law Reform Commission published an Issues Paper No 6 in January 1985.

Then in August 1987, the Commission released a discussion paper no 32, with its preliminary views on reform. Submissions were called for.

The Commission's final report ALRC 45 – 'General Insolvency Inquiry' – was issued in September 1988, nearly 5 years after the inquiry commenced.

The bulk of the changes to corporate insolvency law recommended by ALRC 45 took another 5 years, being introduced by the Corporate Law Reform Bill 1992 which commenced on 1 July 1993.

Article

We think that the Committee would be assisted by an article of Professor Mason – *Insolvency Academics Contributing to the Review of Insolvency Laws: An Australian Perspective* – in the Nottingham Insolvency and Business Law e-Journal - (2015) 3 NIBLeJ 14. In that article, Professor Mason gives an account of the progress of the Harmer Report and of other law reform inquiries in recent years, including parliamentary inquiries, in which insolvency academics have made significant contributions. We enclose a copy for the Committee's consideration.

Senate Economic References Committee Report 2010

The article of Professor Mason also refers to the then progress of the reforms following from the September 2010 Senate Economic References Committee Report – "The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework". That inquiry commenced on a reference from the Senate of November 2009; its progress through advertisements, submissions and hearings is recounted at [1.9] to [1.18] of the Report.

That Report ultimately led to the major personal and corporate reforms introduced by the *Insolvency Law Reform Act* 2016, which commenced in two stages, in March and in September 2017, that is, nearly 7 years after the 2010 report. It is to the Explanatory Memorandum to the Insolvency Law Reform Bill 2015 and related documents that we refer in our joint submission to the Committee of 29 November 2022.

Further article

We have since published an article on the issues we raise in our submission - *Harmonising the responsibilities of directors of insolvent companies with those of bankrupts* – (2023) 22(5) INSLB 76. We enclose a copy for the Committee's consideration.

M Murray ***R Mason***

Michael Murray Dr Rosalind Mason

16 March 2023

(2015) 3 NIBLeJ 14

Insolvency Academics Contributing to the Review of Insolvency Laws: An Australian Perspective

Rosalind MASON*

Introduction

1 It gives me great pleasure to contribute to this publication to honour Professor Ian Fletcher on his retirement as Foundation Chair of the INSOL International Academic Group. A collection of essays that include topics on domestic, cross-border and international insolvency appropriately reflects the breadth of Professor Fletcher's impact on the scholarship of insolvency law – not only in his "home" jurisdiction of England and Wales and closer to home in Europe, but also stretching around the globe, in this case, to Australia.

2 In the early 1990s when I first began to research in the area of cross-border insolvency law, a colleague mentioned that they had recently attended the XIIIth International Congress of Comparative Law in Montreal in August 1990 and heard the *Cross-border Insolvency: General Report* expertly delivered by an English academic, Ian Fletcher, who was widely regarded as an authority in the area. This was my first introduction to Professor Fletcher's work and over the intervening years I have referred often to his scholarship.

3 It was at the 2001 Academics Colloquium, the academics' ancillary meeting at the INSOL International Quadrennial Conference in London, that I met Professor Fletcher in person. As Chair of this international group of insolvency academics, his leadership at the 2001 and subsequent conferences has been collegial, inclusive, and his scholarly insights have enhanced the colloquium discussions. Using his deep technical understanding of insolvency law and practice, he has led by example in engaging with legislators and with policy-makers both at home[1] and on the international stage[2] to improve the (re-)design of insolvency systems.

* Rosalind Mason is Professor of Insolvency & Restructuring Law at the Faculty of Law of the Queensland University of Technology, Brisbane, Australia.

4 As such it seems fitting to contribute to this collection an article which addresses the contribution of research by insolvency academics to the development of insolvency law and practice.[3] It draws on examples from Australia of government enquiries to reform insolvency law as well as other areas of law with which it intersects. It comments on the role that insolvency academics[4] can play in such policy debates for the public good.

5 Where governments seek to improve the laws regulating business failure (as well as consumer over-indebtedness), insolvency academics can bring to the process insights they gain through their teaching. The process of regularly lecturing on insolvency law provides a valuable and deep understanding of its internal and external connections. This is a good foundation from which to analyse an area. Teaching also requires academics to maintain currency on case law developments and issues arising in practice. Such insights provide a perspective which places insolvency academics in a unique position, as "disinterested" observers, to contribute to the public good by way of commentary and submissions to improve the law.

6 This article draws upon material that is publicly available on the internet for the benefit of an audience around the globe – in particular for those who may be interested in comparative research on insolvency with an Australian dimension.[5] There will no doubt be issues that Australia shares in common with a range of jurisdictions, as well as points of difference that may be interesting and informative for future research.

7 This article will first provide some background on the Australian context for insolvency law and policy. Secondly, it will describe three broad categories of

---

[1] For example, Ian Fletcher made a written submission to the Cork Committee appointed in 1977 to review Insolvency Law and Practice in England and Wales and consistently contributed to subsequent enquiries to reform domestic insolvency laws.

[2] He has participated in projects such as the World Bank Task Force to develop principles and guidelines for effective insolvency systems and, as a co-reporter, the Transnational Insolvency Project initiated by American Law Institute and the International Insolvency Institute.

[3] This article is a revised version of the Edwin Coe Lecture delivered by the author on 9 October 2014 at the INSOL Europe Academic Forum Conference, held in Istanbul.

[4] My focus has been on insolvency law academics, although in my review of government enquiries, it is encouraging to see that academics from a range of law sub-disciplines, as well as other disciplines, such as economics and social work, have contributed their expertise. I have also observed valuable contributions to the law reform process by scholarly practitioners in legal and accounting practice as well as from professional associations.

[5] For that reason, the names of insolvency researchers and their university affiliations are included in the text or footnotes. This is based on information on the web sites for the various enquiries – although it is possible that some submissions have been inadvertently missed or that for some researchers their university affiliations have changed.

government enquiries to which insolvency academics have contributed in recent decades. They are:

(i) referrals to independent law reform commissions by the Attorney-General;
(ii) a range of departmental consultations by working parties, through discussion or options papers as well as enquiries by relevant statutory advisory bodies; and
(iii) enquiries undertaken by committees of parliamentarians.

8 Finally, it draws together some themes about the contributions that insolvency academics can make to government attempts to improve insolvency systems and encourages academics, whether in Australia or elsewhere, to contribute their unique expertise when similar opportunities arise. In so doing, they will be following in the footsteps of scholars such as Professor Ian Fletcher.

The Australian Context

9 To begin, it is important to appreciate the constitutional context for Australian law-making regarding insolvency. In 1901, the six Australian colonies federated to become the Commonwealth of Australia, comprising six States.[6] Under the Australian Constitution, the new Federal Parliament was granted a specific power, to be exercised concurrently with the States, to make laws with respect to "bankruptcy and insolvency".[7] The colonies' personal bankruptcy and insolvency laws continued in existence until comprehensive federal bankruptcy legislation came into effect in 1928. The main statute that currently applies to the insolvency of natural persons is the Bankruptcy Act 1966 (Cth).

10 Although the grant of power to the Commonwealth to legislate on "insolvency" was wide enough to extend to the liquidation of companies,[8] the then English approach of including the regulation of corporate insolvency in the general corporations legislation was followed in Australia. Thus, the colonies - and later, the States - continued to legislate on the winding-up of trading companies and other associations in various Companies Acts.[9]

11 The Australian Constitution granted the Commonwealth concurrent law-making power with the States over corporations, in respect of:

---

[6] New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. There are also two internal Territories: the Australian Capital Territory, the seat of the national capital Canberra, and the Northern Territory.
[7] Section 51(xvii), Australian Constitution. Australian statutes are available at: <www.austlii.edu.au>.
[8] Justice R. French, "Federal Jurisdiction — An Insolvency Practitioner's Guide to the Labyrinth" (2000) 8 *Insolvency Law Journal* 128, at 129.
[9] M. Gronow, *McPherson's The Law of Company Liquidation* (2008, Lawbook Co, Sydney), at paragraph 1.400.

> "…foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."[10]

12 Despite the constitutional limitations imposed by the words "trading", "financial" and "formed", a move towards uniform corporate regulation in Australia began in the early 1960s. However ongoing constitutional difficulties required the referral of state powers to the Commonwealth[11] combined with the Commonwealth's pre-existing constitutional powers to finally achieve a sound basis for comprehensive federal legislation in the form of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth).[12] Thus the parliament with responsibility for legislating on both personal and corporate insolvency is the Commonwealth or federal Parliament based in Canberra.

13 However, the bifurcation of insolvency law between individual (or natural person) debtors and corporate debtors has resulted in separate regulatory bodies for personal and corporate insolvency administrations and practitioners. Individual debtor administrations are regulated by the Australian Financial Security Authority ("AFSA") established as an executive agency within the Attorney-General's portfolio.[13] Corporate insolvency administrations are regulated by the Australian Securities and Investments Commission ("ASIC").[14] ASIC and AFSA have signed a Memorandum of Understanding to provide a framework for cooperation in the performance of their regulatory functions[15] and both bodies are members of the International Association of Insolvency Regulators ("IAIR").[16]

14 More significantly for present purposes, different government departments are responsible for policy and law reform for personal and corporate debtors.[17] The Commonwealth Attorney-General has responsibility for bankruptcy policy, the Bankruptcy Act 1966 (Cth) and AFSA. Within the Attorney-General's Department, The Civil Law Division (within the Civil Justice and Legal Services Group) advises

---

[10] Section 51(xx), Australian Constitution.
[11] Ibid., section 51(xxxvii).
[12] The states agreed to refer the relevant powers for a period of five years that may be terminated earlier or may be extended by proclamation. The referral of powers has since been extended, most recently until 2016.
[13] Until August 2013, it was known as the Insolvency and Trustee Service Australia ("ITSA"). For more information, refer to the Annual Report available at: <www.afsa.gov.au>.
[14] See: <www.asic.gov.au/>.
[15] In September 2014, ASIC and AFSA signed a new Memorandum of Understanding (replacing a 2002 agreement) to facilitate liaison, cooperation, assistance and the exchange of information between the agencies in performing their regulatory functions, for which see: <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AFSA-MOU-published-1-October-2014.pdf/$file/AFSA-MOU-published-1-October-2014.pdf>.
[16] See: <http://www.insolvencyreg.org/>.
[17] Until 1996, they were in different sections (ITSA and Companies and Business Law Section) within the Attorney General's Department. However, the Companies and Business Law Section was moved to Treasury following the 1996 election and a change of government.

the Attorney-General on policy relating to, bankruptcy and insolvency. As AFSA's Portfolio Department, it also communicates with industry through the Bankruptcy Reform Consultative Forum.

