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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
Canberra ACT

By email corporations.joint@aph.gov.au

Submission for the inquiry into Corporate Insolvency in Australia

We welcome the opportunity to make a submission to the Committee's Corporate Insolvency in Australia inquiry.

Executive summary

In Part 1, we explain that it is difficult to assess the corporate insolvency regime without relevant data. What data is available reveals a system that is underfunded, with its insolvency practitioners (IPs) attending to tasks better performed or funded by the state. It also suffers from barriers to entry given the costs of its processes.

We recommend a financial and legal analysis of the regime in order to re-assess the law's expectations against available resources. This may lead to a re-assessment of the tasks of the IP in relation to offence investigations and reporting, and other public interest tasks; and the need for a greater role of the state in insolvency. While these matters may be outside the remit of the PJC, a road map or other guidance on how such an analysis, if accepted as necessary, might proceed, would be useful.

In Part 2 we address each of the Terms of Reference with recommendations as relevant.

In Part 3, we conclude with an offer to assist further as may be required.

Our submission has two attachments, A and B.

Part 1

We note that the terms of reference are broad in scope, but also refer to specific rules within corporate insolvency, such as unfair preferences, insolvent trading safe harbours and small business restructuring. Any review of the operation of the corporate insolvency system should consider both how the insolvency system operates within itself and how the insolvency system operates within the broader economy. While there have been several parliamentary and government sponsored reviews of insolvency law over the past 30 years,[1] these have tended to focus on particular issues and have given rise to specific reform proposals.[2] This has led to the expansion in volume and complexity of insolvency law. As noted in the announcement of the inquiry, the last broad-based review of insolvency law was the ALRC's Harmer Report in the mid-1980s.[3] The economy has changed significantly since the Harmer Report was released in 1988, with a digital/online industrial revolution, diversification of the credit markets and a move from fixed asset bases to intangibles for most businesses.

While we welcome the Committee's inquiry as an opportunity to consider the state of corporate insolvency law in Australia, the need for a detailed examination of insolvency law (both personal and corporate) can't be satisfied by a parliamentary committee reporting back in several months. Insolvency reform that is fit for purpose takes some

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[1] See for example, Commonwealth Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Law: A Stocktake* (June 2004); Productivity Commission, *Business Set-up, Transfer and Closure: Inquiry Report* (September 2015).
[2] Most notably, the *Insolvency Law Reform Act 2016* (Cth).
[3] Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (AGPS, 1988).

considerable time and requires consultation across the economy. We strongly recommend that one outcome of this inquiry is a referral to the ALRC or similar body equipped with the expertise for the sort of threshold inquiry we suggest. Many other countries have undertaken broad scale reforms of their insolvency law in the past 30 years, including notably India and Singapore in our own region. Many aspects of our insolvency law date back to the 16th century. Many of the goals of insolvency law have not been reviewed in decades. Now is the time to rethink insolvency law to ensure that it is meeting community expectations and delivering outcomes that are commercially and economically appropriate.

Initial threshold issues

Before addressing the specific terms of reference, we offer the following comments on what we believe are important threshold issues for the inquiry to consider beyond any technical reforms that may be evaluated. We are in the midst of a book project that will recommend a review of Australia's insolvency laws from a systemic perspective. We say that this is necessary first step before examining the operation of effectiveness of insolvency provisions. Our broad thesis is that a large portion of the work that insolvency practitioners engage in is in the public interest but must be paid for out of assets otherwise available to creditors. Also, in a large proportion of corporate insolvency matters there are insufficient funds to pay for the liquidator's work, let alone to provide a meaningful return to creditors.[4] The role of government, "the state", in the administration and conduct of insolvency matters needs to be increased in corporate insolvency. Furthermore, we argue for a realignment of the purposes of insolvency to recognise the role of the public interest and a re-allocation of the responsibility and funding of work undertaken in corporate insolvencies to recognise that public interest work should be undertaken and/or funded from public sources. [5]

Any consideration of the detail of insolvency law should be considered in that realigned context. To some extent, the terms of reference raise issues relevant to that.

This submission raises these as "threshold issues". At the same time, we appreciate that the detail of insolvency law as outlined in the bulk of the terms of reference (TOR) require consideration. We give those appropriate response through the lens of this threshold issue.

