

Submission to CAMAC on Corporate Social Responsibility

1. Introduction

Whilst the terms of reference in the discussion paper seem limited to directors and “the positive role for Government”, any contemplation for change in this area of the Corporations Act should also include the consideration and potential impact upon corporate insolvency law. This is crucial given its location as part of the corporate law statute and particularly given the role that external administrators perform within an insolvent company. It is somewhat surprising that the discussion paper has not specifically dealt with this subset of corporate law. My submission promotes extending the discussion to allow this to be considered.

Australia does not have a developed theoretical perspective on corporate insolvency. At best there is some agreement that certain principles influence good local insolvency law-making.¹ Given this absence it is apposite to contemplate corporate social responsibility as a potential ‘candidate’.

The Australian corporate law has developed in a pragmatic and piecemeal way with different perspectives exerting varying degrees of influence in the present law.² It is rare to find these perspectives expressly stated as such conceptual frameworks tend to remain “beneath the text of the statute or judicial decision”.³ It is heartening to see the terms of reference requesting consideration and advice on such matters. As I have already indicated the subset of corporate insolvency law should not be omitted from this discussion.

¹ See, the principles of insolvency first listed as “aims” in Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) (‘the Harmer Report’) para 1.

² Roman Tomasic, Stephen Bottomley & Rob McQueen, *Corporations Law in Australia 2nd ed*, (2002) 52.

³ *Ibid.* The authors mention concession theory, aggregate theory, economic theories, natural entity theory, communitarian theory, feminist theories, corporate social responsibility, and an organisational perspective.

Internationally it has been argued that corporate insolvency law operates through a contractual perspective as its features are conveniently viewed as being grounded in contract.⁴ This is understandable as the law of corporate insolvency focuses on the rights of creditors and the corporate debtor and such rights arise from the contractual relationship between these two.

In quite recent times, this dominant perspective of the contract in corporate law and its influence on corporate insolvency law has been challenged by a few scholars whose vision for these areas of law suggests the application of broader considerations. Such challengers have developed perspectives that go beyond contractual analysis to incorporate other factors such as a range of community interests, recognition of ethical issues and accepting multiple values can apply all matters that fit into a corporate social responsibility discussion.

This submission acknowledges the dominant perspective in corporate law and corporate insolvency law is not corporate social responsibility and yet advocates for the inclusion of the community and broader notions of influence on corporate insolvency law. Areas within corporate insolvency like the law of statutory priorities lend itself to such broader notions.

2. Creditors' bargain – insolvency's shareholder primacy perspective

The shareholder primacy that underpins the perspective leading to maximizing shareholder wealth could be substituted in an insolvent corporation by a requirement to act in the interests of creditors, creditor primacy, and to maximise their distribution from the estate. Over the last two decades one dominant model of insolvency law has been promulgated. This model is the creditors' bargain model and it asserts that the most prominent features of insolvency law are best seen as reflecting the notional agreement the creditors of the corporation themselves would strike if given the chance to bargain

⁴ See, eg, Douglas A Baird & Thomas H Jackson, 'Corporate Reorganization and the Treatment of Diverse Ownership Interests: a Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 *University of Chicago Law Review* 97, Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (1986)

with each other before anyone lends anything. It is a perspective of an *ex ante* bargain for a collective regime.

The creditors' bargain model developed in the United States of America amongst discussion regarding the aims of insolvency law. It is by far the most developed of insolvency perspectives and while "currently rather unfashionable"⁵ is the model that constitutes the "only sustained attempt at a principled analysis of the law governing bankrupt companies".⁶ Its major advocate, Jackson,⁷ proposes a restrictive view that insolvency law is to be analysed as collectivized debt collection law and the purpose of the law is the efficient coordination of the claims of creditors in order to enhance the value of the debtors' assets for all claimants. When diverse co-owners (creditors) assert rights against a common pool and achieve the same return as if the individual creditors had enforced their own claims⁸ then this is known as the 'creditors' bargain'.

Jackson⁹ and Baird¹⁰, argue for the proper function of insolvency law to be seen in terms of a single objective that of maximising the collective returns to creditors as a group.¹¹ Jackson states that insolvency law should be seen as a system designed to mirror the agreements one would expect creditors to arrive at were they able to negotiate such agreements *ex ante*.¹²

The creditors' bargain perspective is argued to justify the compulsory, collectivist regime of insolvency law on the grounds that, if company creditors were free to agree to forms of enforcement of their claims on insolvency, they would agree to collectivist arrangements

⁵ Rizwaan Jameel Mokal, *Corporate Insolvency Law Theory and Application* (2005) 34.

⁶ Ibid.

⁷ Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (1986) 3.

⁸ Thomas H Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 5 *Yale Law Journal* 857, 864.

⁹ Jackson, above n 7, 25.

¹⁰ Douglas G Baird, 'The Uneasy Case for Corporate Reorganisations' (1986) 15 *Journal of Legal Studies* 127.

¹¹ Douglas G Baird & Thomas H Jackson, 'Corporate Reorganisations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 *University of Chicago Law Review* 97.

