International Insolvency Research Symposium

"Insolvency – Current Issues"

12 July 2022

Michael Murray

Rethinking Insolvency Practitioner (IP) Remuneration

A purpose of this paper is to rethink the sometimes contentious issue of IP[1] remuneration not by way of reviewing existing analyses but rather through adding more perspectives to those analyses. The existing views take an undue regulatory approach without, in my view, having regard to some fundamental underlying issues in insolvency that might temper that approach.

A further purpose of this paper is to raise some issues for research and law reform and suggest sources.

Introduction

Much of the debate about IP remuneration and whether the amount in question is reasonable or excessive is too narrowly directed. It needs to be informed by a broader range of issues that go both to the tasks required to be performed in an insolvency, for which remuneration is claimed, and to issues concerning the nature of the IP and their role and matters that impact upon the performance of that role.

Those tasks and the issues are initially summarised here - A - and then referred to throughout the following commentary on remuneration itself – B. The relevance of this, and the responsibility for it, is at C. Law reform is examined at D.

A. Summary

Firstly, closer examination is required of the *work required to be performed* in an administration for which remuneration, based on time to perform that work, is claimed. The dollar amount of remuneration is the mathematical outcome of that time spent by the IP and her or his staff, accepting that the 'value' of the work is in focus not merely the time spent. The focus of the law has been on that dollar amount; rather the focus should be, as a threshold, on the tasks involved.

As to time spent, for the purposes of this paper, it is assumed that IPs spend reasonable time on proper tasks in winding up a company, and such as to meet the standard of providing 'value' and not seeking to indemnify time. The debates about the reasonableness of the time spent – the length of time taken in performing tasks, the level of staff used, and related issues - are not ignored but are not the subject of this paper.

But to at least acknowledge those issues, time-based costing is claimed to be an unreliable measurement of liquidator remuneration because of costs potentially being inflated by unproductive hours or deliberate "padding", with limitations on the ability for external review, and other related issues. Other bases of remuneration,

[1] I use the terms IP or liquidator; and this includes bankruptcy trustees.

such as by commission, also have negative performance features.[2] Nevertheless, these are not the subject of discussion in this article. In reality in any event, it is not unreasonable to assume that the majority of a regulated group is compliant, within acceptable parameters.

That focus on tasks then leads to a focus in an administration of what those tasks are and how much time is required to be spent by the IP in attending to them, which underlie the remuneration claimed.

This will show just what work is involved in a winding up and how long that reasonably takes. That then allows a law reform assessment of what work is presently required to be done by the law in an estate, and to assess whether that is necessary, on a cost benefit basis, in all cases.

Put another way, it has been said that the minimum level of work required of an IP by the law is at a Rolls Royce level, and that it is a "one size fits all" regime, irrespective of the size of the company. If this is the case, it adversely impacts the costs and efficiency of the system. A more accurate assessment of that minimum level of work required, and beyond, would allow a better law reform assessment of the costs and benefits of the system, and would also provide some temper to what I often see as the highly regulatory approach taken to IP remuneration.

None of this is to suggest that law should focus only on monetary outcomes such that, for example, assetless estates should not be administered - there would be integrity issues involved if that were the case[3] - but the costs versus the benefits of an insolvency system must be assessed in some way.

Second, the *nature and role of the insolvency practitioner* is important given that it involves the exercise by a private individual of significant authority on behalf of the state and in the interests of the state as well as in the private interests of creditors. This is apparent from the nature and history of the role itself with its exercise of significant statutory authority including at a quasi-judicial level. It is said that '[i]n the field of insolvency there are two actors whose integrity and expertise are central to the functioning of the insolvency system: judges and administrators'.[4] The decisions of an IP are not necessarily commercial. Although performing work on behalf of the state, the IP is using funds that might otherwise be paid to creditors as dividends. An IP also assumes personal financial risk in taking an insolvency appointment, and statutory risk under some Australian laws like Part 5.3A Corporations Act, such that work is required, and funds expended, in mitigating that risk.

