

The Harmer Amendments: 15 years on

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In 2005, the following comments by a barrister appeared in the Australian Law Journal:

"No instructions are more sweet than those that require counsel to seek to set aside a wanton statutory demand. The facts in the brief are in short compass; the law is reasonably clear: the company judge or Master, ever-courteous; the unsuccessful defendant (by definition) solvent; the successful applicant entitled (usually) to indemnity costs – you can be back in the pavilion (with the fee note typed and dispatched) by lunchtime."¹

The author then went on to note that the only downside to this apparently easy money was the fact that the barrister who practises in this area has to keep up to date with a constant plethora of new cases about statutory demands.

Opinions on the law of statutory demands often differ, but no one would, I think, disagree with the proposition that the low thresholds for challenging a demand mean that we now have considerably more litigation in this area than before the 1993 amendments. The quotation from the ALJ supports that view.

It is, therefore, fair to ask whether this is the outcome that was anticipated or desired when the amendments were made. Indeed, since 15 years have passed since the commencement of the Corporate Law Reform Act 1992, the time is now surely right for a stocktake of what the Act achieved. To some observers, it may appear paradoxical that I would call for such a review so soon after the large number of insolvency amendments that came into effect at the end of last year. In my defence, I can only say that last year's amendments were largely technical, and did not address the really significant policy issues, such as the ones that I will examine in this paper.

History

In order to understand how we got to our current position, it is necessary to revise some corporate law history.

Before 1993, corporate insolvency law was to be found in the Corporations Law and the Bankruptcy Act (the Law incorporated the Act's voidable preference provisions by reference). With one exception, the Law dealt with all of the topics we find in today's Ch 5: schemes of arrangement, receivers and winding up (voluntary and involuntary). The pre-1993 Ch 5 also provided for a type of insolvency administration called "official management". Almost no one ever used the official management regime.

It is fair to say that, with the exception of official management, the statutory law governing corporate insolvency had changed little since the mid-19th century.

So what prompted the 1993 amendments?

The answer begins in a 1976 reference to the ALRC, by then Attorney-General Bob Ellicott, to examine the application of the Bankruptcy Act to small debtors. When the Commission reported back the following year, it recommended a wider-ranging inquiry into the Bankruptcy Act. That challenge wasn't taken up until November 1983, when the new Attorney-General, Gareth Evans, gave the Commission a broad reference to examine and report on Australia's insolvency laws.

The ensuing inquiry took five years: the Commission issued its final report in late 1988. The report was nicknamed the "Harmer Report" after its main author. That report informed much of the Corporate Law Reform Bill 1992, which ultimately became the Corporate Law Reform Act 1993. The insolvency amendments commenced on 23 June 1993.

Since the ALRC report was colloquially referred to as the Harmer Report, the amendments it inspired were (and are) often referred to as the "Harmer Amendments". This may do Mr Harmer an injustice, since the four

¹ Lee Aitken and Hugh Stowe, "Issues in corporate insolvency: Statutory demands and Corporations Act, s 440A" (2005) 79 ALJ 182.

years between his report and the final Bill involved an internal governmental process which resulted in some departures from the Harmer proposals. In this paper, I will refer to the "1993 amendments" rather than the "Harmer amendments," although I will make specific reference to the Harmer Report where appropriate and relevant.

I won't give a detailed accounting of the changes made in 1993. The big picture is fairly well-known:

- official management was repealed and replaced by voluntary administration;
- voidable preferences were "internalised" to the Corporations Law and extensively amended from the then current Bankruptcy Act provisions;
- the insolvent trading provisions were completely rewritten;
- as mentioned above, the statutory demand procedures were rewritten.

In this paper, I will look at three of those headline areas: voluntary administration, insolvent trading and statutory demands, and ask how successful the amendments have been. Comment on voidable preferences will have to await the outcome of the High Court appeal in *Capital Finance Australia Limited & Anor v Tolcher & Anor*.²

Voluntary administration

Voluntary administration (VA) is definitely the pin-up boy of the 1993 amendments. Apart from the fact that it is a very common form of insolvency administration, it has been adopted in New Zealand and England - surely a mark of success!