¹² Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (1986) 17.

rather than procedures of individual action or partial collectivism.¹³ Jackson recognizes that this system is attractive to creditors as it reduces strategic costs and is administratively efficient.¹⁴ The result is then a greater pool of assets. Finch concludes (and, in a way, Jackson admits it¹⁵) that it follows from this position that “the protection of non-creditor interests of other victims of corporate decline, such as employees, managers and members of the community, is not the role of insolvency law”.¹⁶

3. The critiques of the creditors’ bargain

Recently Cole wrote

“When Thomas Jackson published *The Logic and Limits of Bankruptcy Law* in 1986 he framed virtually all bankruptcy scholarship that would follow for the next fifteen years... This “creditors’ bargain” approach has divided the world of bankruptcy academics into two camps: the “Law and Economics” scholars who appear to adopt the creditors’ bargain as the essential purpose of bankruptcy, and the “Progressives” who contend that the purpose of bankruptcy is to promote social welfare, ordering and redistribution that is not politically feasible through other means. The common pool, according to the Progressives, should be shared by more claimants than the Law and Economics scholars are willing to acknowledge.”¹⁷

Critique of the creditors’ bargain and its fostered parentage, the law and economics scholarship; have been heard from ‘progressive’ voices in the United States and the United Kingdom. The main United States of America critiques are presented by Warren¹⁸

¹³ Vanessa Finch, *Corporate Insolvency Law Perspectives and Principle* (2002) 28.

¹⁴ Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (1986) 25.

¹⁵ Ibid.

¹⁶ Finch, above n 13, 28.

¹⁷ Marcus Cole, ‘Limiting Liability Through Bankruptcy’ 70 *University of Cincinnati Law Review* 1245, 1251.

¹⁸ Elizabeth Warren, ‘Bankruptcy Policy’ (1987) 54 *University of Chicago Law Review* 775.

and Korobkin¹⁹ while in the United Kingdom the most substantial work is presented by Finch,²⁰ and more recently Mokal.²¹

Warren²² advances a case for consideration of wider interests that include employees and suppliers. She suggests that insolvency law is “more complex and ultimately less confined”²³ than proponents of the creditors’ bargain such as Baird and Jackson might suggest. Warren uses Congressional comments on the United States of America’s *Bankruptcy Code* to support “concerns broader than the immediate problem of debtors and their identified creditors”.²⁴ Congress has stated that insolvency policies should have a public interest beyond the debtor and creditor.²⁵

There is ready acknowledgment that the creditors’ bargain perspective is attractive because it is straightforward and central; however Warren observes that this perspective can close off further inquiry into insolvency analysis.²⁶

Korobkin²⁷ suggests that the economic approach is incapable of recognising non-economic values such as moral, political, social and personal considerations following failure. He suggests that the creditors’ bargain perspective has misidentified the distinct function of corporate insolvency law because it views the law as a response to the economic problem of collecting debt. He contends that insolvency policy should not be ‘closed’ as the proponents of the creditors’ bargain perspective suggest.²⁸ He concludes that corporate insolvency law must be explained “not as a maximiser of economic

¹⁹ Donald R Korobkin, ‘Rehabilitating Value: A Jurisprudence of Bankruptcy’ (1991) 91 *Columbia Law Review* 717.

²⁰ Vanessa Finch, *Corporate Insolvency Law Perspectives and Principle*, (2002).

²¹ Rizwaan Jameel Mokal, *Corporate Insolvency Law Theory and Application* (2005) 34.

²² Elizabeth Warren, ‘Bankruptcy Policy’ (1987) 54 *University of Chicago Law Review* 775.

²³ Elizabeth Warren, ‘Bankruptcy Policy’ (1987) 54 *University of Chicago Law Review* 775, 778.

²⁴ *Ibid* 788.

²⁵ *Ibid* 788 and detailed in fn 25 thereof.

²⁶ *Ibid*. 812-813.

²⁷ Donald R Korobkin, ‘Rehabilitating Value: A Jurisprudence of Bankruptcy’ (1991) 91 *Columbia Law Review* 717, 762.

²⁸ *Ibid* 787-789.

outcomes but as a system for rendering richer, more informed decisions in response to financial distress”.²⁹

Finch³⁰ is strident in her criticism of the creditors’ bargain model. She posits that, in real life, creditors differ in their knowledge, skill, leverage and their ability to bear the costs of litigating so that such a perspective is wrong in the way it assumes creditors to be de-historicised and equal.³¹ This argument suggests that not all stakeholders are suited by a creditors’ bargain perspective. The stakeholders differ in knowledge, skill and leverage bargaining position. For example, employees are unlikely to have the ‘knowledge’ to bargain and achieve an advantageous position upon the insolvency of their corporate employer. Moreover, the skill and position of a liquidator to arrange the payment of their own fees and reimbursements is clearly superior to other priority creditors. A deserving creditor like a consumer who makes a prepayment to a corporation who later fails is clearly in a poor position to leverage a special bargain should insolvency occur to their supplier. Also, the costs of litigating to obtain improve a position against other creditors again suggests some priority creditors would not benefit from an insolvency law based upon a creditor’s bargain. For example, the ability to keep litigation costs down as happens with the governments employing its own legal staff as opposed to very small business creditors who need to fund the litigation personally, suggests that the function of insolvency law should be somewhat broader than merely maximising the collective returns of creditors as a creditors’ bargain model decrees.