15 Corporate insolvency law reform is the responsibility of The Treasury, which provides advice to government on company law and corporate governance issues, corporate insolvency, corporate financial reporting and oversight of portfolio agencies connected to corporate regulation and related financial issues. Corporate insolvency falls within the Financial Services and System Division which sits within the department's Markets Group.

16 Beginning with law reform commission referrals, the article now provides an overview of government enquiries into Australia's insolvency laws since the late twentieth century describing the contribution by insolvency academics to such enquiries to improve the design of the Australian insolvency system.

Law Reform Commission Enquiries

17 There have been few formal Australian law reform commission referrals that comprehensively enquire into insolvency. The most recent reports have their origins in 1976 when the Commonwealth Attorney-General issued terms of reference to the Australian Law Reform Commission (ALRC) to report upon whether the Bankruptcy Act 1966 (Cth) adequately provided for small or consumer debtors to discharge or compromise their debts from their present or future assets or earnings and what legislative measures could be adopted to provide financial counselling facilities to small or consumer debtors.[18]

18 The reference resulted in ALRC Report 6 "*Insolvency: The Regular Payment of Debts*" (1977).[19] The Commissioner in Charge, David Kelly,[20] was assisted by consultants who included industry experts as well as three Australian academics.[21] It is noteworthy that the ALRC also consulted internationally – appointing an expert on bankruptcy law, Harvard Law Professor Vern Countryman.[22] The

[18] In making its report, the ALRC was to have regard to "the community's interest in the financial rehabilitation of small but honest debtors, and the need to ensure that creditors have an effective means of enforcing the payment of debts due to them." (Insolvency: The Regular Payment of Debts [1977] ALRC 6, at v).

[19] See: <http://www.alrc.gov.au/report-6>.

[20] David Kelly was a foundation full time member of the Australian Law Reform Commission (1976-1980) and a Professor of Law at University of Adelaide (1980-1983).

[21] Professor Colin Howard (University of Melbourne); Anthony Moore (University of Adelaide); John Willis (La Trobe University).

[22] On Professor Countryman's support for the rights of the debtor, see: <http://www.law.harvard.edu/news/bulletin/backissues/fall99/article6.html>.

Commission received written submissions from four Australian academics[23] as well as a Canadian Professor.[24]

19 The final Report concluded that the existing systems were inadequate, as they did not meet the needs of a modern consumer credit based society and recommended a review of the entire law of bankruptcy.[25] A substantial review of the Bankruptcy Act 1966 (Cth) was undertaken by the Department of Business and Consumer Affairs and the Act amended in 1980.[26] An example of a recommendation which was taken up, albeit in an amended form, was the introduction of automatic discharge from bankruptcy.[27] Some other recommendations were not implemented for many years.[28]

20 During its work on ALRC Report 6, the ALRC identified that judgment debt recovery procedures in the States and Territories could contribute to worsening insolvency. As a second stage of its response to the 1976 terms of reference, the ALRC investigated these procedures more fully in ALRC Report 36 "*Debt Recovery and Insolvency*" (1987).[29] Professor David Kelly continued as the Commissioner in Charge (1976–1985).[30] Consultants were appointed once again and comprised industry experts and academics, from Australian and overseas law schools[31] as well as from a department of social work.[32] Submissions were received from two academics[33] and an academic consultant made oral submissions during the public hearings.[34]

---

[23] Professor Bob Baxt (Monash University); Bruce Kercher (Macquarie University); C.W. O'Hare (Monash University); J. Neville Turner (Monash University).

[24] Professor William Neilson (University of Victoria, British Columbia).

[25] ALRC Report 6 concluded that the procedures provided under the Bankruptcy Act 1966 (Cth) for rearranging of debts were costly, cumbersome and inappropriate for the needs of non-business debtors. See: <http://www.alrc.gov.au/inquiries/insolvency-and-debt-recovery>.

[26] ALRC Report 36, Chapter 1 Introduction, at 2.

[27] ALRC Report 6 recommended an automatic six-month discharge for non-business debtors unless creditors object. Instead the 1980 amendments provided that a bankrupt should be automatically discharged from bankruptcy after three years although it also introduced procedures for objecting to the discharge.

[28] For example, a system for the regular payment of debts for non-business debtors was introduced in 1997 through a new Part IX in the Bankruptcy Act 1966 (Cth) on Debt Agreements.

[29] See: <http://www.alrc.gov.au/report-36>.

[30] Ron Harmer was also appointed a Law Reform Commissioner during this period.

[31] From Australia, A.J. Duggan (University of Melbourne, subsequently of University of Toronto); Bruce Kercher; A.P. Moore (University of Melbourne) and J.E. Willis (La Trobe University). From overseas, Dr C.G. Veljanovski (Centre for Socio-Legal Studies, Oxford University).

[32] Dr. T.C. Puckett (La Trobe University).

[33] A.J. Duggan (University of Melbourne) and Bruce Kercher (Macquarie University).

[34] J. Willis (La Trobe University), who had also consulted on ALRC Report 6. Ron Harmer also made oral submissions at the public hearings in Perth.

21 The ALRC acknowledged additional assistance was received from a large number of persons and organisations, including local[35] and international[36] academics. One of these was Professor Alan Fels, an Australian economist and lawyer,[37] who had criticised the ALRC Report 6:

> "…for its failure to analyse the costs and benefits of the reforms it proposed."

It was said that:

> "…the discussion of insolvency took place in an economic vacuum; overlooking considerations of demand and supply; with no attempt to assess whether the proposed reforms might have significant and adverse effects on the supply of credit."[38]

22 The 1977 Report's recommendation of a general insolvency inquiry was taken up in 1983 when the Attorney-General referred the law and practice relating to the insolvency of both individuals and bodies corporate to the ALRC. The consequent ALRC Report 45 "*General Insolvency Inquiry*" (1988)[39] is commonly known as the "*Harmer Report*" after the Commissioner-in-Charge Ron Harmer, then a legal practitioner and subsequently a Professor at University College London.[40] The part time Commissioners on this reference included another scholarly practitioner, Richard Fisher.[41] Consultants included three Professors of Law[42] as well as a Professor of Banking and Finance.[43] The list of written submissions discloses significant Australian and international academic input.[44] The public hearings did not appear to include academics.

---

[35] These included Professor Maureen Brunt and Professor Alan Fels, competition lawyers (Monash University); Martin Ryan (Department of Social Work, La Trobe University).

[36] Professor C.R.B. Dunlop (a Canadian specialist in creditor and debtor law) and Professor R.M. Goode OBE LLD (an English specialist in corporate and insolvency law).

[37] Professor Fels became chairman of the Australian Competition and Consumer Commission (1995–2003).

[38] ALRC Report 36, above note 23, at 115.

[39] See: <http://www.alrc.gov.au/report-45>.

[40] A co-teacher with Ian Fletcher in the UCL postgraduate program, Ron Harmer was an internationally recognised insolvency expert who worked with many multilateral organisations, including INSOL International, the Asian Development Bank, the World Bank, the European Bank for Reconstruction and Development and UNCITRAL on improving the design of insolvency systems.

[41] Richard Fisher AM was then a partner at Dawson Waldron and subsequently became General Counsel and an Adjunct Professor at University of Sydney.

[42] Professor Robert Baxt, who at the time was Chairman, Trade Practices Commission; Professor Harold Ford (University of Melbourne), Chairman of the Companies and Securities Law Review Committee, which was established by the Ministerial Council for Companies and Securities pursuant to the inter-governmental agreement between the Commonwealth and the States to assist the Ministerial Council by carrying out research into, and advising on, law reform relating to companies and the regulation of the securities industry; and Professor James O'Donovan (University of Western Australia).

[43] Professor Tom Valentine (Macquarie University).

[44] These included submissions by Professor Ford (University of Melbourne); A.P. Moore (University of Melbourne); Dr. O'Donovan (University of Western Australia).

23 ALRC Report 45 examined the developments of overseas jurisdictions in relation to insolvency, in particular in relation to voluntary arrangements with creditors. There were nine submissions from the United States including from Professors Thomas Jackson, Frank Kennedy and Kenneth Klee.[45] The ALRC also received submissions from Europe on cross-border insolvency - from Professor Ulrich Drobnig, Max Planck Institut, Hamburg and Professor Dr Hans Hanisch, Switzerland.

24 The Corporate Law Reform Act 1992 (Cth) implemented many of the 1988 Report's recommendations on corporate insolvency, including the introduction of the new Part 5.3A on voluntary administration, which was a significant development in Australian corporate rescue regulation. In 1993, legislative changes also implemented the Harmer Report's recommendation to abolish the statutory priority of the Tax Commissioner over other creditors in bankruptcy and insolvency in relation to unremitted tax.[46] This was well-received by insolvency specialists, although other legislative provisions have ensured taxation laws continue to have a significant impact on insolvency.[47]

25 So far I have discussed formal Law Reform Commission enquiries concerning insolvency that were referred to it by the government of the day. Now I will provide a snapshot of some less formal ways in which the government gathers input on policy and law reform.

Governmental Enquiries

26 A recurrent theme of Australian enquiries has been government interest in the regulation of insolvency practitioners.[48] In 1993, the government established the "*Working Party on the Review of the Regulation of Corporate Insolvency Practitioners*".[49] This was a result of recommendations for changes to the regulation of insolvency practitioners made by the *Harmer Report* (1988) and the

[45] While a number appear to be practitioners, such as James W Meyers, Myron Sheinfeld and Ralph Boldt, there are also some well-known names in bankruptcy scholarship: Thomas Jackson (during the 1980s, a professor researching bankruptcy law at Stanford University and Harvard University); Frank Kennedy (professor teaching bankruptcy law at University of Michigan Law School); and Kenneth Klee (professor of bankruptcy and reorganisation law, UCLA Law Faculty).

