

INSOLVENCY PRACTITIONERS' ASSOCIATION OF AUSTRALIA

NATIONAL CONFERENCE

OPENING REMARKS

THE HON T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

SYDNEY

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1. When I first started practice - many years ago - there was a perception that the task of a liquidator after being appointed was to do two things. The first was to go down to the court registry and obtain a sealed copy of their appointment. The second was to call their office from the registry payphone and ask someone to bring round their car, with an axe and a battering ram in the boot. They would then commence their duties by going to the unfortunate company's place of business, using the axe or ram to break down the door and grabbing any cash, as well as the business' books, before they could be destroyed. In this way the company's assets were recovered.
2. One look at the program for this Conference demonstrates just how far gone those days are - although the people I am jokingly referring to of course did much more than break down doors, and had a knowledge of insolvency law far surpassing that of most members of the legal profession.

3. Over the next two days, you will hear from senior insolvency practitioners, lawyers, economists and regulators. You will consider big issues - such as the desirability of fundamentally reshaping Australia's insolvency regime to adopt a US Chapter 11 style procedure. You will also engage in detailed analysis of complex matters relevant to day-to-day practice, through case studies and a number of master classes.

4. By allowing practitioners to develop their expertise and to analyse current and forthcoming developments in insolvency regimes, this conference plays a tremendously important role in promoting the efficiency, transparency and integrity of our insolvency regimes - to the benefit of all participants. It is therefore my great pleasure to formally welcome you today, and to congratulate the Insolvency Practitioners' Association of Australia for once again putting on such a valuable event.

5. One issue which will no doubt feature prominently in your upcoming discussions is the forthcoming Insolvency Law Reform Bill. Some of you will have been following the development of these reforms since the original Senate Committee report was released in September 2010. I understand you will be delving further into the detail of the Bill tomorrow, with a keynote address by Greg Medcraft and a panel discussion featuring a number of key stakeholders.

6. I cannot to hope to equal their expertise, nor indeed that of many of you here today, in discussing the detail of the proposed legislation. Nonetheless, given the Bill's significance - not only for insolvency practitioners, but all those who interact with the industry, including lawyers and the courts - I would like to use my time today to briefly consider some aspects of the reforms.

7. I will largely confine myself to the proposed changes to corporate insolvency. That is for two reasons. First, the harmonisation effort underlying the Bill seems to have centred largely on amending the corporate regime to more closely align with current bankruptcy law. Second, as I am at least somewhat familiar with corporate insolvency, I have a fighting chance of avoiding making a fool of myself in the coming minutes.

8. Let me first say that many of the key themes of the reforms appear very desirable. I have no doubt for example that a common set of Practice Rules across bankruptcy and insolvency will minimise complexity for insolvency practitioners, creditors and other stakeholders and therefore reduce compliance and participation costs.

9. Changes to improve the control of creditors, including by allowing them to remove and replace a liquidator at any time and across all types of insolvency administration are also extremely welcome. Regardless of whether a liquidator is complying with their legal duties, it is surely

desirable for the efficient and expeditious conduct of external administrations that creditors are empowered to remove a practitioner who no longer enjoys their confidence. That creditors often face significant financial barriers in removing practitioners through the court process only reinforces this point. I would add the caveat that this should not extend to circumstances where one major creditor is able to use their power to control the liquidator. I do not believe that sufficient attention has yet been paid to avoiding this circumstance in drafting the proposed legislation.

10. However, I do have a number of questions about the Bill's operation, particularly in relation to the Court's oversight of liquidations. When I mentioned these queries to a colleague, he responded: "yes, but the thing is you are thinking like a lawyer". I felt quite sheepish. I can only ask that you forgive me if I am adopting an overly legalistic perspective, as well as the obvious self-interest in my focus.

11. Now, of course, I am aware that the recently released Exposure Draft is just that – a draft. Everyone, including the relevant government departments, would no doubt agree that further work is needed before the Bill is introduced into Parliament, both in relation to consequential amendments and to iron out certain anomalies. In those circumstances, I will resist the urge to be boringly fastidious – some might say anal retentive – and go through the Bill with a fine tooth comb to pick out problems. Except to say that I became very confused when the Draft started referring to paragraphs of the *Corporations Act*, rather than

sections.¹ Sorry – I had to get that off my chest. You can't be surprised by a little bit of nit picking. After all I am a judge.

