Week 9: Insolvency practitioners (and some topics continued from week 8)

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Some resources on small business restructuring

Cambridge-SMU Roundtable: https://www.youtube.com/watch?v=HOO4xwznzCU

[https://ccla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Final%20Report.%20SMU-3CL%20Cambridge%20Roundtable.pdf]

Sydney University webinar: Case study- 26.00 – 47.31
https://www.youtube.com/watch?v=HyNX9cnw7lI&t=2854s

Prepacks (Poulus and McCunn article)

"In Australia, a traditional pre-pack sale can be completed by a receiver under s 420(2)(b) of the Corporations Act 2001 (Cth) (the Act) or, less frequently, by an administrator exercising the power under s 437A(1)(c) of the Act. Also, a practice has developed, commonly referred to as a "pre-pack DOCA" (or pre-pack deed of company arrangement) which involves a sale by a deed administrator under a Deed of Company Arrangement (DOCA). Whilst the pre-pack DOCA can be distinguished from the traditional pre-pack sale in the that it does not involve an immediate sale upon appointment, as we will discuss, it does share the essential characteristics of a pre-pack in that the desired outcome is agreed by key stakeholders prior to the appointment of the insolvency practitioner who is to give effect to the transaction."

Prepacks

Difficulties in Australia:

"Certain parts of the Australian legal framework impede the pursuit of a pre-pack transaction, the main ones being:

- ~~insolvent trading provisions;~~
- the duty of care in exercising a power of sale under s 420A;
- ~~ipso facto clauses; and~~
- independence requirements for insolvency practitioners.

Section 437A pre-pack sale:

An administrator could utilise the powers granted under s 437A of the Act to complete a sale of the business or property of the company immediately after appointment. Section 437A provides:

(1) While a company is under administration, the administrator:

(a) has control of the company's business, property and affairs; and

(b) may carry on that business and manage that property and those affairs; and

(c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and

(d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.

(2) Nothing in subsection (1) limits the generality of anything else in it.

Role of the IP

The World Bank's Principles and Guidelines makes the point:

Those who administer insolvencies, whether appointed by creditors, the court, a government department or agency, a public or statutory authority or the debtor are given powers over debtors and their assets, and they have a duty to protect them and their value. The nature of the appointment in some jurisdictions is seen as that of, or closely resembling, a trustee exercising public interest powers and undertaking functions [for the] benefit of the creditors and the debtor

(Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency Laws: A Stocktake, 2004)

IP

An insolvency practitioner may be a:

liquidator;

provisional liquidator;

receiver, receiver and manager or other controller;

voluntary administrator or administrator of a deed of company arrangement; or

scheme manager.

They must be registered as insolvency practitioners and are subject to strict requirements under the Corporations Act. Their legal responsibilities in any particular case will depend upon the type of administration concerned. Compliance with the requirements of the Corporations Act is supervised by ASIC, which is empowered under the Act to set educational and experience requirements for insolvency practitioners and may inquire into matters concerning an administrator

Independence

“Many witnesses agreed that administrators and liquidators should not be, nor appear to be, puppets of the directors or any of the parties affected by the financial difficulties of the company in question. They must be independent and be seen to be independent. Creditors should, as a matter of course, be aware of any relationship, influence or interest that may affect an administrator’s capacity to perform his/her duties impartially.”

Who chooses the IP? Usually the creditors/ directors

Negative perceptions

ONE VIEW

"…it is difficult to overcome the perception among creditors that an administrator is not impartial when appointed and, in cases where a deed fails, that his role as liquidator is to bury his mistakes and/or the wrongdoing of his appointors."

ANOTHER VIEW

"One of the major benefits of a deed of company arrangement to a director is obviously the avoidance of a claim for insolvent trading. If in fact a company director decides to appoint an administrator who happens to have whispered in his ear prior to the appointment, "Donít worry, buddy; youíll be right. I'll get this deed up and you won't have to worry about insolvent trading," there is obviously a potential problem. I am not saying that that is widespread or that it even occurs, but there is a perception out there, I think, among some creditors, that that sort of thing is occurring."

But…

"…the structure of the legislative scheme is such that on their appointment administrators have limited further obligations to directors. Instead they have specific, on-going obligations and incentives to focus on the concerns of creditors."

