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THEORY AND INFLUENCES FOUND IN AUSTRALIAN INSOLVENCY LAW

Abstract

The 140th anniversary of the Adelaide Law School gives me the occasion to reflect on some of the influences upon insolvency law that have occurred from the 19th century up until today. Locally the reflection includes the doctoral pursuits at Adelaide Law School by one of the South Australian Supreme Court's greatest Chief Justices, and the work of recent post-graduates, the teaching and scholarship of Adelaide academics past and present, or by the many Adelaide Law School undergraduates who have gone on to careers in law, journalism, politics or a multitude of other callings. My reflection goes beyond the state border to consider the many others who have influenced Australian insolvency law and practice, which is considered one of the world's best examples of insolvency and bankruptcy law. An Australian theory of insolvency does not yet exist or remains unidentified, and I start with a brief exploration of the theoretical position of insolvency law in Australia.

I Introduction

In July and August 2023, the Senate and House of Representatives respectively released and tabled its long-awaited joint report on corporate insolvency in Australia. One of the first recommendations is that Australian insolvency law should have a clear statement of objectives.[1] In particular, recommendation 1 of the 28 recommendations is that '[t]he committee recommends that as soon as practicable the government commission a comprehensive and independent review of Australia's insolvency law, encompassing both corporate and personal insolvency.' Recommendation 2 states that 'the committee recommends that the comprehensive review, as part of its early work, consider and report on the appropriate principles and objectives of insolvency law.' Later, the recommendations talk of re-examining

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1 Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency in Australia* (Final Report, 1 August 2023) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000055/toc_pdf/CorporateinsolvencyinAustralia.pdf>.

the principles, purposes, and objectives of the insolvency law. It seems therefore that insolvency law is very relevant at present.

Where do we go to establish the objectives? Perhaps the *General Insolvency Inquiry* or '*Harmer Report*' of 1988[2] which lists the '[a]ims of insolvency law' at its paragraph 33, or perhaps Roman Tomasic's early textbook on insolvency titled *Australian Corporate Insolvency Law*[3] — especially in chapter 1, where he also talks of the 'aims' — or potentially even the Parliamentary Joint Committee on Corporations and Financial Services' ('PJC on CFS') own report titled 'Corporate Insolvency Laws: a Stocktake' ('Stocktake Report') from 2004 which noted that

> [t]he Committee appreciates that a wide range of policies and objectives must be taken into consideration in the design of an insolvency law. An effective insolvency regime must achieve a careful balance of multiple and even conflicting policies and objectives. The foremost objective, in the Committee's view, is to promote and maximise trust and confidence in the operation of insolvency law on the part of the community in general and the business and corporate sector in particular.[4]

In addition, we could go to Michael Murray and Jason Harris' practitioner text which, in its latest edition, adds to the regular list with some new objectives such as to 'recycle.'[5]

II Theories of Insolvency Law

Let me start this reflection with a discussion on theory, although I am not going to spend a lot of time on it. On 1 April 2019, in Singapore, I made a presentation to an international audience of insolvency academics which was titled 'The Opals of Insolvency'[6] — noting that Australia has 95% of the world's opals — and in preparing the presentation I was searching for an Australian insolvency theory while somewhat

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2 See Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, September 1988) 15 ('*Harmer Report*').

3 Roman Tomasic, *Australian Corporate Insolvency Law* (Butterworths, 1993) 4–17. His list includes the orderly processing of insolvencies; the facilitation of debtor and creditor participation; impartiality, efficiency and expedition; convenience in recovering property; equality between creditors; release or discharge from obligations; compatibility with commerce; harmonization with the general law; cross frontier insolvency; divesting directors of their managerial powers; the disqualification of directors and the maintenance of standards by insolvency practitioners.

4 Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (Final Report, June 2004) <https://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/2002_04/ail/report/ail_pdf.ashx> ('*Stocktake Report*').

5 See Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters, 11th ed, 2022).

6 See Christopher Symes and Sylvia Villios, 'The Opals of Insolvency' (Speech, INSOL 2019 Academics Colloquium Singapore, 1 April 2019).

playing the jester. In the presentation I identified theories that did not originate in Australia, being the two primary ones: Creditors Bargain or Contractarianism and Communitarianism. I then added others with less import such as the Multiple Values or Eclectic Approach, the hybrid Forum and Ethical vision theories, and the Prospects and Systems from authors such as Vanessa Finch[7] who try to identify 'aims, objectives and benchmarks.' Afterwards, I spoke about getting away from insolvency theories and said that we could explore insolvency theory through the lens of Montesquieu's *The Spirit of the Laws* (1748)[8] and could also consider corporate law theories such as realism. In the same year as my presentation, Dr John Tribe of Liverpool University had written on why we (being the common law countries) do not have insolvency theories, and had mooted that this is because such theories would emanate from insolvency practitioners, legal practitioners, judges, academics and governments, who all are too darn busy to worry about theories![9] In 2024, Tribe is publishing a book[10] on this and we await what he will make of the United Kingdom ('UK') and if any parallels can be ascertained for Australia.

In the Singapore presentation I then quoted from Jay Lawrence Westbrook et al that 'each jurisdiction will have insolvency laws closely linked with its other laws and [they] will inevitably reflect its fundamental values.'[11] I observed that in Australia we had fundamental values, or what we might call our precious opals. These 'opals' included concepts such as '[a] fair go', 'ave a go ya mug', 'trust ya gut', 'the banks

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7 Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (Cambridge, 2002) 28–42.

8 See Montesquieu, *De l'Esprit des Loix* [The Spirit of the Laws] (Barrillot & Fils, 1748) ('*The Spirit of the Laws*'). On Montesquieu's view, the key to understanding different laws and social systems is to recognise that they should be adapted to a variety of different factors, and cannot be properly understood unless one considers them in this light. Specifically, laws should be adapted

> to the people for whom they are framed, … to the nature and principle of each government, … to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.

Montesquieu, *The Spirit of the Laws* pt 1.3. When we consider legal and social systems in relation to these various factors, Montesquieu believes, we will find that many laws and institutions that had seemed puzzling or even perverse are in fact quite comprehensible.

9 See John Tribe, 'Why the Theory of English and Welsh Bankruptcy Law is Not Yet Written' (2019) 30(9) *International Company and Commercial Law Review* 473, 473–89.

10 John Tribe, *Corporate Insolvency Law: Challenging Orthodoxies in Theory, Design and Use* (Edward Elgar Publishing, 2024).

11 Jay Lawrence Westbrook et al, *A Global View of Business Insolvency Systems* (Brill, 2010) 2.

are bastards', and others such as 'we're the most multicultural society of Earth', 'we look after our mates', we 'hate the tall poppy' — and I concluded with the justification that '50 million blowflies can't be wrong.' Of course, all of this was tongue in cheek, but the real point was 'how do you identify fundamental values'?[12]

I then said that Aussies love statutes, which aligns with what Professor Ian Ramsay wrote in 1992 when he stated that 'the way in which significant social [and commercial] problems are resolved is through legislation.'[13] Therefore, if we try to identify a theory, we should not concentrate on the courts but on the process of statute law making (eg lobbying, government committees, stakeholder consultation, academic commentary etc) — and yet all these lack theory. I also noted that Professor Paul Finn, in a 1993 article, began with the important observation that 'we were born to statutes'.[14] For Finn, 'the age of statutes is no contemporary legal phenomenon but a foundational and enduring characteristic of the constitutional system of governance'.[15] I then said that we should look to insolvency statutes of the future, and suggested that these would focus on the ease of doing business, the attitude to entrepreneurship/public private divide for determining government involvement and the United Nations Commission on International Trade Law's ('UNCITRAL') development of Model Laws (in areas such as Micro, Small and Medium Enterprises, and Corporate Groups). I concluded that the history, objectives, philosophy and even theoretical underpinnings in Australian insolvency legislation and jurisprudence are based upon fundamental values, and that these might suggest an opal theory of the future. Finally, I reminded them all of what day it was — April Fool's Day! When I was ultimately asked a serious question of what if I had to settle on what Australian insolvency's main objective would be, my reply was 'fairness'.

In the textbook *Australian Insolvency Law*, I also suggest that it

> is early days in the discussion on theories for corporate insolvency law in Australia. The next few decades will probably provide an Australian theoretical perspective that has been absent in the past. Currently, two main perspectives are emerging, predominantly from the United States with some flavor added from the United Kingdom — one grounded in a 'nexus of contracts' argument, referred to below as creditors' primacy, and another that goes beyond the contract to incorporate other factors such as community interests and values.[16]

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12 And whilst it might have been tongue in cheek, I have seen two attempts at referencing it in scholarly works!

13 Ian Ramsay, 'Corporate Law in the Age of Statutes' [1992] (14) *Sydney Law Review* 474, 474.

14 Paul Finn, 'Statutes and the Common Law' [1992] (22) *University of Western Australia Law Review* 7, 8.

15 Dan Meagher, 'One of My Favourite Law Review Articles: Paul Finn's, "Statutes and the Common Law" (1992) 22 *University of Western Australia Law Review* 7' (2016) 35(1) *University of Queensland Law Journal* 135, 140.

16 Christopher F Symes, David Brown and Sulette Lombard, *Australian Insolvency Law* (LexisNexis, 5th ed, 2022) [1.27].

A *Is Australian Theory of Insolvency Merely Fairness?*

While acknowledging that there is no Australian theory, is it reasonable to consider fairness as an objective? In *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd*, our current Vice Chancellor and alumnus, Branson J spoke of the role of an insolvency practitioner (here an administrator) and said:

> In such role he or she is, in my view, obliged to consider not only means to maximise the chances of the company, or as much as possible of its business, continuing in existence (s 435A), but also issues of fairness between the company and its creditors, and between the company's creditors inter se.[17]

Recently, when looking at independence in an insolvency in *ASIC v Jones*, Buss, Mitchell and Beech JJ of the Western Australian Court of Appeal discussed what the 'fair-minded observer might reasonably apprehend.'[18] Two very legalistic concepts were examined together — 'fair' and 'reasonable.'