In our view, by standards of effectiveness (in achieving purposes, aims) and efficiency (in being cost/time effective),[6] the Australian insolvency regime has shortcomings that need attention, in particular in the MSME sector. In that sector, its effectiveness is qualified by the financial limits on those insolvents[7] who cannot access it and qualified overall by the lack of data showing desired outcomes, or indeed a lack of data showing any final outcomes of insolvency (desired or otherwise).

The effectiveness and efficiency of the insolvency system in Australia is also qualified by the dual system of laws and regulation that exists between ASIC and AFSA. Its efficiency is qualified by the unfunded cost of administrations, the unrecognised public interest work performed by insolvency practitioners (IPs), and the unnecessary complexity of the system, including in relation to the disconnection between the operation and regulation of

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[4] This also seems to be the case in personal insolvency; see *Rebuilding the structure of the Australian insolvency system* (2022) 22 (1&2) INSLB 14, M Murray and J Harris (Rebuilding the structure, Murray & Harris), which is Attachment A to this submission.

[5] Discussed further in Rebuilding the structure, Murray & Harris.

[6] As to the distinction between effectiveness and efficiency in the insolvency context, see IMF Report The Use of Data in Assessing and Designing Insolvency Systems (imf.org), WP/19/27, prepared by José Garrido (dir.), Wolfgang Bergthaler, Chanda DeLong, Juliet Johnson, Amira Rasekh, Anjum Rosha, and Natalia Stetsenko, February 2019.

[7] Companies and individuals

the personal and corporate insolvency law systems. In the large company sector, it appears (anecdotally at least) to operate much better, although refinements are required, and collection and analysis of data is also required.

Detail of the threshold issue

Insolvency needs to deal with both public and private interests. The nature of those interests and who attends to them and who should bear responsibility for them must first be examined and balanced appropriately. The approach to clarifying those respective responsibilities in insolvency has been explained as being that

> "private functions should be performed by the private sector and paid out of funds otherwise available for distribution among creditors, while public functions should be performed by public officials and paid for out of public funds …".[8]

At present in corporate insolvency in Australia, there is no significant government role and we consider that this creates problems and distortions in that sphere in which the inquiry is proceeding. This is caused by the fundamental and pervasive lack of sufficient funding to pay for the work that the law requires corporate insolvency practitioners to undertake. In short, we have a corporate insolvency system that cannot pay for itself and certainly produces little or nothing to creditors *in most cases*.

ASIC reports based on insolvency practitioner filings[9] show that in 92% of companies that enter external administration (i.e. formal insolvency) the estimated returns to unsecured creditors are 0c in the dollar (no return). In 96.4% of cases the estimated return is 11c in the dollar or less. In only 2.3% of cases is the return estimated at more than 21c in the dollar.

These figures show that in almost every corporate insolvency where the insolvency practitioner filed a return with ASIC at the commencement of the case, there was virtually no prospect of a meaningful financial return to creditors. Furthermore, in 18% of liquidations, the liquidator estimated there would be no remuneration, meaning the liquidator is effectively working for free. In Australia (and unlike in many other common law countries) liquidators consist solely of a private profession, there is no government liquidator (often called an Official Receiver, Official Liquidator or Official Assignee).

Three broad concerns arising from lack of state involvement

We identify three issues in relation to that lack of government involvement

First, the need to pay a liquidator to take the appointment (which can cost $10,000 or more) presents a barrier to entry for no or low asset insolvent companies. While there may be a desire by the directors to liquidate their insolvent company, they have no funds to pay a liquidator, which is generally required. Their easiest option, absent any action by a creditor, or direct claim on the directors by the ATO, is to simply "walk away" and let the company be deregistered. This was an expected outcome given changes and statements made by the government in 2016.[10] Latest figures from ASIC show that for every company dealt with under Ch 5, 13 more simply are deregistered.[11] However, these figures do not show the full picture. A review of deregistration notices on https://publishednotices.asic.gov.au/ shows that each year since 2012 (when records on

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[8] P Heath, *Insolvency Law Reform: The Role of the State* (1999) NZLRev 569 ["Heath, the Role of the State"].

[9] ASIC Insolvency Statistics, Series 3.3 (FY18-19). This report stopped in 2019 and is currently being reviewed by ASIC for release in a new form in 2023.

