

Book Review

Company Directors' Liability for Insolvent Trading by Ian Ramsay (ed) (Melbourne, CCH Australia Ltd and Centre for Corporate Law and Securities Regulation, 2000) pp v, 209.

Company Directors' Liability for Insolvent Trading provides a collection of essays on the topic of directors' liability for insolvent trading. The insolvent trading provisions of the Corporations Law have received considerable media attention recently with the One.tel and H.I.H Insurance collapses and are among the most contentious of the duties imposed on company directors. In broad terms, the provisions impose a duty on directors to prevent a company from incurring debts once the directors suspect, or have reasonable grounds to suspect, that the company has become insolvent. A breach of this duty exposes directors to a range of remedies, including compensation orders, disqualification from managing companies and criminal sanctions. The provisions are subject to both public enforcement by the Australian Securities and Investment Commission (ASIC) and private enforcement, typically by the liquidator of the company. A similar duty to prevent insolvent trading is also imposed on a holding company for debts incurred by its subsidiary.

The insolvent trading provisions are controversial for both policy and technical reasons. In terms of policy, the most striking aspect of the provisions is that they undermine a fundamental principle of company law namely that, unless otherwise bargained for, the company itself should be solely responsible for debts it incurs. The protection this 'corporate veil' otherwise offers to directors and shareholders is removed by the legislation at the very time when it is most needed by directors, that is, when the company is insolvent. The provisions have also raised difficulties of interpretation, most notably in relation to the central requirement that the company 'incurs a debt'. There is now a body of often inconsistent case law on the meaning of this phrase. Another area of technical difficulty involves the need to identify and prove the company's insolvency.

This short, but excellent, book examines a range of issues raised by insolvent trading regulation. It is divided into four parts. The first part is a chapter by the editor, Ian Ramsay, which provides an overview of the insolvent trading provisions and of the debate that these provisions have generated. The second part comprises two chapters expressing opposing views on this policy debate. The third contains three chapters devoted to different aspects of the Australian insolvent trading provisions. And the fourth part provides an international perspective through an examination of the New Zealand and English provisions.

The book is strongly recommended. Its emphasis on policy issues is particularly welcome. Policy issues are primarily picked up in Part II, although there is further discussion in the final two chapters dealing with international perspectives. Chapter 2 is written by Dale Oesterle and provides a United States' perspective on the Australian, New Zealand and United Kingdom provisions.

This viewpoint is particularly interesting as the US has no insolvent trading laws. In fact, the writer suggests that American academics and lawyers, 'when asked about the wisdom of the insolvent trading provisions, express profound incredulity'. In this chapter Oesterle presents an entertaining and informative case against insolvent trading laws. He argues that the provisions 'are excessively protective of corporate creditors and inherently impracticable to boot. Among other ills, insolvent trading provisions, if enforced, make timid managers out of good managers and do not help to catch the crooks...Australia, New Zealand and England would be well advised to repeal their provisions entirely.' Further, he argues that not only are the insolvent trading laws based on a flawed policy but they inevitably involve complex legal technicalities that create difficulties in practice. Chapter 3, by Michael Whincop, is an updated version of earlier articles by the writer. It responds to criticisms of the policy underlying the insolvent trading laws by an analysis drawing on game theory and information economics. He suggests that policy justifications for insolvent trading provisions exist but that further empirical evidence is required to determine whether the particular legislative responses are appropriate.

Part III has 3 chapters devoted to insolvent trading in Australia. The first, by Niall Coburn, provides a detailed coverage of the Australian provisions. It traces the background to the present provisions and examines the elements, defences and enforcement of insolvent trading. The writer is with the ASIC and explains ASIC policy towards insolvent trading. The next chapter is by David Noakes and deals with the topical issue of employee entitlements in insolvency. The link here with insolvent trading, apart from the fact that employees will commonly be creditors of insolvent companies, is provided by the Corporations Law Amendment (Employee Entitlements) Act 2000 (Cth). One of the means adopted by this legislation in an attempt to protect employees is to deem 'uncommercial transactions' entered into by the company to constitute incurring a debt for the purposes of the insolvent trading provisions. Noakes provides convincing grounds for skepticism in regard to the usefulness of these provisions for employees. Finally, Abe Herzberg, drawing on earlier publications, asks why there are so few insolvent trading cases in Australia. His conclusion is that the most important reason for this is the increasing use of the voluntary administration provisions of the Corporations Law.

The fourth part of the book provides a useful international perspective. This discussion sheds light on the Australian provisions. Both the policy and provisions of the New Zealand insolvent trading laws are critically examined by David Goddard who suggests a number of reforms to the New Zealand provisions. The final chapter is by Jenny Payne and Dan Prentice who examine the different ways in which a director may be liable to creditors. These include 'lifting the corporate veil', common law negligence actions and directors' fiduciary duties to take into account creditors' interests. These actions are considered to be of limited value to creditors and so the chapter goes on to consider the English 'wrongful trading' provisions, the counterpart to the

Australian insolvent trading provisions. These are viewed as unsatisfactory in their application to corporate groups and in relation to enforcement. However, they are seen as providing 'the right start'.

In a book of this kind, it is hard to avoid overlapping of the same areas by the different writers but for the most part this is not significant here. A slight irritant, however, is the number of typographical errors.¹

Overall, this is a welcome book on a specialised but important topic. The scope of topics covered is admirable and it deserves a wide readership.

JOHN DUNS
Faculty of Law
Monash University

¹ These are noted here in case they could be corrected in future editions. *Credit Corporation Australia Pty Ltd v Atkins*, cited in footnote 10 on page 5, is incorrectly dated 1990 instead of 1999; the discussion under heading 1 on page 6 refers to 'insolvency' instead of 'solvency' in two places; in a number of places on pp 46-7 'debtors' has been transposed for 'creditors'; on p 98 there is an incorrect reference to *Hawkins*; p 112 refers to 'reasonable cause' replacing 'reasonable grounds' whereas it should be the other way around; on p115 there is a reference to s 588H(4) instead of s 588H(5).