[46] The Insolvency (Tax Priorities) Legislation Amendment Act 1993(Cth) amended the Income Tax Assessment Act 1936 (Cth), the Bankruptcy Act 1966 (Cth) and the Corporations Law.

[47] For example, see C. Brown *et al.*, "The Certainty of Tax in Insolvency: Where does the ATO fit?" (2011) 19(2) *Insolvency Law Journal* 108.

[48] That is, the specialist accounting professionals who are appointed as company liquidators, bankruptcy trustees etc.

[49] It comprised departmental officers; a senior corporate regulator; accounting and legal practitioners specialising in insolvency as well as the President of the insolvency practitioners' professional body.

Trade Practices Commission in its "*Study of the Professions*" (1992).[50] The only submission by an academic[51] was in respect of the importance of local regulation of corporate insolvency practitioners for cross-border insolvency practice. The Working Party Report was delivered in June 1997 and after some ten years, it was finally referred to in the Corporations Amendment (Insolvency) Bill proposals which were introduced in 2007.

Discussion Papers and Options Papers

27 In recent years, the federal government has issued Discussion Papers and Options Papers, seeking input on specific law reform proposals, including the regulation of insolvency practitioners. In June 2011, the Attorney-General and the Parliamentary Secretary to the Treasurer released an Options Paper titled "*A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia*" (2011).[52] It examined reforms "to address concerns about misconduct in the insolvency profession" and "to improve the value for money for recipients of insolvency services".[53] Of the 33 submissions received,[54] one was from insolvency academics Associate Professors Christopher Symes[55] and David Brown.[56]

28 Then, in December 2011, the government issued a Proposals Paper[57] to which there were some 29 submissions,[58] including from Associate Professors Colin

[50] Its mandate was to consider and make recommendations as to whether any changes should be made to the current system for the registration, appointment and remuneration of insolvency practitioners, as well as to the procedures for responding to complaints about the conduct of corporate insolvency administrations.

[51] The author, then at University of Southern Queensland.

[52] Both Ministers were involved as it covered practitioners appointed in both personal and corporate insolvency. See: <http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2011/A%20Modernisation%20and%20Harmonisation%20of%20the%20Regulatory%20Framework/Key%20Documents/PDF/Options_Paper20110602.ashx>.

[53] Key reform areas in the paper include promoting a high level of professionalism and competence by practitioners, enhancing transparency and communication and promoting increased efficiency in insolvency administration. See: <https://www.afsa.gov.au/practitioner/pir-newsletter/june-2011-pir-newsletter>.

[54] See: <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2011/A-Modernisation-and-Harmonisation-of-the-Regulatory-Framework/Submissions>.

[55] University of Adelaide.

[56] Idem.

[57] See: <http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2011/Reforms%20to%20Modernise%20and%20Harmonise%20Insolvency/Key%20Documents/PDF/Proposals_Paper_insolvency.ashx>. It acknowledged the work of the Senate Economics Reference Committee, *Inquiry into Liquidators and Administrators* (2010), discussed below.

[58] See: <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2011/Reforms-to-Modernise-and-Harmonise-Insolvency/Submissions>.

Anderson[59] and David Morrison[60] as well as Associate Professors Christopher Symes and David Brown. Subsequently, draft laws on the regulation of insolvency professionals were released for public comment by March 2013.[61] Of the 16 submissions, none were by academics.

29 In November 2014, government released an Exposure Draft of a revised Insolvency Law Reform Bill 2014 (ILRB).[62] The stated goals of the proposed amendments include to "remove unnecessary costs and increase efficiency in insolvency administrations" and to "boost confidence in the professionalism and competence of insolvency practitioners". While some aspects are retained from the 2013 draft, a significant new development is the proposal to introduce delegated legislation to the insolvency statutes[63] by way of Insolvency Practice Rules for bankruptcy and for corporations, drafts of which were also released. The explanatory material anticipates the commencement date will be February 2016, if the Bill is passed during the second half of 2015.

30 Submissions to Treasury on the Bill closed in December 2014 and at the time of writing, they have not been published, although it is likely that a number of insolvency academics will have made submissions. There is also no information on when a (possibly revised) Bill might be introduced into Parliament. The ILRB addresses matters such as improved alignment of personal and corporate insolvency regulation,[64] including on the registration (including qualifications) and disciplinary frameworks that apply to registered liquidators and registered trustees.[65]

31 Another recent wide-ranging enquiry, the "*Financial System Inquiry*" ("FSI"), requested input on insolvency laws in Australia.[66] In 2013 the government initiated this inquiry following the 2012 release of a government Consultation Paper on strengthening the banking regulator's crisis management powers.[67] During the height of the global financial crisis which began in 2008, a few Australian banks

---

[59] Queensland University of Technology.
[60] University of Queensland.
[61] See: <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2012/Insolvency-Law-Reform-Bill>.
[62] See <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/ILRB-2014>.
[63] That is the Bankruptcy Act 1966 (Cth) and the Corporations Act 2001 (Cth).
[64] It is interesting though that it does not take up an option of moving regulatory oversight of insolvency functions from ASIC to AFSA. See the *Financial System Inquiry Interim Report*, referred to below, at pages 3-124 and 3-127.
[65] The final provisions in the ILRB also propose a few miscellaneous amendments unrelated to regulation of insolvency practitioners – for example, introducing a new definition of 'relation-back day' for winding up a company.
[66] See: <http://fsi.gov.au/>. This FSI material draws on joint research by the author with Michael Murray, Legal Director ARITA and Visiting Fellow, QUT Faculty of Law, on the Australian approach to crisis management in the banking sector.
[67] The Treasury, *Strengthening APRA's Crisis Management Powers* (2012, Consultation Paper), a copy of which is available at:
<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2012/APRA>.

did experience funding pressure to a limited extent, however there were no failures.[68] Subsequently there has been commentary about the possible need to review Australia's crisis management tools because of the concentrated structure of its banking sector.[69]

32 In July 2014, the FSI released an Interim Report in which it sought submissions on a wide range of issues, including whether there is evidence that Australia's external administration regime causes otherwise viable businesses to fail and, if so, what could be done to address this. The FSI has received over 6,500 submissions in response to its Interim Report, some of which are by insolvency academics and address the external administration issue.[70]

33 The FSI Final Report was released in early December 2014 and the Inquiry is now concluded. In respect of insolvency administrations, there were limited recommendations. The recurrent theme for insolvency research of the need for better data on insolvencies[71] is reflected in a broad recommendation to review the costs and benefits of increasing access to and improving the use of data, taking into account community concerns about appropriate privacy protections.[72]

34 Submissions to the FSI indicated that the external administration provisions are generally working well.[73] However it did recommend that government "consult on possible amendments to the external administration regime to provide additional flexibility for businesses in financial difficulty."[74] It refers specifically to submissions on 'safe harbour' provisions and suspension of ipso facto clauses to support restructuring efforts for firms facing financial difficulty.

35 Also, the FSI Final Report draws attention to the overlap in external administration and bankruptcy processes causing disproportionate complexity and cost as well as to a need for an improved complaints and dispute resolution

---

[68] See: <http://www.rba.gov.au/publications/bulletin/2011/dec/pdf/bu-1211-5.pdf>.

[69] International Monetary Fund, *Australia Financial System Stability Assessment* (IMF Country Report No 12/308, 2012), at 51, a copy of which is available at: <http://www.apra.gov.au>.

[70] Submissions were made by academics on a broad range of the issues, for example by Professor Justin O'Brien; Dr George Gilligan; Professor Ross Buckley; Ken Ooi; Professor Kingsford-Smith (University of New South Wales); Associate Professor Paul Latimer (Monash University) and Phillip Maume (Technische Universität München, Germany). The submission by Dr Colin Anderson, Cath Brown and the author (Commercial & Property Law Research Centre, Queensland University of Technology) addressed insolvency issues.

[71] See discussion below under Senate Committees.

[72] Regarding access to public sector information, the *Financial System Inquiry Final Report* notes (at p. 184) that the Productivity Commission has observed that, "... academics, researchers, data custodian agencies, consumers and some Ministers are eager to harness the evidentiary power of administrative data, but this enthusiasm generally is not matched by policy departments:" citing Productivity Commission 2013, *Annual Report 2012–13*, Chapter 1: Using administrative data to achieve better policy outcomes, Commonwealth of Australia, Canberra, at 1.

[73] *Financial System Inquiry Final Report*, at 265.

[74] Idem.

processes relating to the external administration regime.[75] Both these matters are subject to consultation through the ILRB. In respect of the possible creation of a single insolvency regulator for both personal and corporate insolvencies, the FSI was not persuaded that there is a strong case for removing any of ASIC's functions, other than possibly separating out its registry business.[76]

Federal Statutory Authorities

36 Another avenue for governments considering policy reform is through its own advisory bodies, established as federal statutory authorities.