But is that an accurate assessment? Unfortunately, it is difficult to answer that question definitively.

In June 1998, the CAMAC Legal Committee published a report on corporate voluntary administration. The Legal Committee concluded that:

"The corporate voluntary administration procedure has been very successful. It is now the most commonly used form of insolvency administration in Australia."

However, if one searches through the report, it is noticeable that the word "evidence" appears only 6 times in an almost 200-page report. The Committee relied heavily upon an ASIC report into VAs around Sydney in 1998. That research does not really justify the use of the adjective "very successful". It may be true that VA became the most commonly used form of insolvency administration, but that is surely not the only (or even a meaningful) measure of success.

For example, the ASIC report found that the "recovery rate" for companies which go into administration is "around" 20%-25%. This refers to companies which subsequently resume normal trading. ASIC thought that this compared favourably with the UK (19%) and the USA (6%). Two comments can be made about this.

The first is that the difference between the UK and the Australian figures was not so great that one could really say that the Australian regime was comparatively "very successful". The second comment is that the comparison with the US figure is intriguing. Given that the US model is one of debtor-in-possession (c.f. the Australian external administrator model), the difference between the two regimes is puzzling. One would have expected that, all other things being equal, a debtor-in-possession regime would have produced a higher rate of return to trading than an external administration regime. This suggests that, rather than being a measure of success, the lower level of recoveries under the US model is a reflection of a statutory policy directed against allowing financially-dubious returns to "normal trading".

² *Capital Finance Australia Limited & Anor v Tolcher & Anor* [2008] HCA Trans 281 (5 August 2008); *Capital Finance Australia Limited & Anor v Tolcher & Anor* [2008] HCA Trans 282 (6 August 2008).

When the Parliamentary Joint Committee looked at voluntary administration in 2004, it was not so starry-eyed about the fact that VA is now among the most popular forms of external administration:

"Much of the data available in relation to the VA procedure relates to usage of the procedure. Such data does not necessarily provide a basis for evaluating the costs or benefits of the procedure and assessing whether creditors achieve a better outcome as a result of using the procedure than they would under the alternatives."³

Even if one were to judge the success of VA by the number of instances in which it is used, recent evidence suggests that it is currently experiencing an eclipse.

In the first six months of 2008, 3967 companies entered external administration. 879 (22%) of those were VAs. In the corresponding period in 2007, there were 1164 VAs, representing 32% of new insolvencies. The 2006 figure was 1380 (36%). The difference between 32% and 36% is not significant, but the difference between 22% and 32% is unlikely to be something as simple a statistical variation.

In a recent issue of the Insolvency Law Bulletin, Martin Hirst asked:

"Is it just me, or has anyone else noticed a steep drop-off in the number of voluntary administrations?"⁴

His explanation is the 31 December 2007 commencement of the Corporations Amendment (Insolvency) Act 2007. Among other things, the Amendment Act made it easier and faster to put a company into voluntary winding up.

Why would voluntary winding up be more attractive to directors and creditors than VA? As regards directors, Hirst suggests that, until the 2007 amendments, directors of insolvent companies may have preferred VA because it was faster than voluntary winding up and thus allowed the directors to avoid personal liability for unpaid tax. If correct, this suggests that, rather than being a success story, VA was simply the least bad option for directors of a failing company.

As regards creditors, Hirst's theory is that creditors have a psychological preference for liquidators over administrators:

"With administration, there is often a lingering doubt with creditors that the company is trying to avoid paying its creditors and, perhaps, being reborn with the aid of an insolvency practitioner who:

- was selected by the directors;
- was not known by the creditors; and
- was not selected by the creditors."⁵

It is, with respect, difficult to understand the point of distinction. In most companies there would be little difference between the directors and the members, so the members' preferred liquidator is likely to be the same as the directors', which means that there is little practical difference between the directors' choosing a voluntary administrator and the members' choosing a liquidator. Equally, the creditors' statutory power to change the liquidator in a voluntary winding up (s 497(11)) is fairly similar to their power to replace a voluntary administrator (s 436E(4)).

³ Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: a Stocktake*, Canberra, June 2004, at para [5.18].