Third, as a corollary of the second, the role bears *little comparison with the roles of lawyers or accountants, and their clients*. IPs are not subject to the direction of

[2] Ethical Issues in Turnaround Engagements can affect results, The Secured Lender, Vol 68, No 9, Oct 2012, pp 16-20, Renee Fellman

[3] UNCITRAL Legislative Guide on Insolvency Law, [73-74]: "Where an insolvency law does not provide for exploratory investigations of insolvent companies with few or no assets, it does little to ensure the observance of fair commercial conduct or to further standards of good governance of commercial entities. Assets can be moved out of companies or into related companies prior to liquidation …" etc

[4] *A Global View of Business Insolvency Systems,* Westbrook, Booth, Paulus and Rajak, The World Bank and Brill, 2010, at 203.

creditors nor do IPs' decisions necessarily need to benefit creditors. Unlike clients, creditors have no direct responsibility for the IP's fees.

Four, the operation of the insolvency regime mainly relies for its funding on the *remaining assets of the insolvent*; relevant figures in Australia show these to be inadequate resulting in the recovery of remuneration of practitioners being uncertain and variable; in many cases, claims are not met. That leads to legitimate ways that IPs pursue lost remuneration, for example by raising charge out rates, or bringing recovery proceedings, discussed later.

There are other related features of the role that will be raised in this article.

B. Commentary

Work required to be performed

As to the need to bring a focus to the tasks required in insolvency, less so on the time taken to perform them, I give two opening examples.

Example 1

In *Mirror Group v Maxwell*,[5] Ferris J said it was "profoundly shocking" that an insolvency practitioner, a receiver, had recovered £1.672m in assets and claimed £1.449m (£744,000 in professional fees and £705,000 in legal fees and disbursements), so as to leave a recovery of £43,428 for creditors.

After ordering a detailed assessment of the remuneration of the receivers and their advisers, very little was taxed off the amounts claimed.

One industry comment on that outcome was that the issue concerning the expertise of the courts in dealing with remuneration "was still unresolved",[6] as if a more knowledgeable taxing process might have found excessive charging.

Another comment was "the fact that cases of no, or minimal, returns to creditors after remuneration and costs continue to occur is one reason why issues of liquidator's remuneration will remain controversial".[7]

In my view, the fact that cases of no, or minimal, returns to creditors after remuneration and costs continue to occur is not so controversial, or not for the reason implied. Rather it is perhaps indicative of the reality that winding up takes time and skill, that there are invariably limited or no remaining assets, or funds, or the funds or assets that are there are difficult to locate and retrieve, including assets that are in the hands of 3rd parties or beyond. Fraud adds to that

Importantly, it may show that in some cases the processes and tasks involved in insolvency that an IP must perform can be excessive and may need to be reassessed from a law reform perspective.

---

[5] Mirror Group Newspapers Plc v Maxwell and Others (No 2) (1997) Ch D 15 Jul 1997

[6] "Office Holder Remuneration", Microsoft Word - 6. Office Holder Remuneration - CCB & PF.doc (guildhallchambers.co.uk)

[7] Corporations Law Conference August 2016, *Three recent developments in insolvency law,* Justice Ashley Black, Supreme Court of New South Wales. See also Finch and Milman Corporate Insolvency Law, *Perspectives and Principles,* 3rd ed, p 203ff.

Example 2

In contrast to the judicial comments in Maxwell, in *Five Star Finance*,[8] a large-scale Ponzi scheme, involving investor losses of $43 million, the New Zealand High Court approved liquidators' remuneration of over NZ$330,000 which left no dividend for creditors. In approving the remuneration, the Court said that the efforts of the liquidators were properly undertaken in the face of what was a massive fraud.

"The liquidators represented the only prospect of the creditors receiving any appreciable recovery. … That nothing came of those efforts is not in any way a matter for which the liquidators are to be criticized. Further, there was a strong public policy requirement that there be a proper investigation of the affairs of the company …".

That is a more realistic and fair response.

Assumptions

The work that must be done is expensive

As to the work that is or can be required, the Australian jurist Michael Kirby has written[9]

"the task of insolvency administration is inherently expensive. Principally this is so because of the intensive nature of the investigation of accounts (sometimes in a shambles and sometimes deliberately deceptive) that the insolvency practitioners must analyse and understand".

He went on to say that there is an unwillingness of people to appreciate that securing a just outcome (in law) is inherently costly.

"It is unreasonable to demand that skilled professionals should perform their functions at low cost. Dispute resolution has a cost component".

Any insolvency system will cost money to administer – a court system and a registry are two fundamentals. Another fundamental is the IP who must be paid for in some way.