Arguably Adelaide Law School's most well-known theorist or legal philosopher, John Finnis has something to say about fairness.[19] In his exploration of legal theory, Finnis suggests that rival interpretations of any law can be compared on two dimensions: its fit with the legal materials (eg precedent) and moral soundness. He notes that hard cases occur when the best interpretation on fit is different from the best interpretation on moral soundness. He also states that, since fit and moral soundness are incommensurable, there cannot be a uniquely right interpretation of the hard case, and that the solution must be achieved on the basis of fairness.[20] In insolvency we have both the legal materials in the form of precedents dating back centuries and legislation, and we also have plenty of stakeholders looking for moral soundness from that insolvency law. A wonderful example of this is the law of preferences where there is the 'hard case' of the lawful payments to creditors, balanced

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17 (1996) 63 FCR 391, 405–6 (Branson J).

18 [2023] WASCA 130, [17].

19 See John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 221–3. Moral decision-making involves seeking integral human fulfilment by responding to 'the reasons for action, the practical reasons, that each basic good provides'. From this it follows for Finnis that one must not intentionally do harm to others or intend evil to achieve good; on the contrary, one must act fairly towards others. Fairness does not involve rational commensuration of good vs bad; rather it is guided by the Golden Rule through commensuration of alternative options based on 'one's own differentiated feelings toward various goods and bads as concretely remembered, experienced, or imagined' in view of integral human fulfilment (cf the Aristotelian mature person of reasonable character). Analogously, decisions about what speed to drive on a private road, or whether to have the institution of trusts in English Law, are made by communities not based on rational judgement but instead on decisions reached as aforesaid. For a criticism of this, see Richard Stith, 'A Critique of Fairness' (1982) 16(3) *Valparaiso University Law Review* 459, 459–81.

20 See Finnis (n 19).

with the fairness that comes with the concept of pari passu and equal treatment to all creditors, which could be seen as moral soundness.

I also attended a fairness workshop in Canada where much was discussed on fairness, and the published proceedings includes a chapter where I identify 'fairness' in some aspects of Australian insolvency law, particularly the statutory provisions. I commenced the chapter with a quote from the song 'Beds are Burning' by Midnight Oil: 'The time has come to say fair's fair.'[21]

B *Other Considerations on Insolvency Theory*

Elsewhere I have said that corporate law has developed in a pragmatic and piecemeal way.[22] An alumnus and my former colleague Associate Professor Kath Hall (Australian National University) has observed that there has been a lack of attention to theory in corporate law scholarship,[23] and so it must be considered what can be expected from corporate insolvency if not even corporate law theory is developed or developing in Australia.

Whenever legal theory in insolvency is considered in the Australian context, Professor Helen Anderson's article 'Theory and Reality in Insolvency Law: Some Contradictions in Australia' is oft referenced.[24] Despite its title it is not about insolvency law theory, although it considers the reality of creditor protection for three types of unsecured creditors — the Commissioner of Taxation, unsecured trade creditors, and employees — against a backdrop of the theory underpinning corporate insolvency law.[25] Anderson discusses the American and English work on theories and then concludes for her purposes that insolvency law theory can therefore be seen to explain the three types of ex-post legislative protection of creditors. In her view, creditor welfare maximisation is a powerful objective which underpins all three forms. In addition, deterring opportunistic behaviour upon approaching insolvency was also seen to be the aim of lifting the corporate veil to impose liability on directors. She then concludes that 'Thomas Jackson's "creditors' bargain" provided, for the purpose of this paper, a useful lens through which insolvency laws could be considered for three specified cohorts of creditors.'[26]

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21 Christopher Symes, 'Fair's Fair in Australian Insolvency, Tacitly' in Janis Sarra (ed), *An Exploration of Fairness: Interdisciplinary Inquiries in Law, Science and the Humanities* (Carswell Thomson, 2013) 317, 317–28.

22 Christopher F Symes, *Statutory Priorities in Corporate Insolvency Law* (Ashgate, 2008) 51.

23 Katherine Hall, 'The Interior Design of Corporate Law: Why Theory is Vital to the Development of Corporate Law in Australia' (1996) 7(1) *Australian Journal of Corporate Law* 1, 6.

24 Helen Anderson, 'Theory and Reality in Insolvency Law: Some Contradictions in Australia' (2009) 27(8) *Company and Securities Law Journal* 506, 506–23.

25 Although at this point her reference is to torts: ibid 506.

26 Ibid 510.

Recently, in the matter of *BCA National Training Group Pty Ltd (in liq)*,[27] Black J cited the reasoning of Lord Hoffmann in *Buchler v Talbot*, who had posited that 'the winding up of a company is a form of collective execution by all its creditors against all its available assets.'[28] Whilst this may be true, I do not think that it captures all of insolvency — I think that, in going forward with the development of insolvency theory, we should reflect a little on what Dr John Tribe wrote in 2022 in support of the wider communitarianism in that

> Communitarian insolvency law and policy exemplifies a humane approach to dealing with a company's stakeholders. Forged in the boiling pressures of insolvency at a time of crisis communitarianism insolvency law policy has much to teach us about general company usage and it should be our guiding hand as we move forward. It is then perhaps time to reimagine companies as being collectives of humanity striving for a common goal, as they were envisaged in their earliest developmental stages, as opposed to being central points for the agglomeration of capital and ruthless accumulation of profit.[29]

III Influences

If we do not have an identified theory at work in Australian insolvency law then we must have at least some influences. I have identified eight influences: historical, media, judicial, academic, politicians, the profession, reform bodies, and overseas influences.

A *Historical Influences*

'A lawyer without a sense of history is a mere mechanic.' These are the words of McPherson J, about whose influence will be dealt with later and whose sapiency we should adopt.

1 *Companies Acts/Bankruptcy Acts in the UK and the Colonies*

The UK had a winding up statute since 1844,[30] while the New South Wales ('NSW') Crown Colony passed its own *Companies Winding Up Act* in 1847. The South Australian Crown Colony then passed its own winding up act known as the *Companies Act of 1854* (No 5 of 18 Vic, 1854), which was to provide for the dissolution and winding up of the affairs of joint stock companies. It was 13 pages long and provided for 45 sections. After much criticism, the UK then passed the *Companies*

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27 [2023] NSWSC 366, [47].

28 [2004] UKHL 9; [2004] 2 AC 298.

29 John Tribe, 'Communitarianism Bankruptcy Law & Policy as a Bulwark against Neo-Liberalism: Forging a Humane Future with Stakeholder Insolvency Responses to Public Interest and Sports Club Insolvency' (2022) 15(6) *Corporate Rescue and Insolvency* 183, 183–7.

30 See *Joint Stock Companies Winding-Up Act 1844*, 7 & 8 Vict c 111.

Act in 1862 which contained provisions dedicated to corporate insolvency.[31] In 1864, an updated *Companies Act* was passed in the South Australian colony.[32] Part IV of it governed the winding up of trading companies, featuring 87 sections covering 21 pages of legislation.[33] By 1883, and the commencement of the Adelaide Law School that year, the South Australian colony had a passed a number of Acts during a period in-between the application of the *Insolvency Act 1880*[34] and the *Insolvency Act 1886*,[35] being two influential pieces of legislation. The *Bankruptcy Act 1883* in England was also a substantial piece of legislation,[36] which became the basis for both the Commonwealth's first *Bankruptcy Act* in 1924 and South Australian bankruptcy law after Federation. The English *Bankruptcy Act* created the role of an Official Receiver and gave the courts power to approve schemes, noting that this was incorporated into the *Companies Act 1862* by amendment.[37]

2 *The 1890s Depression*

The Adelaide Law School had been going just eight years when a major economic depression was experienced in the colonies:

> Counting 'banks' as 'any institution that called itself a bank and solicited public deposits', 54 of the 64 institutions operating in 1891 had closed by mid-1893. The widespread runs on building societies and land banks, which were forcing institutions to conduct fire sales of assets, prompted both the NSW and Victorian colonial governments to pass emergency legislation revising liquidation procedures in 1891. The aim of the legislation was to give financial institutions more time to resolve their difficulties by delaying bankruptcy proceedings and deferring depositors' claims. In NSW, the legislation provided that any single creditor's ability to force compulsory liquidation could be overridden by an agreement amongst a numerical majority of creditors holding three-quarters of a company's liabilities. The Victorian arrangements were slightly different. The *Voluntary Liquidation Act* (which was passed on 3 December 1891 and applied for one year) provided that compulsory liquidation of a company could only go ahead if one-third of creditors, both by number and by value of shares, joined in application to the court.
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> …
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> The *Voluntary Liquidation Act* also allowed many companies to be wound-up without any independent investigation. While the pretext of the Act was that companies

31 25 & 26 Vic c 89.

32 13 of 27 & 28 Vic.

33 See ibid ss 70–157.

34 No 185 of 43 & 44 Vic.

35 No 385 of 49 & 50 Vic.

36 46 & 47 Vic c 52.

37 We know this from the work of the Adelaide Law School graduate Professor Bill Cornish: see William Cornish et al, *Oxford History of the Laws of England 1820–1914* (Oxford University Press, 2010) vol XI.