37 From 1989 – 2014, a statutory body the Corporations and Markets Advisory Committee ("CAMAC")[77] provided independent advice to the responsible Minister on the administration of corporate and financial services laws or changes to them.[78] While CAMAC undertook work on its own initiative,[79] most issues were referred by government Ministers. For example, in May 2007, the Parliamentary Secretary to the Treasurer referred a number of issues on insolvency law to CAMAC arising from its consultation on proposed changes to the law through the Insolvency Bill (2007) referred to below. CAMAC issued a consultation paper to which it received submissions, including from academics.[80]

38 CAMAC's role was only to make recommendations and there was no requirement for the Minister or government to act on its reports. Just one example of its impact has been the reference to its reports on "*Corporate Voluntary Administration*" (1998) and the "*Rehabilitation of Large and Complex Enterprises*" (2004) in the Explanatory Memorandum to the Corporations Amendment (Insolvency) Bill 2007.[81]

39 An ongoing federal statutory body is the Productivity Commission ("PC"),[82] the government's independent research and advisory body on a range of economic,

---

[75] Ibid., at 266.
[76] Ibid., at 235.
[77] See: <http://www.camac.gov.au/CAMAC/camac.nsf>. Its most recent report was on report on crowd sourced equity funding in May 2014.
[78] The federal government announced CAMAC's abolition in its 2014-15 Budget as a "smaller government" measure. See: <http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-07.htm>. The committee's advisory function is to be merged into Treasury. A draft Bill to effect this has been released for consultation. At the time of writing, there is no further information on the progress of the Bill.
[79] Such as the "*Members' Schemes of Arrangement Report*" (2009).
[80] The submission by Professor Michael Adams (University of Western Sydney) and Dr Marina Nehme (then University of Western Sydney) was cited at 18 and that by Anil Hargovan (University of New South Wales) at 74. All are available under the rubric "Submissions" at: <www.camac.gov.au>.
[81] Additional CAMAC publications include the "*Report on External Administrations*" (2008); "*Shareholder Claims against Insolvent Companies Implications of Sons of Gwalia Decision*" (2008).
[82] It is established under the Productivity Commission Act 1998 (Cth): <http://www.pc.gov.au/>.

social and environmental issues affecting the welfare of Australians. In 2010, it undertook a "*Regulatory Burdens on Business Review*" (2010) to which Associate Professors David Morrison and Colin Anderson made a submission regarding the duplication of laws around insolvency and the regulation of that profession.[83]

40 Another PC enquiry which intersected with insolvency law was the "*Inquiry into The Market for Retail Tenancy Leases in Australia*" (2007). Associate Professor Jenny Buchan,[84] an expert in franchising law, made a submission pointing out that in the event of a franchisor's insolvency, franchisees occupying retail premises were not protected under the relevant legislation in some States to their potential detriment.[85]

41 A current PC enquiry on "*Business Set-up, Transfer and Closure"* (2014)[86] is reviewing the barriers to business entries and exits in the Australian economy. It has been asked by the relevant Minister (the Treasurer) to identify appropriate options for reducing these entry and exit barriers, including advice on the potential impacts of the personal/corporate insolvency regimes on business exits.

Parliamentary Enquiries

42 Thus far, I have been addressing enquiries by the executive arm of government, Ministers and their Departments. I will now turn to the legislative arm of government, the Parliament. The Commonwealth Parliament itself also undertakes enquiries through its Parliamentary Committees and on occasions has done so in respect of insolvency law reform.

43 The Australian Parliament comprises a lower house (the House of Representatives) and an upper house (the Senate). Bills have to be passed by both houses and assented to by the Governor-General before they become Acts of Parliament.[87] Most enquiries in the area of insolvency have been initiated either by the Senate, which is understandable as it is a house of review and seen as a "watchdog" of the executive branch of government, or by joint parliamentary

---

[83] See: <http://www.pc.gov.au/__data/assets/pdf_file/0013/100606/subdr053.pdf>.
[84] University of New South Wales.
[85] "For example, if the franchisor becomes insolvent, the head lease may be disclaimed by the franchisor's liquidator... This leaves the franchisee who is a sub lessee, licensee, or casual tenant without a contract based right to remain in the premises unless a side agreement has been reached between the franchisee and the landlord." Jenny Buchan's Submission at 5, a copy of which is available at: <http://www.pc.gov.au/__data/assets/pdf_file/0014/70223/sub139.pdf>.
[86] See <http://www.pc.gov.au/inquiries/current/business/issues/business-issues.pdf>. Submissions have been called for by 20 February 2015.
[87] Bills can be introduced in either House, except for laws relating to revenue and taxation, which must be introduced in the House of Representatives: <www.aph.gov.au>.

committees comprising members of both houses of Parliament than by the House of Representatives.[88]

Senate Committees

44 The Senate has developed a comprehensive range of committees[89] to investigate matters of public policy; examine government administration; and scrutinise proposed legislation. The Senate Committee that is most relevant for policy and regulation in the area of insolvency is the Senate Economics Committee, however other committees can be involved depending upon the department responsible for proposed legislation. I will now discuss three types of enquiries by Senate committees.

45 First, a Senate Committee may be asked to examine proposed legislation. A recent example relevant to insolvency is an inquiry by the Senate Education and Employment Legislation Committee into employee issues in insolvency. On 4 September 2014, the Fair Entitlements Guarantee Amendment Bill 2014 was introduced into Parliament.[90] This Bill proposes to amend the Fair Entitlements Guarantee Act 2012 (Cth) to cap the maximum amount of redundancy pay entitlement available under the Fair Entitlements Guarantee ("FEG") scheme at 16 weeks; and make technical amendments to clarify the operation of the scheme.[91] When the Bill came before the Senate later that day, it referred the Bill to the Senate Education and Employment Legislation Committee for inquiry and report. It called for submissions with a closing date of 12 September 2014 and reporting date of 24 September 2014.[92] Eleven submissions were received from industry bodies, trade unions and the Department of Employment, the responsible government department, as well as from a law firm that acts for employees seeking payment of entitlements where their employer is under administration in insolvency. A public

---

[88] The House of Representatives has a Standing Committee on Economics, which can inquire into and report on any annual reports referred to it by the House. In March 2014, it agreed to undertake an inquiry into the 2013 Annual Report of the Australian Prudential Regulation Authority, an independent statutory authority which regulates banks, superannuation and insurance companies. This inquiry is relevant to insolvency because it concerns the regulatory settings for resolution of financial distress for banks. See:
<http://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/2013_APR_Annual_Report>.

[89] Senate Committees are either Select Committees, appointed by the Senate to inquire into some specific matter and to report back to the Senate within a set time, or Standing Committees, a permanent committee of the Senate for the life of the whole of any one Parliament.

[90] See: <http://www.comlaw.gov.au/Details/C2014B00186>.

[91] Hansard is available at: <www.aph.gov.au>. For background on the FEG, see M. Wellard, "Bailing out the FEG : is the Fair Entitlements Guarantee (formerly GEERS) Approaching its own Fiscal Cliff?" (2013) 13(7) *Insolvency Law Bulletin* 153.

[92] See:
<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Entitlements>.

hearing was held in Melbourne on 17 September.[93] No submissions or appearances at the public hearing were made by academics, although the law firm's submission referred to research on the FEG scheme published by practitioners and industry[94] and academics.[95] Even though this was a relatively brief amendment bill, this was a remarkably short time for submissions. The Report handed down on 24 September 2014 fell along party lines - with a majority of members, drawn from the government, supporting the legislation, and two dissenting reports delivered by the federal opposition party and one of the minor parties.[96]

46 Secondly, a Senate committee may undertake an enquiry in response to a current issue of public concern. An example from the Senate Economics Committee concerns a former liquidator, Mr. Stuart Ariff, who was arrested on 19 criminal charges following an investigation by ASIC. The offences related to his conduct whilst he was the liquidator of a company and in 2011, he was convicted and jailed for six years. Following the publicity surrounding this matter, the Senate Economics Committee undertook an "*Inquiry into Liquidators and Administrators*" (2010).[97] Among the 95 submissions, many of which were marked confidential (likely debtors and creditors affected by insolvency), there were submissions by academics from four universities.[98] The Report referred extensively to academics' written submissions as well as oral submissions at the public hearings in Adelaide, Newcastle and Canberra.[99]

47 The Senate Committee referred to the lack of adequate, publicly available data on the state of the corporate insolvency industry in Australia. (This has been a recurring theme in submissions to several inquiries.[100]) When the Senate Committee's report discussed the need for better data on insolvencies, a whole

---

[93] Nine witnesses appeared representing the Australian Industry Group and Australian Chamber of Commerce and Industry (2) (employers); the Australian Council of Trade Unions and Textile Clothing & Footwear Union of Australia (4) (employees); and the Department of Employment (3) (government).

[94] S. Whelan, L. Zwier and R. Campo.

[95] Submission 11 by Slater & Gordon dated 15 September 2014 referred to research by Mark Wellard (Queensland University of Technology); David Morrison (University of Queensland); and Helen Anderson (University of Melbourne):
<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Entitlements/Submissions>.

[96] At the time of writing, the Bill was still before the Senate.

[97] See:
<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2008-10/liquidators_09/index>.

[98] Written submissions by Jeffrey Fitzpatrick and Vivienne Brand (Flinders University); Christopher Symes (University of Adelaide); Colin Anderson (Queensland University of Technology); and David Morrison (University of Queensland).

[99] Public hearings at Adelaide (Dr Vivienne Brand(Flinders University), Associate Professors David Brown and Christopher Symes (University of Adelaide)); Newcastle (Professor Scott Holmes (University of Newcastle); and Canberra (Associate Professors Colin Anderson (Queensland University of Technology) and David Morrison (University of Queensland)).

[100] See the discussion below on the Parliamentary Joint Committee on Corporations and Financial Services "*Corporate Insolvency Laws a Stocktake Report*" (2004).

subsection was devoted to the "Academics' perspectives". The Senate Committee noted it had received evidence from several legal academics based in Brisbane and Adelaide who were critical of the lack of public data on insolvency[101] and who drew unfavourable international comparisons.[102]

48 The Report referred under "Academic Research" to academics' frustration at the lack of adequate insolvency statistics. Dr. David Morrison was quoted as follows:

> "…if you want data from ASIC, if you are an academic and you would like to look at something independently, unless it is a priority area that is presumably flagged between the government and ASIC, ASIC cannot provide it to you. If you want to pay to get data at ASIC, even if you can afford to pay for it … the records they have are based on paper and microfiche, so you have to pay a search fee every time you want something and you have to go into quite an archaic set of files. So, even if ASIC wanted to help people with independent information, they actually do not have the technology to do it, and that is a very stark contrast to ITSA, the bankruptcy regulator."[103]

49 The Report also explored options proposed by academics on gathering statistics on insolvency matters.[104] The Senate Committee concluded that it strongly agreed with the view that there needed to be a better system for collating and analysing corporate insolvency data in Australia. It specifically agreed with Associate Professors Colin Anderson and David Morrison that the lack of data is an issue that needs to be addressed in a comprehensive way to ensure confidence in information about the perceived problems and the resulting policy.[105]

50 Thirdly, Senate committees also have a specific mandate to monitor the performance of departments and agencies. In 2013-2014, the Senate Economics Committee undertook an inquiry into the "*Performance of the Australian Securities and Investments Commission (ASIC)*".[106] The committee examined many aspects of ASIC's work, concentrating on two case studies in particular: consumer credit and misconduct by financial advisers. During its enquiry, the Committee called for submissions[107] (including writing to academics and others with an interest in

---

[101] "*Inquiry into Liquidators and Administrators*" (2010), at paragraph 9.17 referring to Associate Professors Colin Anderson, David Morrison and David Brown.