Payment for work in insolvency typically relies upon the funds that are assumed to be available in the remaining assets of the insolvent estate, both to pay the liquidator and to pay out a dividend to creditors. That is an unwarranted assumption in most cases, as will be explained.

That then creates a tension between the quantity of work that is required in winding up an estate, which incrementally reduces the amount that may be available for creditors. That in itself is not unusual; the same arises for a lawyer acting to recover a debt for a client. The difference with the latter is that the lawyer's work is solely in

---

[8] *Five Star Debenture Nominee Limited (in liq) v Five Star Finance Limited (in rec'p)* [2015] NZHC 142.

[9] BANKRUPTCY AND INSOLVENCY: CHANGE, POLICY AND THE VITAL ROLE OF INTEGRITY AND PROBITY (michaelkirby.com.au); (2010) 22(2) A Insol J 4

the client's interests and is subject to the client's instructions. That brings in the issue of proportionality.

Proportionality

Proportionality between work done by a liquidator and the nature and complexity of the work done, and the actual returns to creditors, arises under legislation and in court decisions. The issue is not unusual in many contexts. Certainly, commercial considerations as to how much time a liquidator spends to recover moneys are relevant. Any person in commerce knows that it costs money to recover it, or to resolve legal problems. But a commercial pursuit of assets by a liquidator is not as a simple as debt recovery on behalf of a client.

We need to dissect what proportionality in fact means.

First, in any insolvency there are the start-up tasks - the obtaining of a list of assets and liabilities, the gathering in of those assets, reporting to the creditors, maintaining the public record and establishing a proper set of accounts. These are statutory duties required to be performed and many of these are really in the nature of public interest duties of the practitioner – to formally record the insolvency of the company and provide a base of information for those inquiring. There is little discretion in how these should be performed.

Second, Australian liquidators must investigate and report breaches of all laws in Australia in relation to the company and support any prosecution. Bankruptcy trustees have similar obligations. This is claimed to be so even if there are no funds to pay for the work done, which is the majority of cases. If there are funds available, the creditors might complain about their use. This is public interest work at its core. The unfunded costs of a practitioner must be factored into their charge out rates or otherwise recovered; as we will see, this is accepted by the law and the regulators, if perhaps begrudgingly. Properly, this should inform creditors of the reason for the high rates of IPs and that they, the creditors, are in effect funding those public interest and other unfunded tasks.

Third, there are then tasks immediately imposed on the IP – leases that may have to be ended, assets disclaimed, litigation assessed, employment contracts terminated etc.

Four, it is then that the IP has to decide what further work is required, by way of investigations, examinations, and litigation. It is in this phase that proportionality is properly to be assessed. But by this stage, a certain amount of time will have properly been spent, for which I say proportionality is not relevant.

Example 3

This useful description[10] of a bankruptcy trustee's not unusual position in an estate assists in understanding the issues concerning proportionality.

---

[10] *Boensch v Pascoe* [2007] FCA 1977.

40 Mr Pascoe [the trustee] made his first report to creditors on 21 October 2005. His assessment was bleak. If no action was taken there would be no return to creditors. Neither would his own fees be paid. If further investigations and, if necessary, litigation resulted in the recovery of further assets the position might improve. He proposed that the validity of the trust be investigated. He informed creditors that there were otherwise no monies in the estate for distribution and no other apparent property available to be recovered. He advised that he would seek funding from creditors to pursue the investigation and litigation and also an indemnity against any adverse costs orders (for which otherwise Mr Pascoe would be personally liable). Mr Pascoe informed creditors that at the meeting he would seek approval of administration costs already incurred ($20,079.50), estimated fees to conduct further investigations, litigation and administration ($30,000) and that further remuneration might need to be approved in the future. He drew attention to the rights of a bankrupt or a creditor, to request that a claim for remuneration be taxed.

41 Arrangements of the kind Mr Pascoe proposed are normal, straightforward and contemplated by the Act (s 109(10))[11]. However, Mr Boensch [the bankrupt] has relied heavily upon the fact that recovery of additional property would also provide the only source of funds from which the trustee's fees might be paid. As Mr Pascoe said in his evidence, that is not an exceptional circumstance. It may readily be the case that the very circumstance of bankruptcy presents a trustee with a circumstance in which insufficient funds are, or will ultimately be, available to pay creditors in full and where the trustee's remuneration also may depend upon recovery of funds into the estate. A trustee does not thereby become disabled from an efficient and, if necessary robust, administration of an estate because his own fees may depend on the outcome.