⁴ Martin Hirst, "Death of administrations: unrealistic fetters on litigation funding" (2008) (9) 1 INSLB 2.

⁵ *Ibid* at 2-3.

So what's the story with returns to creditors?

In 2007, 564 deeds of company arrangement (DOCA) were entered into. During the same period, 2349 voluntary administrators were appointed. Although it is a rough measure, one can say that 24% of voluntary administrations ended up in DOCAs. By way of comparison, the aforementioned ASIC survey of the first four years of the VA regime found that, of 5760 VAs, 1165 resulted in a DOCA (20%).

In evidence to the Joint Parliamentary Committee, Mr Harmer said:

"I can recall during my work at the [ALRC] we thought, 'Maybe if you can save just 10 per cent of all insolvent or near insolvent corporations then you are going to be at least nine per cent in front' - in front of what was then happening."⁶

However, the percentage of VAs that produce DOCAs cannot necessarily be equated with the percentage of businesses saved, for two reasons:

- it is by no means inevitable that a company which is subject to a DOCA will return to business - the DOCA may simply be an orderly transition to liquidation;
- the DOCA may not save the company, but it may result in the sale and, hence, continuation of the company's business.

It should also be acknowledged that returning a business to healthy operation is not the sole determinant of the success of a VA/DOCA. Section 435A states that the objective of the VA regime is "to provide for the business, property and affairs of an insolvent company to be administered in a way that:

(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or

(b) if it is not possible for the company or its business to continue in existence—results in a better return for the company's creditors and members than would result from an immediate winding up of the company."

An Australian Society of Certified Practising Accountants survey found that the estimated average return to unsecured creditors from VA was 21.5 cents in the dollar (compared with an estimated average return of 7.3 cents if the same companies had gone straight into liquidation). ASIC itself concluded that 10 cents in the dollar was becoming the benchmark return on a DOCA.⁷

The "anything is better than nothing school" may point to these estimates as proof of the benefits conferred by the VA regime. The Australian Tax Office, which is presumably a creditor in most VAs, takes a less enthusiastic view. In its submission to the Parliamentary inquiry, it made a number of adverse comments about the VA regime:

"[F]rom discussions with practitioners, other creditors and other anecdotal evidence, Tax Office staff believe that a number of Deed of Company Arrangements [sic] are defaulted on, leading to the company being wound up and creditors failing to receive the amounts pledged under the deed.

The Tax Office is concerned that the provisions relating to Deeds of Company Arrangements [sic] are increasingly being used as a mechanism for companies to avoid paying their creditors. *It is the experience of the Tax Office that there are very few Deed of Company Arrangements [sic] that yield reasonable dividends to creditors*" (emphasis added).

In the light of that last statement, it is hardly surprising that the ATO is sceptical about the use of bare statistics to demonstrate the success of VAs:

⁶ Quoted at para [5.13].

⁷ Both sets of figures quoted in *Voluntary administration - ASC research paper*, SPCH24, ASIC, April 1998.

"The Tax Office supports the Voluntary Administration process, but believes that success of the process should be measured by the quantity of Deed of Company Arrangements [sic] which are actually complied with, rather than the number that are proposed and accepted by creditors."⁸

Another interesting perspective on the question of returns to creditors was hinted at by ASIC when commenting on the result of its 1998 survey. Noting that DOCAs appear to produce a slightly better return for creditors than immediate liquidation. ASIC comments:

"Directors sometimes offer these ex gratia payments to induce creditors to agree to a proposed deed and thus to avoid the consequences of a liquidation."⁹

Some of these "consequences" of liquidation were identified somewhat starkly by the Commercial Law Association in its evidence to the Joint Parliamentary Committee:

"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, 'Don't worry, buddy; you'll 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."¹⁰

If it is assumed that directors of even insolvent companies are rational creatures, it is arguable that any "higher" return that creditors receive from a DOCA would probably be less than they would receive if the company went into liquidation and the liquidator pursued the directors for insolvent trading.

And that leads neatly into the second focus of this paper: insolvent trading.

Insolvent trading

Another important change in 1993 was the abolition of the right of individual creditors to sue for the recovery of insolvent trading debts. According to the Harmer Report, there were several reasons for this:

"[T]he legislation

...