[102] Associate Professor David Brown referred to the more developed data gathering mechanisms of the United Kingdom and New Zealand governments and Associate Professor Colin Anderson to a large United States study on liquidators' fees and returns to creditors.

[103] *"Inquiry into Liquidators and Administrators"* (2010), at paragraph 9.24. Mr Warren Day of ASIC responded to these comments and explained to the Committee the limitations placed upon ASIC, in particular, that payments are required by law.

[104] Ibid., at paragraph 9.26.

[105] Ibid., at paragraph 9.31.

[106] See: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC>.

[107] Many academics made written submissions including Jason Harris (University of Technology Sydney); Professors Dimity Kingsford Smith, Justin O'Brien, Dr George Gilligan, Associate Professor Michael Legg, Dr Marina Nehme (University of New South Wales); Dr Suzanne Le Mire, Associate Professors David Brown, Christopher Symes and Ms Karen Gross (University of Adelaide); Dr

ASIC's performance and inviting submissions) and also conducted public hearings.[108] The Committee's list of references included articles by academics.[109]

51 Once again, a Senate Report referred to the lack of access to information collected by ASIC. A number of witnesses were critical of ASIC's failure to publish much of the information which it collects as a result of its regulatory activities.[110] The Report referred to a submission from several Adelaide academics which expressed concern about:

> "…the relative lack of statistics and data for researchers, stakeholders and the wider public."[111]

Mr Jason Harris, University of Technology Sydney, submitted that the lack of data, particularly relating to enforcement and insolvencies, stifles debate as:

> "…we are unable to determine exactly what it is that ASIC does aside from what it tells us; but, more importantly, we are unable to work out what it is ASIC is failing to do."[112]

52 The insolvency practitioners' professional body, the Australian Restructuring, Insolvency and Turnaround Association ("ARITA")[113] also drew attention to the amount of prescribed information that ASIC receives and stores under legislation and how little is published. While acknowledging ASIC had improved its collection and publication of data it indicated that it needed to do more. When appearing before the Committee, Michael Murray, ARITA's Legal Director, compared ASIC's statistics with those of AFSA who:

> "…produce good statistics which inform the law reform process in bankruptcy. We do not have that sort of information in corporate insolvency."[114]

Vivienne Brand and Dr Sulette Lombard, (Flinders University); Professor Robert Baxt AO; Professor A.J. Brown (Griffith University).

[108] Oral submissions were made by Associate Professor David Brown and Dr Suzanne Le Mire (University of Adelaide); Professors Dimity Kingsford-Smith; Justin O'Brien (University of New South Wales) (Sydney hearings); Professor Bob Baxt; Jason Harris (University of Technology Sydney); Dr Vivienne Brand and, Dr Sulette Lombard (Flinders University); Professor A.J. Brown (Griffith University) (Canberra hearings). President David Lombe, CEO Mr John Winter and Legal Director Mr Michael Murray, represented the insolvency professional body ARITA.

[109] *Performance of the Australian Securities and Investments Commission* (2014), Appendix 6. These included articles by Helen Anderson (University of Melbourne); Vicky Comino (University of Queensland); Aakash Desai and Ian Ramsay (University of Melbourne); Jason Harris and Michael Legg (University of Technology Sydney); Dimity Kingsford-Smith (University of New South Wales); and Roman Tomasic (University of South Australia).

[110] Ibid., at paragraph 22.13.

[111] Ibid., at paragraph 22.14.

[112] Ibid., at paragraph 22.15.

[113] See: <www.arita.org.au>.

[114] Above note 109, at paragraph 22.19.

ARITA's President, David Lombe, gave an example of the limitations imposed on researchers, when he referred to work undertaken by an academic, Mark Wellard:[115]

> "ARITA gives a research prize so that someone can do research. One of our prize-winners was looking at deeds of company arrangement. When you go into voluntary administration, there is a decision about whether you go into liquidation or a deed of company arrangement. He was trying to work out how many companies go into deeds of company arrangement and how successful those deeds of company arrangements are. He wanted to get access to information from ASIC to be able to do that very important research. It would have cost thousands of dollars and ASIC just said, "We can't give that information to you."[116]

The Senate Committee formally recommended that:

> "ASIC promote 'informed participation' in the market by making information more accessible and presented in an informative way."[117]

Parliamentary Joint Committees

53 Finally, Parliamentary Joint Committees (with members from the House of Representatives and Senate) are also established by resolution or legislation agreed to by both houses.[118] In the area of insolvency, the most significant Joint Committee is the Parliamentary Joint Committee (PJC) on Corporations and Financial Services.

54 Its most recent and extensive enquiry in relation to insolvency was initiated in 2002, when it agreed to consider and report on the operation of Australia's insolvency and voluntary administration laws – resulting in the Report, "*Corporate Insolvency Laws: a Stocktake*" (2004) ("*Stocktake Report*"). It invited submissions addressing the terms of reference and notified various academics, organisations and professionals of its inquiry.[119] It then released an Insolvency Issues Paper providing background material and information on aspects of insolvency law that had been highlighted in submissions or in media and professional commentary on corporate insolvency law and practice. The Issues Paper also posed questions for consideration by both the Committee and witnesses in preparing for the series of public hearings. During 2003, the Joint Committee conducted public hearings in Toowoomba, Canberra, Melbourne and Sydney, including by teleconference to

---

[115] Visiting Fellow, Queensland University of Technology. See M. Wellard, "A Review of Deeds of Company Arrangement" (2014) 26(2) *Australian Insolvency Law* 12.

[116] Above note 109, at paragraph 22.20, referring to research undertaken by Mark Wellard, Visiting Fellow, QUT, and his research for the Terry Taylor Scholarship ARITA: <http://www.arita.com.au/about-us/arita-terry-taylor-scholarship/past-recipients>.

[117] Ibid., at paragraph 22.28 (Recommendation 39).

[118] See: <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint>.

[119] See: <http://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/2002_04/ail/report/ail_pdf.ashx>.

international academics, Professors Andrew Keay and Ron Harmer. Its report referred to submissions and research published by academics.[120]

55 Following publication of the "*Stocktake Report,*" the government announced in 2005 that it intended to reform Australia's insolvency laws. Because of the specialised nature of insolvency, it appointed an Insolvency Law Advisory Group to provide technical advice on the draft legislation. It comprised senior accounting and legal practitioners, an academic (the author) and representatives of the leading accounting, banking, insolvency practitioner and legal professional bodies.[121] During 2006, tranches of draft legislation were discussed by the Advisory Group. In November 2006, the Parliamentary Secretary to the Treasurer released a draft Corporations Amendment (Insolvency) Bill 2007 and Corporations and ASIC Amendment Regulations 2007 for public comment.[122]

56 During the progress of the Bill through Parliament, the Parliamentary Joint Committee on Corporations and Financial Services commenced a new inquiry - an "*Inquiry into the Exposure Draft of the Corporations Amendment (Insolvency) Bill 2007*" (2007).[123] It narrowed this inquiry's focus to those elements of the 2004 "*Stocktake Report*" which the Government had rejected, agreed with in principle or argued were matters falling under the jurisdiction of ASIC. It therefore sought the views of stakeholders on specific issues of continuing relevance.[124] The PJC's 2007 Report referred to written[125] and oral submissions[126] by insolvency academics and once again the PJC commented on empirical research and review processes.

---

[120] See:
<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2002-04/ail/submissions/sublist>. A list of the submissions is set out in Appendix 1. Submissions were made by the following academics: Mr Colin Anderson (then University of Southern Queensland) and Dr David Morrison (university of Queensland; as well as the author (then University of Southern Queensland).

[121] Parliamentary Secretary to the Treasurer, *Establishment of Insolvency Law Advisory Group* (Media Release 6 of 2006): <http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2006/006.asp>. It included representatives from the Institute of Chartered Accountants in Australia, CPA Australia, the National Institute of Accountants, the Australian Banking Association and the Insolvency Practitioners Association of Australia.

[122] The Explanatory Memorandum to the Corporations Amendment (Insolvency) Bill 2007 referred to suggestions for reform in the *Harmer Report* (1988) and the Trade Practices Commission's *Study of the Professions* (1992); the Government Working Party Report on the *Review of Insolvency Practitioners* (1997); the Parliamentary Joint Committee on Corporations and Financial Services Report on *Corporate Insolvency Laws a Stocktake* (2004); and the CAMAC reports on *Corporate Voluntary Administration* (1998) and the *Rehabilitation of Large and Complex Enterprises* (2004).

[123] See:
<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/insolvency/index>.

[124] They were under four broad categories: the regulation of the insolvency process; the role of administrators and directors; the treatment of employee entitlements; and the need for empirical research and review processes.

[125] Appendix 1 refers to Submissions by David Morrison, Colin Anderson and Jenny Dickfos (Griffith University).

Conclusion

57 In conclusion, what are some of the themes indicated by this broad review of the contributions by insolvency academics to significant Australian government enquiries over recent decades? I would like to suggest six or seven themes have emerged which apply to Australia and which are likely to resonate with many other jurisdictions as well.

58 First, it is apparent that the executive arm of government uses a wide range of approaches to gathering input from specialists on law reform and that there are many opportunities to contribute. While formal referrals to Law Reform Commissions on insolvency are relatively rare, academic researchers have many opportunities to contribute in response to government papers and inquiries as well as to independent statutory agency enquiries.