42 Recovery of a trustee's fees is guaranteed by the Act if funds are available in the estate. Payment of 'the costs, charges and expenses of the administration of the bankruptcy, including the remuneration and expenses of the trustee' is given a substantial priority (s 109(1)(a)). It is the Act itself which orders the priorities of payments out of the estate. The fact that the trustee's fees would be met before creditors were paid did not disqualify Mr Pascoe from making the necessary decisions or taint them with self-interest".

Example 4

To similar effect is the comment in *Cardinal Group*,[12] the Judge responding to a claim by the counsel for the respondents to a preference claim that "irrespective of the outcome of the proceedings, there will be no return to creditors. … that the litigation appears to be advanced for the benefit of the litigation funder and to meet the liquidators' professional fees", or at a maximum, to pay creditors "a fraction of a cent in the dollar".

The Judge rejected this for two reasons.

"First, an additional recovery of creditors of approximately $214,000 is significant, even if it is spread among a large number of creditors … Second, even if the proceedings were pursued to seek to recover the liquidators' costs or funding which had been devoted to the conduct of the proceedings, it seems to me that that is a proper purpose, where liquidators would less readily accept appointment, and litigation funders would less readily fund proper proceedings

[11] This section allows a funding creditor to receive a priority dividend payment.

[12] *In the matter of Cardinal Group Pty Limited (in liquidation)* [2015] NSWSC 1761

in liquidation, if liquidators could not recover their remuneration or litigation funders could not recover the funding which they provided. It seems to me that that approach is consistent with that of the Court of Appeal in *Hall v Poolman* [2009] NSWCA 64; (2009) 71 ACSR 139."

The decision in *Hall v Poolman* is significant in finding that if liquidators have incurred costs in preliminary investigations which have led to the prospects of recovery, and there are no assets, in the absence of litigation, to pay the costs already incurred, the liquidators may legitimately pursue litigation with the aid of a litigation funder even if there is little or no likelihood of recovery going beyond recovery of their own remuneration and expenses and the funder's fees.

From these more refined examples we can at least say that proportionality is at least not as straightforward as a matter dealt with by a lawyer for a client, and in some cases can be complex.[13]

Proportionality – small and large

Inherently it depends on the size of the estate; as earlier quoted, in a small matter, the IP's costs might appear disproportionately high, in a large matter that can be less of an issue.

Large

Example 5

In *Gunns Plantations,*[14] the liquidators sought approval of their remuneration in the order of $8 million. It was their third application to the court for approval and it was opposed as being excessive. But, in a long judgment analysing the remuneration records of the liquidators, the Court accepted that to the lay person, the hourly rates and remuneration charged by the liquidators seemed 'extraordinary'. However, they were market rates charged by liquidators generally and, in any event, the Court said that the liquidation was 'a most complex insolvency administration, certainly well above the run of the mill administration or liquidation'.

The Judge said that the "claim for remuneration is reasonable and proportionate to the services undertaken by the liquidators and their staff", confirmed by his review of randomly selected entries in the remuneration schedules.

Example 6

In other cases, the work performed and the remuneration expended by a liquidator may appear high but may turn out to be very productive, and more than proportionate.

---

[13] *Templeton v ASIC* [2015] FCAFC 137 at [52], which addresses, for example, where insolvency work is being performed to preserve property of known value as compared with work performed to achieve a return to creditors that is inherently unclear. In the latter case, proportionality is assessed by comparing the cost of such work against the then expected and realistic return, and not with any hindsight review.

[14] *Gunns Plantations Limited (In Liq) (R&M App'd)* [2015] VSC 102

In *Hunter Rural Division of General Practice*,[15] while the Judge said that he had previously "expressed views about the amount of liquidators' remuneration", in this case the remuneration of $100,000 claimed "represents less than 5% of realisations in the liquidation, and it seems to me entirely appropriate". That is, the work of the liquidators had realised $2.2 million, creditors had been paid 100 cents in the dollar, and there was a surplus of around $1 million. However such outcomes are unusual.

