Discussion paper for the insolvency system roundtable
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The roles of the state and the private profession in the insolvency system: do we have the right balance?

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This paper sets out various issues for consideration and discussion in relation to the structure and operations of the insolvency system in Australia, and to some extent, in respect of insolvency law generally.

Our focus is on the system itself, and how it operates, rather than on the laws of personal and corporate insolvency, which are typically the focus of comment and law reform.

The aim of the paper is to explain our views about what we say are the unsatisfactory legal, financial and structural aspects of the system and to present an outline for change. The present system requires too much focus on some issues, and too little on others. It requires readjustment.

While we have given considerable attention to the matters raised, and over some period,[1] at the same time we invite any views differing or challenging our thinking. Indeed, that is a main purpose of the roundtable. That is so in particular because there is little if any consideration given to the issues we raise in the academic or policy literature concerning insolvency law and practice.

Our focus is largely confined to the bulk of insolvencies in Australia, and less focused on the large corporate restructurings or liquidations, or complex bankruptcies. Nevertheless our outline for change does factor in those types of matters.

Our views are presented through this discussion paper rather than a concluded and complete analysis.[2] We expect the roundtable to assist us in developing our views further. We are therefore very grateful for any considered views in response.

Some initial qualifications

An initial qualification is that statistical information on insolvency is limited, the subject of much criticism of government over the years, though personal insolvency data, from AFSA, is of some more assistance. More useful data is available from academic research and inquiry. We refer to and rely upon what limited data is available. That leads to the issue that while we make recommendations for change, the data to support that is limited; on the other hand, there is limited information from which one could say the system is working well.

We present a legal perspective, informed by our knowledge and understanding of other relevant disciplines. However, we consider that the operation of the insolvency system is

[1] See *Keay's Insolvency*, 7-10th eds, 2011-2018, Murray & Harris; *What do we expect of insolvency (and of insolvency practitioners?* Murray & Harris, INSOL International Academics' Colloquium, The Hague, 2013.
[2] On-going; an extensive and on-going bibliography is available.

necessarily based on more than the law and that input from those trained in economics, accounting and finance, and the regulatory and social sciences is needed and is invited.[3]

There is limited comment in the academic literature on the role of the state in insolvency, despite insolvency being imposed by the state and having its origins in state endorsed and enforced processes; and even less so comment on the overall structure of the system and how its various elements are to, or do, operate.[4] In Australia there is also limited debate about the theories concerning insolvency,[5] such as that found for example in the US. To that extent, our discussion is novel, though at the same time rather fundamental.

While we would be pleased to think that our proposals might prompt some reform, our more realistic hope is that at least some of the issues we raise become the subject of consideration, and debate.

Assumptions

Our starting assumptions are, more so from an Australian perspective:

- There is no question that insolvency law has an important role to play in the economy and in society
- Insolvency law serves both private and public interests[6] – an insolvency is not "just a case about money";[7]
- It inherently involves limited funds but its process is not cost free and in many cases this presents barriers to entry for debtors and creditors, among other issues
- The current system in Australia largely relies upon a private profession for its administration, with limited government support
- Insolvency practitioners (IPs) are generally paid from the remaining assets of the insolvent but they regularly work on estates with limited or no funds without being paid
- That work involves work for creditors' private interests in recovering assets but it also involves work that is required in the public interest
- The reality however is that unsecured creditors typically receive little or no dividend returns in insolvency; secured and government creditors fare better
- Given the extent of work that is required in the public interest, paid for, in effect, by creditors, and for related reasons, the state should have a greater role in supporting the administration of the insolvency system.

The nature of insolvency law

The existence of insolvency law is a recognition that the private law of debtor and creditor is inadequate to deal with the practical economic realities of insolvent debtors and their

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[3] See for example sociology's perspective on the balance of power and influence between the insolvency profession and the state in *Knowledge mandates in the state–profession dynamic: A study of the British insolvency profession*, Yvonne Joyce, University of Glasgow, (2014) 39 Accounting, Organizations and Society 590–614; also, *Rescuing Business – The Making of Corporate Bankruptcy Law in England and the United States*, Halliday and Carruthers, Clarendon Press, Oxford, 1998.