12. To be slightly more constructive, I do think that one of the outstanding challenges in relation to the reforms is determining their “architecture” – or in other words how they will fit into existing corporations and bankruptcy law. The Exposure Draft indicates that the Insolvency Practice Rules will be inserted as schedules to the Corporations and Bankruptcy Acts. However it is as yet largely silent on the consequential amendments, which I understand are still being drafted. A number of issues should be considered in finalising these further amendments.

13. First, it is imperative that sweeping repeals do not undermine the integrity of the corporate insolvency regime. For example, the Government's proposal paper, which formed the background to the Bill, states that in relation to Court oversight, the “proposed reforms would consolidate into a single provision... the various provisions which empower persons to seek review of an insolvency practitioner's conduct in various kinds of insolvency administration.”² The explanatory material suggests that this may extend for example to the Court's power to supervise administrators under Part 5.3A and to give directions to liquidators in compulsory winding

¹ Insolvency Law Reform Bill 2013 (Exposure Draft) sch 2, pt 3.

² Australian Government, “Proposals paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia (December 2011) at [172].

ups.³ This raises at least three possibilities in relation to consequential amendments.

14. First, there could be a general revocation of the Court's specific powers of supervision, including those contained in Part 5.3A. As regulatory change for the sake of it is not desirable, this, in my view, is only justifiable if those powers are found not have been operating effectively. Personally, I am not aware of any pressing need to amend them. Second and most undesirable would be that the new and old provisions remain in force alongside each other. This would give rise to difficult issues of reconciliation, including in determining the extent to which the earlier sections had been impliedly repealed. Third, express provision could be made that the new provisions do not apply to Part 5.3A, or are not intended to restrict or enlarge the Court's powers in respect of that Part. A similar provision in relation to the scheme of arrangement provisions in section 411 would be desirable in those circumstances.

15. Second, consideration should be given to whether jurisprudence interpreting current corporations and bankruptcy legislation will be applicable to new analogous provisions. To take just one example, section 17-5, which provides for Court oversight of liquidators, is expected to replace section 536 of the *Corporations Act*. Will cases interpreting section 536 be relevant to the new 17-5? In *Hall v Poolman* for example, a number of factors were held to be relevant to the Court's discretion to make an

³ Consultation Explanatory Document, Insolvency Law Reform Bill 2013 (Primary Amendments) at 14.

order that a liquidator was not fully discharging his or her duties in pursuing certain litigation.⁴ To what extent will discretionary considerations of this nature affect the interpretation, not only of section 17-5, but also the Court's similar power under Division 32 to inquire and make orders in relation to external administrations – a power that specifically contemplates orders in relation to the costs of a court action pursued by the liquidator?⁵

16. Similarly, is the Court's power of inquiry under these provisions subject to a jurisdictional precondition that there is a sufficient basis for concluding that the liquidator's adherence to their duties requires investigation?⁶ Or is it more analogous to the Court's power under section 563(3) of the *Corporations Act* to require the liquidator to answer any inquiry in relation to the winding up?⁷ Or neither?

17. It may well be that I am grasping at analogies where none exist. However, if no guidance is provided as to whether new rules are intended to mirror or be informed by existing provisions directed to similar conduct, this is an issue that will have to be worked out before the courts - inevitably at the cost of parties to the liquidation. Achieving a maximum of clarity and certainty in this regard should therefore be a priority for all those involved in the ongoing preparation of the Bill.

⁴ *Hall v Poolman* (2009) 254 ALR 333 at [116] – [186].

⁵ Insolvency Law Reform Bill 2013 (Exposure Draft) sch 1, s 32-20(4)(c)

⁶ *Hall v Poolman* (2009) 254 ALR 333 at [56]-[60]

⁷ *Ibid* at [105]