Small to medium estates

SMEs constitute the bulk of insolvencies across most jurisdictions. At the same time, at the other end of the spectrum, it is acknowledged, as earlier quoted, that IPs have no choice but to carry out certain statutory duties and in a small estate the costs can appear disproportionately large, even to the extent of consuming all funds. There "are many ways in which costs may be incurred which are not related, principally or even at all, to the assets and liabilities of the estate".[16] The acceptance that reasonable and necessary work need not increase the funds available for creditors is hardly relevant in such cases.[17]

Public interest

Indeed, in a broader context, we are reminded about the broader non-financial purposes and impacts of insolvency by Millett J - that an insolvency can have a severe impact on "many thousands, even tens of thousands, of innocent people" and that an "insolvent liquidation cannot be dismissed as 'just a case about money'."[18]

The public interest was significant in *Hall v Poolman,* referred to earlier, that the enforcement of the insolvency laws, for example insolvent trading, or attempting to recover purloined assets, is important and such pursuit may result in no recoveries by liquidators beyond recovery of their own remuneration and expenses and the funder's fees.

The extent of unfunded bankruptcies and liquidations – the elephant in the room

The extent of unfunded work is significant when discussing the remuneration of IPs and often underlies much of the debate.

As many have said before,[19] Australia lacks good quality data on the operation of Australia's insolvency system. What limited data is available gives cause for concern,

---

[15] *Hunter Rural Division of General Practice Limited (In Liq)* [2015] NSWSC 279.
[16] *Brook v Reed* [2011] EWCA Civ 331; [2011] 3 All ER 743.
[17] *Sanderson, as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr,* [2017] NSWSC 38 at [54]; Re GTL Tradeup Pty Ltd (in liq) [2015] FCA 323 [70-71]; see also ACN 104 635 369 Pty Ltd (in liq) (formerly Total Plant Services Pty Ltd) v Hamilton [2015] FCA 1219..
[18] *In re Barlow Clowes* [1992] Ch 208.

[19] Senate Committee Report, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework,* September 2010, recommendation 1; Submission to the National Data Commissioner of the writers and others of October 2019: see 27.pdf (datacommissioner.gov.au)

suggesting that funds are insufficient to support the costs of the system and that many public interest tasks are performed by IPs and charged to creditors. For example:

- A 2013 study showed that liquidators conducted unfunded work in external administrations to the value of over $48m annually[20]
- 92% of external administrations pay no dividend returns to creditors, and a high proportion pay no remuneration to the liquidator at all[21]
- Around 58% of companies that enter liquidation have less than $10,000 in assets, and 37% of companies have no assets[22]
- A 2020 AFSA report showed that 31% of bankrupt estates handled by private trustees paid no remuneration[23]
- Dividend returns to creditors in bankruptcy are in the order of 1.6 cents.[24]

Drawing on these figures, it is apparent that a proportion of the work in insolvency is performed by IPs for reduced or no remuneration. While there is little other information on the extent of that deficiency, it seems to be inherent, with a 1979 inquiry in NSW finding that 70% of court ordered liquidations were "unremunerative" or assetless.[25] In 2013, as shown above, the unfunded value was estimated at over $45 million annually.

IPs' unpaid costs appear to be recouped from other high value estates – through cross-subsidisation[26] or "swings and roundabouts"[27] in order to meet the inherent lack of funds in the system.

AFSA's report

Most remuneration analyses focus on the apparent end result of the work done, being the amount of the remuneration claimed by the IP – say $20,000. Another focus would be to see what work was and had to be done by the IP according to the law, and then see what remuneration was claimable as the reward for that work.

I suggest this will often show that, overall, the amount of work done (50 hours) at a $400 rate with a quantum of remuneration ($20,000) thereby legitimately claimed is not a reliable figure, because the remaining funds are insufficient to pay that; they may be only $6000.

Hence in many estates, the work of the IP might have been done, and done well, but whether it was to be charged on commission, hours worked or a multiple of the

---

[20] *An analysis of official liquidations in Australia*, A Phillips, February 2013; referred to in the Explanatory Memorandum to the Insolvency Law Reform Bill 2015 [Ex Memo ILRB] at [9.135].

[21] *Corporate Insolvency by the Numbers*, J Harris, 27 February 2018 – www.australianinsolvencylaw.com. See also Murray and Harris, *Rebuilding the structure of the Australian insolvency system* (2022) Insolvency Law Bulletin, July 2022, (forthcoming)

[22] ASIC, *Insolvency Statistics: Series 3, Initial External Administrators' Reports*, Series 3.3, 2019. This report has since been discontinued.