59 Second, the ways in which academics can contribute are by written (and, upon invitation, oral) submissions. In addition, even if they are not in a position to make a formal submission, academics can usefully contribute by forwarding their published research on the topic under consideration to the enquiry.[127] Insolvency academics' publications can also provide useful references for practitioners and others who may wish to make submissions on law reform.[128]

60 Third, because of the way in which insolvency law intersects with so many other areas of law that regulate business or society, insolvency academics can make a unique contribution to the public good by highlighting intersections that would otherwise go unnoticed.[129]

61 Fourth, despite submissions and appearances by numerous academics as well as other stakeholders, no outcome or even a response may be forthcoming from

---

[126] Professor Andrew Keay (University of Leeds) was interviewed and cited.

[127] For example, Jeffrey Fitzpatrick and Vivienne Brand (Flinders University) with Christopher Symes (University of Adelaide) submitted their conference paper "Fit and Proper: An Integrity Requirement for Liquidators in the Australian Corporate Legal Framework" to the Senate Economics Committee *Inquiry into Liquidators and Administrators* (2010).

[128] This can be particularly relevant where academics may not be aware of the proposals under consultation, for example where there has been a brief window of opportunity to make submissions on law reform or where the review is undertaken by a committee not normally associated with insolvency such as the Senate Education and Employment Legislation Committee consulting on the FEG amendments.

[129] A good example is Jenny Buchan's submission regarding the impact on franchisees of franchisor insolvency.

government. Even where recommendations are accepted by government, it may still take many years before references to a Report appear in proposed law reforms.[130]

62 Fifth, and associated with the previous comment about lack of a government response, some issues keep recurring – even where there are many submissions and recommendations supporting a change. One particular example has been highlighted - the lack of data available to assist with empirical research into corporate insolvency. Most recently, the 2014 Senate Economics Committee report on the inquiry into the *Performance of the Australian Securities and Investments Commission* endorsed previous recommendations that ASIC should provide and disseminate information it receives from a range of sources in order to keep the business and academic worlds better informed about developments and trends in corporate Australia.

63 Sixth, international dimensions are relevant to government enquiries into insolvency. Since the earliest law reform commission report to which I referred, overseas academics have made submissions and also acted as consultants and, in more recent times, been invited to participate in public hearings by teleconference.

64 My final theme is not necessarily drawn from the information collated for this paper. Rather it based on a story which I heard while investigating this topic – and which I have subsequently verified through Hansard. When Australia's Personal Property Securities legislation was introduced into Parliament in 2009, Phillip Ruddock, a former Attorney-General who at that time was a member of the opposition party, was speaking in favour of the bill, which had bipartisan support:

> "What I can say is that this issue became an issue largely by accident. I was attending a regional bar association and law society conference on the Sunshine Coast at Coolum. My wife said to me: 'Look, there is this session on personal property security. If you can't see anything else in the program that you want to do, you might as well go along.' I went along and I heard a presentation from the late Professor David Allan from Bond University on measures that had been taken in some states of the United States and Canada to simplify personal property securities and, equally, the measures to codify arrangements that had been put in place by New Zealand. I heard from a very distinguished legal practitioner at that time about the very considerable business that he as a legal practitioner had in advising on variations in personal property security in different jurisdictions. The point that he was making was that if you are a legal practitioner you can spend a lot of time and you can generate very considerable costs, which clients have to pay, offering advice on differences that are in fact totally unnecessary.
>
> I have also spent a bit of time with people in business, people who you might think would not be interested in these matters. … It reinforced my view that this was an absolutely essential reform. We did take it to SCAG [Standing Committee of Attorneys-General for the Commonwealth, States and Territories] and we got the states to agree there. We did take it to COAG [Council of Australian Governments] and, I might say, it was not an easy path to

[130] The Working Party Report on the *Review of the Regulation of Corporate Insolvency Practitioners* (1997) was finally mentioned when the bill to amend corporate insolvency laws was introduced in 2007.

> get the department of finance and the Treasury to agree to meet some of the costs of getting the states up to the barrier in relation to this. I might also say that if you did not drive it, it was not going to happen."[131]

65 Professor David Allan who gave the speech which the government Minister heard had spent a professional life time, commencing in New Zealand in 1964, pursuing law reform to acknowledge the value of personal property and bring it into line with the contemporary needs of society, especially in light of globalisation and the problem of "fugitive assets".[132]

66 This proactive, rather than reactive, stance is to be applauded. It puts me in mind of an insight by Professor Ian Fletcher shared in the 2013 Edwin Coe Lecture delivered at the INSOL Europe Academic Forum Conference in Paris on:

> "…the vital need for those who possess a technical understanding of the law and its actual working to establish effective channels of communication with legislators and with policy-makers in government, to ensure that there is a proper appreciation of the vital impact that this complex and much-misunderstood area of law has upon the totality of social well-being in a modern, credit-based, mercantile society. Therefore it is an important aspect of the "mission" of insolvency practitioners to improve awareness, both on the part of the wider public and within the corridors of government, of the realities of insolvency law and practice, and to do so in a way that earns public confidence and respect rather than functioning merely as special pleading on behalf of the vested interests of those "in the business"."[133]

67 Such a quote seems an appropriate place to conclude this brief examination of the contribution by insolvency academics seeking to improve the design of the Australian insolvency system. Insolvency academics around the globe can play an important, even unique, role in such policy debates in their own jurisdictions – and in so doing, promote the public good.

---

[131] See: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2009-09-16%2F0220%22>.

[132] For accounts of a dedicated academic being proactive and making submissions, even when there was no enquiry in place, see D. Allan, "Personal Property Security - A Long Long Trail A-Winding" (1999) *Bond Law Review* 12, available at: <http://www.austlii.edu.au/au/journals/BondLawRw/1999/12.html>; D. Allan, "Uniform Personal Property Security Legislation for Australia: Introduction to the Workshop on Personal Property Security Law Reform" (2002) *Bond Law Review* 1, available at: <http://www.austlii.edu.au/au/journals/BondLawRw/2002/1.html>.

[133] I. Fletcher, "Spreading the Gospel: the Mission of Insolvency Law, and Insolvency Practitioners, in the Early 21st Century" (2014) 7 *Journal of Business Law* 523-540.

Insolvency Law
Bulletin

Harmonising the responsibilities of directors of insolvent companies with those of bankrupts

Michael Murray *MURRAYS LEGAL and* ***Dr Rosalind Mason*** *QUEENSLAND UNIVERSITY OF TECHNOLOGY*

Overview

The law's treatment of the directors and shareholders in the liquidation of a company is markedly more sympathetic than its treatment of an individual subject to bankruptcy. This is even more apparent in the case of a failed small business where the respective personal and corporate insolvency laws are drafted and debated in different ways. We argue that this difference in treatment is not supported by the reality of business conduct and that attention should be given to harmonising the law's regulatory approach to the individuals involved in personal and corporate insolvency.

This is necessary because, though many small businesses operate through a company, there is often an intertwining of company and personal debt of the owners, through personal guarantees, tax liabilities and the owners' use of their personal funds to support the business.[1]

Thus, it has been said that:

> "personal insolvency regimes are often more relevant for entrepreneurs and small businesses. Indeed, the corporate vs non-corporate distinction in assets and liabilities is often blurred for small firms, either because lenders require personal guarantees or security — e.g. a second mortgage on the owner's home — or because prior to incorporating and obtaining limited liability protection, entrepreneurs typically use personal finances . . .".[2]

US studies have examined the extent to which personal difficulties cause corporate business bankruptcies,[3] for reasons including the owner's matrimonial property disputes; personal and family health problems, including illness or death of key personnel; and theft and criminal loss. Even the concept of consumer debt is not always sound when the business provides the financial support for the owner and their family.

Australian Bureau of Statistics (ABS) figures show that Australian businesses comprise about equal numbers of companies and individual or partnership traders.[4] The vast majority of these are micro to small to medium enterprises (MSMEs). Many of those companies are sole director shareholder structures in respect of which Australia's corporate insolvency law does not specifically address the owner's personal debts or fully address guarantees of the company's liabilities.[5]

We suggest there is another reality which goes deeper, into the policy makers' and community's misplaced moral perceptions of personal debt in comparison with corporate debt, and, further, of business debt in comparison with "consumer" debt. These perceptions have unjustifiably shaped the law's different treatment of debtors and directors. Now is an opportune time to revisit and review this difference in approach, in one respect a necessary time.

In the context of what became the Insolvency Law Reform Act 2016, (ILRA 2016), the government had considered evening up the responsibilities of entrepreneurs and directors by way of imposing some level of restriction on directors who failed to provide what was then a report as to affairs (RATA) and the company's books and other records. The restriction was to have elements comparable with consequences imposed on non-compliant bankrupts. These reforms were however rejected as being "unjustifiably harsh" and all the government did was to arrange to have the RATA improved, the then existing version being said to unduly confuse directors.[6]

But the government did undertake to review the law, in 5 years after it commenced, that is, in 2022.[7] Despite calls from practitioners and scholars for a comprehensive review of Australia's corporate and personal insolvency law, similar to the Harmer Report, parliament has limited itself to initiating an inquiry into corporate insolvency law by the Parliamentary Joint Committee on Corporations and Financial Services.[8] This is a worthwhile inquiry but not one that has the authority to examine the whole of the insolvency system.

Since 2020 and continuing, the social and financial impact of COVID-19 has given a renewed focus on insolvency laws for small business with new guidance issued by the World Bank and UNCITRAL and others, and the need for consistent and comprehensive legal responses to the adverse financial outcomes.

In addition, while the reduction in the period of bankruptcy to one year was first proposed in 2015 and

has been the subject of further consideration as recently as 2021, it has not proceeded. We see this as an overly severe response to any amelioration of the conditions attached to bankruptcy. The 3 year period is particularly stark, and difficult in its blunt application, in the context of small business bankruptcies.

