CORPORATE INSOLVENCY - PROPOSALS FOR REFORM

QUESTIONS AND ANSWERS

Comment - Ron Harmer:

I don't want to convert this into a debate between myself and my colleagues because I am sure we have too much respect for one another to descend to that level. But I think there were some observations that need some correction. First Mr Fox suggested that a declaration might be signed and put in the bottom drawer and it would thereupon be effective immediately a bank-appointed receiver walked in the door. Well that is not the case because the declaration will only be effective if it is in fact lodged with the Corporate Affairs Commission and it will not be effective until that is done. So that unlike what has occurred under Part 10 of the Bankruptcy Act there will be little room for that type of activity.

He referred to the possibility of time being extended. That is always on the cards I suppose but there is a cut-out provision, the moratorium cuts out after 35 days whether or not a meeting has been held in that time unless the courts extend that time. And I would suggest that anyone who is endeavouring to get the court to extend the time where it is shown that there are a number of people holding securities or otherwise having an interest in property of the company which are affected by it the court will have to be greatly persuaded that indeed time ought to be extended.

The personal liability aspect of the administrator which was touched on by Philip Fox, I think he suggested that he would have a seven day holiday, well that is not right. He will have a seven day holiday in terms of his liability for continuing rent or other types of payments arising out of the continued use and occupation of property leased by the company but he will not have any type of holiday nor exemption from normal debts and liabilities incurred in the operation of the company.

One of Peter's last observations on a group administration - I can assure him that that is going to be addressed. In fact a provision in the New Zealand legislation that does in fact enable companies in a group - I think the New Zealand provision only applies to a winding up but nonetheless it can be, I think, successfully adapted for the purposes of something like this to enable the group of companies to be married into one or two or

three, whatever it might appear to be commercially sound and an appropriate way to do it. And that is something which we will not overlook.

Peter suggested that the public notice to which I referred about automatic crystallisation would be something in the public notices section. It would not be. It would be simply a notice lodged at the Corporate Affairs Commission. I appreciate that people do not read the newspapers, nor are they likely to run off to the Corporate Affairs office and search documents there. But the point of the exercise is to clearly pinpoint the time where you are relying on an automatic or self-generating clause in a floating charge to pinpoint the time at which you say that provision has effect. It really does not matter to me whether people read it or otherwise. The important thing in order to straighten out what can be quite confusing commercial relationships and dealings is to know when that point in time has occurred.

Otherwise I think that I have escaped somewhat lightly. So I do not think that I will go away from here feeling that I have been mugged or mauled.

Comment - Eric Anning (Feez Ruthning, Brisbane):

This is not a question. It is an opinion. Australia is poor. We are not the United States of America and we are not the United Kingdom. I do not think we can afford this legislation. We need risk capital and in the twenty-five years that I have practised in Queensland I have seen many great developments there which were only possible because of the introduction of risk capital and if a bank or a syndicate of banks is going to introduce risk capital they need to be absolutely certain of their security. And although I have not had an opportunity to study this legislation to see what exceptions there might be, my personal opinion, as a practising lawyer of twenty-five years in Queensland, is that many of the great projects up there would not have got off the ground if we had had this legislation in force.

Comment - Paul Darvell (Rudd Watts & Stone, Auckland):

All I can say firstly is thank heavens I practice in New Zealand rather than Australia. It seems to me that this is a clear case of what I call social policy legislation and it seems to me that the policy as is stated is that the perceived benefit from continuing a company under a moratorium is basically more important than the contractual or other rights of lenders. It probably comes as no surprise to suggest that most people in this room would not agree with that proposition. I think that is the basic objection to them. In speaking as a practitioner I would support the point that was made by the previous speaker that this new law will make a project significantly more difficult, particularly where overseas lenders and Japanese lenders are

concerned. They will seek legal opinions on these things and you will have to give them very detailed explanations which will be less than convincing. Secondly, my experience in this area tends to suggest that there are in fact very few companies who go into liquidation or whatever that in fact are worth saving and that in many cases where there have been section 205 arrangements under the New Zealand Companies Act their losses have in fact been compounded. So what I am saying is that if you look at it factually the whole assumption on which the social policy is based is in fact incorrect, that in fact you are causing statistically probably greater harm to creditors and to secured creditors in particular by implementing it and that overall you are not increasing the social good by providing for moratoriums and by providing for insolvent companies to keep on trading.