> needed secrecy in order to avoid panicking investors, it allowed past dishonesties to be hidden (Cannon 1966). In contrast, under the NSW legislation, bank directors had to at least convince creditors of the soundness of any reconstruction scheme.[38]

South Australia was not exempt, noting that, in the year the Law School started (1883), it was stated in the *History of South Australia* publication that '[d]uring most of this time insolvency courts were beset with work. The papers were full of assignments and it seemed as though our commerce were utterly unstable.'[39]

3 *The Constitutional Debates of the 1890s and Federation*

Some of the delegates to the constitutional debates of the 1890s,[40] including Samuel Griffith (Queensland), Andrew Inglis Clark (Tasmania) and John Downer (South Australia) in particular, had especially strong views on corporate and personal insolvency. Yet it was only the 1891 National Australasian Convention which gave some expressed consideration to corporate insolvency through a clause dealing with sub-clause 13 of the draft, that related to 'banking, the incorporation of banks, and the issue of paper money of the draft'. Unsurprisingly a relevant topic during the 1890s Depression, Andrew Thynne (Queensland) argued for bankruptcy and insolvency to be left with the state parliaments. However his Queensland colleague, Thomas MacDonald-Paterson, stated:

> The laws relating to bankruptcy, to banking to bills of exchange and promissory-notes, are laws which we would all be happy to see upon a level footing all over Australia. I unhesitatingly say that the absence of uniformity as to these several matters has tended very much, especially within the last fifteen or twenty years, to clog the wheels of commerce and finance. It is a trouble, for instance, to Victorian capitalists to find that we have in Queensland a law which does not exist in Victoria. While the disparity in the law is not of much moment, still it is these little grains of sand falling in between the wheels of commerce, causing hesitation in investment in different parts of Australia, which do so much to clog the whole machinery.[41]

MacDonald-Paterson, a butcher and solicitor, went on to be a Member of the House of Representatives for the seat of Brisbane in the first Federal parliament.

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38 Bryan Fitz-Gibbon and Marianne Gizycki, 'A History of Last-Resort Lending and Other Support for Troubled Financial Institutions in Australia' (Research Discussion Paper, Reserve Bank of Australia, October 2001) ch 6 <https://www.rba.gov.au/publications/rdp/2001/2001-07/1890s-depression.html>.

39 Edwin Hodder, *The History of South Australia* (1893) vol II, ch XVI.

40 These were the 1890 Australasian Federation Conference, 1891 National Australasian Convention, and the 1897 and 1898 Australasian Federation Conventions, including the conference hosted in Adelaide in March 1897 which was held approximately one kilometre from the Adelaide Law School in North Adelaide.

41 *Official Record of the Debates of the National Australasian Convention*, Sydney, 8 April 1898, 685 (Thomas MacDonald-Paterson).

Subsequently, at Federation, the Commonwealth was given the power to legislate with respect to 'bankruptcy and insolvency' as per s 51(xvii) of the *Constitution*.

4 Huddart *and the Early Years*

Chief Justice Bathurst wrote in 2014 that, despite the term 'insolvency' being used in the Constitution, the High Court in *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 ('*Huddart*') gave a 'restrictive interpretation of the Commonwealth's corporation power' and this meant that the insolvency of companies was dealt on a 'state-by-state basis even after Federation'.[42]

This was a case heard by the High Court consisting of Griffith CJ, Barton, O'Connor, Isaacs and Higgins JJ and did not deal with corporate insolvency. Chief Justice Griffith and Barton J were rather opaque in dealing with the corporations power, and the clearest statement is instead from O'Connor J who stated:

> Except in the sub-section under consideration the Constitution gives no general power to deal with corporations. Speaking generally, therefore, the power of creating corporations, that is, the power to give them legal existence and to regulate their form, their incidents, the relations of their members to the corporation and to one another, is left to the States.[43]

Justice Isaacs agreed, commenting that

> [a]nother thing is clear, that corporations to come within the legislative reach of the Commonwealth must be corporations already existing. It is not a power to create corporations. When such a power was intended to be given it was expressly mentioned as in paragraph (xiii.), and federal incorporation necessarily includes a granting of all capacities and the enactment of all ancillary provisions for internal procedure, even though these matters would otherwise be exclusively within State jurisdiction.[44]

By implication, if there is no federal power to create corporations, then there is no federal power to wind them up. Justice Higgins supported the reasoning of the other judges while also giving examples of why the Constitution cannot be interpreted to give wide power over corporations.[45]

Around the same time, in 1907, the Commonwealth Attorney-General proposed the introduction of a Commonwealth Companies Act based upon the structure of English company law and including provisions for the registration, management

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42 Chief Justice Tom F Bathurst, 'The Historical Development of Insolvency Law' (Speech, Francis Forbes Society for Australian Legal History, 3 September 2014) [73] <https://supremecourt.nsw.gov.au/documents/Publications/Speeches/Pre-2015-Speeches/Bathurst/bathurst_20140903.pdf>.

43 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 371.

44 Ibid 393.

45 Ibid 418–19.

and winding up of companies in the one Act.[46] However, with the 1909 High Court decision in *Huddart* casting doubt upon the constitutional authority of the Commonwealth to fully legislate for companies, what was drafted as the Companies Bill 1908 (Cth) did not proceed further.

So, while the Commonwealth continued during most of the 20th century to make laws for the peace, order and good government of bankruptcy and insolvency they did not attempt to legislate for corporate law or corporate insolvency law.

5 *Referral*

As stated by Bathurst CJ, '[u]nity in corporate insolvency was not fully achieved until the successful referral of state power to the Commonwealth allowing for the introduction of the current *Corporations Act*.'[47] This followed the failed attempts to confer jurisdiction on the Federal Court in the early 1990s.[48] Chief Justice Bathurst suggests that '[t]he establishment of this referral has finally ensured a unified method of dealing with bankruptcies and corporate insolvencies, only 100 years after Federation'.[49] With respect I think that this is overstating it, and that we do not yet have a unified method of dealing with bankruptcies and corporate but rather that one level of government is dealing with these areas of law. Although they are not uniform, we must consider for example the differing amounts to issue a bankruptcy notice/statutory demand.

The historical influence therefore has been somewhat shared by the colonial and then state and federal governments since Federation.

B *Media Influences*

If there has been a disappointing or negative influence on corporate insolvency law, it is the media. While accepting that corporate insolvency law in Australia is complex, it is unfathomable why the media struggles with the basics. They regularly confuse receivership with voluntary administration, voluntary administration with liquidation and would clearly never recognise a pt 5.1 scheme of arrangement. They also refer to the bankruptcy of companies — consider for instance how, just before Christmas in 2023 on ABC Television's Media Watch, the host Paul Barry talked about how poorly the free-to-air television station Channel 10 was travelling and

46 Rob McQueen, 'Why High Court Judges Make Poor Historians: The Corporations Act Case and Early Attempts to Establish a National System of Company Regulation in Australia' (1990) 19(3) *Federal Law Review* 245, 247.

47 Bathurst (n 42) [81]. See also: *Corporations (Commonwealth Powers) Act 2001* (NSW); *Corporations (Commonwealth Powers) Act 2001* (Qld); *Corporations (Commonwealth Powers) Act 2001* (SA); *Corporations (Commonwealth Powers) Act 2001* (Tas); *Corporations (Commonwealth Powers) Act 2001* (Vic); *Corporations (Commonwealth Powers) Act 2001* (WA).

48 See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

49 Bathurst (n 42) [81].

said that 'bankruptcy' was possible! It is abundantly clear that Australia, unlike the United States, does not refer to a company entering 'bankruptcy'. The weight of the influence from the media is strong, noting that you only have to consider for example the television footage in 1998 of workers finishing a shift at Cobar Mines and being told that the company is to be liquidated and that they have lost their entitlements.

1 *Australian Financial Review*

This has been the newspaper that seems to have been an influence on insolvency for a long time. Starting in 1951 as a Fairfax publication, it is now a daily newspaper that aims to provide information regarding the Australian business landscape. The Fairfax merger with Nine Entertainment has seen it still continuing its positive influence.

2 *Business Review Weekly*

Business Review Weekly ('*BRW*') was helpful in my understanding of commercial law. Started by Robert Gottliebsen in 1981, it continued to be published until 2013 and went online from 2013 until finally closing in 2016. One outstanding journalist from the BRW days is Tim Boreham (BA Journ from RMIT University), who did Accounting Week and now writes for Small Caps. BRW journalists such as Boreham seemed to understand the complexities of pt 5 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') and reported corporate insolvency in an informed way and created a positive influence.

3 *Insolvency News Online and Sydney Insolvency News Blog*

This is a media outlet created by Peter Gosnell (BA Journ from University of Technology Sydney and former Business Editor of the Daily Telegraph) that has kept up with news of insolvency since 2011. This blog site is a positive influence and accurate in its reporting of corporate insolvency.

4 *Free-to-Air Television*

Programs like the *7.30 Report*, *60 Minutes*, and *A Current Affair* are occasionally unhelpful or a negative influence on corporate insolvency. They tend towards the 'sensational' and will drop an already prepared and recorded insolvency story just before going to air if there is a more 'interesting' story. Many insolvency professionals and academics are disadvantaged as they have had their time wasted and input discarded. There are some experienced journalists who, to my observations, do not listen to the experts they interview about corporate and personal insolvency, and are often unclear and negative about the different insolvency appointments and industry.

5 *ABC Radio*

Current affairs programs on ABC Radio such as *AM* and *PM* regularly tackle corporate insolvency content. The interviewers and program directors generally

provide a positive influence, being sensitive and grateful for the input of insolvency professionals and academics.

C *Judges and Judicial Influences*

As the law of corporate insolvency has 'blossomed' and grown more complex, while the statutory provisions have grown larger and without a specialist court for personal and corporate insolvency, it is not surprising that there is judicial influence upon the law which is large and can be either positive and negative.