[23] *Remuneration in the personal insolvency system*, 4 March 2020 www.afsa.gov.au

[24] AFSA, *Annual Administration Statistics*, 2020-2021.

[25] *Brian Cassidy Electrical Industries Pty Limited (in prov liq) v Attalex Pty Limited (No 2)* (1984) 2 ACLC 752, referring to the 1979 'Helsham Report'.

[26] Ex Memo Insolvency Law Reform Bill 2015 at [9.52]-[9.53].

[27] Explained in *Re Greater West Insurance Brokers Pty Limited* [2001] NSWSC 825.

length of someone's foot, it made no difference – there was no money in the estate to pay, or not enough to pay fully.

That aspect is mentioned, only, in a 2020 report referred to above on the remuneration of trustees, prepared by AFSA, the bankruptcy regulator in Australia. During the preparation of the report, I suggested that the regulator inquire not only as to the amount charged in each estate which appears on the official accounts but also as to the reality of how much was in fact paid.

That further inquiry was relevant because it led to the report revealing that, in the year in question:[28]

- in 63% of bankruptcies administered that year, no remuneration was recovered at all by trustees, with an average of $4,804 drawn in the remainder; and
- over 30% of bankruptcies finalised in that year produced no remuneration in any year of the administration.

Trustees therefore were significantly unfunded for their work. That is significant given that Australia has a government Official Trustee that takes the bulk of assetless consumer bankruptcies.

AFSA's legal and policy answer to this is that lack of funds to pay a trustee's remuneration is an inherent feature of their work and that trustees may validly set higher charge-out rates to accommodate those losses.[29] Those high rates are then charged against moneys otherwise payable to creditors in the few bankrupt estates with assets. A write-off of one third of fees would allow for a substantial mark up.

So, either the trustee pays, or, if they manage it well, the unrelated creditors in their other estates, unwittingly, pay. That seems to be the policy decision of the government and it may partly explain why the average dividend paid to unsecured creditors by registered trustees is just 2.37c/$, in 2020-2021.

The position would be worse in corporate insolvency where there is no government role in Australia.

It can also be reasonably surmised that there is often no record of unfunded hours worked; that is, records were not maintained or not maintained fully because there was no point in quantifying them if there turned out to be no assets.

This is a factor that might properly be taken into account in any view about remuneration. A judge's recent shocked comment about high hourly rates of practitioners"[30] might be seen in that context.

---

[28] 2018-2019, that is, pre-COVID-19; see Registered Trustee Remuneration in the Personal Insolvency System Best Practice Report, March 2020. Remuneration in the personal insolvency system | Australian Financial Security Authority (afsa.gov.au) 2018-2019, that is, pre-COVID-19

[29] Remuneration entitlements of a registered bankruptcy trustee (IGPD6); Proper performance of duties of a bankruptcy trustee (IGPD14)

[30] Up to A$847 incl GST. *Westpac Banking Corporation v Forum Finance Pty Limited* [2021] FCA 807.

Exemplar behaviour?

As to AFSA and the extent of unfunded bankruptcy matters, AFSA recently published what it termed a series of "exemplar behaviour case studies [to] showcase examples of best practice from the insolvency sector", necessarily holding these out as instances of behaviour to be applied by registered trustees.[31]

In one example, the property of the bankrupt was impacted by criminal compensation orders in favour of the creditor. This led to what AFSA described as the creditor's "extremely complex situation" whereupon, on its resolution, the trustee "proactively took steps to limit the remuneration and other expenses (including legal fees) to $35,000, noting that the full remuneration and expenses well exceeded $84,000".

Apart from the fact that this involved an independent insolvency professional effectively donating $49,000 to a creditor, the complexity of the law or the facts and the time taken is a reality that has to be dealt with and should be acknowledged and disclosed and charged for.

In light of the figures shown earlier, one might query why trustees should be so charitable.

The regulator's sentiment is also part of a broader unrealistic expectation gap in relation to IPs, as being a panacea for all ills arising from the insolvency.[32]

What should and does an IP do?

If unfunded work is inherent, what should or could an IP do? If that question were put to a lawyer or accountant, their response may be to refuse the work. In reality, IPs have found legitimate ways to address their inherent losses. Whether this is good policy or not is another matter.