[4] Wood says that he writes about the 'substantive law of bankruptcy, not the detailed procedure' because 'the procedure is usually routine and obvious' *Principles of International Insolvency,* 1995, Philip R Wood, p 94, at 95-96.

[5] As to what if any theories support insolvency law in Australia, see *The Opals of Insolvency,* Symes & Villios, Adelaide Law School, Paper presented at INSOL 2019 Academics Colloquium Singapore 1 April 2019.

[6] Cork Report 1982, Ch 43 The Public Interest.

[7] *In re Barlow Clowes Ltd* [1992] Ch 208, Millett J

creditors and that a collective approach is required.[8] This approach is a feature of both personal and corporate insolvency law generally, but it is a process that relies heavily on private ordering, especially in corporate insolvency.

While as a matter of private law, insolvency law and practice govern the relations between debtors and creditors, its collective process imposed by law serves a public purpose. It also more directly serves other public purposes that, in our view, call for a role of the state. In our view, the present role of the state in Australia is ad hoc, inconsistent and inadequate.

The question of the proper role of government in the administration of insolvency law has, in fact, received little attention in insolvency reform in Australia.

The general assumption that underpins insolvency administration in Australia is that the perceived beneficiaries of insolvency work, that is, the creditors, should pay for that work by IPs charging for their costs and remuneration from the insolvent estate; that estate being the remaining assets of the insolvent to which the creditors might expect to gain access in order to recoup their losses.

However, the parlous financial position of the vast majority of debtors (both personal and corporate) when they enter a formal insolvency administration is such that their remaining assets are so limited that few insolvency matters generate any return for creditors; and many such matters have insufficient assets to pay the IP for their work. IPs have to adjust their hourly fees – to cross-subsidise - to account for the likelihood that they will not be paid, or not paid in full, in a large percentage of matters.

What this means is that creditors of estates with assets mostly fund the administrations of the vast majority without assets (the so called ‘swings and roundabouts’ principle,[9] or, more formally, cross-subsidisation).[10] The absence of a meaningful return to creditors in most insolvencies no doubt contributes to what is perceived to be the widespread creditor apathy and a lack of engagement in insolvency processes and raises legitimate questions as to whether creditors’ private interests are in fact the primary focus of the insolvency system and if they are, whether they should remain so.

While IPs do administer assetless estates on a cross-subsidy basis, in the normal course an IP will generally require an indemnity or payment before the IP will consent to an appointment sought by either a debtor or creditor. This means that the affairs of many insolvent debtors are not able to be administered in insolvency at all. This raises both a question of access to justice, for creditors and debtors, and also raises the issue of a lack of oversight of the insolvency system in that many insolvent estates escape scrutiny.[11]

Given the reality of these outcomes, and whatever were the original aims of insolvency, it may in fact be argued that the primary focus of insolvency today is to serve public interests of transparency and accountability, and to preserve the legitimate interests of those creditors, usually secured, who have protected themselves in advance of their debtor’s insolvency. The

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[8] See *Roman Law of Bankruptcy*, (1928) 3 Notre Dame L. Rev. 169a, Roland Obenchain; *The early history of English bankruptcy*, 67 Univ of Pa L Rev 1 (January 1919), LE Levinthal.

[9] See *Re Greater West Insurance Brokers Pty Limited* [2001] NSWSC 825, Young CJ in Eq, at [15].

[10] *Explanatory Memorandum to the Insolvency Law Reform Bill* 2015 at [9.52-53], [9.135-137]; *The regulation, registration and remuneration of insolvency practitioners in Australia*, Senate Committee Report, September 2010.