Duties

A court will decline to appoint a liquidator if it considers there is an actual or potential conflict between the duties of the liquidator and his/her personal interest or some other duty. It would appear that administrators in line with liquidators are subject to fiduciary duties, in particular duties to act impartially, to avoid conflicts of interest and to act in good faith and for a proper purpose. Wood v Laser Holdings Ltd, [1995] 19 ACSR 245 at 266 [*See article by Nosworthy and Symes on the position of the liquidator*]

Commonwealth Bank of Australia v Irving (1996) ACSR 459: “any substantial involvement with a company prior to its administration will disqualify a person from appointment as that company's administrator as 'such involvement will be seen to detract from the ability of the person to act fairly and impartially during the course of the administration’.”

They are also officers of the company and, as such, subject to the general duties of officers under the Corporations Act.

Rights of creditors

Committee of inspection

Creditors may decide that there is to be a committee of inspection to monitor the administration of the estate and to assist the liquidator.

Members of the committee can be appointed by: Creditor/ creditors who represent at least 10% in value of the creditors; or Employee/ employees representing 50% in value of amount owed to employees.

Once a person exercises a right in one capacity to appoint a member, the person cannot exercise a right in another capacity to do so.

A person can exercise the right in a particular capacity to appoint only one person (unless the person is filling a vacancy in that appointment).

Committee of inspection

The committee of inspection advises and monitors the liquidator. (S. 1612, Div 80-35)

Where the liquidator does not comply with the directions of the committee of inspection, a written record must be made along with reasons for not complying.

The committee of inspection may request information from the liquidator and the liquidator must comply with any such requests unless the information sought is not relevant or its otherwise not reasonable to comply with the request. (S. 1613, Div 80-40, 80-45)

Members of the committee of inspection have a duty not to derive any profit or advantage from the liquidation process. (S.1614, Div 80-65).

Directions of creditors

Liquidator must have regard to directions given by creditors, but is not obliged to comply.

Review by court

The court may review the liquidation process either on its own initiative or by application of the creditors. (S. 1618, Div 90-5, 90-10)

Liquidator can be removed/ replaced by creditors by a resolution passed at the creditors' meeting. (S. 1620, Div 90-35)

Challenging commercial decisions of IPs

https://www.youtube.com/watch?v=oySXL7u9BAg 38.0 – 1.03

Some echoes of directors’ duties

Courts will not interfere with commercial decisions

Debate over remuneration

“The many reports and reform iterations reflect the contentious nature of this area, including normative battles about who should pay for the external administration of failed companies and battles for financial survival for some insolvency practitioners. At the heart of the proposals, however, is the perception that insolvency practitioners charge too much for their services or at least should be held more accountable for the fees which they do charge.” (*Steele, Meng Seng and Ramsay article*)

Anderson and Brown arguments cited in the article (154 – 156) “Anderson and Brown query the need for reform in relation to regulatory standards at all, and call for reforms which close the gap between community expectations and reality.”

Streten: Perceptions of Ips and the impact of such perceptions

Two Australian academics have argued that there is a general lack of confidence in insolvency and its practitioners because stakeholders, and the public, have an unrealistic understanding of corporate insolvency practice.[9] Respected international academics recognise that insolvency law is "often

consequently engendered under-confidence in practitioners and insolvency regimes. It is suggested that this lack of understanding, together with intrinsic losses associated with insolvency, acts as a catalyst for stakeholder and public "blame-shifting" to practitioners and the insolvency profession.

Numerous interviewed practitioners also described dissatisfaction in relation to their primary regulator, ASIC. There was a perception by some interviewed practitioners that ASIC did not support them in the fulfilment of their difficult and complex role. The interview data showed that practitioners were frustrated by what they considered to be the poor implementation of reforms (such as ILRA) which they felt was due, at least in part, to ASIC's failure to assist and guide practitioners in their attempts to understand the implications of the new legislation.[106] One practitioner explained that "[ASIC] weren't [sic] able to adequately tell [practitioners] exactly what the impact of the ILRA was going to be in some cases until days before it was going to be implemented" or until after commencement of those laws.[107]