1 *Justice Deane*

Justice Sir William Deane was an important positive influence on insolvency law. In fact, Allsop CJ called him 'one of the masters of bankruptcy in this country'.[50] Before his time on the bench, he had lectured in equity at the University of Sydney, worked for the Attorney-General's Department in Canberra, and was also the author of the standard practitioner text of its day: *McDonald, Henry and Meeks on Bankruptcy Law*.[51] Justice Deane then served on both the Federal Court and the High Court and there are numerous reported cases as examples of Deane J's influence. For example, with reference to *Kleinwort Benson Australian Ltd v Crowl* (1988) 165 CLR 71; HCA 34, his separate and dissenting judgment on bankruptcy notices and by implication statutory demands are still apposite in an area of law that sees thousands of cases determined each year. Also, it is worthy to recall his Honour's judgment in *Re Tyndall; Ex parte Official Receiver* where he reminds us all that '[b]ankruptcy does not, of itself, involve any criminal offence.'[52] This is true too of the company and its directors when an external administrator has been appointed.

2 *Justice Kirby*

Justice Michael Kirby has had an enormous influence generally on Australian law but has he spent any time thinking about the specialist area of corporate insolvency? The answer is yes and the evidence provided is from a speech given in Adelaide at the Insolvency Practitioners Association of Australia's ('IPAA') national conference.[53] This speech was given in 2010 just after he had stepped down from the High

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50 *Hutchings v Australian Securities and Investments Commission (ASIC)* [2017] FCA 858, [5]. See also Chief Justice James Allsop, 'Values in Public Law' (Speech, James Spigelman Oration, 27 October 2015).

51 See WP Deane, LG Bohringer and NTF Fernon, *McDonald, Henry and Meek's Australian Bankruptcy Law and Practice Embodying the Commonwealth Bankruptcy Act 1966 and the Rules and Forms Thereunder Annotated and Explained* (Law Book Co, 4th ed, 1968).

52 (1977) 30 FLR 6, 15.

53 Michael Kirby, 'Bankruptcy and Insolvency: Change, Policy and the Vital Role of Integrity and Probity' (Speech, Insolvency Practitioners' Association of Australia National Conference, 19 May 2010) <https://www.michaelkirby.com.au/images/stories/speeches/2000s/2010_Speeches/2453-SPEECH-INSOLVENCY-PRACTITIONERS-ASSOC-CONF-ADELAIDE-MAY-2010.pdf>.

Court. He opened by saying '[a] Justice of the High Court of Australia does not ordinarily get many opportunities to meet the highly talented lawyers, accountants and other professionals who work in the field of insolvency, in all of its diversity.'[54] In his speech he also refers to his dissent in *Coventry v Charter Pacific Corporation*.[55] In that judgment, he tried in his words to 'engage in a little careful surgery, in an attempt to avoid an interpretation that they [the courts] decide is so inconvenient, contrary to policy and inimical to legal history, that it could not have been intended.'[56] This case also involves proof of debts under the *Bankruptcy Act 1966* (Cth), which as we know also applies to corporate insolvency.

In this 2010 speech, he also refers to *Cannane v J Cannane Pty Ltd* (in liq) (1998) 192 CLR 557.[57] The case involved an exploration of fraudulent transactions that designed and had the intent to defeat creditors. Again, the examination was focused on behaviour under the *Bankruptcy Act 1966* (Cth) but one that had implications for corporate insolvency. In a comprehensive dissenting judgment, Kirby J traces the history, lists six general principles, uses precedent cases and writings, and even compliments counsel stating that

> I pay tribute to the ingenuity of the appellants' arguments. However, in my view, they were rightly rejected in the Federal Court. To adopt the construction urged by the appellants would not only ignore the language of s 121 [of the *Bankruptcy Act 1966* (Cth)] but also undermine the achievement of the broad purpose, protective of creditors, which the Parliament clearly envisaged. The broad approach to the ascertainment of an "intent to defraud creditors", favoured by the Full Court in this case and in the earlier decision in Garuda, is correct. The narrower approach requiring proof of an intention to "swindle" creditors of their entitlements is not appropriate to s 121. Adopting such an approach would seriously undermine the section's effectiveness.[58]

His judgment seems to have been given support in New Zealand and Hong Kong. While not his speciality, Kirby J did leave a positive influence both from his time on the NSW bench and the High Court.

3 *Justice Ray (Roman) Finkelstein*

Justice Finkelstein from 1971 and 1975 worked in Melbourne as a solicitor and also as a tutor at Monash University. He was called to the Bar in 1975, specialising in equity, commercial and corporate law (dubbed in chambers as 'Bankruptcy Chambers'). He was appointed a Judge of the Federal Court in 1997, retired in 2011, and then returned to private practice and is still there at 77! As can be seen, his Honour had wide experience of commercial law and this extended to corporate insolvency law. His time on the court also saw him take novel approaches to

54 Ibid 1.

55 Ibid 9, discussing *Coventry v Charter Pacific Corporation* [2005] HCA 67, [75]–[144].

56 *Coventry v Charter Pacific Corporation Ltd* (2005) 227 CLR 234, [77].

57 Kirby (n 53) 14–15.

58 *Cannane v J Cannane Pty Ltd* (in liq) (1998) 192 CLR 557, [96].

insolvency. In an article in the *Monash Law Review*, for instance, he writes 'that, while he opposes judges acting as "ad hoc legislators", it is naïve to think that a judge's background, education, heritage and personal ethical views do not influence their decisions.'[59] That was certainly true of his corporate insolvency decisions.

One area of Finkelstein J's influences was in the Court's determination of remuneration for insolvency practitioners. The task of the Court was, under s 473(10) of the *Corporations Act*, to fix reasonable remuneration having regard to the evidence before it and taking into account the matters mentioned in the Act. Justice Finkelstein in *Re Korda, in the matter of Stockyard Limited (subject to DOCA*),[60] explained his 'Lodestar' approach which was then found as an appropriate method of undertaking remuneration. Another example of his Honour's influence and understanding of corporate insolvency law is his judgment in *Fitzgerald, Re Advance Healthcare Groups Pty Ltd (Administrators Appointed)* [2008] FCA 1604. There, Finkelstein J was called upon to interpret a new provision of the *Corporations Act*: s 444DA. He took the view that 'Part 5.3A [which contained s 444DA] did not require creditors to be treated equally',[61] and, 'nor did it require adoption of the priorities that applied in a winding up'. He also noted that 'the main objective of Part 5.3A was to keep corporations "alive"'.[62] He further observed that the objective is somewhat compromised by the wording of s 444DA: 'if a company in difficult financial circumstances cannot be saved because priority must be given to its employees'.[63] Such a judgment demonstrated his understanding of what corporate insolvency law was in 21st century Australia and his judicial approach was refreshing and a positive influence on insolvency law.

4 *Justice Paul Brereton*

Justice Paul Brereton was a judge of the Court of Appeal of the NSW Supreme Court from 2005, retiring in 2023 to head the National Anti-Corruption Commission. Probably best known for the Brereton Report on defence issues, he also had a spotlight in the insolvency space. For instance, when the judgment in *Sakr Nominees Pty Ltd* [2016] NSWSC 709 ('*Sakr*') was given it was said to be 'the latest in a series of controversial decisions on insolvency practitioner remuneration'[64] that had started in 2014. In *Sakr*, Justice Brereton indicated disapproval of hourly rates as a basis for remuneration and suggested that a percentage or commission basis was preferable. His Honour also mentioned that proportionality was a touchstone, and

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59 Raymond Finkelstein, 'Decision-Making in a Vacuum?' (2003) 29(1) *Monash University Law Review* 11, 17.

60 [2004] FCA 1682, [47].

61 *Fitzgerald, Re Advance Healthcare Groups Pty Ltd (Administrators Appointed)* [2008] FCA 1604 [10].

62 Ibid [13].

63 Ibid.

64 Thomas Russell, 'Court of Appeal to Rule on Brereton Remuneration Decisions', *Piper Alderman* (Blog Post, 8 June 2016) <https://piperalderman.com.au/insight/court-of-appeal-to-rule-on-brereton-remuneration-decisions/>.

recommended starting points such as '2.5% of realisations and 3% on distributions', or '10% on the first $100,000 of realisations, and 5% thereafter.' All of this was highly inflammatory to corporate insolvency practitioners. This decision came after numerous other judgments of Brereton J dealing with the same issue, namely: *In the matter of AAA Financial Intelligence Ltd (in liquidation) (No 2)* [2014] NSWSC 1270; *Re Hellion Protection Pty Ltd (in liq)* [2014] NSWSC 1299; *Re Gramarkerr Pty Ltd (No 2)* [2014] NSWSC 1405; *In the matter of On Q Group Limited (in liquidation) (subject to deed of company arrangement)* [2014] NSWSC 1428; and *In the matter of Independent Contractor Services (Aust) Pty Limited (in liquidation) (No 2)* [2016] NSWSC 106. Ultimately, however, a five-member bench (Bathurst CJ, Beazley P, Gleeson JA, Barrett and J Beach AJJA) of the NSW Court of Appeal in 2017 overturned the *Sakr* decision and its previous guidance on how to deal with a liquidator's remuneration claim.[65] As Thomas Russell of Piper Alderman put it after the appeal decision:

> Despite yesterday's decision, Justice Brereton's impact on contemporary attitudes to IP remuneration has been profound. If his aim was to jolt the profession out of complacency and to get liquidators and the courts thinking more critically about what 'fair and reasonable' remuneration really entails, he has certainly achieved his goal.[66]

5 *Chief Justice Len King*

Chief Justice Len King of the South Australian Supreme Court had a unique life being both an Attorney-General of South Australia and later Chief Justice. Additionally, as a trained accountant, he was able to bring a practical commercial approach to commercial cases. Amongst a number of high-profile cases that he gave judgments in, the case of *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99 has been important of late given that the question of trusts and corporate insolvency have been a rich topic of litigation. There, King CJ had decided that a liquidator appointed to a trustee of a trading trust may be paid his or her remuneration from trust assets to the extent that remuneration is incurred in relation to the trust. The influence of this judgment is clear when looking at the 174 'cases referring to this case' on LawCite. In particular, the High Court later supported King CJ's views in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth of Australia & Ors* [2019] HCA 20.[67]

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65 See *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr* [2017] NSWCA 38.