- gives any benefit of the civil liability to the creditor taking action and thus is only of advantage to a creditor with the resources to take such action

- fails to provide a liquidator with standing to bring an action for the benefit of all creditors

...

- requires a multiplicity of actions if all creditors who have been affected by the behaviour of the directors are to be compensated, with the possible result that the first creditors to take action may exhaust the assets of the errant directors."

As a result, the right of creditors to take individual recovery actions was abolished (although a vestigial ability to take action was notionally preserved in Pt 5.7B Div 4 Subdiv B). It is arguable that the outcome has not been wholly beneficial: there has been a noticeable drop in the incidence of insolvent trading litigation since 1993. When the premises of the reforms are examined, such an outcome is hardly surprising.

⁸ Comments from the Australian Taxation Office to the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Australia's Insolvency Laws*, Canberra, June 2004.

⁹ *Ibid.*

¹⁰ Quoted at para [3.19].

For example, the claim that the pre-1993 provisions were "only of benefit to a creditor with the resources to take" an insolvent trading action is disingenuous. It implicitly acknowledges the great expense involved in an insolvent trading action, but fails to acknowledge that the only creditors likely to want to expose themselves to that expense are creditors who are owed very large amounts of money. Contrary to the clear implication in the Report, this was far from being a free-ride situation. Indeed, at the time the Report was written, an insolvent trading claim was by no means guaranteed to be successful. This was because the NSW Court of Appeal, in *Metal Manufacturers Ltd v Lewis* (1986) 4 ACLC 739, had effectively held that a sleeping director could use his or her ignorance of the company's finances as a defence to an insolvent trading claim. While this did not kill off insolvent trading claims completely, it did make them considerably more difficult to establish in the case of the type of company most likely to become insolvent - smallish family companies in which both spouses were directors but only one played any active part. Insolvent trading suits against the sleeping director were not an attractive proposition after *Metal Manufacturers*.

In addition, the Report's claim that there would be a "multiplicity of actions if all creditors who have been affected by the behaviour of the directors are to be compensated" is technically correct, but it wasn't reflected in practice. The pre-1993 regime simply didn't tend to produce clashes between creditors who were competing for access to the directors' personal funds, probably because, in any one solvency, there would not be a great multiplicity of creditors with the resources to run a claim.

(As an aside, the Report's arguments against a self-help remedy for creditors would, in theory, be equally applicable to the case of secured creditors, yet no one suggested that there was anything inherently unfair in allowing them to use their superior resources to put themselves in a superior position to unsecured creditors.)

Anyway, for better or worse, individual creditors were stripped of their right to bring an insolvent trading action, and the exclusive right to bring such actions was restored to liquidators (returning them to the position they'd been in until the Companies [name of State] Code of 1981).

The other significant insolvent trading change in 1993 was the recasting of the insolvent trading provisions as a positive duty upon directors. The Report contains a long a detailed argument about why this was a positive step. However, it did mean that a provision (s 592) which ran to just over one page was replaced by 11 provisions extending to more than five pages. With the benefit of hindsight, one may wonder whether the new provisions have really changed things that much.

This is because, after the Report was published, *Metal Manufacturers v Lewis* was consigned to the dustbin of history. The immediate cause of this reversal was the decision of the Supreme Court of Victoria in *Statewide Tobacco Services Ltd v Morley* (1990) 8 ACLC 827. This case concerned the widow of the proprietor of a tobacco kiosk in central Melbourne. The kiosk had been run through a family company of which Mrs Morley and her late husband had been the directors. While he lived, Mr Morley had run the business by himself. After his death, that role was taken over by the Morleys' son. The company was wound up in insolvency in 1988. One of the company's suppliers then sued Mrs Morley for an insolvent trading debt.

Mrs Morley ran the standard sleeping director defence that had been endorsed by *Metal Manufacturers*. Unfortunately for her, the world had changed considerably in the four years since *Metal Manufacturers*. In 1988, stock markets around the world had collapsed and, in their wake, had taken with them a number of entrepreneurs and companies whose business practices were revealed to have been less than financially rigorous. It was, therefore, not a good time for Mrs Morley to argue that she should not be liable for her company's debts on the grounds that she had been totally ignorant of the company's finances.