[11] *Insolvency – it’s all about the money* [2018] U Melb LRS 6, Helen Anderson.

private law aim of paying unsecured creditors from the remaining assets of the insolvent is rarely met, or to any significant degree.

The need for a sense of justice in the system is acknowledged, as necessary to maintain confidence in commercial and consumer dealings, and in the insolvency system itself. A primary initial purpose of insolvency law, which remains, is to prevent a series of individual and disruptive actions by creditors, rather than a more ordered collective process. How much of that sense of justice is achieved for creditors at present is problematic. Their sense of injustice is often directed at the IPs and their fees which, while that may be valid, does not acknowledge the opaque bases upon which those fees need to be calculated.

We have however been referring to ordinary trade or commercial creditors. Government creditors fare better. Professor Harris concluded his 2018 statistical survey of corporate insolvencies by noting that government is now the largest beneficiary of the insolvency system – through the Australian Taxation Office and the Fair Entitlements Guarantee, both of which are given certain priority in an insolvency. Given that, as he says, Australia's system is 'not designed to produce meaningful recoveries for [non-government] unsecured creditors', he asks 'why does not the government fund it?'[12]

In other words, in addition to the various public interest issues in insolvency supporting the state, the state's creditors predominate among the private unsecured creditors. We see this as further support for a larger role for government in the insolvency processes.

The role of the state – 19th to early 20th century debates

That role was the subject of widespread debate in England in the 19th century and the outcomes, confirming the role of the state through the creation of the Official Receiver position in both personal and corporate insolvency law, have been little questioned since.[13] Similar debates took place in New Zealand.[14] It should be noted however that the focus was more on the need to deter and regulate conduct than on providing access to the more beneficial aspects of insolvency which are seen today.

In Australia, at federation, while an Official Receiver role was adopted for personal bankruptcy, along with the role of the Inspector-General in Bankruptcy, under the Bankruptcy Act 1924, that approach was never adopted for corporate insolvency, for constitutional and other reasons unrelated to this discussion[15] but nevertheless having significant impact over time.

In particular, the role of a private individual, the official liquidator, with an obligation to administer companies wound up by order of the court, irrespective of assets being available for payment of fees, was relied upon.[16] At one stage, 70% of court appointed liquidations

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[12] *Corporate Insolvency by the Numbers*, Jason Harris, 27 February 2018 – www.australianinsolvencylaw.com
[13] *Victorian Insolvency,* M Lester, 1995, Clarendon Press, Oxford.
[14] As discussed in *Insolvency Law Reform: the Role of the State* [1999] NZ Law Review 569, Paul Heath.
[15] Explained to some extent in *Officially Receiving – a history of Australia's bankruptcy law and administration*, C Meiklejohn, ITSA 2010; also, *Towards Harmonised Company Legislation - Are We There Yet?* (2012) 40 Fed L Rev 141, RI Barrett.
[16] Explained in *Review of the Regulation of Corporate Insolvency Practitioners*, June 1997. See for example Companies Act 1910 (Vic) s 148. See also *Historical Foundations of Australian Law,* Vol II, Gleeson et al (eds), Federation Press, 2013, *The history of bankruptcy and insolvency law in England and Australia*, Allsop and Dargan, chapter 16.

were found to be without assets to fund the liquidators' remuneration.[17] Later, in 2013, an assessment was made of liquidators conducting over $48m in unfunded work annually.[18]

The government abolished the official liquidator role in 2017 in favour of an expected fee for service paid by creditors for the winding up of assetless companies; but accepting that a consequence would be that more insolvent businesses would not go through a liquidation process and proceed to default deregistration.[19] Public interest issues associated with that, for example in relation to abuse of the system, were not then raised.

The role of the state in insolvency law was again raised in more recent times, in New Zealand, where law reform attention was given to "contemporary views on the role of the state in a modern market-based economy and to the role that insolvency law plays in that context".[20] In an article in 1999, Paul Heath QC had argued that a distinction be drawn between private and public functions in insolvency, and that insolvency's "private functions should be performed by the private sector and paid out of funds otherwise available for distribution among creditors, while public functions should be performed by public officials and paid for out of public funds ...".

