Consideration of the June 2004 Report to the Parliamentary Joint Committee on Corporations and Financial Services – "Corporate Insolvency Laws a Stocktake" – and the "Impact of that report on the possible implementation of Chapter 11 type regime in Australia"

Steve Sherman
Partner
Ferrier Hodgson
Sydney

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Introduction

The original topic to be discussed in this session was to be an extension of the fertile debate on the issue of Chapter 11 v Voluntary Administration within the framework of the Australian business landscape.

The recent report issued by the Parliamentary Joint Committee on Corporations and Financial Services has, in my view effectively "killed off" the debate in favour of the incumbent regime. Notwithstanding that the argument may continue, I don't think that I would be alone in suggesting that discussions may shift to examine the impact of the various recommendations on the efficacy of the VA regime. It is clear from a review of the submissions made to the Committee and from the Committee's conclusions, that a system which has as a fundamental element the debtor remaining in possession during a possible restructure, is one which will not in the foreseeable future, if ever, sit easily within Corporate Australia.

This paper does not propose to rekindle the debate but will briefly look at some of the "main" committee recommendations from a practitioners perspective.

I acknowledge that not all and may be only a few may agree with my comments. At this point in time my comments reflect a "reaction" to the recommendations and not necessarily a conclusion.

Background

Before reviewing some of the Recommendations, it is interesting to reflect briefly on the terms of reference relating to the Committee's review, if for nothing else but to better understand what may have triggered the current debate and hence what may have driven some of the Recommendations:

> *"Corporate governance is complemented by an effective treatment of insolvency.*
>
> *The G22 Working Group on International Financial Crises noted that, in addition to contributing to crisis prevention, strong and predictable insolvency regimes are an important element of crisis mitigation and orderly crisis resolution.*
>
> *Australian law dealing with corporate insolvency is contained in the Corporations Act 2001. The relevant provisions are primarily concerned with procedures for the winding up of companies, the orderly realisation of the available assets of those companies and the equitable distribution of the proceeds to creditors (including employees) and shareholders"..*

"On 14 November 2002, the Parliamentary Joint Committee on Corporations and Financial Services agreed to consider and report on the operation of Australia's insolvency and voluntary administration laws, including:

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

(b) the duties of directors;

(c) the rights of creditors;

(d) the cost of external administrations;

(e) the treatment of employee entitlements;

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

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

(h) whether special provision should be made regarding the use of phoenix companies." 22

Other commentators suggest that the review was initiated in reaction to the spate of high profile collapses (Ansett, HIH, Pan Pharmaceuticals) coupled with the fact that no major review of the insolvency provisions of the Act had occurred since the 1988 Harmer report. Whatever the reasons the debate has been healthy and if it does nothing else other than "fine tune" the existing regime then in my view it would have been beneficial.

Following submissions in late 2002 and early 2003 the Committee released an issues paper in May 2003 before tabling it's report, entitled *"Corporate Insolvency Laws: A Stocktake, in both houses of Parliament on 30 June 2004".*

A quick look at the Committee's comments on the results of its review of Chapter 11, underline my earlier comment that the Chapter 11 debate in terms of its appropriateness to the Australian Corporate landscape has been "killed off".

"The US corporate rescue model may be seen to occupy one end of a continuum. It is widely perceived as being one of the most debtor-oriented rescue procedures in the world. The debtor company's pre-petition management usually remains in control for long after the petition is filed. The debtor is granted an exclusive 120 day period in which to propose a reorganisation plan. In contrast, and perhaps at the other end of the continuum, are rescue models such as Germany's that are strongly creditor-oriented."[23]

The Report concluded "The Committee is not persuaded to the view that an insolvency procedure modelled on Chapter 11 of the US Bankruptcy Code is appropriate for the Australian corporate sector. Nor does it consider that wholesale amendments to the voluntary administration procedure to conform with Chapter 11 have the potential to make a significant improvement in outcomes that are presently achievable under the VA procedure." [24]

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[22] Parliamentary Joint Committee on Corporations and Financial Services Corporate Insolvency Laws: a Stocktake June 2004, Terms of Reference
[23] Parliamentary Joint Committee on Corporations and Financial Services Corporate Insolvency Laws: a Stocktake June 2004, p.86

[24] Parliamentary Joint Committee on Corporations and Financial Services Corporate Insolvency Laws: a Stocktake June 2004, p.91

Voluntary Administration – Recommendations

I support the Committee's recommendation which prefers Voluntary Administrations to Chapter 11. As evidenced by some of the largest Voluntary Administrations in Australia's recent corporate landscape many criticisms of the Voluntary Administration regime are in my view unfounded. The VA process can be as flexible as the Chapter 11 process.