Finch continues her rebuttal of the creditors’ bargain by questioning the assumption that all creditors have purely economic interests.³² She cites the employee creditors who face displacement costs and may consider that they have claims on the corporation’s assets that are morally superior to those of secured creditors.³³

²⁹ Ibid. 789.

³⁰ Vanessa Finch, *Corporate Insolvency Law Perspectives and Principle*, (2002) 28-33.

³¹ Ibid. 31.

³² Ibid.

³³ Ibid.

The creditors' bargain perspective provides for pre-insolvency rights being enforced post-insolvency. However, the insolvency of a company brings into play new factors, for example, the importance of creditors and the making of new decisions about where losses will fall. The insolvency regime that will apply in a particular corporation generally depends upon the course of action taken by the creditors. For a receivership it will be the secured creditor that chooses the insolvent corporation's future but for a corporate rescue under Australia's voluntary administration laws or the compulsory winding up of the insolvent corporation, all of the creditors are invited to participate. Insolvency law looks beyond the pre-insolvency rights and recognises formal rights which were not in place before insolvency. Finch goes even further to suggest that while some creditors who suffer in an insolvency and they have formal rights, those without formal rights may also be prejudiced.³⁴ She nominates employees who lose their jobs and also cites suppliers who will lose customers, the tax authorities whose prospective entitlements might be diminished as those without formal rights who suffer prejudice.³⁵

Finch argues that the creditor wealth maximisation 'vision' that the creditors' bargain model emits fails to consider "those who suffer the greatest hardships in the context of financial distress".³⁶ She criticizes insolvency law being seen in such a narrow construct that it is, in essence, merely a sale of assets for the benefit of creditors, akin to a 'car-boot sale'.³⁷ Such criticism is justified when one interprets 'creditor' beyond those identified pre-insolvency and contemplates the wider effects of insolvency. The creditors' bargain model cannot therefore support the legislative intervention that addresses the financial needs of priority creditors. Such insolvency legislation to provide a statutory priority for say employees' wages upon insolvency of their corporate employer is clearly not grounded in a creditors' bargain perspective.

In a final blow to the creditors' bargain model, Finch attacks the Jackson idea of pre-insolvency legal rights being carried through to insolvent companies. She states "the

³⁴ Ibid. 32.

³⁵ Ibid.

³⁶ Ibid. 32. This is a point made by Donald R Korobkin, 'Contractarianism and the Normative Foundations', (1993) 71 *Texas Law Review* 541, 581.

argument that insolvency law should only give effect to these pre-insolvency rights can be countered by asserting that a core and proper function of insolvency law is to pursue different distributional objectives than are implied in the body of pre-insolvency rights”.³⁸ This is what eventuates when we have statutory priorities. ‘Different’ because some creditors are identified for special treatment that they did not receive pre-insolvency. Finch elegantly describes this as “insolvency law’s application to the turbulence of financial crisis, as distinct from the calm waters that mark pre-insolvency contracts”.³⁹ The statutory priority treatment represents “an intrusion of a number of value judgements concerning relative priorities of various liabilities and the order in which groups of liabilities should be discharged”.⁴⁰ These value judgements are not needed before the company’s insolvency nor in some cases could they have been made earlier. For example, the financial decision by a company on whether to expend money on environmental cleanup or pay employee redundancies is unlikely to be troublesome and value laden for a solvent company but it can be for an insolvent company.

The creditors’ bargain model can only be measured in monetary amounts and seen only through the eyes of the creditor.⁴¹ Recently, Mokal, a supporter of the creditors’ bargain model in the past⁴² has attempted to apply it to a feature of insolvency law, the automatic stay.⁴³ He argues the model fails as it has neither descriptive nor moral force.⁴⁴ He concludes that the model relies on nothing but creditors’ preferences and it suggests no reason why those preferences ought to be considered binding.⁴⁵ The creditors, if actually asked *ex ante* to choose an insolvency regime, would, in Mokal’s opinion, not be able to reach agreement or would pick a system designed to reflect their pre-insolvency advantages.⁴⁶ Any agreement made under the circumstances of the creditors’ bargain model would likely be exploitative and oppressive of weaker parties and would have no

³⁷ Ibid. 29.

³⁸ Ibid. 32.

³⁹ Ibid. 32.

⁴⁰ Ibid. 33.

⁴¹ Karen Gross, *Failure and Forgiveness* (1997) 138.

⁴² Rizwaan Jameel Mokal, *Corporate Insolvency Law Theory and Application* (2005) 34.

⁴³ Ibid 32-59.

⁴⁴ Ibid 59.

⁴⁵ Ibid.