That question was then the subject of inquiry and report by the New Zealand Law Commission in 2000, with Mr Heath being the Commissioner responsible, with recommendations that assetless bankruptcies and liquidations should be administered by the Official Assignee but if there were assets, or their prospects, creditors should determine whether to appoint a private practitioner. The establishment of a new regulatory figure, an Inspector-General in Insolvency, was provisionally recommended, with responsibility for all investigations and prosecutions, including director disqualifications, and responsibility for overseeing office-holders, including the Official Assignee. A response was given by government in 2001 with no major change to the structure, including the retention of the Official Assignee for corporate insolvency, along with the private profession; and the retention of the Official Assignee as the *sole* appointee in personal insolvency.[21]

In the UK, Professor Peter Walton has described the debate "whether, and to what extent, the state should be involved in the administration of insolvent estates"[22] as "one of the largely unheralded battles in the world of insolvency law." As he explains, it has long been recognised that insolvency law does not just involve debtors and creditors, that the state has a crucial interest in ensuring that insolvencies are properly administered and that misconduct is pursued. He gives an account of the history and role of the Official Receiver, and then examines the increasing assumption of responsibility of the OR "with a potentially serious impact on the private sector insolvency practitioner profession". This offers a useful addition to the debate but in our view, Walton's focus is more on the legitimate interests of the profession and with a narrower view of the public interests served by insolvency.

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[17] *Brian Cassidy Electrical Industries Pty Limited (in prov liq) & Anor v Attalex Pty Limited (No 2)* (1984) 2 ACLC 752.

[18] *An analysis of official liquidations in Australia*, A Phillips, February 2013

[19] Explanatory Memorandum to the Insolvency Law Reform Bill 2015 at [9.135].

[20] New Zealand Law Commission Study Paper 11 - *Insolvency Law Reform: Promoting Trust and Confidence, An Advisory Report to the Ministry of Economic Development,* May 2001.

[21] Latest decisions on Insolvency Law Review, 28 February 2002. Latest decisions on Insolvency Law Review | Beehive.govt.nz.

[22] *It's Officialism – the Uncertain Past, Present and Future of the Insolvency Practitioner Profession in the United Kingdom,* Peter Walton LLB, PhD, Professor of Insolvency Law, University of Wolverhampton. Gore-Browne Special Release, March 2017, SR97.

While these contributions bring many of what we see as relevant issues to the fore, some particular to each jurisdiction, we would go further. Nevertheless, to a large extent, the proper role of the state in insolvency is a question adopted for the purpose of this debate.

Some detail about the problems

What we see as problems in the Australian insolvency regime will be explained in more detail by way of statistics and reports but briefly they are these, based on our explained assumption that insolvency law and practice involves both private and public aims.

Insolvency is conducted by a private profession of IPs - registered liquidators and registered trustees in bankruptcy - which administers a collective rules-based regime that serves important public purposes. More particularly, insolvency confers on private professionals significant public authority to investigate and refer misconduct of individuals, as well as significant powers, including quasi-judicial powers.[23] In that and other respects, much of the work of an IP does not necessarily produce monetary returns to creditors.[24]

That private profession, like all others, operates on the profit motive. Given that insolvency inherently involves limited or no funds, and that IPs are required to pursue public purposes, this leads to some evident tension and perhaps unsatisfactory outcomes.

Three main tensions are:

- **Access to insolvency services:** Unless there are remaining funds of the insolvent from which the IP may draw their remuneration and pay their proper expenses, the estate may not be administered at all. An IP must agree – consent – to be appointed to any insolvent estate and an IP is most likely to refuse consent to administer an estate without a prospect of being paid.