Ormiston J succinctly set out the question that Mrs Morley's defence raised for the Court:

"The critical question in both [*Metal Manufacturers*] and the present proceeding was whether a director who leaves the conduct of the business entirely to another director or executive can make out the defence under para. (a) of subsec. (2) of sec. 556 by proving that the debts in question were incurred without his or her `express or implied authority or consent'. However, the defence under para. (b) of that subsection was also raised in this proceeding, in that the defendant claimed that she had no reasonable cause to expect that the company would not be able to pay all its debts as and when they became due" (at pp 828-829).

His conclusion was:

"Where:

(1) a director ... takes no effective part in the management of a company which continues to trade while insolvent and, in particular, that director does not seek to obtain regular trading accounts of the company; and

(2) that director has participated in the conferring of general authority upon an executive director or other employee or agent whereby that executive director, employee or agent incurs debts to a creditor on behalf of the company in the course of the insolvency;

then the director will have committed an offence and may be made liable to that creditor for those debts of the company" (at p848).

Ormiston J paid due deference to the fact that *Metal Manufacturers* was a Court of Appeal decision by distinguishing it on its facts. However, in legal circles, there was no doubt that his decision represented a very different train of thought from that in *Metal Manufacturers*. In fact, his policy approach was subsequently adopted and developed by the Full Court of Victoria, on appeal, in *Morley v Statewide Tobacco Services Ltd* (1992) 10 ACLC 1,233, another Victorian Supreme Court Judge (Tadgell J), in *Commonwealth Bank v Friedrich* (1991) 9 ACLC 946 and ultimately by the NSW Court of Appeal itself. In *Daniels v Anderson* (1995) 37 NSWLR 438, the Court of Appeal used *Morley's* case as the basis for a fundamental recasting of the basic common law duties of directors:

"The insolvent trading cases demonstrate that ignorance is no longer necessarily a defence to proceedings brought against a director. In some respects, at least, the director must inform himself or herself about the affairs of the company.

There is no doubt reason for establishing a board which enjoys the varied wisdom of persons drawn from different commercial backgrounds. Even so a director, whatever his or her background, has a duty greater than that of simply representing a particular field of experience. That duty involves becoming familiar with the business of the company and how it is run and ensuring that the board has available means to audit the management of the company so that it can satisfy itself that the company is being properly run."

In fact, with the exception of the "rogue" case of *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation*,¹¹ it is arguable that the law of insolvent trading is still that laid down by the three Victorian cases in the early 1990s, applying the pre-1993 version of the Act. Ormiston J's decision is still regularly cited in decisions on the 1993 provisions (e.g. *Australian Securities and Investments Commission v Plymin (No 1)* (2003) 175 FLR 124 and *Manpac Industries Pty Ltd v Ceccattini* (2002) 20 ACLC 1304).

How did the 1993 amendments improve the regulation of insolvent trading?

Some interesting statistics were unearthed by my colleague Paul James in a 2004 article published in the *Insolvency Law Journal*.¹²

Insolvent trading litigation has tailed off dramatically since the 1993 amendments. The roughly 10 years between the enactment of the Companies Code and the 1993 amendments gave rise to 60 reported insolvent trading cases. Up until 2004, the 1993 provisions has produced only 11 decisions.

There are a number of possible explanations for this.

¹¹ (2001) 53 NSWLR 213. There, a single judge of the NSW Supreme Court revived the "dumb spouse" defence by holding that it could be applied where the spouse in question was a woman. The Court of Appeal restored the status quo ante: *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 (citing, *inter alia*, *Statewide Tobacco v Morley*).

¹² Paul James, Ian Ramsay and Polat Siva. "Insolvent Trading - An Empirical Study" (2004) 12 *Insolv LJ* 210.

For example, it may simply be that a lot of insolvent trading claims are now settled out of court. There is, however, little in the 1993 provisions to have induced such an outcome. If settlements are now more common, it would be because the legal principles are relatively settled and the relative lack of successful defences in the wake of Morley's case has encouraged such an outcome: since 1970, 75% of all insolvent trading cases have been decided against the director.