The report addresses a wide range of contemporary insolvency related issues. My comments in this paper are not designed to be a conclusive study. I recognize that in some quarters the Recommendations relating to Phoenix Corporations, employee entitlements etc hold a position of higher concern. Notwithstanding, I have chosen to focus my comments on those Recommendations (outlined below) which may, if translated to law, impact on the present VA regime. They are not presented in any order of importance.

Recommendation 14 – relating to the threshold test to permit directors to make the initial appointment;

Recommendations 15 & 16 – amending the time periods in respect of creditors' meetings;

Recommendation 2 – allowing creditors to appoint a different person as liquidator when either the administration or deed of company arrangement ends and the company proceeds into liquidation.

Recommendations 3 & 25 – prohibiting an administrator from using a casting vote in a resolution concerning his or her replacement or remuneration; and

Recommendation 55 – permitting administrators to apply to a court for an order that a party to a contract may not terminate the contract by virtue of entry into voluntary administration.

Notwithstanding the wide spread nature of the Committee's review it is also my opinion that the Chapter 11 regime continues to have one major advantage over the VA regime and that is in relation to "ipso facto" clauses. Whilst Recommendation 55 has in part addressed this matter, I believe it could be equally argued that Recommendation 55 may not go far enough.

Closer Consideration of some of the VA Related Recommendations

Working within the theme, *"A Stocktake"* I thought it appropriate to expand and comment on several of the recommendations from a practitioners perspective.

Recommendation 14

Revision of the threshold test permitting directors to make the initial appointment.

S.436A of the Act encompasses the following wording in relation to the consideration/resolution by directors to appoint a VA.

> *"the company is insolvent or is likely to become insolvent at some future time".*

The recommendation suggests alternate words *"the company is insolvent or may become insolvent."*

The aim behind this recommendation is said to be to alleviate perceptions that the voluntary administration process is only available to insolvent companies.

From my experience the most frequent area of discussion with any director/director group is in relation to the question: *"is the company insolvent now and if so what should we do?"* Experience has not shown that the question(s) associated with the current wording *"is likely to become insolvent at some future time"* is more prominent at or around the time when decisions such as contemplating the appointment of a VA are made. May be this reflects that the reconstruction elements of the VA regime has been masked and/or not utilised to there fullest extent or may be it simply reflects the real time mentality of those making and those who may be involved in making the decision to place a company in VA.

One issue which may arise from an adoption of the Recommendation is that the VA regime could be used as an effective means by which a company and/or business can be cleansed of old problems and revitalised as an entity with a distinct competitive advantage (US-Airline Examples).

The reality is that if the wording is changed the system may be "abused". If, however, the change is made and it invokes a regime which facilitates the exploration of reconstruction/ rehabilitation of a company then in my view it could be a positive and constructive change.

Recommendation 15 and 16

Amending the time periods for creditors meetings so that the first creditors' meeting is held within eight business days of commencement of the VA (with 5 business days notice) and the period within which the second meeting must occur is extended to 25 business days (with a 20 business day convening period).

The reasoning given by the Committee suggests a sound basis for this recommendation. With respect to the first meeting it is envisaged that more time will facilitate greater preparation and importantly it will create an increased opportunity to ensure notification to all known creditors. The complaint of *"we didn't get notice"* is an all too familiar one.

The expanded timetable with respect to the second meeting is to allow a fuller investigation and comparative analysis for the benefit of creditors.

The reality is that where necessary and justified the judiciary has supported reasonable extensions in this area. In some instances it may be advantageous/realistic (cash burn, trading liabilities) not to delay what may be the inevitable in terms of a company's inability to restructure, therefore it may be warranted to consider the merits of a "within" phrase so as to facilitate an early/timely decision with respect to the future of the company. That is, call and hold the meeting no earlier than is envisaged in the current timing and no later than the proposed new time.

The proposed time extension may be a distinct advantage in the event where the incumbent administrator is replaced at the first meeting.

Recommendation 2

Allowing creditors to appoint an alternate person as liquidator when either the administration or DOCA ends and the company proceeds to liquidation.

This recommendation seeks to address a "concern" that the incumbent administrator may not have the confidence of the creditors to diligently fulfil his/her obligations as a liquidator.

Creditors are provided with an opportunity to address this issue during the first VA meeting and they are also able to further consider it in the context of a DOCA. From my perspective that is adequate opportunity and creating an environment where the tenure can again be questioned may not be in the best interest of creditors. There are also cost implications to be taken into account, notice of possible alternate liquidator, disclosure/conflict statements and when and how this is done.