18. In addition, the substance of the proposed reforms will raise new issues for court supervision of liquidations. I will briefly consider three.
19. First, the amendments provide that in making orders under both sections 17-5 and 32-20, the Court may take into account “public confidence” in registered liquidators as a whole. As a side note, it is interesting that no similar provision applies in relation to the deliberations of the committee convened by ASIC to consider disciplinary action against practitioners.⁸
20. As I understand it, one of the primary objectives of this amendment is to allow the Court to make an order directing a practitioner to stand aside from an external administration in cases where there is a prima facie case of wrongdoing but a disciplinary investigation initiated by ASIC has not yet concluded.⁹ The reform responds to delays which occurred in the Ariff case.¹⁰
21. I am by no means opposed to the Court considering public confidence in the system as a whole when supervising liquidators. A reform of this nature does however hold implications. First, in the circumstances I have just outlined, questions of fairness to the practitioner will arise. In determining whether or not a prima facie case exists, a court will inevitably have to adjudicate – at least at that level – on the issues raised in the disciplinary proceedings. Currently, courts commonly adjourn civil

⁸ see Insolvency Law Reform Bill 2013 (Exposure Draft) sch 1, s 16-65.

⁹ Australian Government, “Proposals paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia (December 2011) at [175.1]

¹⁰ *Australian Securities and Investments Commission v Ariff* [2009] NSWSC 829.

proceedings to await the outcome of such disciplinary proceedings. This would, of course, frustrate the intended operation of the provision. It will be interesting to see how courts grapple with this challenge, particularly in light of the obligation to act in accordance with the dictates of justice when making case management orders, including orders staying proceedings.¹¹

22. Further, while the legislative intent behind the reform may be directed to a particular situation, the provision itself is broad. A consideration of public confidence in the system may well require courts to alter their approach to many matters commonly arising in liquidations. It is perfectly conceivable for example, that this factor could affect the assessment of whether and when it is permissible for a liquidator to engage in speculative litigation that is financed by a litigation funder.

23. Second, the new provisions providing for Court supervision contain divergent standing requirements. Section 17-5 is extremely narrowly framed, allowing the court to make orders only on the application of the registered liquidator or ASIC. By contrast, sections 32-15 and 32-20, which overlap significantly with 17-5, provide that the Court may inquire and make orders on the application of any person with a “financial interest” in the external administration. The same broad standing requirement can be found at other points in the Exposure Draft.¹² This divergence raises the possibility that Division 32 could be used as a way to circumvent the much

¹¹ *Civil Procedure Act* 2005 s 58.

¹² see for eg Insolvency Law Reform Bill 2013 (Exposure Draft) sch 1, s 22-20.

narrower requirements in 17-5. I also question whether such an expansive standing requirement is desirable for the efficient conduct of liquidations.

24. You may think I am doing exactly what I said I would not do – going through the Bill and criticising details. However these questions are important and they relate to a broader issue, which I do not think the Bill has yet grappled with. That is the appropriateness of allocating supervisory responsibilities to the Court, ASIC and industry bodies, and of conferring on each of them concurrent but different powers of investigation, supervision and regulation. Such an approach may be thought to bring undue complexity and uncertainty to the regulatory process. It is generally the role of Courts to determine allegations of wrongdoing in adversarial proceedings and to supervise the actions of regulators. The desirability of more direct involvement by Courts in the administration of liquidations is a matter deserving serious consideration.

25. There is one final matter I would like to mention. The abolition of the category of official liquidator has been flagged as an intended reform, which may create unintended difficulties. Currently, to become registered as an official liquidator, a practitioner must give an undertaking to ASIC that they will not refuse consent to act in a court winding up solely because the company does not have sufficient funds to cover their anticipated professional costs. In the absence of such an undertaking – which I doubt very much would be obtained from all registered liquidators – it may be difficult to find liquidators to act in liquidations where the company has little

or no funds. I note for example that only a couple of weeks ago, the Federal Court made an order dividing some 187 external administrations amongst Victoria's official liquidators.¹³ This was necessary because the liquidator who had been administering them had resigned. In the absence of the category of official liquidator it may be difficult for courts to act in such circumstances.

26. These are only a few of the many challenges which will no doubt arise as a result of the contemplated reforms. I would stress again - this does not mean change is undesirable. As I have said on other occasions, regulation can have a positive role to play, provided it is clear and its provisions can be efficiently applied.

27. Each of you has a significant role to play in this regard and it is therefore extremely apt that the title of this year's conference is "Forging the Future". I wish you all the best in your important deliberations, as you contribute to the future of this and other important issues over the next two days. Thank you once again for your invitation and kind attention. It my great pleasure to declare this conference formally open.

¹³ Ongoing matter of *ASIC v Andrew Leonard Dunner*, Federal Court of Australia (12 April 2013).