While we do not go to the point of suggesting particular law changes in Australia, we do suggest that insolvency reform take account of these developments and work more in parallel in relation to small business failure. This would require an approach to law reform less from a legal perspective as from a business perspective, regardless of how that business might be structured. It is often only when insolvency arises, that the law separates out the personal liabilities from the corporate, often with difficulty given that the individuals running the business themselves made little distinction between the two.

In that context, we take issue with Australia's bifurcated insolvency system, between personal insolvency, under the Attorney-General, and corporate insolvency, under the Treasurer. This is based not on policy, but on the result of a constitutional quirk at federation.[9] However, its legacy is becoming increasingly problematic given the intertwining of personal and corporate debt, and assets, in small business. While we raise some law reform options here, in our conclusion, we take a more pragmatic "soft law" approach to effecting necessary change, by way of recommending that personal insolvency policy and regulation be transferred from the Attorney-General's Department to The Treasury, alongside Australian Securities and Investments Commission (ASIC) and the Australian Small Business and Family Enterprise Ombudsman. Personal insolvency has more connections with the economy, access to credit, and social support than with law enforcement. Policies in relation to the insolvency of small business should be combined and co-ordinated.

No law change is required in this option but in a de facto sense the insolvency regulation function would be combined. We would anticipate that in due course, changes to the law to support the change would follow. We therefore suggest a more universal approach be taken by the law to the consequences of insolvency for individuals, whether as debtors in their own right or as directors of companies, based on principles of fairness and consistency. We now address these issues in more detail.

Small business and corporate and personal insolvency

From a legal perspective, how the business is legally constituted will be relevant — generally either operated by the individual owner through a company as shareholder and director ("director") or operated by the business owner as a sole trader ("sole trader"). In the event that the business fails, the insolvency consequences for each individual are quite different.

There is the legal reality that a company is a separate entity from the owner; and it is the company, and not the owner, that has incurred excessive debt and is put through the liquidation process. By comparison, it is the sole trader who incurs debt and becomes insolvent and goes bankrupt.

At this point, the law is quite separated from the reality of the insolvency. The law passes no real judgment on a sole trader except that they have become insolvent and are made bankrupt — there is an automatic 3 year period of bankruptcy restrictions imposed irrespective of the sympathetic circumstances of their bankruptcy, which may have occurred for example, through unavoidable debt incurred as a result of COVID-19 public health restrictions.

In corporate insolvency, the law takes the same approach in not passing judgment on the company itself, or its owner director — the company is wound up whatever the circumstances leading to its insolvency. A reality may be however that it was through the inept business conduct of the owner director that insolvency occurred. In practice, a director may become a bankrupt following the company's liquidation based on debts arising from guaranteeing the insolvent company's financial obligations. This will depend upon the circumstances of any given insolvency.

From a policy perspective, these respective outcomes go to the nature of a company separate from its owner, who is permitted by the law to engage in entrepreneurial risk taking and perhaps inept conduct without incurring personal liability.[10] While, without argument, we may accept that outcome, the relative protection of the director continues into post-liquidation obligations.

Obligations to assist the liquidator or trustee

When a business fails and an insolvency practitioner (IP) is appointed, whether a liquidator or a bankruptcy trustee, there is a serious obligation imposed on those running the business to assist the IP with information and documents. The IP is appointed as an independent person with no real background knowledge of the business but with a need to quickly acquire that knowledge so as to be able to locate and gather in assets, contact creditors and as necessary take control of the business.

The director of a company wound up by court order is required to provide a completed Report on Company Activities and Property (ROCAP) to the liquidator and other information sought by the liquidator, generally, within 10 business days of the order: s 475 Corporations

Act 2001 (Cth) (CA). The liquidator is entitled to access to the company's books: s 477(3) CA. Directors and others may be required to deliver up to the liquidator any money, property of books of the company: s 483 CA. Similarly, a bankrupt must deliver a completed statement of affairs within 14 days of a court sequestration order: s 54 Bankruptcy Act 1966 (Cth) (BA); the 3 year period of bankruptcy commences only when that is filed: s 149(2) BA. There are comparable but higher obligations of bankrupts to assist the trustee, deliver books and attend meetings; non-compliance allows the trustee to lodge an objection to discharge under s 149D BA.

While both sole traders and directors have responsibilities to assist the IP appointed to their own affairs or their company's, the means of enforcement of those tasks and the consequences of non-compliance differ. Non-compliant directors suffer less consequences than those imposed on non-compliant bankrupts, despite the adverse consequences of lack of assistance for the IP being the same. This is so even though there is nothing particularly different between a bankruptcy and a liquidation that makes it of greater urgency or importance.

Bankruptcy is different in itself in that a person who becomes a "bankrupt" remains as such for at least 3 years. In the case of a court ordered bankruptcy, that 3 year period does not begin to run unless and until the statement of affairs is filed. That is an extreme penalty and hence a very strong incentive for the bankrupt to do so, for which there is no comparison in corporate insolvency. Non-compliance with the obligations to provide books and other records can result in an objection to discharge being lodged, which likewise serves to extend the period of the bankruptcy.

The primary responsibility of the directors, in the case of court appointed IPs, is to provide a ROCAP. A director's delay or refusal to provide that information is a serious matter and is understandably an offence, which may be prosecuted.[11] But there is no default consequence for directors comparable to the automatic extension of the person's bankruptcy. Nor is there any process comparable to an objection to discharge for failure to provide company books.

The question we ask is whether that disparity between directors and sole traders is fair and effective. Is bankruptcy too severe or is corporate insolvency too lenient? We put aside for the moment the numerous other impositions of bankruptcy, and the length of time that they continue.

Attempts at law reform

There has been an attempt to even up the responsibilities.

In the 2015 Explanatory Memorandum accompanying an early draft of the Insolvency Law Reform Bill at [9.325], the government broadly acknowledged that the directors may be uncooperative in completing and lodging a RATA (the precursor to the ROCAP) which was required to be provided on behalf of the company at commencement of the administration.[12]

One option proposed [Option 6.3] was to allow ASIC to administratively suspend a director for failure to provide a RATA or books of the company.[13] On the likely net benefit of this option, the Explanatory Memorandum said [9.341]:

> ". . . this option would seek to achieve a similar outcome as that currently provided for in personal insolvency [referring to section 77CA of the Bankruptcy Act; with an offence provision for non-compliance in section 267B] with the regulator assisting insolvency practitioners to obtain important information regarding the company under administration, which will assist in the efficient completion of the winding up."

The measure was also seen [9.342] as assisting:

> ". . . in addressing phoenix activity in limited circumstances where a director has transferred assets out of their initial company (OldCo) into a new company (NewCo), placed OldCo into liquidation, is refusing to assist the corporate insolvency practitioner in completing the winding up of OldCo and is managing NewCo".

However, this proposed regime was said in submissions by director groups to be "unjustifiably harsh" [9.369] for a range of reasons:

- in imposing a penalty that was not proportionate to the misconduct;
- in failing to provide appropriate court oversight to the power for ASIC to disqualify directors;
- in providing insufficient procedural fairness;
- in inappropriately balancing the power of ASIC with the rights of the individual directors; and
- in failing to recognise the significance of disqualifying directors. [9.343]

It was also submitted that the then RATA form was confusing; and this might well have explained many instances of director non-compliance.

It was only in response to the last issue that the government acted, by way of having the RATA form reviewed and redrafted. The RATA form had in fact not been altered in several decades and there was some sense in attending to what may have been an exacerbating issue in director compliance rather than simply passing a stronger law.

That review proceeded and a new form — the ROCAP which replaced the RATA in 2018 — was the result.[14] A subsequent review resulted in Version 2 of the ROCAP operative from 1 August 2022. Whether director compliance has improved with the replacement of

the RATA by the ROCAP is not stated. Irrespective, the government said in its Explanatory Memorandum to the ILRB 2015 that there should be a review of this change and other personal and corporate insolvency reforms under the ILRA.[15]

The government's response, to simplify the form, although with some validity, was nevertheless a narrow response to a broader issue about the need for directors to comply and assist liquidators. The need to provide liquidators with the company's financial and other records is another compliance requirement where, unlike the previous RATA, there is no lack of clarity of the obligation imposed.

We suggest that any review should not be confined simply to whether the new ROCAP has produced positive results. It should be reviewed in the context of the obligations of individuals in insolvency generally, small business insolvency in particular, and the need for consistency of approach.

Relevance of a deeper issue

Any law reform should examine some deeper reasons for what we see as a disparity in cultural perceptions as to both corporate and personal debts, and business and consumer debts.

Personal and corporate debts

We argue that a difference in community perception between personal and corporate debts results in the more severe way the law treats a personal insolvent compared with a director of an insolvent company, in both cases where we might assume, for the sake of argument, their standards of commercial conduct have been the same. The separation in the law itself is quite entrenched and there is little comment in policy or academic literature. In the US, Karen Gross has acknowledged it.[16]

"The dichotomy between the treatment of individuals and that of corporations is troubling. A corporation may cease to exist, but its officers, directors, and shareholders do not die with the business". Nevertheless, "they can proceed in the future, with limited exceptions, unrestrained by their corporation's debt". She gives an example of the company incurring debt by fraud, other things being accepted, the owner can set up under a different name "unencumbered by the businesses' prior fraud and free of old debt".[17] As she concludes, "this leads to a perception of unfairness", and perhaps a reality, not assuaged by her following description of the fiction of a corporation — a "hollow shell".

The difference does lie in that "hollow shell" legal concept of a company being a separate legal entity. Apart from the law, this serves to depersonalise business loss or failure — "her company failed (or one of her companies) but she herself is a capable businesswoman and she is doing very well in her other endeavours". The fact that she as a director can set up a new company the next day, legitimately, or continue as a director of other companies, dilutes the failure of one of her companies.[18]

But if the person operated as a sole trader — "she went bankrupt/was forced into bankruptcy/is now/remains 'a bankrupt'" over her venture — there is a personal label attached, of failure and finality. It is an all-encompassing label, attaching to the person, for all purposes; it imposes restrictions on that person to open or operate another business or to be employed in certain occupations.[19] There is also the term "bankruptcy", which has been shown to connote adverse responses. In fact, the term insolvency was adopted in the 19th century when "bankruptcy" started to impact the middle and upper classes, who sought a softer description of their plight.[20]

We emphasise that in both cases, we should assume that the same standards of business conduct, and market conditions, existed.