Recommendation 3 and 25

Prohibiting an administrator from using a casting vote on a resolution concerning his or her replacement or remuneration.

The stated aim with respect to these proposals is to enhance the notion and actual existence of independence.

From a practical perspective every responsible administrator acknowledges the ethical code of conduct associated with their position and in such circumstances to use a casting vote may be described as professional suicide. That is not to say that particular groups of creditors should hold sway to the detriment of the general body of creditors and that we (practitioners) should meekly fall on our swords.

Ultimately, these are matters of professional judgement and a prudent practitioner should/will exercise due care and caution having regard to the interests of all creditors. The legislation currently provides a judicial right of recourse to affected creditors. This will remain an option and as such it may be that the current Recommendation could be over legislating.

Matters concerning administrators' fees are arousing increasing scrutiny. In some cases this is highly justified. However to assume that this has been lost on the general body of practitioners may be a little naïve and as such this recommendation may be seen as attempting to address the actions of a few and not the majority.

Recommendation 55

This recommendation would see administrators able to apply to the court for an order that a party to a contract may not terminate the contract by virtue of entry into VA.

As stated earlier the "impact" of this Recommendation within a framework of "Reconstruction/Rehabilitation" is in my view extremely important.

To better consider the impact of this recommendation it is worth returning to the Chapter 11 v VA debate.

Under the US Bankruptcy Code a stay of creditor actions against the Chapter 11 debtor automatically goes into effect when the bankruptcy petition is filed [11 USC § 362(a)].

Transactions caught by the automatic stay include:

- enforcement against the debtor or property of the estate of a judgement debt;

- any act to obtain possession of property of or from the estate;
- any act to create or perfect a lien against property of the estate;
- set off of any debt owing to the debtor that arose before filing.

Transactions **not** caught automatically include – [§ 362(b)]:

- commencement or continuation of criminal action;
- transactions relating to the establishment of paternity and alimony;
- enforcement of government policy;
- set off claims associated with commodity contracts;
- completion of tax audit including demand for tax returns;
- any act by a lessor (to obtain possession) to the debtor under a lease of non-residential real property that has terminated prior to the filing or expires after the term.

The stay generally provides breathing space for the debtor, during which negotiations can progress relative to the debtors financial affairs.

Under certain circumstances a secured creditor can obtain an order from the court granting relief from the automatic stay. For example, when the debtor has no equity in the property and the property is no necessary for the effective reorganisation
[11 USC § 362(d)].

The automatic stay provisions applied under a Chapter 11 renders unenforceable "Ipso Facto" clauses in contracts.

Ipso Facto clauses allow the client/supplier to terminate "for cause" (or modify or forfeit rights) if the other party becomes bankrupt, insolvent etc. These clauses allow termination as a result of the party's distressed financial condition. An attempt to enforce such a clause could result in a violation of the automatic stay.

Within the automatic stay period the Debtor in Possession and/or Trustee must make decisions relative to contracts/leases etc caught by the legislation.

Generally, the regime in America [11 USC § 365] allows a debtor to assume, assign or reject executory contracts and unexpired leases with the notable exception being that a contract to make a loan or extend financial accommodations cannot be assumed. Generally, there is no deadline for a debtors decision on these issues, bearing in mind the primary aim is to facilitate a reorganisation plan within 120 days of the original filing. During the stay period the debtor may require continued performance by the provider. The general election provisions are further refined relative to non-residential leases.

The debtor must perform under a non-residential real property lease and it must assume or reject within 60 days subject to court extensions. A debtor must perform under non-consumer personal property leases after first 60 days unless otherwise ordered by the court.

Assumption: Requires cure of defaults; adequate assurance of continued performance, assumption must be in full not in part; cannot be modified without creditors consent and a breach after assumption yields an administrative claim.

Rejection: Excuses debtors future performance and is treated as pre-petition breach of contract.

Assignment: The contract must be assumed first; adequate future performance assumed; anti-assignment clauses can generally be overridden and a debtor is no longer liable for breaches.

History shows to this is not an area of the US system which is free from controversy. The ever inventive legal and banking sectors have pushed amongst other things, "Waivers of automatic stays" in an attempt to circumvent the operating provision of Section 362(a). Generally, the courts have rendered such waivers as unenforceable however there is sufficient legal evidence to suggest that the fight will be continued. In the New York Law Journal (17 February 2004) a recent article entitled *"Conflicting Clauses of S.365 – Still make Courts Struggle"* opined that this area is an extremely fertile one in terms of seeking to better define the positions of the various competing interests.