⁴⁶ Ibid.

justificatory force.⁴⁷ The advantage of corporate social responsibility as a persuasive framework is that it would attempt to prevent such outcomes.

Another criticism is that the creditors' bargain model fails to recognize the significant differences among creditors and that not all creditors reach their predicament in the same fashion nor will emerge equally able to withstand the loss caused by the insolvent company's inability to pay. Certainly, some creditors are significantly different from other creditors [such as the financial creditors] and so an expectation upon external administrators to consider the stakeholders in a corporate social responsibility framework is fairer.

4. The Australian position for creditors' bargain

While Australian literature discusses the aims and objects of corporate insolvency law (and these are broadly similar in all Western legal systems),⁴⁸ it remains thin on persuasive support for a creditors bargain model or any other vision. Routedge⁴⁹ in 1998 tested Australia's voluntary administration law and found it complied both in construction and judicial interpretation with the creditors bargain model. Anderson⁵⁰ in 2001 also considered the creditors bargain model when discussing the same voluntary administration law.

Observers of Australian theoretical perspectives on corporate law are advised to be 'wary of pigeon-holing' ideas under any of the perspectives as none can claim to supply an

⁴⁷ Ibid.

⁴⁸ Roman Tomasic, *Australian Corporate Insolvency Law* (1993) chapter 1 discusses 10 objectives identified by the Australian Law Reform Commission, *General Insolvency Inquiry* Report No 45 (1988) para 33 and Roy M Goode, *Principles of Corporate Insolvency Law* (1990) 5-9. Many other writers call upon these objectives to introduce their insolvency discussions.

⁴⁹ James Routedge, 'Part 5.3A of the Corporations Law (Voluntary Administration): Creditors' Bargain or Creditors' Dilemma' (1998) 6 *Insolvency Law Journal* 127.

⁵⁰ Colin Anderson, 'Commencement of the Part 5.3A Procedure: Some Considerations from an Economic and Law Perspective' (2001) 9 *Insolvency Law Journal* 4. This author also notes a "substantial attempt to look at some of the economic issues surrounding the insolvency legislation in Australia in a Staff Research paper issued through the Productivity Commission. See Bickerdyke, Lattimore and Madge, *Business Failure and Change: An Australian Perspective*, Productivity Commission Staff Research Paper (AusInfo, Canberra, December, 2000)".

overarching explanation of the solvent or insolvent corporation.⁵¹ Theoretical imprecision still exists in Australia and elsewhere and much of this area of law operates according to simple pragmatic influences.⁵² Historically, there is evidence to suggest that insolvency law developed without much thought for theories or visions. Lester, writing about the Victorian era, suggests that this area of law “originated from the need to solve the practical commercial problem created by failed businesses. Its roots were not in political philosophy or a particular theory of government, and there appears to be no evidence that it ever became a partisan political issue”.⁵³

5. The communitarian perspective

In response to the shareholder primacy perspective in corporate law other perspectives have been presented. One of these is communitarianism.⁵⁴ This perspective regards corporations as being comprised of important constituencies in addition to shareholders. In this manner it has a strong relationship to the understanding of corporate social responsibility. The list of constituencies is long and includes corporate employees, secured and unsecured creditors, customers or clients, and the local communities in which a corporation operates.⁵⁵ There is no complete list and communitarians can disagree about which non-shareholder constituencies are included.⁵⁶ What communitarians want is the corporation to be responsive to all constituencies.⁵⁷

Communitarians view individuals as being connected to each other and as being ‘obliged’ to act in the interests of the good of the community even if that curtails some individual

⁵¹ Roman Tomasic, Stephen Bottomley & Rob McQueen, *Corporations Law in Australia 2nd ed*, (2002) 66.

⁵² *Ibid*.

⁵³ V Markham Lester, *Victorian Insolvency* (1995) 37.

⁵⁴ See, eg., David Millon, ‘New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law’ (1993) 50 *Washington & Lee Law Review* 1373, 1379; Daniel J Morrissey, ‘Toward a New/Old Theory of Corporate Social Responsibility’ (1989) 40 *Syracuse Law Review* 1005, Lawrence E Mitchell, *Progressive Corporate Law* (1995), .

⁵⁵ Roman Tomasic, Stephen Bottomley & Rob McQueen, *Corporations Law in Australia 2nd ed*, (2002) 60.

⁵⁶ Larry Mitchell, ‘The Fairness Rights of Corporate Bondholders’ (1990) 65 *New York University Law Review* 1165.