Personal business and consumer debts

We then go further and suggest that this division between good corporate debt and bad personal debt also extends to personal debts of an individual in business compared with personal debts of a person incurred as an employee on a salary.

We suggest that business failure leading to a bankruptcy is seen less negatively than what is loosely, and most likely inaccurately, called a "consumer" bankruptcy. The terms consumer and business focus on the types of debt rather than the causes and they also assume that they are mutually exclusive. There is an assumption that consumer over-indebtedness is "bad", as being caused by poor self-control, or consumer greed, or by unemployment or illness. These are seen more as personal failings of the individual in not factoring in the normal vicissitudes of life.

But, a person in business is perceived as incurring good productive debt that unfortunately they cannot repay, even if through their ineptness, lack of knowledge and failure to face business reality. In the latter case, business negligence or inattention is more readily excused as someone succumbing to undue market forces, government policies or business pressures; and in reality, while company law proscribes poor conduct, a reinterpretation of that conduct as entrepreneurial flair often occurs.

Overall, we suggest that a personal bankruptcy is seen as resulting from an individual's lack of personal control, whereas a liquidation of one's company is a distant and objective event detached from the individual director and caused by market conditions and risk.

Government perceptions

It remains to point out that the government itself adopts or at least accepts this undue separation in the way the law is framed. The then Treasurer referred to the 2021 (corporate) small business insolvency reforms as addressing the need to "meet the needs of small business and to support increased productivity and innovation by reducing the complexity and costs in insolvency processes. Further, the reforms are aimed at achieving greater economic dynamism and ultimately helping more small businesses to survive".[21] There were no comparable supportive words from the Attorney-General in relation to the many sole traders; in fact, there have been no insolvency reforms addressing their need for support. In response to a January 2021 discussion paper, following a 2018 attempt at reform, the government reported in January 2022 on its proposals,[22] saying that while many stakeholders supported reform, some were "concerned that a default period of one year will be abused by rogue, reckless and repeat bankrupts" and it went on to present an array of proposals to meet those concerns. That seems to assume there are no rogue, reckless and repeat directors.

The timing was also relevant. The corporate reforms were introduced into law with what was said to be undue haste, with submissions open during the limited period of 7–12 October 2020 and the new law commencing on 1 January 2021. The bankruptcy reforms were first proposed in 2015.[23]

Universal obligations

For the purposes of offering some universal approach across insolvency law, we suggest some universal set of obligations in both bankruptcy and liquidations that are aimed at assisting the trustee or liquidator in managing the insolvent estate, with comparable consequences for non-compliance.

These obligations are broadly the completion of statements of assets and liabilities and giving early assistance to the trustee or liquidator by way of delivering books, giving information, identifying assets etc; failing which the person is restricted in pursuing defined activity. These obligations of the debtor are accepted as being necessary, however much another goal of the personal insolvency law is to release the individual debtor and allow their fresh start.[24]

UNCITRAL's Legislative Guide on Insolvency Law[25] lists these debtor obligations as including to cooperate with and assist the insolvency representative, to provide accurate, reliable and complete information, including as to prior transactions, on-going proceedings, and so on: [Recommendation 290]. Standardised information forms that set out the specific information required will assist: [Recommendation 295]. It acknowledges there should be sanctions, in the case of a company for example, "any person who generally might be described as being in control of the debtor, including directors and management": [387].

One enforcement option would be the placing of restrictions on existing directorships of the director or preventing new directorships. Previous debates about the "harshness" of this approach need to be seen in the context we describe.

Broader reform

Insolvency law's separation into personal and corporate debts and assets of any insolvent is not based on reality in many cases for the reasons we have explained. While this is a call for broader reform than focusing on the obligations of individuals, it is one that should be pursued, or at least acknowledged. The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and UNCITRAL's recent guidance both refer to the need for a simplified insolvency system for small business by which "all personal and business debts of a natural person should be included in simplified insolvency proceedings"(C19.1) and "should address, including through procedural consolidation or coordination of linked proceedings, the treatment of personal guarantees provided for business needs of the MSE debtor"(C19.8).

While it would be difficult to unwind the settled separate approaches of insolvency law, it would be necessary for any "holistic" or "root and branch" insolvency law reform.

Conclusion

We have drawn attention to the different approaches the law takes to those individuals involved in corporate and personal insolvencies. We suggest reform is needed in aligning how insolvency law regulates sole trader and director conduct. Apart from the legal differences between a business operated by an individual and that operated through a company, the misalignment is not assisted by personal insolvency being the responsibility of the Attorney-General, with an emphasis on law enforcement, and corporate insolvency being the responsibility of the Treasurer, with an emphasis on the economy. A starting point in any review would be to move bankruptcy responsibility to Treasury as a more pragmatic "soft law" approach that would assist in comparing and aligning personal and corporate insolvency law in regulating debtor and director conduct.

That may then assist in any comprehensive review of Australian personal and corporate insolvency law with a view to harmonising and co-ordinating insolvency laws for small business and more generally. That would be consistent with the slated review of the ILRA 2016

reforms which, while they made progress in harmonisation, left much unattended. Any such review will be assisted by the current 2023 inquiry into corporate insolvency by the Parliamentary Joint Committee on Corporations and Financial Services.

Michael Murray
Co-editor
Insolvency Law Bulletin
Murrays Legal

Dr Rosalind Mason
Adjunct Professor of Law
Queensland University of Technology

Footnotes

1. See *The hidden dimension of business bankruptcy in Australia* (2018) 46 ABLR 291, Lucinda O'Brien, Ian Ramsay and Paul Ali which suggests that published bankruptcy data underestimates the extent to which bankruptcy is business-related in Australia.
2. *Design Of Insolvency Regimes Across Countries* 2018 OECD Economics Department Working Papers No. 1504 by Müge Adalet McGowan and Dan Andrews, citing Berkowitz, and White, "Bankruptcy and Small Firms' Access to Credit", (2004) 35 RAND Journal of Economics; Cumming, "Measuring the Effect of Bankruptcy Laws on Entrepreneurship across Countries", (2012) 16 Journal of Entrepreneurial Finance.
3. Warren and Westbrook "Financial Characteristics of Businesses in Bankruptcy" (1999) 73 Am Bankr LJ 499, 560–561. See also *Guide on the Treatment of Insolvent Micro and Small Enterprises in Asia*, a joint project by the International Insolvency Institute and the Asian Business Law Institute, 2022, Features of MSEs, pp 14–16.
4. Australian Bureau of Statistics, August 2022.
5. Australian Small Business and Family Enterprise Ombudsman (ASBFEO), Submission to the Productivity Commission's 2022 Inquiry into Australia's Productivity Performance called for "Improvements . . . to insolvency processes for small and family businesses." <www.asbfeo.gov.au/sites/default/files/2022-04/20220404%20BB%20to%20Productivity%20Commission.pdf>
6. Explanatory Memorandum, Insolvency Law Reform Bill 2015 (Ex Memo ILRB 2015) [9.354–9.376].
7. Ex Memo ILRB 2015, [9.377], [9.381].
8. *Corporate Insolvency in Australia*, <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency>
9. Although the grant of Federal power to legislate on "insolvency" (*Commonwealth Constitution* s 51(xvii)) was wide enough to extend to the liquidation of companies, corporate insolvency continues to be regulated in the general corporations' legislation: French RS, 'Federal Jurisdiction — An Insolvency Practitioners' Guide to the Labyrinth' (2000) 8 *Insolvency Law Journal* 128 at 129.
10. That is, subject to personal liabilities for breach of insolvent trading laws and directors' duties and the like.
11. Section 475 CA is an offence provision on a strict liability basis, with a penalty of up to 50 penalty units and/or 6 months imprisonment. That is comparable with the 50 penalty units imposed by s 54 BA on a strict liability basis. ASIC also has power to "ban" a director from being a director or taking part in the management of corporations for a period of time: Part 2D.6 CA.
12. See Ex Memo ILRB 2015 at [9.325].
13. See Ex Memo ILRB 2015 at [6.331]–[9.334].
14. ASIC said it intended "revising the ROCAP periodically, with a Version 2 anticipated following industry feedback after a period of use. ... A further version of the ROCAP may coincide with any possible law reform that will facilitate lodgement of Part B with ASIC on a confidential basis". ASIC, Report on company activities and property (ROCAP) 2022: <https://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/report-on-company-activities-and-property-rocap/>
15. Ex Memo ILRB 2015 at [9.381].
16. *Failure and Forgiveness, Rebalancing the Bankruptcy System*, 1999, Yale University Press.
17. At p 19.
18. This needs to be read in the context of Australia's introduction of Director Identification Numbers. This system is intended to "identify and eliminate director involvement in unlawful activity, such as illegal phoenix activity": Australian Business Registry Services <www.abrs.gov.au/director-identification-number/about-director-id>
19. Nicola Howell and Rosalind Mason, "Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce" (2015) 38(4) *UNSW Law Journal* 1529. There are also restrictions imposed on failed companies in some cases: eg *Home Building Act* 1989 (NSW) s 22 under which a contractor's licence that is held by a corporation is cancelled where the corporation has been wound up
20. See TF Bathurst, *The Historical Development of Insolvency Law*, Francis Forbes Society for Australian Legal History, 3 September 2014.
21. Explanatory Memorandum, Corporations Amendment (Corporate Insolvency Reforms) Bill 2020.
22. Bankruptcy system — options paper, January 2022
23. National Innovation and Science Agenda report, 1 November 2015, National Innovation and Science Agenda report | Department of Industry, Science and Resources

24. Nicola Howell, "The Fresh Start Goal of the *Bankruptcy Act*: Giving a Temporary Reprieve or Facilitating Debtor Rehabilitation" (2014) 14(3) *QUT Law Review* 29.

25. UNCITRAL 2022, Legislative Guide Part 5 Insolvency Law of micro and small enterprises (advance copy).