The article concludes with the statement "*Until congress acts to clarify the inherent conflict within S.365 courts will continue to find new ways to justify an outcome based more on what may be factually or intellectually "appropriate" under the circumstances, rather than being guided by what may have been intended, even if that means we wind up back where we started*". This quote serves to underline that whilst the "automatic stay" provisions generally provide for a more stable and controlled determination of a company's future in terms of its possible reorganisation it is not devoid of battles in terms of defining the respective rights of the participants.

In the Australian context the VA regime also imposes a moratorium on creditors claims however, tighter time frames are imposed one assumes to minimise any inconvenience and potential prejudice to creditors through an "interference" of their proprietary rights and rights accrued under freedom of contract.

Where there was an agreement made before the administration of the company, and the company continues to use or occupy, or to be in possession of, property of which someone else is the owner or lessor, under that pre-administration agreement, the administrator is made liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period:

(a) that begins more than seven days after the administration began; and

(b) throughout which:
   (i) the company continues to use or occupy, or to be in possession of, the property; and
   (ii) the administration continues.

The administrator *may*, within seven days after the beginning of the administration, *give* to the owner or lessor a notice that specifies the property and states that the company does not propose to exercise rights in relation to the property (sec 443B(3)). The administrator is not liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to *a period during which a notice under sec 443B(3) is in force*, but such a notice does not affect the company's liability (sec 443B(4)).

Many contracts that companies enter into include "ipso facto" clauses that give the other party to the contract the right to terminate the contract 'by the mere fact' of the other party's insolvency, if

the other party becomes subject to a form of external administration or financially distressed or if it fails to maintain a contractually specified financial condition.

Within the current VA regime such clauses permit termination of the agreement simply because of the other party's financial difficulties. The insolvency laws of some countries override these clauses, so that, if the party cancels, it is liable in damages to the insolvent.[25] However, in Australia there is no statutory right for a Voluntary Administrator to void ipso facto clauses.

The IPAA submitted to the Parliamentary Joint Committee on Corporations and Financial Services that in an insolvency scenario "if part of a contract that is fundamental to the company's ongoing operation, can result in the external administrator losing the only asset of value to the company its business or alternatively place the external administrator in a 'no win' situation when he/she is trying to negotiate the terms of the contract. The administrator may seek injunctive relief in the Courts but this is both expensive and time consuming. "[26]

"The IPAA proposed that the law should be amended so that the other party to a contract (other than a charge) would be unable to terminate or modify the contract or repossess any property to which the contract relates without the consent of the administrator or the court. The IPAA proposed further that in order to protect the other party to the contract, if the administrator chooses to continue with the contract, he or she should be liable to pay for that portion of the contract where benefit is obtained during the term of the voluntary administration, similarly to s 443B"[27]

Recommendation 55 suggests that the administrator be empowered to make an application to the court to restrain a potential termination. With all due respect the proposed change whilst in my view being a move in the right direction does not take account the practical issues that are evident in most trade on VA's. In addition, it could be argued that Recommendation 55 does not fit within the broad based objectives associated with Recommendation 14 which supports an early move into a VA and the general thrust of the VA regime which is in part to provide an opportunity for a company to be rehabilitated.

The One.Tel (OTL) Experience: To emphasise the impact of ipso facto clauses, I have briefly outlined what I refer to as the OTL experience.

OTL was a full service telephony company which provided FW/Mobile/ISP/Phone Card/GSM-Digital Network (build project).

At its peak OTL had in excess of 1.3m domestic subscribers, 1500 trade/service providers,10 major lease finance commitments,2000 permanent/semi permanent employees,500 One.Tel mobile dealers and25 retail outlets. In addition it had substantial operations in the UK, Hong Kong, Switzerland, France, Germany and Netherlands.

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[25] Parliamentary Joint Committee on Corporations and Financial Services Corporate Insolvency Laws: a Stocktake June 2004, p.215
[26] Parliamentary Joint Committee on Corporations and Financial Services Corporate Insolvency Laws: a Stocktake June 2004, p.216
[27] Parliamentary Joint Committee on Corporations and Financial Services Corporate Insolvency Laws: a Stocktake June 2004, p.216-7

At the time of our appointment (May 2001) OTL through a number of wholly owned subsidiaries had committed to the building of its own GSM network with the assistance of Lucent Technologies. The total investment in the network was (circa) $1.2 billion. The network had been built and delivered in Adelaide and the remaining state based builds were substantially progressed. This was OTL's move to have operational independence, the historical aim being to compete head on with both Telstra and Optus.

