

A Framework for Corporate Insolvency Taxation: The Crossroads of the Theoretical Perspectives in Taxation Law and Insolvency Law

Sylvia Villios

MTax, CTA, GDLP, LLB (Hons), BCom (Acc)

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Abstract

The first aim of this thesis is to develop a theoretical framework that can be used to analyse the effectiveness of Australian laws and administrative practices that sit at the crossroads of tax law and insolvency law, and to propose options for law reform and administrative reform where significant disharmony between these areas of law is identified. The second aim of this thesis is to apply the theoretical framework to assess the effectiveness of the Australian Federal Commissioner of Taxation (Commissioner) as a creditor in a corporate insolvency, and to propose law reform.

In particular, this thesis applies the theoretical framework to answer the following questions:

1. Should the Commissioner have priority in a corporate insolvency?
2. Is there harmony at the intersection of tax law and insolvency law with respect to the Commissioner's debt collection practices in the context of tax administration?
3. Is there harmony at the intersection of tax law and insolvency law with respect to the Commissioner's powers to issue:
 - a. notices under section 260-5 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (TAA 1953)?
 - b. director penalty notices under Division 269 to Schedule 1 of the TAA 1953 (DPNs)?

- c. statutory demand notices under section 459E of the *Corporations Act 2001* (Cth) (Corporations Act)?

The significance of this thesis is to develop an appropriate theoretical framework as a new tool to assess the effectiveness of a law, the interrelationship of laws and administrative practices with respect to both tax law and insolvency law, and to propose law reform. The theoretical framework is applied in relation to one area that sits at the intersection of tax and insolvency law, being the role of the Commissioner as a creditor in a corporate insolvency with respect to the Commissioner's debt collection powers under the tax law and the Commissioner's debt collection practices in the context of tax administration. Whilst the theoretical framework is applied in relation to this one particular area, it is intended that the framework has far broader application and can be used in relation to analysing the effectiveness of any law that sits at the intersection of tax law and insolvency law.

Publications Arising From the Writing of this Thesis To Date

'Tax Collection, Recovery and Enforcement Issues for Insolvent Entities' (2016) 31(3) *Australian Tax Forum* 425.

'Director Penalty Notices - Promoting a Culture of Good Corporate Governance and of Successful Corporate Rescue Post Insolvency' (2016) 25(1) *Revenue Law Journal* Article 2.

'The Insolvency Priority Contest - Garnishee Notices versus General Law Fixed Interests and PPSA Security Interests' (2015) 2(6) *Australian Tax Law Bulletin* 112.

'The Legislative Interface Between the Creation of a Liability to Tax and the Right to Challenge That Liability' (2014) 29 *Australian Tax Forum* 551.

'The Commissioner's Power to Issue Creditor's Statutory Demands: Implications for Corporate Rescue Post Insolvency' (2014) 43 *Australian Tax Review* 187.

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Originality Statement

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

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Glossary

The following abbreviations and acronyms are used throughout this thesis:

Abbreviation/ Acronym	Definition
AAT	Administrative Appeals Tribunal
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977 (Cth)</i>
ANTS	A New Taxation System
ARITA	Australian Restructuring Insolvency and Turnaround Association
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BAS	Business Activity Statement
BISEP	Business, industry, sociological, economic, and psychological
BVAT	Business Viability Assessment Tool
C2P	Capacity to Pay
CGT	Capital Gains Tax
Commissioner or FCT	Australian Federal Commissioner of Taxation
Cork Report	United Kingdom, Review Committee on Insolvency Law and Practice, <i>Report of the Review Committee on Insolvency Law and Practice</i> , Cmnd 8558 (1982)
Commonwealth or Cth	Commonwealth of Australia

Corporations Act	<i>Corporations Act 2001 (Cth)</i>
DCT	Australian Deputy Commissioner of Taxation
DMF	Debt Management Framework
DOCA	Deed of Company Arrangement
DPN	Director Penalty Notice
DRN	Debt Right Now
EDCA	External Debt Collection Agency
ERMF	Enterprise Risk Management Framework
ETAAC	US Electronic Tax Administration Advisory Committee
Federal Court	Federal Court of Australia
GFC	Global Financial Crisis
GIC	General Interest Charge
GST	Goods and Services Tax
Harmer Report	Australian Law Reform Commission, <i>General Insolvency Inquiry, Report No 45 (1988)</i>
HCA	High Court of Australia
HMRC	Her Majesty Revenue & Customs
ICA	Institute of Chartered Accountants
IGT	Inspector General of Taxation

IMF	International Monetary Fund
IRS	Internal Revenue Service
ITAA 1936	<i>Income Tax Assessment Act 1936 (Cth)</i>
ITAA 1997	<i>Income Tax Assessment Act 1997 (Cth)</i>
OECD	Organisation for Economic Co-operation and Development
OIC	Offer in Compromise
P2P	Propensity to Pay
PAYE	Pay As You Earn
PAYG	Pay As You Go
PPSA	<i>Personal Property Securities Act 2009 (Cth)</i>
Proposals Paper	Australian Treasury, ' <i>Action Against Fraudulent Phoenix Activity</i> ' (2009)
PS CM	Corporate Management Practice Statement
PS LA	Law Administration Practice Statement
RBA	Running Balance Account
RBC	Royal Bank of Canada
SBR	Standard Business Reporting
SGC	Superannuation Guarantee Charge
SME	Small-to-Medium Enterprise

SMS	Short Message Service
STA	Swedish Tax Agency
SGAA 1992	<i>Superannuation Guarantee (Administration) Act 1992 (Cth)</i>
TAA 1953	<i>Taxation Administration Act 1953 (Cth)</i>
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States of America