From society's viewpoint, an important aspect of this point is whether it matters that an insolvent company with outstanding creditors, including employees, is not externally administered because it has limited or no remaining funds to pay for its own winding up?

Is the consequence of that, that a high number of companies are deregistered by default (under s 601AB Corporations Act),[25] a problem that warrants attention by way of public intervention? For example, we note consistent academic comment as to the potential for this process to be used for unlawful phoenix conduct.[26]

We suggest that this does warrant attention both as a market failure and an issue that suggests closer examination, subject to our opening qualification that we don't really know.

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[23] *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 is typically cited; also *Sands Contracting Pty Ltd v Cant (costs)* [2021] FCA 751.

[24] "Courts have pointed out that "a trustee has no choice but to carry out certain statutory duties and that, in a small bankruptcy, the trustee's costs might appear disproportionately large"; *Simion v Brown* [2007] EWHC 511 (Ch)" [and "there are many ways in which costs may be incurred which are not related, principally or even at all, to the assets and liabilities of the estate": *Brook v Reed* [2011] EWCA Civ 331": *Keay's Insolvency*, 10th ed, [2.205].

[25] *Sunlight as the Disinfectant for Phoenix Activity* (2016) 34 Company and Securities Law Journal 257, Helen Anderson; *Illegal Phoenix Activity: Practical Ways to Improve the Recovery of Tax* [2018] Syd Law Rw 10; (2018) 40(2) Sydney Law Review 255, Helen Anderson.

[26] Phoenix Activity: recommendations on detection, disruption and enforcement February 2017, Anderson et al Phoenix-Activity-Recommendations-on-Detection-Disruption-and-Enforcement-Melbourne-Law-School-and-Monash-Business-School-February-2017-002.pdf (unimelb.edu.au)

As to the market failure, if debtors are 'too poor to go broke' there is a problem with the insolvency system that needs to be adjusted to match the economic reality.

- **Nature of insolvency services:** While much of the work of an IP is directly related to recovering money for creditors, an IP is also required to perform work in the public interest. For example, s 533 Corporations Act requires a liquidator to report all offences etc, federal and state, in relation to the company; irrespective of funds being available to do so (s 545); a similar but more limited requirement exists under the Bankruptcy Act, s 19.

While we say there needs to be a realignment of the focus of insolvency law's public and private interests, is it appropriate that private creditors, and therefore the credit system across the economy, underwrite the performance of public purpose roles undertaken by private IPs, or should government instead have a role?

One might say that if government were to assume that role, it might be more ready to refocus, and limit, the law's present requirements for an examination of the conduct in each and every insolvent estate; and, for example, bring forward its developing capacity for the use of technology and AI.

The question itself indicates the tension. We consider there are sufficient public purposes in insolvency for the state itself to assist as liquidator or trustee – for example, in the nature of an Official Receiver, but with more authority - or by providing funding to support the private insolvency profession to assist in fulfilling these public purposes, as existing or refined.

- **Cost of insolvency services:** There is evident tension in the way that IPs recoup their fees for work done – from both the remaining assets of the insolvent, and/or from higher charge out rates, and the fact that some of the work is done in the public interest, rather than the creditors' interests. Hence, even if there are funds remaining in a particular estate, which might otherwise be available for creditor dividends, these are often consumed in whole or in part by the higher charge out rates and by the public tasks required to be performed by the IP.

To some extent, that has been met by IPs consenting to appointments to assetless estates in particular categories (court appointments of the ATO), or particular clients or, depending on the market, on a speculative basis. That 'portfolio' approach to remuneration then raises issues concerning the proper attention given to the administration of estates, the nature of behavioural responses of IPs appointed in estates with no funds, and the validity of the accepted legal requirements to conduct investigations and reporting irrespective of remuneration being able to be claimed. It also raises questions about the transparency of the bases of remuneration.

It can however be fairly said that creditors in all insolvent estates, in effect, fund the insolvency system. Is that appropriate? Likewise, is there a cause for concern that there appears to be no sound basis to quantify the costs of the insolvency system, so opaque are the funding arrangements?