⁵⁷ Michael Bradley, Cindy A Schipani, Anant K Sundaram and James P Walsh, ‘The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads’ (1999) 62 *Law & Contemporary Problems* 9, 45.

freedom.⁵⁸ The communitarian perspective recognises that legal persons are not all separate ‘individuals’ but part of an interconnected world.⁵⁹ When considering to whom the company owes a duty (rather than the company operating purely for the profit of shareholders) there is an argument that directors should take the interests of the community into account. There would then be no distinction between the interest of the shareholders, seen as private, with the interests of the community, that is, the public.⁶⁰

Where shareholder primacy uses law as a means of ensuring *ex ante* freedom and efficiency of contracting, communitarians see law as a vehicle to ensure distributive justice and equity from the payoffs to contracts.⁶¹ As Bradley et al recognise the communitarian view argues for various types of corporate constituency statutes providing an ability to choose different rules for different situations.⁶² Bradley et al conclude the conceptual battle lines between contractarianism and communitarianism are “stark” because the contractarian finds legitimacy in the values of liberty and competition whereas the communitarian emphasizes justice and cooperation.⁶³

6. A Communitarian perspective of insolvency that includes corporate social responsibility

In the mid 1990s a radical view was outlined that both the corporate and personal insolvency systems should take into account the interests of the community, basically that insolvency law be interpreted from a communitarian perspective.⁶⁴ This alternative view

⁵⁸ The definitive work on communitarianism generally (i.e. not in the corporate or insolvency law sense) is Amatai Etzioni, *The Spirit of Community; Rights, Responsibilities and the Communitarian Agenda* (1993) and Amitai Etzioni, *The Moral Dimension: Toward a New Economics* (1988).

⁵⁹ Karen Gross, ‘Taking Community Interests into Account in Bankruptcy: An Essay’ (1994) 72 *Washington University Law Quarterly* 1031, 1040.

⁶⁰ Karen Gross, *Failure and Forgiveness* (1997) 205.

⁶¹ Michael Bradley, Cindy A Schipani, Anant K Sundaram and James P Walsh, ‘The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads’ (1999) 62 *Law & Contemporary Problems* 9, 45.

⁶² Michael Bradley, Cindy A Schipani, Anant K Sundaram and James P Walsh, ‘The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads’ (1999) 62 *Law & Contemporary Problems* 9, 45.

⁶³ Michael Bradley, Cindy A Schipani, Anant K Sundaram and James P Walsh, ‘The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads’ (1999) 62 *Law & Contemporary Problems* 9, 42.

⁶⁴ Karen Gross, ‘Taking Community Interests into Account in Bankruptcy: An Essay’ (1994) 72 *Washington University Law Quarterly* 1031.

was not so unusual given an environment of a dominant creditors' bargain model that provided a view of insolvency law as a narrow restricted law that merely applied to contractual creditors and the insolvent debtor. In a growing insolvency scholarly environment, North American discussions (and to a lesser extent, British) on alternative and, arguably, more appropriate visions of corporate insolvency have propagated.

The application of communitarian concepts including a corporate social responsibility perspective to the world of insolvency suggests that the welfare of the community should be very much a part of corporate insolvency. A communitarian perspective "mandates attention to what is often ignored in contemporary policy debates: the social side of human nature...the ripple effects and the long term consequences of present decisions".⁶⁵

Communitarianism in insolvency, and by inference therefore corporate social responsibility, defines the scope of corporate and personal bankruptcy as legal regulation beyond the debtor and its immediate creditors. It follows, therefore, that at the heart of the debate about insolvency policy is a determination of who and what the system is designed to protect.⁶⁶

Obviously defining what is meant by 'community' is important to a perspective based upon the premise that the community matters.⁶⁷ The present discussion paper in 3.3.2 when describing the pluralist approach and discussing the Steering Group observes that body did not attempt to define precisely the non-shareholder participants. Placing communitarianism into the insolvency context requires some thought about the identifiable players in the system, followed by looking beyond these players to identify, if possible, others affected by insolvency, whose interests should be considered.

⁶⁵ Ibid. 1042 where she is footnoting Amatai Etzioni, *The Spirit of Community; Rights, Responsibilities and the Communitarian Agenda* (1993) 253-254.

⁶⁶ Karen Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 *Washington University Law Quarterly* 1031, 1046.

⁶⁷ Barry S Schermer, 'Response to Professor Gross: Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 *Washington University Law Quarterly*.1049, 1051.

The community in insolvency must, by its definition, involve the debtor and creditor.⁶⁸ Traditionally, insolvency has also involved a third party assigned to wind up the estate. This liquidator or trustee has had an independent role to assist in the efficient management of the insolvent estate. The courts, perhaps a ‘fourth party’, have had a long involvement in insolvency⁶⁹, including the appointment of liquidators and the source of support and direction for third parties such as liquidators. The government has been a long-term member of the insolvency community, arguably a ‘fifth party’. Governments have been involved not just in the making of laws but also in areas such as conducting the licensing of liquidators, and qualifying as an involuntary creditor for taxes and other government debts. The government continues as a source of administrative help in such areas as the present Australian employees’ entitlement support scheme (General Employee Entitlements & Redundancy Scheme) which is designed to protect employees wages. Others that will make up the community in insolvency are less identifiable members such as involuntary creditors like tort victims.⁷⁰

7. Support for a communitarian perspective from the Law Reform Commissions

The influential Cork Report⁷¹ (United Kingdom) in 1982 refers to the law of insolvency as embodying a “compact to which there are three parties: the debtor, his creditor and society”.⁷² Any system which is to cope with the consequences of an insolvency has to bear in mind the interests of these three parties.⁷³ Each of the principles (or aims) of insolvency as outlined by the Cork Report⁷⁴ could fit into this perspective. In what could be taken as support for the communitarian perspective, the Cork Report stated:

“We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be

⁶⁸ The statutory definition of solvency is an ability to pay debts as and when they are due and payable. section 95A of the *Corporations Act 2001* (Cth).