Alternatively, liquidators may simply not be taking action to recover insolvent trading liabilities. It is not difficult to understand why this may be happening, even with the availability of litigation funding. Although he owes a duty to all creditors, a liquidator lacks the personal incentive to pursue directors for insolvent trading liabilities. Creditors may also enjoy some forensic advantage over liquidators in this regard, given that they are litigating to recover debts for which they probably have a strong paper trail.

Finally, of course, it should be acknowledged that VAs may give errant directors the ability to "buy" freedom from an insolvent trading action.

Overall, therefore, it is interesting to speculate on how things might have looked if the 1993 amendments had not amended insolvent trading laws so radically. I suspect that the practical application of the law would not be radically different from what we have today, largely because the major principles were already established (after Morley's case) before the amendments were made. Making creditors the primary agents of recovery would probably have resulted in more recovery actions, but there would also probably have been more challenges to DOCAs by creditors who did not want to see their insolvent trading claims being bought off by the failed company's directors.

Statutory demands

In my introduction, I noted comments that appeared to lend support to the view that the current law on statutory demands is akin to an income support scheme for junior barristers.

Indeed, one does not need to be a statistician to know that litigation about statutory demands ballooned after 1993. A quick search on Casebase turned up 634 cases in which s 459G was mentioned. That's an average of 42 a year. What's really interesting is that in the 12 months to August 2008, Casebase returns 38 s 459G case references. From this it is possible to see that there has been no appreciable diminution in the number of statutory demand cases coming before the Courts.

Experience tells us that a reasonable number (albeit not a majority) of s 459G applications are successful (due, in no small measure, to the low threshold for a disputed debt). If one considers the underlying policy issues, would a rise in absolute numbers of companies defeating statutory demands (when compared with the pre-1993 situation) mean that companies were being wound up under the old law which would not have been wound up under the current law?

That's one possible view. However, there are two alternative explanations.

The first is that, under the previous law, creditors may have opted not to proceed to a winding up application if the company could persuade them that the debt claimed in the statutory demand was not actually owing. Hence, instead of a formal set-aside application (such as we have today), the dispute about the debt was settled informally. The problem with this putative explanation is that it leads to the conclusion that matters which were formerly settled informally now end up in litigation. In other words, the 1993 amendments did not change the end result, but simply established a more expensive mechanism for getting there.

However, I suspect that many practitioners will opt for the third possible explanation - one which was predicted by the Australian Bankers Association in its submission to the Harmer Inquiry:

"The Australian Bankers Association expressed concern that this proposal [i.e. the current set-aside procedure] would allow insolvent companies to frustrate creditors and that the present system was preferable."¹³

The ALRC's response to this concern was arguably illustrative of a lack of foresight:

¹³ ALRC, at para [148].

"[T]he Commission considers that the existing, largely unregulated, procedure in relation to notices of demand too often produces disputes about the debt at the hearing of a winding up application. The Commission is anxious that this should be avoided."¹⁴

It is unfortunate that the Commission didn't explain what "too often" means. It would be interesting to know whether the current system "too often" produces disputes about debts that are clearly owing or even simply "too often" produces debt disputes simpliciter.

If one digs a little further, it is clear that, as well as the usual disputes about the existence or quantum of debts, the current statutory demand regime is a technical nightmare. Leaving aside the "hang 'em high" approach to statutory interpretation adopted by the High Court in *David Grant*,¹⁵ the current legislation has given rise to a cornucopia of legal and practice issues, most of which are still unresolved, 15 years after the changes were made. Two of the most prominent are:

- how does one serve documents on a company? The plethora and variety of judicial pronouncements on this issue defies categorisation.
- what does s 459J actually mean?¹⁶

Strangely, statutory demands did not excite much comment when the Joint Parliamentary Committee conducted its "stocktake" of Chapter 5. It claimed to have received few submissions on statutory demands. Nevertheless, the only substantive submission that it did refer to raised enough serious concerns for the Committee to recommend a major review of the law of statutory demands:

"Professor Andrew Keay raised a range of concerns about the statutory demand procedure, including that - the law is technical and gives rise to substantial litigation; it does not discourage or prevent insolvent companies from continuing to trade; it is inflexible and harsh in its consequences; and it may be used unfairly against solvent companies. He commented:

`the procedure and scheme that has been set up has caused certain problems in that a huge number of cases have been heard since 1993. There has been a stream of cases since this year. I would imagine that this is the area that has attracted the most litigation since 1992 and it has produced a rather tangled mass of case law.'"¹⁷

Of course, it is easy to point out that the statutory demand procedure is a legislative and practical disaster zone. What can be done to fix it up?