[10] See *Rebuilding the structure*, Murray & Harris

[11] *Is ASIC deregistering more 'abandoned companies'? What the data shows*, (2022) ARITA J 40, Thea Eszenyi, ASIC. It shows in 2020-2021, 52,365 companies "ASIC initiated" (ie, s 601AB) deregistered.

that website began) there have been more than 82,000 voluntary company deregistrations and more than 65,000 involuntary (ASIC-initiated) deregistrations. Some proportion of these may be defunct companies; another proportion may be 'spent' phoenix companies, or by-products of other corporate law abuse. The important point to note is that *none* of these companies are investigated by ASIC, they are simply deregistered. A government liquidator's office could have a role in conducting basic investigations into corporate misconduct, as the Official Receiver's office does in the UK.[12] It is quite clear that the numbers of formal insolvency cases are merely the tip of the iceberg and that many more are being abandoned each year.

Second, there is much public interest work done by private sector IPs on behalf of the state[13] which is charged to creditors. This is apart from the fact that much of insolvency is inherently in the public interest, as is apparent from its history. Some particular public tasks are the investigations of misconduct under s 533 Corporations Act and related sections and the referral of offences to ASIC. Although almost 20,000 offence referrals are made to ASIC each year, only a tiny fraction of cases are actually brought by the regulator.[14] There are a variety of reasons for this, including a lack of evidence where books and records have been destroyed by the directors of the company (or indeed, perhaps were never kept in the first place) and a lack of resources to undertake full proceedings.

Third, overall, there is a limited amount of remaining funds in insolvent estates. The system relies upon those funds to operate. A 2013 study quantified the annual contribution of liquidators at over $47million by way of unfunded work.[15] From this we conclude that the system is seriously underfunded. The remuneration of liquidators, who are central to the system, is extracted instead as best they can from the largest estates, by high charge out rates, creating distortions in the system. A system of 'swings and roundabouts' is in place where large asset matters fund the work done on unfunded matters.[16]

We consider a government role, an Official Receiver, would address in part or ameliorate these issues.

In contrast with New Zealand, the United Kingdom, and Singapore, Australia does not have an Official Receiver in corporate insolvency. It relies entirely on the private liquidator profession. The reasons for that are based more on default than design. An Official Receiver role was contemplated at Federation, in the draft Companies Bill 1908, being one and the same as the Official Receiver role created by what became the Bankruptcy Acy 1924. However, concerns were raised about the limit of the Constitution's corporations power generally, since discounted. While the idea of an Official Receiver was raised in 2018 in the context of anti-phoenix reforms, it was not pursued further.[17]

An Official Receiver may also be needed for what might be seen as national or public interest insolvencies, where there is undue risk and responsibility involved in the IP role as liquidator. For example, in the UK, the Official Receiver is the liquidator of British Steel,[18] with its extreme environmental and health risks; of Thomas Cook, the failure of which

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[12] The Official Receiver is appointed the default liquidator in every court liquidation and may subsequently be replaced by a private liquidator by a vote of the creditors.
[13] See *Rebuilding the structure*, Murray & Harris
[14] Compare ASIC 6-monthly enforcement reports with the offence referrals listed in ASIC Insolvency Statistics Series 3.3, Table 3.3.16.1.
[15] A report by A Phillips (2013), referred to in *Rebuilding the structure,* Murray & Harris.
[16] As to issues in relation to IP remuneration, see *Rethinking Insolvency Practitioner Remuneration*, (2022) Insolvency Law Bulletin, Murray, M (forthcoming).
[17] See Rebuilding the structure, Murray & Harris.
[18] See *British Steel – is it a wind up?* Corporate Rescue and Insolvency August 2019, A Keay and P Walton.

called for the largest peace time repatriation of British citizens; of Carillion Constructions, which had extensive government contracts for the construction of schools and hospitals; and most recently a failed electricity supply company on whose electricity supplies local authorities depended.[19] In each case, the Official Receiver was appointed by the Court with large private firms appointed as special managers to handle the work under the supervision of the Official Receiver. That default option is not available in Australia.

We note that there is limited data upon which we or the Committee might come to conclusions about the efficiency and effectiveness of Australia's insolvency laws, indeed as to how they work in practice. This lack of data has been the subject of critical comment from earlier inquiries.[20] We refer to some progress in that area and to some data which we ourselves have extracted in order to support our threshold arguments for reform, and which go to some of the points in the TOR.

In particular reference to small business, we need to know more about how small business operates – are personal guarantees common? How often is the family home "on the line"? How often do corporate liabilities lead to personal insolvency? How common are personal tax liabilities? Is the ABS division of 50-50 between corporate and personal businesses accurate?