⁶⁹ In the New South Wales colony the courts heard insolvency matters from 1823 onwards.

⁷⁰ One recent Australian example, involving the James Hardie companies, has been the potential victims of asbestosis and their future payouts should the company not be present to pay when these claims materialise.

⁷¹ Review Committee, *Insolvency Law and Practice*, Cmnd 8558 (1982) ‘the Cork Report’.

⁷² *Ibid.* para 192.

⁷³ Fiona Tolmie, *Introduction to Corporate and Personal Insolvency Law* (1998) 3.

⁷⁴ Review Committee, *Insolvency Law and Practice*, Cmnd 8558 (1982) para 198.

so disastrous to creditors, employees and the community that it must not be overlooked.”⁷⁵

In Australia, the Harmer Report⁷⁶ in 1988 stated, in its opening paragraph, that insolvency law concerns not only the principal participants of debtor and their creditors but it has a direct impact on many others.⁷⁷ The Harmer Report expressly mentions employees, family, customers and agencies of government such as those concerned with the revenue and administration of the law⁷⁸ as the ‘others’ that insolvency law has a direct impact upon.⁷⁹

In summary, both the United Kingdom and Australian Law Reform Commissions have made ready acknowledgement that the insolvency law is made up of more than just debtors and creditors. Such support for a broader view accords to communitarianism, corporate social responsibility and exceeds the creditors’ bargain model.

8. Present support for a broad perspective

Recent discussions on perspectives in corporate insolvency have supported broadening the focus even beyond the creditors’ bargain model and narrow versions of communitarianism including corporate social responsibility.⁸⁰ Keay⁸¹ has discussed the importance of the public interest in insolvency and Finch⁸² has described her ‘visions’

⁷⁵ Ibid. para 204.

⁷⁶ Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) (‘the Harmer Report’).

⁷⁷ Ibid. para 1.

⁷⁸ Ibid.

⁷⁹ Ibid. para 33 there is the heading is *Aims of insolvency law* and immediately underneath the heading ‘Principles’ where nine (9) principles are discussed. None of the principles address perspectives or the community other than in a general way although the Harmer Report notes that “on a more abstract level insolvency law is viewed by some as the guardian of values that seem appropriate in the conduct of the credit economy” (para 33).

⁸⁰ It is not suggested that the discussion of theoretical perspectives in insolvency is commonplace. Mokal’s book *Corporate Insolvency Law Theory and Application* (2005) follows Finch’s *Corporate Insolvency Law Perspectives and Principles* (2002) as two recent English texts dedicated to moving beyond the practical description of insolvency law.

⁸¹ Andrew Keay, ‘Insolvency Law: A Matter of Public Interest?’ (2002) 51 *Northern Ireland Legal Quarterly* 509.

⁸² Vanessa Finch, *Corporate Insolvency Law Perspectives and Principle*, (2002) chapter 2.

which include creditors' bargain and communitarianism but also to three other 'benchmarks'; forum vision, ethical vision and a multiple values/eclectic approach.

The concept of the public interest definition, when considered in the insolvency context, has an admirable width. Scholars have defined 'public interest' by default as the interest of those other than the debtor. Keay suggests it is the interests of anyone who has a stake, financial or otherwise, in the business of the insolvent company.⁸³ This is supported by Gross' community approach where she includes many as having a community interest, a term that Keay suggests can equate to public interest.⁸⁴ Keay concludes that, rather than formulating a conclusive definition, the legal system should interpret the public interest as "taking into account interests of those parties involved in any given insolvency situation".⁸⁵ However he then appears to limit his interpretation of the insolvency system to the debtor and the creditors.⁸⁶ Certainly insolvency law as part of a legal system appears to take into account the interests of some parties that consider they deserve statutory priorities, and meets their needs. Other parties that do not enjoy a statutory priority can argue that it is in the 'public interest' that insolvency law extends further to embrace their position.

Insolvency is generally categorised as a matter of private law because of the private nature of the rights of creditors against particular debtors and the amounts those creditors will receive by way of payment.⁸⁷ Keay argues that "insolvency law is wider than that".⁸⁸ No legal issue can be seen as 'off limits' to a consideration of the public interest⁸⁹ and insolvency law has the potential to involve substantial numbers of the public suggesting that the public interest should be considered. Such a concept as the public interest is certainly a consideration for the formulation of statutory priorities. The legislators have had to consider whether the modifications to the principle of *pari passu* is appropriate. In

⁸³ Andrew Keay, 'Insolvency Law: A Matter of Public Interest?' (2002) 51 *Northern Ireland Legal Quarterly* 509.