While we present options for reform, we also appreciate the significant adjustment in thinking required for these options to be considered and adopted. To some extent, in Australia, that adjustment is the more significant because Australia never adopted an official receiver role in corporate insolvency. Rather it adopted what we consider were makeshift measures in response, including through the official liquidator role, which continued for well over a century. This led to a hybrid-model of a liquidator which had both private interest tasks but also, increasingly, public interest tasks. Those measures are now well embedded. Change would be difficult.

However, we point out that insolvency law reform is a central and continual feature of relevant international bodies and that some of the issues we raise here, including the funding of the system, are the subject of focus. Both UNCITRAL[27] and World Bank[28] have issued guidance on establishment and maintenance of insolvency regimes in member states. Their recent tasks and guidance have been in the context of micro to small enterprises (MSEs) and the impact of COVID-19, which raise some of the issues we consider relevant. Such issues have been little considered in Australia.

Some particular examples

We referred to a lack of data about the operation of the insolvency system but we have referred to what reports and research are available. Some particular examples serve to support our views.

- ***A 2013 study showed that liquidators conducted unfunded work in external administrations to the value of over $48m annually***

That study is referred to in the Explanatory Memorandum to the Insolvency Law Reform Bill 2015 as follows:

"9.53 The unrecovered costs borne by practitioners in assetless administrations, or administrations with insufficient assets to meet remuneration and disbursements incurred, may be seen as being borne by other administrations through the charging of these risk premiums. It has been estimated that "insolvency practitioners are required to personally fund disbursements of $1.4 million and remuneration of $47.3 million in the conduct of their roles as Official Corporate insolvency practitioners annually".26 Concerns persist both within and outside the industry about the effects of this cross-subsidisation. 26 Phillips, A, An analysis of official liquidations in Australia, February 2013[29]

- **A 2020 AFSA report - *Remuneration in the personal insolvency system* - showed that 31% of estates handled by private trustees were unfunded[30]**

"In 2018–19, of the $230.35 million distributed by registered trustees, 32.2% was paid in dividends to creditors while 40% was paid in practitioner remuneration. The remaining 27.8% was for trading payments, cost administering estates, bank fees and charges, realisation charges and interest charges. In the same year, in 63% of bankruptcies administered by registered trustees, no remuneration was recovered at all. The average remuneration drawn by registered trustees in each matter in 2018–19 was $4,804, including matters in which no remuneration was drawn. Analysis done for the 2018-19 year showed that 69% of registered trustee bankruptcies finalised in that year had remuneration drawn in one or more years of the bankruptcy and that in finalised cases where remuneration was drawn, the average remuneration was $29,532. In 2018-19, 31% of bankruptcies finalised in that year produced no remuneration in any year of the administration". p 8.

- **Liquidators refer over 7,000 of breaches of the law etc to ASIC each year[31]**

ASIC's 2018-2019 insolvency statistics listed 7,498 reports lodged by IPs with ASIC. These comprised reports from receivers under s 422, reports lodged by administrators under s 438D and reports lodged

[27] UNCITRAL's Draft text on a simplified insolvency regime, 2021. Working Group V: Insolvency Law | United Nations Commission On International Trade Law
[28] World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes, 2021 Principles for Effective Insolvency and Creditor/Debtor Regimes, 2021 Edition (worldbank.org)
[29] Explanatory Memorandum to the Insolvency Law Reform Bill 2015 [9.53].
[30] *Remuneration in the personal insolvency system*, 4 March 2020 www.afsa.gov.au

[31] ASIC Report 645 Insolvency statistics: External administrators' reports (July 2018 to June 2019) December 2019.

by liquidators under s 533. That total figure had been 9,465 in 2015-2016.[32] Of those, external administrators alleged misconduct in 6,638 or 88.5% of reports and reported 19,985 possible breaches, at an average of three breaches per report, where possible misconduct was reported. The top three breaches reported were s 588G(1)–(2) Insolvent trading (5,350 or 71% of reports); s 180 Care and diligence—Directors' and officers' duties (4,141 or 55% of reports); and ss 286 and 344(1) Obligation to keep financial records (3,294 or 44% of reports).