As much as there are regulator, judicial or government responses to this lack of money, they include that:

- as explained earlier, IPs can set higher hourly charge out rates for paying estates that have assets so as to make up for the losses. That is, a risk premium is imposed. Whether this includes liquidators charging on a "swings and roundabouts" basis is not clear, so opaque is the system;
- there is litigation funding, including to recover fees;
- for IPs to themselves, 'spec' the matter;
- if all else fails, liquidators in particular can refuse to wind up insolvent companies that cannot afford a liquidator and the companies and their liabilities can simply disappear off the register.

---

[31] Case studies highlighting best practice in insolvency sector | Australian Financial Security Authority (afsa.gov.au)

[32] See Murray and Harris, *Keay's Insolvency*, 11th ed, Thomson Reuters, 2022, (forthcoming), Chapter 1.

Some of these are hardly honourable or well calculated mechanisms, on both a policy and a numbers basis, and more.

C. Relevance and identifying responsibility

A purpose of raising these issues is to add context and colour to the "concerns" about IP remuneration, and also to explain where responsibility lies. That is not to say that there are not concerns nor to say that regulation is not required. There are various structural issues in an insolvency not found elsewhere with some perverse incentives. And while for example there is no client monitoring costs, there are numerous creditors doing so, and the regulator and the courts. Processes for recording and disclosure of remuneration border on the excessive. The cost of approval of remuneration is high, more so if court approval is required.

Necessarily it is the legislature that is responsible for the law and the processes and difficulties explained here. In Australia's split regulatory system, we know more about bankruptcy trustees' remuneration through AFSA's statistics than about liquidators', and about the relative effectiveness of various recovery mechanisms.

Professional bodies and regulators can and do provide guidance, including by way of instilling a culture of compliance. But insolvency remuneration relies upon a financially opaque system of funding with little if any public accountability by government. Payment of public interest services provided by IPs are sourced from creditors generally, through higher charge out rates. It is all hardly exemplary of sound and transparent financial management. It appears to be difficult for IPs to manage as proprietors of often small firms.

The courts have a role in their considered judgments, providing points of principle. More issues of the extent of unfunded work come out of court judgments than from regulator disclosure. They could do more, by way of inquiry as to the financial outcome of litigation, a query raised by the judge in *Hall v Poolman*. Similarly, a judge ordered that the trustees in bankruptcy file "evidence that identifies the benefits the creditors of the bankrupt are likely to receive of the Trustees succeed" in the voidable transaction claims being brought.[33] These are however exceptions.

Beyond this, I leave these issues for considered questions, one of which I have already noted but dismiss or defer. That question is "whether IPs provide value for money", which is merely stated in order to dismiss it, being so unclear as to be unanswerable.

Making a good faith effort, IPs administer the insolvency system, and in so far that system works to a degree but with considerable complexity, delay and effort, then they provide value, bearing in mind that "insolvency is not just about money". Or, in a particular estate, an IP might administer it, with no outcome for creditors, and with reduced remuneration for themselves, that is some value. In another estate, the IP might recover significant assets, and pay creditors a dividend, then that is value.

It is relevant to question the value of the insolvency regime, which IPs assist in administering, as a larger and threshold question for law reform.

[33] *Macks v Lee (No 2)* [2021] FCCA 1800

D. Remuneration and law reform

As to law reform, I earlier quoted Michael Kirby as referring[34] to the insolvency practitioners performing

"crucial public functions which are vital to a well governed polity and an efficient economy. Unless the public purse is willing to absorb all such costs a significant burden on creditors is virtually inescapable".

As to law reform, he continued that

"greater efficiency and more realism in the administration of bankrupt and insolvent estates will likely be the way ahead and the future directions of insolvency law seem likely to involve broad strokes. Pernickety administration is inescapably expensive".

As one example, in reference to preferences, Professor Andrew Keay in his early book on avoidance provisions[35] came to the conclusion that preferences might properly be automatically voidable, so as to avoid the need for the extensive issues of proof required under the present law, both by the liquidator and the respondent. Such expediency is a valid approach in insolvency law.