66 Thomas Russell, 'Sakr Punched', *Piper Alderman* (Blog Post, 9 March 2017) <https://piperalderman.com.au/insight/sakr-punched/>.

67 Pravin Aathreya and Sara Gaertner, 'A Matter of Trust: High Court Rules on Distribution of Assets of an Insolvent Corporate Trustee', *Johnson Winter Slattery* (Blog Post, June 2019) <https://jws.com.au/insights/articles/2019-articles/a-matter-of-trust-high-court-rules-on-distribution#_ftn1>.

6 *Other Judicial Influences*

Of course, there are so many more judges who have exerted influence on corporate insolvency but there are four that must be mentioned here. First, Jessell MR (1873–83) had a huge impact in the 1880s when new problems were arising after modern corporate law began in the middle of the century.[68] Second, an honourable mention must be given to Master Craig Sanderson from Western Australia who has been a Master of the state's Supreme Court since 1996. It is said that 'Master Sanderson is well-known for his eccentric style of judgment-writing. His decisions are often brief, and make use of humour and literary references.'[69] As has been quoted elsewhere, his decision in *Bell Group (UK) Holdings Limited (In liquidation)* [2020] WASC 347 effectively ended the 'Bell litigation' which had been ongoing for 25 years — the longest-running and most expensive civil litigation in Western Australia's history. His decision contains the catchwords '[o]de to a dying corporation', opens with the phrase '[t]hese reasons are not so much a judgment as a requiem', and ends simply with '[a]men'. The decision also states that the Master was tempted to 'drive a wooden stake through the heart of the company to ensure it does not rise zombie-like from the grave', or alternatively to order that 'the files be removed to a secure facility in Roswell and marked: "[n]ever to be opened"'.[70] Overall, Master Sanderson has given judgments over nearly 30 years of dealing with many corporate insolvency matters including complex receiverships and liquidations which often arose from the mining industry. Thirdly, in South Australia, Sir Herbert Kingsley Paine was an Insolvency Court Judge for 22 years (1926–48). Born in Gawler, he was an alumnus from 1904 and kept doing judicial jobs until he was 88! Finally, in the last decade, Justice Brigitte Markovic of the Federal Court has certainly embraced the international corporate insolvency law 'influence' work.[71]

D *Academic Influences*

1 *Dr John Bray*

A former Chief Justice of South Australia (1967–78), Bray CJ did what is likely to be the second doctoral thesis in Australia on insolvency[72] — the first having been

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68 See generally: *Griffith v Paget* (1877) 5 Ch D 894, which involved a scheme of arrangement in insolvency; *In re David Lloyd & Co* (1877) 6 Ch D 339, when a winding up order takes effect assets become those of creditors; *Re Rica Gold Washing Co* (1879) 11 Ch D 36, fraud in winding up; and *In re Hallett's Estate* (1880) 13 Ch D 696, 710, tracing of trust assets.

69 See, eg, Jack Oakley and Brian Opeskin, 'Banter from the Bench: The Use of Humour in the Exercise of Judicial Functions' (2016) 42(1) *Australian Bar Review* 82, 86.

70 *Bell Group (UK) Holdings Limited (in liquidation)* [2020] WASC 347, [1], [8], [9].

71 'Biography of Justice Markovic', *Federal Court of Australia* (Web Page, 24 August 2015) <https://www.fedcourt.gov.au/about/judges/current-judges-appointment/current-judges/markovic-j>.

72 See John Bray, 'Bankruptcy and the Winding Up of Companies in Private International Law' (LLD Thesis, University of Adelaide, 1937).

PD Philips's 'A Treatise in the Insolvency Law in Force in the Colony of Victoria with an Historical Review of the English Bankruptcy Legislation' as published in 1899 by the University of Melbourne.[73] However, I moot that he was also the first academic influence, noting that he spent time at the University of Adelaide teaching jurisprudence and legal history. In 1937, this doctoral thesis was submitted (330 pages long) and entitled 'Bankruptcy and the Winding up of Companies in Private International Law.'[74] It commences with several questions such as how '[i]n many cases, our propositus the man or company concerned has property situated in more than one country or the rights of the claimants upon his or its property may arise under different systems of law'. He also finishes his introductory chapter with the statement that

> if our propositus is discharged as a result of some bankruptcy or liquidation proceeding in one country, in what cases if at all will that discharge be a good answer to an action brought against him [it its] by one of his [or its] former creditors in the courts of another country? It is the object of this thesis to endeavour to discover the principles which guide the solution of these and similar questions.[75]

He further treats a large number of topics including immovables, creditor protection and domicile. For those not familiar with international insolvency law, these topics are still a matter for great debate today.

2 *Dr Bruce McPherson*

Bruce McPherson was born in Zululand and attended the University of Natal and the University of Cambridge. He was a lecturer at the University of Queensland ('UQ') in 1960 when he started to do his PhD. He later received his PhD in 1967, and in 1968 it was published as the first edition of what is now *McPherson's Law of Company Liquidation* after updating it with the new Companies Rules of NSW. He was a lecturer who was 'urbane, amiable, articulate' and delivered his course with 'lucidity and wit.'[76] It is claimed by P Sayer that McPherson's treatment of the subject of company insolvency as an academic 'was clear, concise and authoritative making its study all the more pleasurable.'[77] He then went from academia to the

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73 See PD Phillips, 'A Treatise in the Insolvency Law in Force in the Colony of Victoria with an Historical Review of the English Bankruptcy Legislation' (JC Stephens, 1899) <https://www.austlii.edu.au/au/journals/AUColLawMon/1899/3.pdf>.

74 Bray (n 72).

75 Ibid.

76 Justice Stanley Jones, 'A Judicial Hero' in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honorable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 10.

77 P Sayer, 'Agony and Ecstasy: The Progress of Bankruptcy Reform in 1860s England and its Reception in Queensland' in Rahemtula (n 76) 262, 262–99. See also 'The Honourable Bruce Harvey McPherson', *Supreme Court Library of Queensland* (Web Page) <https://www.sclqld.org.au/collections/explore-the-law/judicial-profiles/mcpherson-126890>.

Queensland Bar and was appointed to the bench in 1982 before retiring in 2006. He was even the Acting Chief Justice of Queensland in 1991, and Acting Governor of the State at different times. Justice Pincus, at the time of McPherson's appointment to the bench, said that 'it is likely [that he is] the best qualified lawyer in an academic sense ever appointed to the Bench in this State.'[78] In *Re Karaganison (Construction) Pty Ltd (in liq)* [1982] QR 695, he decided his first case on the topic of his PhD thesis, albeit in a Court of Appeal where the principal judgment of Andrews J, being the Senior Pusine Judge, cited *McPherson The Law of Company Liquidation* with approval — with McPherson also agreeing! McPherson also published several important academic papers in the 1960s.

3 *Professor Roman Tomasic*

Professor Roman Tomasic was a polymath, but his interests also included corporate insolvency. First, Roman's corporate insolvency influence in this space was from his early textbook *Australian Corporate Insolvency Law*, as published by Butterworths in 1993. Not only did it present the law at a critical time following the introduction of pt 5.3A of the *Corporations Act*, but it also helpfully tried to summarise the 'objectives' of corporate insolvency law in Australia.[79] Second, Tomasic worked in the comparative law field for most of his academic life and so his 'influence' was with detailing and analysing corporate insolvency in other parts of the world including East Asia and the UK. Third, as I said in a recent editorial for a special issue of the *Australian Corporate Law Journal* dedicated to his memory: 'During Roman's long academic career, we recalled he worked with many academics and students and was generous in co-writing with a number of scholars across the world.'[80] This is certainly true of his involvement with corporate insolvency, as he attended local and international conferences and supervised many PhD students. He was a regular visitor to Adelaide Law School during the time that he lived in Adelaide and provided a substantial positive influence to insolvency law over 40 years.

4 *Professor Andrew Keay*

Professor Andrew Keay may have been born in England, and has now spent 21 years at Leeds University and 5 years at Wolverhampton before that, but he is also a law graduate from the University of Adelaide, and practiced law in Adelaide and other parts of Australia. He completed an LLM thesis at UQ in 1991 titled 'The Power to Conduct Public Examinations pursuant to the Bankruptcy Act',[81] and a PhD dissertation at the same university in 1996 on 'The Avoidance of Pre-Liquidation

78 'Swearing in of the Honourable Bruce McPherson', *Supreme Court of Queensland* (Web Page, 1982) <https://archive.sclqld.org.au/judgepub/1982/wanstall19820202.pdf>.

79 Roman Tomasic, *Australian Corporate Insolvency Law* (Butterworths, 1993) 4–12.

80 Christopher Symes, 'Professor Roman Tomasic Special Issue' (2023) 38(3) *Australian Journal of Corporate Law* (2023) 271, 271–4.

81 See Andrew Richard Keay, 'The Power to Conduct Public Examinations Pursuant to the Bankruptcy Act' (LLM Thesis, University of Queensland, 1991).