- **92% of external administrations give no dividend returns to creditors**

In 96% of external administrations in 2018-2019, the dividend estimate was less than 11 cents in the dollar; but in 92% it was nil/c.

- **A 2012 study showed deeds of company arrangement average dividend return was 5.4 cents in the dollar** [33]

Also, insolvency practitioner fees as a voluntary administrator which preceded what were 'small company' DOCA were around $31,500, while the typical amount of remuneration charged by a deed administrator for the administration of a DOCA was $28,700.

- **It has been estimated (2016) that five times as many companies were deregistered by default, through s 601AB, as were deregistered following an external administration**[34]

" …both employees and general unsecured creditors of insolvent companies, where the directors have not sought liquidation or VA, are in a difficult position. They will need to fund the company's liquidation themselves if they hope to recover anything of what they are owed, and risk further losses if it eventuates that company has no assets. As a result, many of these creditors do nothing, and the abandoned companies are eventually deregistered by ASIC for failure to return documents or pay annual fees.[14] It is estimated that there are five times as many abandoned companies as there are companies in liquidation each year,[15] but the amounts lost to their creditors are unquantified".

- **Dividend returns to creditors in bankruptcy are in the order of 1.2 cents**[35]

AFSA's Administration Statistics reports that the break-up is 2.53c/$ for registered trustees, and 0.91c/$ for the Official Trustee.

Questions for debate and next steps

The relevant points to note so far are that corporate insolvency is administered solely by a private profession, with limited government support, even to the extent that the private profession administers a public role. Personal insolvency is part administered by the state, through AFSA, but the private profession still administers a public role. The performance of that public role is funded by creditors generally, along with the private tasks conducted by an IP.

Our original questions are restated.

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[32] See *Shelter from the Storm: Phoenix Activity and the Safe Harbour* [2018] Melb U Law Rw 2; (2018) 41(3) Melbourne University Law Review 999, Helen Anderson.

[33] *A sample review of Deeds of Company Arrangement under Part 5.3A of the Corporations Act* [2013 ARITA Terry Taylor Scholarship Report], Mark Wellard.

[34] *Insolvency, it's all about the money*, [2018] U Melb LRS 6, Anderson; *Phoenix Activity: recommendations on detection, disruption and enforcement* February 2017, Anderson et al.

[35] AFSA statistics Rate of return | Australian Financial Security Authority (afsa.gov.au)

- Given the range of important public aims of insolvency, is it satisfactory that the system be administered solely by a private profession?

- Even if that were considered satisfactory, should insolvency's public functions be funded by moneys otherwise payable to creditors?

- Should an option be implemented whereby insolvency is solely administered by a public body, or by a private profession working jointly with a public body assuming public interest tasks? Or some other option?

We have examined comparable jurisdictions and while none provides a complete answer, in our view, both England and New Zealand do have reasonable models of government involvement in insolvency. Both have had government trustees and liquidators for over 100 years, operating side by side with the private profession.

In fact, New Zealand has *only* a government role in personal insolvency, through the Official Assignee, with corporate insolvency handled by both the Official Assignee and the private profession. The 'monopoly' in relation to bankruptcy was maintained by the government on the basis that "(b)ecause the Official Assignee is not profit driven, the interests of debtors are better observed by the state than by the private sector".[36]

Singapore also has an official receiver role operating in conjunction with a private profession. Its 2013 law reform review conducted a useful comparative review of the structure of a number of jurisdictions including Australia.[37]

We also draw attention to the extended role of the Official Receiver in England of being appointed as liquidator to several large insolvencies. These include Thomas Cook, Carillion Constructions, British Steel[38] and the Kids Company. The core work in each is handled by private firms as statutory 'special managers'[39] under the direction and control of the Official Receiver, or by the OR's office direct. As we understand, these collapses and their potential difficulties and liabilities, as well as their limited remaining funds, prompted the Official Receiver to assume responsibility.[40] There will inevitably be more.