Similarly, the introduction of administrative recovery mechanisms in bankruptcy in Australia[36] was based on a recognition that litigation to recover assets can be expensive, complex and time consuming and that many potentially voidable transactions are not able to be challenged by the trustee because of the lack of available funds. Also, it was considered that debtors, being aware of this, were arranging their affairs accordingly, for example by transferring assets to family members.[37]

While that assessment of litigation as being expensive, complex and time consuming was more the subject or broad observation, it shows that a focus on what is required by the law to be done has law reform merit.

One fundamental law reform would be to define the limits of the legal responsibility of IPs to continue to administer an estate when there are no or limited funds.[38]

Research areas?

Information and data are needed for any law reform.

The amount of necessary work properly done by IPs for which there are no or not enough funds is not reportable to AFSA or ASIC – that is, the actual time spent in administering a bankruptcy or liquidation is not reported or recorded. Perhaps it should be reported by IPs, as a matter of providing transparency and accountability in the operation of the insolvency system, including as to who supports and pays for

[34] BANKRUPTCY AND INSOLVENCY: CHANGE, POLICY AND THE VITAL ROLE OF INTEGRITY AND PROBITY (michaelkirby.com.au); (2010) 22(2) A Insol J 4
[35] *Avoidance Provisions in Insolvency Law*, LBC Information Services, 1997 at 377-384.
[36] Section 139ZQ notices etc.
[37] See Ex Memo Bankruptcy Amendment Bill 1991 at [22-25].
[38] Section 545 of the Corporations Act 2001 is inadequate.

it. That information would also assist in monitoring the efficiency of the insolvency laws for the purposes of law reform.

In the absence of the government asking for this information, perhaps the response lies with the industry itself, for its representative bodies to survey their IP members and find out how much time is spent on matters for which there is no recompense, and then explain why, and how they recoup those losses.

Such a task was undertaken some years ago when it was revealed that IPs personally funded disbursements of $1.4 million and remuneration of $47.3 million each year in corporate insolvency.[39]

AFSA has good if basic statistics. An example of their potential use comes from data showing that trustee fees represent around 25% of all realisations. That could provide a law reform response to increase the commission rate in the rules,[40] necessary financial analyses in support being assumed. In comparison, the Official Trustee takes $4 000 plus 20% of the realised balance in each matter, acknowledging that most of its estates are assetless.[41]

Other data can be extracted from Australia's corporate database.

Summary

In the end result I sum up my paper in this way, that there is more to IP remuneration than regulating excessive charging. Rather it highlights a range of idiosyncratic features of insolvency law and practice that should be acknowledged when remuneration is being assessed, and which should provide some springboard for law reform.

Michael Murray
M +61 402 248 353
Murrays Legal
michael@murrayslegal.com.au
Sydney Australia.

8 July 2022

[39] Ex Memo to the ILRB 2015 at [9.53].
[40] IPRB s 60-20.
[41] Bankruptcy (Fees and Remuneration) Determination 2015

Selected References

- BANKRUPTCY AND INSOLVENCY: CHANGE, POLICY AND THE VITAL ROLE OF INTEGRITY AND PROBITY (michaelkirby.com.au); (2010) 22(2) A Insol J 4
- EBRD Assessment of the Performance of Insolvency Office Holders - Discussion Paper, 11 May 2012
- Jennifer Dickfos, The Costs and Benefits of Regulating the Market for Corporate Insolvency Practitioner Remuneration (2015) 25(1) International Insolvency Review p 56-71.
- Wee MS, Kiu YY, *Principles and rules on IPs' remuneration* (2021) 30(3) International Insolvency Review 383-409, Wee MS, Kiu YY.
- Stacey Steele, Vivien Chen and Ian Ramsay, 'An empirical study of Australian judicial decisions relating to insolvency practitioner remuneration' (2016) 24(3) Insolvency Law Journal 165
- Jennifer Dickfos, 'Does CIP remuneration provide value for money?' (2016) 24(1) Insolvency Law Journal 62
- R3, *Insolvency fees and the cost of regulation – the details behind the headlines*, 2022. Although I have not individually footnoted or quoted this R3 report, it was of considerable assistance to me in the insights it gave.
- Murray and Harris, *Rebuilding the structure of the Australian insolvency system* (2022) Insolvency Law Bulletin, July 2022, (forthcoming).
- Murray and Harris, *Keay's Insolvency*, 11th ed, Thomson Reuters, 2022, (forthcoming).
- www.murrayslegal.com.au

==========