Transactions: the Corporations Law Regime'.[82] Both theses' topics focus on crucial law that operates in both bankruptcy and corporate insolvency law. He also has a massive amount of academic writing on Australian corporate insolvency law, from academic and practitioner journals to book chapters and books.[83] He was the inaugural editor of *Insolvency Law Journal* in 1993 and continued as editor until 1997. Even these days, he continues with his Australian influence, writing mainly comparative writings which draw in Australian corporate law and corporate insolvency law with English law. He presented in the University of Adelaide's 140th Anniversary series (Law 140) in May 2023 on 'The Impact of *Sequana* on the Directors' Obligation to Consider Creditor Interests in Financially Distressed Companies: Was the Wait Worthwhile?', and his presentation features as a chapter in this issue of the Adelaide Law Review.

5 *Emerita Professor Rosalind Mason*

Emerita Professor Ros Mason has played a significant influence, particularly in making Australian corporate insolvency law recognise cross-border issues. She did her 2003 doctoral dissertation at UQ on 'Insolvency and Private International Law: Principal Interests in the Resolution of Multistate Insolvency Issues'.[84] Cross-border issues were part of the Federal Government's Corporate Law Economic Reform Program ('CLERP') when they released a paper in 2002 seeking comments on the possible enactment by Australia of the UNCITRAL Model Law on cross-border insolvency.[85] From the 1990s, she has also had an extensive publishing history on cross-border corporate insolvency. Professor Mason was General Editor of the Insolvency Law Journal from 1997–2006 and Co-General Editor from 2017–19. She has also assisted numerous younger academics in their careers through her guidance and research functions.

6 *Other Academics*

While those mentioned above have provided the biggest influence, many others deserve an honourable mention including Professor Helen Anderson from the University of Melbourne. Anderson has received the highest amount awarded to date from the Australian Research Council to an insolvency researcher for her project 'Phoenix Activity: Regulating Fraudulent Use of the Corporate Form'. Running from 2014 to 2018, it had received an ARC Discovery Project Grant of $403,000,

82 See Andrew Richard Keay, 'The Avoidance of Pre-Liquidation Transactions: The Corporations Law Regime' (PhD Thesis, University of Queensland, 1996).

83 A brief look at the UQ library indicated over 400 such items catalogued and available.

84 Rosalind Mason, 'Insolvency and Private International Law: Principal Interests in the Resolution of Multistate Insolvency Issues' (PhD Thesis, University of Queensland, 2003).

85 See 'Cross-Border Insolvency: Promoting International Cooperation and Coordination' (CLERP Paper No 8, Department of the Treasury, 17 October 2002) <https://treasury.gov.au/publication/clerp-paper-no-8-proposals-for-reform-cross-border-insolvency>.

with 34 publications resulting.[86] Prior to this, Anderson had also received a grant for her project 'Reform of the Personal Liability of Directors for Unpaid Employee Entitlements' for the period of 2010 to 2016, with 11 publications resulting.[87] Keith Bennetts worked for both the University of Adelaide and the South Australian Institute of Technology (later the University of South Australia) and also had an outstanding technical mind for the complicated law and procedure that is corporate and personal insolvency. He taught at Adelaide Law School in both undergraduate and postgraduate subjects, including courses I undertook in Company Receivership and Company Liquidation. Similarly, Associate Professor David Brown has been at Adelaide Law School since 2009, and since 2011 has co-directed the research unit originally known as Bankruptcy and Insolvency Law Scholarship (BILS) and now known as Regulation of Commercial Insolvency and Taxation (ROCIT). His outstanding scholarship in comparative insolvency law, property law and all areas of local insolvency law continues to be influential. Overall, the current crop of insolvency academics across Australia offers a bright future. This list includes Professor Jason Harris (University of Sydney), Dr David Morrison (Reader in Law, UQ), Associate Professor Sulette Lombard (University of South Australia), Associate Professor Mark Wellard (Southern Cross University), Dr Robin Bowley (University of Technology Sydney), Anil Hargovan (University of NSW), Dr Catherine Robinson (University of Technology Sydney), Dr Catherine Brown (Queensland University of Technology), Dr Jennifer Dickfos (Griffith University), Dr Casey Watters (Bond University), Dr Paulina Fishman (Deakin University) and many others.[88] Professor James O'Donovan (University of Western Australia) was also active in the 1990s, authoring McPherson's third edition and writing on receivership and related articles. Likewise, Associate Professor Colin Anderson (Queensland University of Technology) obtained his doctorate on corporate rescue, most likely Australia's first one on the topic, and co-authored the text *Crutchfield's Corporate Voluntary Administration*.[89] He also produced an extensive list of academic articles before retiring recently.

In a category of his own is Michael Murray, a former lawyer with the Australian Government Solicitor and Visiting Fellow of the Queensland University of Technology. Murray has been one of most influential individuals in corporate and personal insolvency law and practice in Australia for over 30 years. Amongst his long list of contributions to influencing insolvency law are his foundation editorship

86 'Phoenix Activity: Regulating Fraudulent Use of the Corporate Form', *University of Melbourne* (Web Page) <https://law.unimelb.edu.au/centres/mccl/research/projects/projects/phoenix-activity-regulating-fraudulent-use-of-the-corporate-form>.

87 'Reform of the Personal Liability of Directors for Unpaid Employee Entitlements', *University of Melbourne* (Web Page) <https://findanexpert.unimelb.edu.au/project/16322-reform-of-the-personal-liability-of-directors-for-unpaid-employee-entitlements>.

88 Professor Jason Harris, Dr Catherine Robinson and Dr Paulina Fishman are all alumni of Adelaide Law School, having completed their doctoral studies in Adelaide.

89 See Colin Anderson and David Morrison, *Crutchfield's Corporate Voluntary Administration* (Lawbook Company, 2003).

of *Insolvency Law Bulletin*, his role as co-author of *Keay's Insolvency*,[90] his membership of the Corporations and Markets Advisory Committee ('CAMAC'), and his maintenance of the active blog *Murray's Legal*.

E *The Politicians*

1 *Senator John ('Wacka') Williams*

Senator Williams was a Nationals Senator from NSW with offices in Newcastle. He was in the Senate from 2007 through to 2019. He was born in Jamestown, South Australia in 1955 and had been a truck driver, shearer, farmer on the Yorke Peninsula, and later a businessperson before being elected to the Senate. Unfortunately, his interactions with the misconduct of the disgraced insolvency practitioner Stuart Ariff, also from Newcastle, coloured Senator Williams' approach to insolvency. Senator Williams was also a member of the PJC on CFS in 2009 and 2014–19, and a member of the Senate Economic References Committee in 2010 and 2011–14. This saw him become very active in the Senate Economic References Committee inquiry and the associated report known as 'The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: The Case for a New Framework' in 2010.[91] He had attended the University of Adelaide on a scholarship for three months before going back to Jamestown. During his time in the Senate he certainly made known his sceptical views about insolvency laws and practice, and exerted what was adjudged by the insolvency profession as a negative influence.[92]

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90 See, eg, Michael Murray and Jason Harris, *Keay's Insolvency: Personal & Corporate Law and Practice* (Thomson Reuters, 11th ed, 2022).

91 'The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: The Case for a New Framework' (Senate Economic References Committee, September 2010) <https://www.aph.gov.au/parliamentary_business/committees/senate/economics/completed_inquiries/2008-10/liquidators_09/report/index>.

92 Senator John Williams also disliked banks — having had foreign currency loans with Commonwealth Bank which resulted in losing five generations of family farmland — and was a member of the PJC on CFS when it held an inquiry into proposals to lift the professional, ethical and education standards in the financial services industry in 2014, after the previous 2009 *Inquiry into Financial Products and Services*. He also disapproved of ASIC and wanted a royal commission on white collar crime: see the Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (Final Report, June 2014) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/~/media/Committees/Senate/committee/economics_ctte/ASIC/Final_Report/report.pdf>. Lastly, Senator Williams also disliked insurers: see Parliamentary Joint Committee on Corporations and Financial Services, *Life Insurance Industry* (Final Report, March 2018) <https://www.aph.gov.au/-/media/Committees/corporations_ctte/LifeInsurance/report.pdf?la=en&hash=E290F9E521D8626F832DC19904BC812F75937C4D>.

2 *Senator Gareth Evans*

Senator Gareth Evans was a Senator from 1977–96, and was responsible for setting up the Harmer Inquiry in 1983 (which resulted in the *Harmer Report*) — where he pleaded in the Terms of Reference for the 'desirability of examining all aspects of the law and practice relating to insolvency.'[93] He had been Shadow Attorney-General from 1980 to 1983, and was acutely aware of the need to reform insolvency. Senator Evans was also responsible for the Bankruptcy Amendment Bill 1985 (Cth), which made amendments to the *Bankruptcy Act 1966* (Cth) following a review of the latter's operation and objective, inter alia, to achieve greater uniformity with comparable provisions of the *Companies Act 1981* (Cth), particularly in the area of priority of debts and the registration and control of trustees. Also in Opposition at the time was Senator Alan Missen, a small-l liberal, who should be acknowledged for having supported the Harmer Inquiry. Senator Missen crossed the floor 41 times during his time in parliament and was described by Senator Evans as 'right over at the far, idealistic end of the political spectrum'.[94] Both senators exhibited a positive influence on insolvency laws.

3 *The Downer Brothers of the South Australian Colony*

Henry Downer arrived in the South Australian colony in 1838 and was a shopkeeper and tailor in Hindley Street. He had three sons, John, Henry Edward, and George, who were all educated in England. All had an influence on Australian insolvency law. First, Sir John Downer was a barrister who later became a member of the colonial House of Assembly, and ultimately Premier of the colony in 1885 and 1892. He was also a leading figure in the Federation debates, having sailed to London in 1887 for the Imperial Federation and argued strongly for uniform law with respect to winding up of estates in bankruptcy. Second, Henry Edward Downer was also a barrister and politician. He was the South Australian Commissioner for Insolvency from 1865 to 1881, and was later the colony's Attorney General who oversaw the passage of amendments to the *Insolvency Act 1882* (SA).[95] Third, George Downer was a barrister whose practice included insolvency. Other members of the Downer family have held political seats in more recent times such as Alick Downer — who was Minister for Immigration from 1958–63 — and Alexander Downer who was Federal Opposition leader in the 1990s, although neither had much to do with significantly influencing insolvency laws.