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[36] Latest decisions on Insolvency Law Review, 28 February 2002. [Latest decisions on Insolvency Law Review | Beehive.govt.nz]

[37] See *Report of the Insolvency Law Review Committee*, Final Report, 2013. See also *Developments in Singapore's Insolvency and Restructuring Regime*, [2021] 33(2) ARITA J 18, Aurelio Gurrea Martinez and Dr Kai Luck.

[38] See *British Steel – is it a wind up?* Corporate Rescue and Insolvency, August 2019, p 125, Keay and Walton.

[39] Insolvency Act 1986 UK s 177; See *Official Receiver Technical Manual*, Application for and appointment of special managers, February 2012.

[40] As an example of the English system, in the compulsory liquidation of the Thomas Cook group of companies, the High Court said that:
"16. ... A winding up order brings the Companies' businesses to an end and ensures that the assets of the Companies are distributed in an orderly fashion, in accordance with statute. Unlike administration, there is no need for the Companies to identify an insolvency practitioner who is willing to accept appointment as liquidator. The Official Receiver will instead become the liquidator as a matter of law, pursuant to section 136 of the Insolvency Act 1986.

17. It is important, in this regard, to note that Her Majesty's Government has indicated that, whilst it will not fund an administration, it will provide the support necessary for an insolvency process which involves the Official Receiver being appointed as a liquidator. The Official Receiver will consent to act as liquidator on an expedited basis and has arranged, as I have described, for insolvency practitioners at AlixPartners and KPMG to assist by accepting appointment as special managers. There will, consequent upon the orders that I am being invited to make, be a services agreement between the special managers and the CAA, pursuant to which services will be provided to ensure the repatriation of approximately 145,000 people back to the UK who are presently abroad": *Re Thomas Cook Group Plc & Ors* [2019] EWHC 2626 (Ch) (23 September 2019).

British Steel, as one example, had serious potential environmental and health and safety issues, and neither Ernst & Young, which had been advising the asset-based lenders, nor PwC, which had been advising British Steel, were prepared to accept appointment as administrators. The Official Receiver took the role as liquidator but then applied for the appointment of special managers on the grounds that the Official Receiver's office did not itself have either the necessary expertise or manpower to cover the various tasks likely to be necessary in the liquidation. The High Court appointed partners in Ernst & Young as special managers.

That option, were it required, is not available in Australia, in corporate insolvency and it is an option we would consider. That necessarily raises other issues than those at the smaller end of the market we have been discussing but which we are examining.

We are in the process of considering various options[41] but one that we are considering is that the be a government role in providing a *gateway* for all insolvent entities to enter, and what we term a *triage* process for allocation of the level of examination and investigation required to be given to each. That process could extend to the government assuming a role in the conduct of administrations with no or insufficient funds, with the option of allocation to a private practitioner, either in whole or on a co-operative basis. Technology based processes and artificial intelligence (AI) would be applied for risk assessment of the insolvent entities. An insolvency portal could be established.[42]

The more detailed features of the system, including the roles allocated between the government and the private profession are being formulated and an outline will be presented.

In the meantime, if those reading this paper would like to offer views in advance, please do so.

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[41] Managing the insolvency curve – a new government role is needed? | Murrays Legal Commentary; Managing the insolvency curve – a new government role is needed? | Australian Insolvency Law

[42] See TIP – The Insolvency Portal | Murrays Legal Commentary We do not address the potential for insolvency practice to adopt the efficiencies of technology, but see *The potential for the use of information technology (IT) in insolvency practice, and the reality*, IAN, *4 December 2020,* Murray.