⁸⁴ Andrew Keay, 'Insolvency Law: A Matter of Public Interest?' (2002) 51 *Northern Ireland Legal Quarterly* 509, 524.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* 525.

⁸⁷ *Ibid.* 509.

⁸⁸ *Ibid.* 510.

doing this, serious social issues, such as employees going without their wages due to the insolvency of their corporate employer, are bound to be seen a matter of public interest.

Keay asserts that parliaments, law reform commissions and the courts do take the public interest into account when considering significant insolvency law issues.⁹⁰ There has been a steadily expanding range of interests considered in the history of corporate insolvency law. Keay concludes that unless the public interest is considered, it is likely that rudimentary elements of our society will be damaged and the law will be regarded with contempt and as something which is aloof from everyday life.⁹¹

Finch⁹² acknowledges that an important aspect of communitarianism is the centrality that is given to distributional concerns.⁹³ For her, the problem is not that community interests cannot be identified but that there are so many potential interests in every insolvency and, so, the selection of interests worthy of legal protection or for special treatment like a statutory priority is liable to give rise to considerable contention.⁹⁴

In an attempt at pushing the contemplation of perspectives beyond the creditors' bargain model, Finch describes a vision of the insolvency process establishing a 'forum' in which all interests, not just monetary, that are affected by business failure would be recognised.⁹⁵ This would shift the focus beyond creditors to all participants in the company's financial distress. While underdeveloped at this point in time it has been described as requiring the law to establish 'space' and should provide "not just interested parties" with a "medium of ... discourse".⁹⁶ Another 'vision' recognised (and questioned) by Finch is the ethical one⁹⁷ promoted by Shuchman.⁹⁸ This perspective does not broaden

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid. 534.

⁹² Vanessa Finch, *Corporate Insolvency Law Perspectives and Principle*, (2002) 25-56.

⁹³ Ibid. 36.

⁹⁴ Ibid. 37.

⁹⁵ Ibid. 38.

⁹⁶ See, eg, A Flessner, 'Philosophies of Business Bankruptcy Law: An International Overview' in Jacob S Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (1994) and D R Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 *Columbia Law Review* 717.

⁹⁷ Vanessa Finch, *Corporate Insolvency Law Perspectives and Principle*, (2002) 39.

the amount of members or actors but proposes that the foundations of insolvency law take into account the situation of the debtor, the moral worthiness of the debt, and the size, situation and intent of the creditor.⁹⁹ Finally, Finch recognizes a notion that insolvency law serves a series of values.¹⁰⁰ This ‘vision’ encapsulates economic and non-economic dimensions and the principle of fairness as a moral, political, personal and social value.¹⁰¹ Found predominantly in the work of Warren¹⁰² and Korobkin,¹⁰³ the multiple value/eclectic approach attempts to achieve such ends as distributing the consequences of financial failure amongst a wide range of actors and protecting the investing public, jobs, and the public and community interests.¹⁰⁴ This approach is recognised by Finch as broad enough to incorporate communitarian philosophies and the forum vision.¹⁰⁵

Both Key and Finch from the above discussion make a conjecture to move the theoretical perspective of insolvency law beyond the creditors’ bargain model. As for statutory priorities there has been no ‘microscope’ study of the appropriate perspective. Finch has suggested that while there is silence on which perspective is used for distributional matters in insolvency, such matters are too serious a matter to be overlooked by those concerned with fairness and justice.¹⁰⁶ She concludes that valuing factors other than economic efficiency as the creditors’ bargain model does is an important step to analysing and justifying distributional fairness.¹⁰⁷

9. The future for the broader perspective of the progressives

The theoretical perspective that could emerge as the vision to be applied to corporate insolvency law, certainly as a portion of distributional fairness, may embrace a communitarian’s fairness and justice. Meanwhile corporate social responsibility

⁹⁸ Philip Shuchman, ‘An Attempt at a Philosophy of Bankruptcy’ (1973) 21 *University of California Los Angeles Law Review* 403.

⁹⁹ Vanessa Finch, *Corporate Insolvency Law Perspectives and Principle*, (2002) 39.

¹⁰⁰ *Ibid.* 40.

¹⁰¹ *Ibid.*

¹⁰² Elizabeth Warren, ‘Bankruptcy Policy’ (1987) 54 *University of Chicago Law Review* 775.

¹⁰³ D R Korobkin, ‘Rehabilitating Values: A Jurisprudence of Bankruptcy’ (1991) 91 *Columbia Law Review* 717.

¹⁰⁴ Vanessa Finch, *Corporate Insolvency Law Perspectives and Principle*, (2002) 40-41.

¹⁰⁵ *Ibid.* 41.

¹⁰⁶ *Ibid.* 53.

¹⁰⁷ *Ibid.* 55.

approaches or any other broad approach must continue to support established insolvency principles¹⁰⁸ like the aim to “realise the assets of the insolvent which should be properly be taken to satisfy debts with the minimum of delay and expense”, or the aim to “distribute the proceeds of realisations amongst creditors fairly and equitably. Another aim is “to recognise and safeguard the interests not merely of insolvents and their creditors but those of society and other groups in society who are affected by the insolvency, for instance not only the interests of directors, shareholders and employees but also those of suppliers whose livelihoods depend on the enterprise and the community”.¹⁰⁹ As such an aim already exists it may serve to provide the base from which wider theoretical perspectives like corporate social responsibility will develop.