Surveys of small business would be one way of finding this information. The information being/to be collected by the ABR will help. A centralised portal for all insolvency administrations is another, future, option.[21] Apart from these more formal mechanisms, the recent figures about those still to obtain a "director identity number" suggest many in small business do not know of have forgotten that they operate, or purport to operate, through a company. The Senate Economics References Committee Report of 2010 - *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework,* of September 2010 – recommended - recommendation 17, that there be a unit established that was to be responsible for gathering, collating and analysing data on a range of corporate and personal insolvency matters. The data was to be made publicly available with no charge.

We suggest a further recommendation be made to this effect by an independent body comprising representatives of AFSA, ASIC, the ASBFEO and other relevant agencies. A further point is that while there are certain settled aims of insolvency law, in our view these should be reconsidered in light of the reality that some are not or are rarely met, or do not seem to be met based on available data. We respectfully suggest that the Committee itself might usefully take submissions on what the aims of the system are in parallel with its consideration of the detail in our threshold issue.

In our view, an option for the Committee could be to recommend that a threshold financial and systems analysis of the regime, personal and corporate, be conducted, with a view to determining available funds and resources for necessary tasks. Depending on those findings, to then conduct a legal review to ascertain the private law and public law responsibilities in an insolvency and separate those that could be considered for a government role in the nature of an Official Receiver/Inspector-General role, funded by means to be devised.

That may then lead to a need to reconsider the aims of the Australian insolvency system, in particular in relation to the rights of unsecured creditors, of secured creditors, and in relation to investigation and enforcement of misconduct, with a view to redrafting aspects

[19] *Counsel General for Wales v Allen* [2022] EWHC 647 (Ch) (21 March 2022).
[20] Harmer Report at [43].
[21] See further, https://murrayslegal.com.au/blog/2022/11/27/tip-the-insolvency-portal-or-big-data-room/

of the law accordingly. There is also a need to provide for on-going data collection as to the performance of the system.

At the same time, we acknowledge the terms of reference and we respond to those accordingly, although with reference back to the issues just raised.

Part 2: The Terms of Reference ('TOR')

TOR 1

Recent and emerging trends

As to the measures taken to address the Coronavirus in 2020-2022, our view is that they were appropriate as to content and length and consistent with steps taken in comparable overseas jurisdictions. Their impact was as intended, with a significant drop in companies being wound up by the court at the instigation of a creditor. Insolvent trading liability was put on hold. These led to not necessarily positive outcomes, as it may have meant that non-profitable companies traded on, relying on government payments, incurring debts they could not pay, with that full outcome yet to be seen in the market. Details of that outcome calls for an economic assessment that we are unable to give.

However, the effect of that continues, with numbers of liquidations remaining low. That may soon change but there are reasons why it may not. We have explained that assetless companies may not be able to afford the services of a liquidator. Nor may a creditor wish to apply to wind up a company when, apart from its own debt, it must incur the costs of funding a liquidator as well. This may be evident in current ASIC figures. As explained earlier, this was contemplated by law changes made in 2016 removing the role of "official liquidator".[22]

Beyond that, we speculate that the hiatus in insolvencies may have had a permanent effect on creditor behaviour, in at least causing some creditors to rethink the use of liquidation, and debtors and creditors also may have come to realise that, in a post COVID-19 environment, some compromises short of insolvency are worthwhile. In addition, creditors have increased access to their debtors' financial and trading affairs, through credit reference services, the internet and social media, directors' identity numbers [pending], as well as greater ability to take security over personal property using the PPSR. Such "self-help" remedies by creditors secure any recoveries for themselves alone; insolvency is necessarily a collective process with recoveries shared between all. Recovery proceedings are often complex and expensive, and creditors can often be asked to contribute. Ultimately, given the limited recoveries in insolvency, and time taken, banks and credit managers with unsecured loans may well decide that insolvency is of limited use, or at least that its use should be more directed and strategic.

We also note that there remains the regulatory "blind spot" of 'pre-insolvency' advisors whose business involves reaching out to distressed company directors and advising them how to hide assets and avoid their tax liabilities. We have even heard of struck-off liquidators operating in this market. Lawyers, accountants, financial advisors, tax agents etc are all heavily regulated professional advisors but pre-insolvency advisors seem to flourish in a lax regulatory environment where regulators focus on one-off prosecutions rather than a system-wide regulatory approach. Anecdotally we have heard of very different approaches being taken between ASIC, ATO, AFSA and the Fair Work Ombudsman to these matters.