This is where things get difficult. Professor Keay suggested two amendments to the Joint Committee:

"Firstly, the adoption of the procedure in personal bankruptcy which requires a judgment to be obtained before the issue of a bankruptcy notice. He observed:

`If you have the judgment of a court already, it is very difficult for the debtor to argue that there is no debt.'

12.58 Secondly, he proposed that courts be given powers to make directors liable for the costs of proceedings where their companies clearly do not have a genuine dispute and are just trying to raise defences as a way of putting the creditor off taking up the winding-up proceedings."

The first suggestion is almost a case of "return to the future". Exactly the same proposal was put to the Harmer Inquiry, by the National Creditor Managers Association (Victoria). The ALRC rejected the proposal, but without giving any reason other than that it did not consider such a change to be "justified".

¹⁴ Ibid.

¹⁵ *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43.

¹⁶ The High Court may provide some clues when it rules on the Neutral Bay appeal: *DCT v Neutral Bay Pty Ltd; Broadbeach Properties; MA Howard Racing Pty Ltd* [2008] HCA Trans 75.

¹⁷ At p 222.

The second suggestion is a good one and may lead to some reduction in the current amount of litigation, but it would not really address the fundamental structural problems with the current regime. (Indeed, given the type of company which is typically involved in statutory demand litigation, one would suspect that the directors already fund many of the set-aside applications.)

What did the Joint Committee recommend? Alas, it was just as much at sea as everyone else. It saw the need for reform but wouldn't, or couldn't, commit itself to any specific changes:

"12.59 Given that the law relating to statutory demands is such a central aspect of insolvency law and generates many complaints and litigation, the Committee considers that it would be appropriate to review the operation of the law after a decade of use of statutory demands. The Committee makes no specific recommendations about amendment of the provisions governing the statutory demand procedure. However, it considers that in any CLERP review of insolvency law the statutory demand provisions should be included by Treasury, both to review the underlying policy and remove any technical anomalies that may have emerged from the case law, with a view to reducing the incidence of wasteful litigation."

Perhaps the question that should be asked is: what was wrong with the old system? It is true that there were some gray areas (most noticeably the Aussie Rules v Rugby League dispute about the effect of a disputed debt). However, it produced very little litigation when compared with the current legislation, and it was not, as far as I am aware, ever described as a system which was designed to operate harshly.¹⁸ There was little wrong with the system that a few tweaks could not have remedied.

Conclusion

This paper has not attempted a systematic review of all of the 1993 amendments. Rather, I have concentrated on three "headline" topics which were among the most far-ranging amendments in the Act. The survey has, I think, illustrated some interesting points about both insolvency law and law reform in general.

As regards the three highlighted areas, the following conclusions are open:

- the statutory demand changes were a disaster;
- the insolvent trading changes may not have greatly changed the pre-existing situation;
- the "success" or otherwise of voluntary administration is by no means clear.

Does the answer lie in another inquiry and more amendments? Before going down that road, one should ask whether this classic model of law reform has really served us well. In particular, anyone who works with the Corporations Act should have a look at the Financial Services Reform Act 2001 before being too quick to embrace the concept of the all-singing, all-dancing comprehensive amendment Bill. In fact, a theorist may even argue that the 1993 amendments were a forerunner of the FSR Act, in that they both reflected a belief that the answer to perceived regulatory problems is even more detailed legislation. If, as Martin Hirst has opined, VAs are being overtaken by voluntary winding up, it is salutary to consider whether, instead of enacting Pt 5.3A in all its minute detail, the real "needs" of the business world could have been met by the few simple amendments to the voluntary winding up provisions that were made last year.

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¹⁸ See the comments of Gummow J, in David Grant at para 40.

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