

United Nations Day Speech 2019
25 Years of Cross Border Insolvency Reform
23 October 2019
Federal Court Hobart

Tim's paper traces the internationalisation of Tasmanian business from its early days. He sets out compelling reasons to ensure global business and local laws should be subject to a higher jurisdiction of a model law to reach the lofty goal of a cheap quick and just insolvency process worldwide.

At university we read about macro economics and the benefits of comparative economic advantage of various states.

If policies are put in place at a macro level it will have far reaching consequences on citizens as the effect of these policies trickle down to the individual.

Micro economics is substantially based on how an individual reacts to the macro environment.

So how does the model law effect us in a practical way in Tasmania?

Aspirational perspective

We all recognise that we don't live in a bubble. There is an increasing number of highly credentialed people either moving to Tasmania for a lifestyle reason or for education. With modern technology the intellectual property of international insolvency law can equally be resourced in Tasmania as well as any other jurisdiction. UTAS prides itself in being creative in niche markets. Lets not dismiss this out of hand

How will a model law effect Tasmania?

When you buy something over the internet and it doesn't go right what are your remedies both legally and commercially.

Commercially is about a bad review. This may bring about compensation or act as a deterrent for an action to do the right thing.

Unless it is a high value transaction the legal costs of pursuing an international player is not likely to be positive. However, we are all connected to the global world. Currently two large employers in Tasmania - have international owners subject to Insolvency. Nystar and Norske Skog. As such we are not immune from cross border insolvency.

UNCITRAL, as Tim notes, is about addressing problems associated with global trade and commerce. By creating a set of common rules that apply in participating states.

Does society have a misconception about insolvency?

Is the aim of insolvency laws to maximise the return to creditors and shareholders?

Whilst a lofty goal my experience is that 80% of insolvency cases in this country pay no dividend. Of the 20% that do 80% pay less than 10c in the dollar.

Paying 100c in the dollar is as rare as a sighting of a Tasmanian tiger.

Apparently it does happen from time to time.

I am of the view that we have insolvency laws for a number of reasons.

1. To facilitate entrepreneurial activity

If we don't have a reasonable level of insolvency we won't advance as a state/nation. We want to encourage people to "Have a go." I often say

more people succeed in business than fail. We all learn that about 50-75% of business fail in the early years of a business. Interestingly, small business survival rates in Tasmania are the highest in the country, 62.5% ¹

What do these statistics mean?

- Are we better business people or are we more reluctant to “have a go”?
- Perhaps if the failure rate was higher we would have more people employed!
- In the USA 99.9% of firms, in number, are small businesses. They employ 48% of the private workforce. Chapter 11 is not readily available to small business. At a conference I attended a few years ago I was informed that the cheapest chapter 11 was a million US dollars!

2. A FRESH START.

Limited liability companies and the Bankruptcy Act provide the opportunity for a fresh start. The concept of a phoenix is legal if carried out correctly with the proper accounting of all assets and liabilities.

In our Bankruptcy regime a single person is allowed to earn approximately \$75,000 without paying a compulsory contribution to the estate. Superannuation is basically protected and personal income compensation is also protected.

¹ Australian Small Business
Key statistics and analyses December 2012 Australian government,
department of industry innovation, science, research and tertiary education.
Table 14 June 2007 – June 2011. Date source ABS CAT 8165.0 DISRTE
calculations.

3. A just outcome

A just outcome is not measured solely in return to creditors. It incorporates a notion of rehabilitation of the debtor and in a corporate setting if that is not possible for palliative care and a dignified end.

4. Insolvency laws also to act as a deterrent.

In respect of voidable transactions and to some extent stigma.

The reality is people pay their debts because they don't want to be made bankrupt and have to deal with us, insolvency professionals. The general public is aware the bankruptcy trustee and liquidator do investigate suspect transactions, reasons for failure, including the ability to recover preferences and uncommercial and unfair loans etc.

From an international perspective, this third reason differs in different countries due in part to the public policy of the particular country. Eg Australia's defence to preference payments are perhaps the most restrictive of model law adoptee countries.

Why the Model Law Needs to Keep Evolving.

- Corporate groups not included
- Banks and insurance companies excluded
- Manipulation of the COMI (Centre of Main Influence) eg. to move assets to USA
- To demonstrate trust in the system.

Who is getting the best deal?

Tim, commented on the leap of faith by countries who have adopted the model law. I agree it is a large leap of faith by a country to give up control of property in their own country, trusting another country's system and authorities to distribute assets to creditors around the world in a just, fair, timely and inexpensive way.

I am reminded of an experience at an international insolvency conference in New Orleans in 1997.

The session was about the different bankruptcy regimes in the world at this time. I distinctly remember a US attorney proclaiming that he couldn't understand why everyone else in the world just didn't adopt their system. He was quite critical of the Spanish System (who if I recall correctly didn't discharge a bankrupt from their debts). It became quite heated and the Spanish attorney shouted back at the US attorney reminding him that the Spanish didn't imprison debtors unlike the US. Given this type of animosity and or general lack of cultural understanding it is surprising the UN has been able to not only produce a model law but to have many member states embrace it formally. (Spain hasn't!)

In conclusion, thank you Tim for making the journey South and for your presentation today. It is thought provoking and provides insight into how we are all connected to the global world of finance commerce and the law. It is an aspirational goal to create a common set of rules that apply to all nations, who are united in that pursuit

The international insolvency law and recovery provisions continue to evolve.

Great progress has been made but more is required.

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