4 *Current Political Figures Influencing Insolvency Laws*

Current politicians have also recognised the need for insolvency law reform, such as Senator Deborah O'Neil who chaired the recent PJC on CFS. The current Federal Treasurer Dr Jim Chalmers had opposed the Fair Entitlements Guarantee

93 Harmer Report (n 2) ix.

94 Anton Hermann, 'Alan Joseph Missen (1925–1986)' in Melanie Nolan et al (eds), *Australian Dictionary of Biography* (Melbourne University Press, 2012) vol 18.

95 276 of 45 & 46 Vic.

Amendment Bill in 2014, saying it took 'fair' out of the Fair Entitlements Guarantee ('FEG'). Bill Shorten, the Minister for Government Services and the National Disability Insurance Scheme, also influenced the insolvency law as it related to employees by initially introducing FEG legislation in 2012.

F *The Insolvency Profession and Government Departments Influence*

1 *ARITA*

The Australian Restructuring Insolvency & Turnaround Association or 'ARITA' (formerly the Insolvency Practitioners of Association of Australia known as 'IPAA') is the major influence from the professions upon corporate insolvency. Regulation of insolvency practitioners had started with the Uniform *Companies Acts* of 1961 and 1962, and one of the requirements for registration was membership of either the Institute of Chartered Accountants in Australia ('ICAA', later known as 'CAANZ') or the Australian Society of Accountants (later to become the Australian Society of Certified Practising Accountants and then CPA Australia).[96] It is not surprising therefore that the IPAA sprang partly from the ICAA. While there were numerous accounting bodies since the 1890s, from 1931 onwards there was an organisation known as the Bankruptcy Trustees & Liquidators Association ('BTLA') which later became the IPAA in 1982. As noted previously, in 2014, the IPAA became ARITA.

ARITA as a membership organisation is well-positioned to influence corporate insolvency, and dedicates significant resources to government submissions and reform activity including discussion papers. This work is carried out by its in-house staff, members, academics, and stakeholders. For example, the December 2022 submission to the PJC on CFS was 90 pages long and received accolades for its depth.[97] Some outstanding individuals have been employed or have served on committees of this organization including Hugh Parsons, Michael Mount, Michael Murray, John Winter, Kim Arnold, Narelle Ferrier, Scott Atkins, Alan Scott and others too many to mention.

2 *Law Council of Australia*

The Law Council of Australia, through its Business Law Section and particularly its Insolvency and Restructuring sub-committee, exerts a positive influence. The Law Council was set up in 1933 as the peak national body representing the legal profession. Given that lawyers are not necessarily registered as insolvency practitioners, the influence tends to be on the law and less on the practice of the

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96 See, eg: *Companies Act 1961* (Qld) s 9(7); *Companies Act 1962* (SA) s 9(7); *Companies Act 1961* (Vic) s 9(1); *Companies Act 1961* (WA) s 8(2).

97 'ARITA Makes Submission to Parliamentary Inquiry into Corporate Insolvency in Australia', *Australian Restructuring Insolvency & Turnaround Association* (Web Page, 7 December 2022) <https://www.arita.com.au/ARITA/News-2023/Submissions/ARITA_makes_submission_to_parliamentary_inquiry_into_corporate_insolvency_in_Australia.aspx>.

practitioner. For example, its submission in December 2022 to the PJC on CFS' inquiry into corporate insolvency in Australia was prepared by the Insolvency and Restructuring Committee of the Business Law Section — with additional input from the SME Business Law Committee, Financial Services Committee, Taxation Committee, and the Corporations Committee.[98] It was over 60 pages. The work on public policy advocacy is also performed almost entirely by volunteer members. This subcommittee has monthly meetings in most capital cities and has been active for over 30 years.[99]

3 *Government Departments as 'Active Creditors'*

As would be expected in most countries, the taxation or revenue department of government would be expected to sometimes play a major role in corporate insolvency, particularly in the collection of debt. The Australian Taxation Office ('ATO') exerts influence on corporate insolvency in Australia. There are also specialist taxation officers who are specialists in corporate insolvency matters. The ATO will frequently fund litigation which has played a significant role in clarifying the law.

More recently, the government department responsible for administering FEG legislation — at present called the Department of Employment and Workplace Relations — has become a major influence and funder of litigation involving corporate insolvency matters mainly related to the consequences of which creditors will be paid. There is also an FEG Recovery Program, where liquidators of companies (where FEG advances have been made) can apply for funding to pursue recovery proceedings such as litigation. This may increase the returns available to creditors in the external administration including by helping to recover some of the money paid by the government to employees for their entitlements. A new phrase entered the Australian corporate insolvency environment when FEG officers started to refer to their office as being an 'active creditor'.[100] This is a phrase that was previously used mainly in United States literature, and describes creditors who attend creditors' committees, and vote and adopt a role which is often the opposite of the apathetic creditor which has historically hindered practice — especially with the requirements of quorums to approve insolvency practitioner remuneration. The FEG office wants to be an informed and engaged creditor, and so they are an

98 Law Council of Australia, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Corporate Insolvency in Australia (1 December 2022) <https://lawcouncil.au/resources/submissions/corporate-insolvency-in-australia>.

99 The subcommittee has had outstanding contributions from many individuals. Amongst the Adelaide group providing 'influence' have been a number of legal practitioners such as David Proudman, Ray Mansueto, James Jarvis, Jon Clarke, David Colovic, Kym Ryder, Peter Leech, Ben Renfrey and Madeleine Harland.

100 'Fair Entitlements Guarantee Recovery Program', *Department of Employment and Workplace Relations* (Web Page) <https://www.dewr.gov.au/fair-entitlements-guarantee/recovery-program#:~:text=FEG%20Active%20Creditor&text=attends%20creditors'%20meetings,the%20recovery%20of%20FEG%20advances>.

'active creditor' because they attend creditors' meetings, take part in Committees of Inspection, review anticipated distributions, and engage with insolvency practitioners on issues of law that concern the recovery of FEG advances.

4 *Other Professional Groups*

The accounting bodies have always maintained some interest in insolvency, though obviously not as much as in the areas of tax or audit where most of the members practice. In particular, CAANZ, CPA Australia and the Institute of Public Accountants ('IPA') all have members who are actively involved in corporate insolvency. They have exerted influence by making submissions to government — in 1984, for instance, I contributed to the Institute of Affiliate Accountants' submission to the Harmer Inquiry (the Institute of Affiliate Accountants' now being the IPA). However, these submissions are usually not as detailed as those prepared by bodies mentioned earlier such as ARITA, and as seen by how CAANZ made a 12 page submission to the PJC on CFS in 2022.[101] Other recent groups that offer some choice of professional development membership bodies for insolvency professionals include the Association of Independent Insolvency Practitioners ('AIIP'), the Turnaround Management Association ('TMA'), and also bodies focused on empowering women such as the Women's Insolvency Network Australia ('WINA').

G *Reform Bodies' Influence*

1 *Australian Law Reform Commission*

Two major reports from the Australian Law Reform Commission ('ALRC') have influenced Australian insolvency law. The first report to deal with insolvency was titled *Insolvency: The Regular Payment of Debts* ('ALRC Report 6' and tabled in November 1977).[102] It 'considered whether the *Bankruptcy Act 1966* (Cth), as it applied to small debtors, made adequate provision for the compromise or discharge of their debts from present or future assets and earnings',[103] and so had little influence on corporate insolvency. As mentioned above, the second extensive ALRC report had a massive impact on corporate insolvency. Known as the *Harmer Report*, or the 'General Insolvency Inquiry' and tabled on 13 December 1988, it thoroughly examined corporate insolvency including the developments of overseas jurisdictions in relation to insolvency — and identified that existing forms of voluntary administration were unnecessarily complex, confusing, and uncoordinated, and suggested

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101 Chartered Accountants Australia and New Zealand, Submission to the Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Corporate Insolvency in Australia (30 November 2022) <https://www.charteredaccountantsanz.com/-/media/c9cdfd9a526e46c5a706d458f1cbb75c.pdf>.

102 Australian Law Reform Commission, *Insolvency: The Regular Payment of Debts* (Report No 6, November 1977).

103 'Insolvency: The Regular Payment of Debts (ALRC Report 6)', *Australian Law Reform Commission* (Web Page) <https://www.alrc.gov.au/publication/insolvency-the-regular-payment-of-debts-alrc-report-6/>.

revolutionary changes.[104] There was a limited South Australian connection in the form of Professor David St L Kelly, an alumnus and former Adelaide Law School professor. He was a Law Reform Commissioner from 1976 to 1980, and so was present for *ALRC Report 6* and ultimately wrote a book on debt recovery titled *Debt Recovery in Australia* based on the ALRC's work.[105]

2 *Productivity Commission*

The Productivity Commission is the Australian Government's principal review and advisory body on microeconomic policy, regulation and a range of other social and environmental issues. It was founded in 1998 and is located under the purview of the Department of the Treasury. It has a budget of over $34 million and has 164 employees. Its Inquiry Report No 75, published in September 2015 and known as *Business Set-Up, Transfer and Closure*, extended to subject matter such as insolvency and reform. However, ordinarily, the Productivity Commission does not spend much time or resources on insolvency reform.