Following our appointment we were faced, as it not unusual, with a business with a dire cash position: approximately $2m in the bank on the day of our appointment and a projected net trading loss for June '01 of $30-$40m. This "positive" cash position was eliminated shortly after our appointment as a result of a financial institution exercising a right of set-off. The financial institution also cancelled OTL's merchant facility thereby affecting debtor collections.

A few days after our appointment a major supplier, who had supported the business since its inception, unilaterally terminated services, which had the immediate impact of not only completing exposing OTL's customers but also potentially undermining the overall integrity of OTL's debtors, which at that time had a book value of $620m. At that time the supplier was owed significant monies circa $50m, this was not disputed.

This ultimately was the beginning of the end. As a consequence of the termination, to protect the "value" of the customer base and to underpin in some way future debt collections, we were "forced" to deal immediately with the customer base. Given the veracity of the "vultures feeding off the carcass" there was no alternative.

In this instance, where a company has contractual rights which are not defined as "property rights" the legislation provides no opportunity for an administrator to invoke some degree of status quo so as to at least give some opportunity for a restructure to be examined/tested. In contrast, if OTL had been in possession of a third party's assets; it would have enjoyed the statutory benefits provided by s.440.

I know that this criticism or identification of what I consider to be a shortcoming of the legislation can be equally balanced by any number of propositions to support the theories of market forces/creditor driven systems and the like, but I question as to whether the mechanics of the system allow us as professionals to ply our trade? Does it give us the required breathing space to, at a very minimum; provide some examinations of options for all parties with an interest in the subject company?

Early commentary by those involved in the profession and also the judiciary after the introduction of Part 5.3A gave us phrases/commentary to support the theory of reconstruction which was to be the vanguard of the new legislation. Such as:

"Absolute essence behind the philosophy is the concept of suspension of existing indebtedness to give breathing space to seek an alternative to liquidation by composition with creditors and reconstruction with consequent benefits to employees and the community." and from the judiciary; in **Vanfox Pty Limited (1994).**

"The scheme (referring to Part 5.3A) enables directors to appoint administrators who will have the benefit of a moratorium on actions against the company while formulating a plan of action for consideration by the creditors. The emphasis is on informality, flexibility, speed of action and protection of creditors interests."

Notwithstanding the intent, in my view the reality of the matter for service type companies which operate primarily with the benefit of contractual rights is that the moratorium is strong enough so as to provide an opportunity to explore options for **<u>all</u>** creditors. I do not profess to have the

answer, however, I do know that in the case of OTL the legislation did not assist. An opportunity (whether it was remote or more likely) was not afforded to the company and all of its creditors to even examine options.

The obvious comparison in this example is to what might have occurred with a Chapter 11 type broader moratorium. It may have been the same outcome but a stronger moratorium would have established a more stable platform from which to assess options.

The proposition put forward by the IPAA of a general moratorium, whilst maintaining the personal liability provisions, this would at least provide a level playing field and an opportunity to canvas the business prospects?

The US system in relation to the moratorium imposed on creditors (S.362) enables, in conjunction with the formulation of a plan, a debtor in possession to reject or confirm contracts and thus leave a counterparty as an unsecured claim or bind a party or assign a contract against the counter party's wishes. This ability is generally policed by what is referred to as the "Test of Adequate Protection". This principal provides creditors with a judicial forum by which to challenge not only the ultimate plan, but also the decision by a debtor in possession, and at a more fundamental level the initial imposition of the general moratorium.

Regardless of your views, it is my opinion that the OTL experience highlights a problem with the effectiveness of the present legislative framework. Maybe it is OTL that was the problem, but that question has yet to be played out.

The OTL experience may not be isolated. The issue was also critically examined by Korda Mentha in a paper produced in December 2003 in the context of the Ansett administration.

Korda Mentha supported a combination of the policy options identified by CAMAC in paragraphs 2.205 and 2.206 of the Discussion Paper. Their recommendation incorporated some but not all elements of their experience in relation to the Chapter 11 treatment of contractual obligations for Ansett's US subsidiary. Under Chapter 11, contracts are effectively frozen however a company may be required by the Court to provide evidence that they can honour post-petition contractual obligations which may include a requirement to place funds on deposit to support contractual obligations.

Korda Mentha were of the view that ipso facto clauses should not be enforceable as is the case under Chapter 11. "We believe that freezing ipso facto clauses has the potential to significantly enhance a large and complex enterprise's prospects of rehabilitation."

Recommendation 55 is a start in recognising the issue of the impact of "Ipso Facto" clauses. The real impact is in some cases significant in terms of being denied an opportunity to examine options to restructure companies. In my view the Recommendation does not go for enough, but nothing is meant to be easy.

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