10. Specific responses to the discussion paper

Some parts of the discussion paper can be contemplated in light of corporate insolvency. In 1.3.2 the discussion of philanthropic approach is necessarily irrelevant to the liquidator who may take on some directors’ functions but would almost never be in the position of contemplating philanthropic actions which would work against the interests of creditors. In 1.3.3 the commercial approach has the focus on the long term interests of the company and again this has little relevance for the insolvent company and its external administrator. The attracting and maintaining employees or brand image or identifying new business opportunities are generally not high on the liquidator’s priorities. In 1.3.4 the ethics-based approach has some relevance to external administrators. In particular it may influence who they can sell company assets. In 1.3.5 the altruistic approach that contemplates solving social problems is not one that resonates with the insolvent company and possibly quite the opposite, the insolvency will cause social problems, is generated. In 1.4 stakeholders, sustainability and triple bottom line reporting could be approached with the contemplation of the insolvent company. While the directors may make these

¹⁰⁸ These principles are found in Report of the Review Committee on Insolvency Law and Practice (Cmmd 8558, 1982) para 198, Roy M Goode, *Principles of Corporate Insolvency Law* (1990) 5-9, Roman Tomasic, *Australian Corporate Insolvency Law* (1993) 4-12.

¹⁰⁹ Report of the Review Committee on Insolvency Law and Practice (Cmmd 8558, 1982) para 198(i)

commercial judgments to determine what stakeholder interests should be considered in the solvent company, the task would pass to the external administrator in an insolvent company. The decision though in the insolvent company is really one for the creditors.

In 2.1 the division of the corporation is discussed particularly the influence of the shareholders in general meeting but in the insolvent company it will be the creditors at their creditors meetings that could adopt various environmental or social policies or goals. This has been a possibility in more recent times with unions playing a very important role at creditors' meetings. One example was the Ansett voluntary administration.

In 2.6 the ASX principles are discussed and the recommended listed company code of conduct is one example that could be copied for external administrators so that they would be required to present to creditors and stakeholders the so called 'community factors'.

In 3.4 the questions are asked should directors be permitted or required to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions. For corporate insolvent law and practice the question becomes "should liquidators/administrators/controllers be permitted or required to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions. My submission is that they should be required to take this broader communitarian or corporate social responsibility perspective.

In 4.5.2 the quote from EU Commission give reasons why environmental issues should be disclosed. The reasons are for investors and for regulatory authorities. In the insolvent company the disclosure of such information is required for the external administrator, the creditors and for the many other stakeholders.

In 4.5.3 the discussion of an OFR and its purpose points to other stakeholders having some interest in its preparation. Should a similar review be available in Australia the process of addressing the second creditors meeting in Part 5.3A may well be assisted. In

fact in most external administrations the contents of an OFR would assist. Perhaps it is time to relook at the extent of coverage of s299A CA.

As a final comment I would strongly support the initiative of “funding appropriate empirical and other research” as I feel other common law countries seem to be ahead of Australia in directing research into company law and its subsets like corporate insolvency law.

11 Conclusion

The literature and scholarship on Australian corporate insolvency law is in its infancy when discussing theoretical perspectives such as corporate social responsibility. The closest expressed perspective has occurred in the ‘aims’ paragraph of the Harmer Report¹¹⁰ and the text by Tomasic¹¹¹ where the authors use objectives earlier identified by Goode¹¹² in the United Kingdom. Corporate insolvency principles usually include fairness, expedition, efficiency and impartiality. Such principles are often incorporated into these expressed aims or objectives. Discussion on the principles of insolvency law like the principle of equal sharing between creditors and orderly processing of insolvencies can be made in the context of corporate social responsibility.

When observing international perspectives on insolvency and local and international perspectives on corporate law, it is acknowledged that the creditors’ bargain vision is dominant, although regularly criticised. This submission expresses the need for a broader approach and encourages the development of corporate social responsibility in both corporate law but more specifically raises it in the corporate insolvency context. I suggest we engage in further enlightened discussion and we could potentially lead the world in developing a corporate social responsibility approach not just for corporate law but for corporate insolvency law as well. Many submissions will call for the status quo to be

¹¹⁰ Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) para 33. (‘the Harmer Report’).

¹¹¹ Roman Tomasic, *Australian Corporate Insolvency Law* (1993) 4-12.

¹¹² Roy M Goode, *Principles of Corporate Insolvency Law* (1990) 5-9, 54-63.

maintained. This is to be expected from the conservative dominance in corporate practice and the slavish acceptance of shareholder primacy. Perspectives like corporate social responsibility were not taught in the Universities when the commercial practice world were students and so many have not been exposed to such 'progressive' thought when it comes to theoretical perspectives of the corporation. It is now time to facilitate a re-think.

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