3 *Corporations and Markets Advisory Committee and Company and Securities Advisory Committee*

The Corporations and Securities Advisory Committee or 'CASAC' was established in 1989 under the *Australian Securities and Investments Commission Act 2001* (Cth) to provide advice and recommendations to the Minister about matters relating to corporations and financial services law, administration and practice.[106] The name was then changed in 2002 to the Corporations and Markets Advisory Committee or 'CAMAC'. Later, as part of the 2014–15 Budget, the Commonwealth Government announced its decision to cease the operation of CAMAC and its legal committee. Specifically, CAMAC was abolished by sch 7 of the *Statute Update (Smaller Government) Act 2018* (Cth), which commenced on 21 February 2018. Ramsay states that '[f]rom 1983 until the abolition of the Corporations and Markets Advisory Committee (CAMAC) in 2018, there existed an independent body to provide advice to the government on matters of corporate law reform.'[107] A forerunner of these two bodies was the Companies and Securities Law Review Committee, which 'was established under the formal agreement made on 22 December 1978 between the Commonwealth and the States regarding the first Commonwealth-State co-operative regime for the regulation of companies' and corporate insolvency.[108]

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104 *Harmer Report* (n 2).

105 David St L Kelly, *Debt Recovery in Australia* (Australian Government Publishing Service, 1977).

106 See generally Ian Ramsay, 'History of the Corporations and Markets Advisory Committee and its Predecessors' in P Hanrahan and A Black (eds), *Contemporary Issues in Corporate and Competition Law: Essays in Honour of Professor Robert Baxt* (LexisNexis, 2019) 56, 56–72.

107 Ibid 56.

108 See ibid 57.

For insolvency reform, there was also the report *Corporate Voluntary Administration* (June 1998) published by CASAC. Its advisory committee included Adelaide-based practitioners Gary Watts, a partner at Fisher Jeffries, and Dick Whitington QC of Hanson Chambers. CASAC, from 1998 onwards, had the two insolvency specialists Anne Trimmer and Berna Collier, who held minor interests. Later, CAMAC published the report titled *Rehabilitating Large and Complex Enterprises in Financial Difficulties* in October 2004,[109] although the Committee did not have an expert insolvency person as a member when it released this. Finally, the report titled *Issues in External Administration* ('*Issues Report*') in November 2008 was the last dedicated report by CAMAC.[110] In 2008, when the *Issues Report* was released, David Proudman of JWS Adelaide and our alumnus provided the sole corporate insolvency expertise.

The removal of CAMAC attracted much criticism, with Ramsay stating that it has resulted in a weakened law reform process.[111] Similarly, ARITA submitted that

> CAMAC has delivered sophisticated and important advice and reports to policy makers and industry. Indeed, CAMAC's work continues to be instructive for much of the work we do … It is ARITA's view that, without CAMAC, important, authoritative studies like these would not have been completed and reform processes likely to have been less-well informed … CAMAC has delivered real value to the efficient and robust operation of corporations, financial markets and the economy as a whole and we urge the rejection of this Bill.[112]

H *Overseas Influence*

1 *Chapter 11 of the US Bankruptcy Code*

In the United States, under the Bankruptcy Code, there is ch 11 which is often mentioned in comparison to our own pt 5.3A of the *Corporations Act*. It may be said that there is some influence exerted by making comparisons to what the United States law provided rescuing businesses. Some attempts to set out the differences and reasons for why these direct comparisons are appropriate have been attempted, particularly by Harris.[113]

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109 Corporations and Markets Advisory Committee, Parliament of Australia, *Rehabilitating Large and Complex Enterprises in Financial Difficulties* (Final Report, October 2004) <https://treasury.gov.au/sites/default/files/2019-12/camac_large_enterprises_report_oct04.pdf>.

110 Corporations and Markets Advisory Committee, Parliament of Australia, *Issues in External Administration* (Final Report, November 2008) <https://takeovers.gov.au/sites/takeovers.gov.au/files/2021-04/external_administration_report_nov_2008.pdf>.

111 Ramsay (n 106) 61.

112 Ibid 61.

113 See, eg, Jason Harris, 'Restructuring Nirvana? Chapter 11 Bankruptcy and Australian Insolvency Reform' (2015) 16(1) *Insolvency Law Bulletin* 42, 42–6.

As the PJC on CFS said in its Stocktake Report in 2004:

> Most submissions that commented on the US Chapter 11 model argued strongly against its adoption. Two of the major concerns expressed about a Chapter 11 regime were of the company remaining in the hands of the debtor and the length of the process.
>
> The Committee is not persuaded to the view that an insolvency procedure modelled on Chapter 11 of the US Bankruptcy Code is appropriate for the Australian corporate sector. Nor does it consider that wholesale amendments to the voluntary administration procedure to conform to Chapter 11 would have the potential to make a significant improvement in outcomes that are presently achievable under the VA procedure.[114]

2 *Forum of Asian Insolvency Reform*

The Asian Financial Crisis in the late 1990s caused concern about corporate insolvency laws. A Forum for Asian Insolvency Reform ('FAIR') was conceived in Australia and has been a biennial event which has been committed to bringing stakeholders together to discuss insolvency reform in Asia. Paul Keating built strong bilateral links with Australia's Asia-Pacific neighbours and was a driving force in establishing the Asia Pacific Economic forum ('APEC') heads of governments meeting, with its commitment to regional free trade. As the economies in Asian countries grow in global prominence, it has become increasingly important that they create insolvency regimes that provide creditors with sufficient protection to encourage the lending of capital. In November 1999, the Organisation for Economic Co-operation and Development ('OECD'), the World Bank, Australian Treasury, Australian Aid, and APEC organized a meeting on 'Insolvency Systems in Asia: An Efficiency Perspective', which was held in Sydney. Approximately 80 policy-makers, members of the judiciary, private sector practitioners, insolvency experts, and academics from 14 Asian non-OECD countries and nine OECD member countries came together and expressed a great desire to continue dialogue on insolvency reform. They also urged the sponsoring organisations to remain active in this area. Since this first meeting, there have been FAIRs in Bangkok (2002), Seoul (2003), Beijing (2006), Kuala Lumpur (2010), Manilla (2013), Hanoi (2016), Bangkok (2018), and in 2024 it will be in Singapore.

This influence was outward facing rather than internal, with Australian corporate insolvency law being considered by other Asian nations. Sadly, however, the Australian government has lost interest — after attending some meetings with a large Australian delegation, and accompanied by Professor Roman Tomasic, on more recent occasions such as at Manila in 2013 and Hanoi in 2016 I was the sole Australian representative.

114 Stocktake Report (n 4) xxi.

3 *Other Overseas Influences*

Other groups with more outward influence are the UNCITRAL National Coordination Committee Australia (UNCCA) and the Law Association for Asia and the Pacific (LAWASIA). They have provided annual lectures on corporate insolvency here in Australia (an Annual May Seminar), and they have also attended and participated at the United Nations — in particular the UNCITRAL Working Group V, which meets in December at Vienna and in April at New York each year.

IV Conclusion

In choosing the topic of theories and influences on insolvency law, I hope that I have kept alive the subject of insolvency law at Adelaide Law School that has been going here for over 120 years. We know that in 1900, amongst the special subjects for the four-year law degree, there were already Equity and Insolvency classes. However, in 1901, it was replaced with Property II. While I was an undergraduate student here in the 1980s, there were no insolvency classes, but in the 1990s Keith Bennetts renewed the teaching of insolvency at least at the Master's level — with separate courses on Company Receiverships and Company Liquidation, and in the 2000s on Corporate Rescue. Later, from the early 2010s, Associate Professor David Brown and I have saturated undergrad and postgrad teaching at Adelaide Law School with a smorgasbord of insolvency courses. We have also conducted an active research unit that has made over a dozen submissions to government on insolvency reform, produced a textbook now in its fifth edition and a casebook in its second edition, published numerous papers, received research grants funding, hosted insolvency law glitterati from around the world, and also organised professional and academic conferences.[115] One could say that Adelaide Law School has been a centre of attention for insolvency law.

To conclude then, let me take you back to 1866 some 17 years before the Adelaide Law School commenced. Commissioner Henry Downer is the Commissioner of Insolvency, and a farmer comes before him to be made bankrupt as he has over-extended himself and bought a second farming property which then failed financially. His property, including 98 acres of wheat, one acre of barley, two iron ploughs, one pair wooden harrows, four ducks, four fowls, 50 posts and railings, 50 loads of building limestone and a stack of straw, are all assigned. Two years later, the final dividend is paid. We can ask what were the principles and objectives of insolvency then and are they the same now as queried by the PJC on CFS in 2023? If we return to the fundamental values of a fair go, or simply fairness, then the principles and objectives that result in our insolvency statutes should be guided by this and they appear to have been for at least 158 years. Historically, the farmer who had 10 children did return to farming on the Adelaide Plains after what appears to

115 The research unit is immensely grateful to Adelaide law firm Lynch Meyer's partners James Neate and Alice Carter, and the Australian firm Piper Alderman — particularly its partner Mike Hayes — for their ongoing support.

be the orderly processing of the estate — including debtor and creditor participation, convenient property recovery, equality between creditors, compatibility with commerce and harmony with general laws, and even the recycling of the assets (ploughs and harrows) — and importantly, the discharge of obligations which gave him a fresh start. I know this because one such farmer was my great, great grandfather, James Symes, and that ironically, I taught an undergraduate insolvency law course to the great, great, great grandson of that Insolvency Commissioner — who I note was recently recognised as a member of the Restructuring Team of the Year in 2023 in his role as a partner of Willkie Farr and Gallagher in London.

My hope for Adelaide Law School is that its staff, students and alumni will continue to add to the development of insolvency law through engagement with many of the 'influences' as identified above, and that a unique insolvency law theory emerges — or that, at the very least, an answer to the PJC on CFS' quest for the appropriate principles and objectives of insolvency law can be found.