Having made a political statement, if I could actually ask one question in relation to automatic crystallisation clauses. To me the concept of having to lodge a notice in the Companies office about it I find mystifying - the whole point behind these automatic crystallisation clauses is that they work where one normally does not know what has happened. If I could just ask one question I would ask how this would work. Let us say day 1 the company gives a debenture with a normal floating charge over assets and it says that it will automatically crystallise if the company purports to give a specific charge over an asset. Day 2 the company does give a specific charge and under the normal crystallisation clause that would cause the debenture to crystallise. Day 3 the lender under the debenture does not know about this, the company then has a moratorium over this issue. As I understand it appears that in fact that debenture has not crystallised therefore is it the case that the specific charge actually will have priority?

Response - Ron Harmer:

I should not think so. But I am obliged to you for raising that type of issue. As a matter of contract in my view it would be difficult for the holder of the later charge to enforce it in priority to the prior charge and I do not see our proposals as intervening upon that basic issue.

Question from the Floor: (No name given)

I would like to ask Mr Harmer if he has any knowledge of statistics from the United States or from other jurisdictions where this type of arrangement like a chapter 11, what is the percentage of success?

Response - Ron Harmer:

If you look at success as being a total rehabilitation it is quite low. Indeed if you look at it as being anything, that is other than perhaps a 5-6 percent rehabilitation in the United States, I think you would be fairly lucky. But the other statistics that I have seen and there are contrary views on it

indicate that, excepting the reorganisation of the company as a whole, the saving of the business and the employment of people engaged in that business is reasonably high. But you could never justify anything like this on the basis of rehabilitating the company totally.

Comment - Richard Barber (Price Waterhouse, Brisbane):

I thought today was going to be "be nice to the accountants day" after the barrage we copped yesterday but Peter broke that myth when he said that we got the last thousand dollars out of the job. However, as a practitioner in the insolvency field I can only say that the legislation is nice in theory but my situation would be that most businesses that go bust are not even good tradesmen let alone businessmen and that they are going to go to the wall anyway. The ones that are much bigger that schemes of arrangement, the costly part of trying to put them together is there. I believe that it is one of attitude. Any creditor - they want blood, it does not matter what. You go to a creditors' meeting now, he says "wind the bastard up!" And that is an attitude of creditors and rightly so. They are unsecured bankers, that is what they are, and they have got to accept this. So you have got one of attitude in the community. The creditors towards the debtor, they want blood, you will not change that because they feel they have been let down, misled etc and I do not see that this legislation will change the attitude in our community.

Comment - Tony Sherlock (Coopers & Lybrand, Sydney):

I am a practitioner also in the game and I would just like to make an observation. First, I enjoyed Peter's comments very much. He prefaced his comments by saying that he was not a cynic. I can only speculate on his comments if he was in fact a cynic. But on more serious a note I think that Mr Harmer's comments about saving the business and the employment is really what this legislation is about. We have seen over the last five years I think an increasing tendency for banks and secured lenders to become involved with their troubled borrowers in an attempt to save not only their account and their client but to save the business. They are beset with problems of section 556 which we all see and we all know about. And I think provided that there is the general caveat that people take action early then this controlling administrator idea is one which will enable someone who is independent of the company and independent of the groups of creditors who have an interest in that company to take control. We must assume that those people are both diligent and expert and hopefully they will be. There will always be some problems. But in that time I think the 28 days is sufficient. There can be some sensible propositions put forward. It is not necessarily for the accountants that I am making these comments obviously but I think there are too many situations where companies go to the wall because receivership is seen as the end of the line, so is obviously liquidation, and this provides a very real alternative.