We recognise that many (perhaps most) advisors of insolvent or financially distressed companies are highly qualified and ethical professionals. Indeed, multiple professional

[22] See *Rebuilding the structure*, Murray & Harris.

industry bodies such as ARITA, TMA, ABRT and the AIIP have professional codes of conduct and ethics and training requirements for members. However, there does appear to be a segment of the market that is operating without professional standards and is regularly giving unlawful advice about circumventing and frustrating insolvency laws and preying on directors who are under significant financial pressure.

Clear rules around what advice needs to be given by a registered advisor and what those registration requirements are is needed. We recommend below that the recent Safe Harbour report recommendations be implemented, and one of those recommendations concerns clarifying who can provide safe harbour advice. This is needed beyond just safe harbour engagements, with regulation needed for pre-insolvency advisors to promote access to quality information and advice for directors of distressed and insolvent companies.

TOR 2

Small business insolvency generally

Small businesses comprise over 95% of all businesses in Australia and are central to nearly all the various questions raised in the terms of reference. An initial difficulty is that "small business" is variously classified in the law – by industry type or financial turnover[23] or revenue or employee number[24] – but not in terms that the law of insolvency recognises, that is, whether the business operates through a sole trader or a company. For better or worse, insolvency law only looks at small business in terms of those legal structures, through which debts are incurred and assets held.[25] As to corporate structures, the ABS reports that 1.05m companies and 1.03m sole traders/partners comprise the bulk of businesses in Australia.[26]

Corporate insolvency law should start to look at small business insolvency from the debtor's operational perspective and not only at the form of legal structure used to run the business. Seeking to address the financial problems of an insolvent company is addressing only half of the problem if the financial problems of the directors (who are often owner-managers) are ignored. A solution that 'saves' the company but bankrupts the directors is unlikely to be attractive to directors who are responsible for most insolvency appointments. Furthermore, ignoring the overlap between personal and corporate finances in MSMEs means that unnecessary costs and complexities remain in requiring separate corporate insolvency practitioners and separate personal insolvency practitioners. Jurisdictions around the world are investigating combined proceedings for MSMEs that address the problems of the business and the family owners.[27]

In Australia, the insolvency of sole traders arising from their personal liabilities is dealt with under the *Bankruptcy Act*, and the insolvency of companies is dealt with under the *Corporations Act*. But even in relation to the insolvency of companies, there will be a significant proportion where the owner [shareholder] has incurred personal liabilities by

[23] The ASBFEO Act 2015 s 5 refers to under 100 employees or revenue under $5m. Section 6D of the Privacy Act 1988 refers to annual turnover of under $3m. The ITAA 1997 at s 328.10 refers to aggregated turnover of under $10m.
[24] And internationally, see for example *Guide on the Treatment of Insolvent Micro and Small Enterprises in Asia* 2022, p 13.
[25] Bankruptcy Act s 7; Corporations Act s 459A
[26] In 2021-22 sole traders increased by 90,239 businesses, or 12.7% to 798,209 in total. [see Counts of Australian Businesses, including Entries and Exits, July 2018 - June 2022 | Australian Bureau of Statistics (abs.gov.au)].
[27] See Riz Mokal et al, *Micro, Small and Medium Enterprise Insolvency: A Modular Approach* (Oxford University Press, 2018); Aurelio Gurrea-Martinez, 'Implementing an insolvency framework for micro and small firms' (2021) 30 *International Insolvency Review* S46.

way of giving personal guarantees, or otherwise incurring liabilities in their own name in support of the business. Tax liabilities or indemnities may also have been imposed on the owner personally. Some such liabilities may be owed by the owner to the company itself. Small corporate businesses therefore will not always be neatly packaged within their corporate structure.

While corporate insolvency law can deal with significant corporate liabilities, and that is what the terms of reference focus on, corporate insolvency does not resolve those personal liabilities, whether it be liquidation, Part 5.3A; or the new Part 5.3B.

The practical difficulty for a small business owner is that if there is some current financial slide in its operations, there is no one-stop-shop in insolvency law to try to remedy that. Insolvency law requires a two or more step process, a trustee as to personal liabilities, a liquidator as to corporate, and even then there is the further division between the directors' interests and the company's interests.

This can be compounded by business owners not having an accurate idea of how their business is set up. There may be blurred lines between corporate and personal assets and liabilities. The business owner will need to know where the liabilities come from and decide whether their personal insolvency or their company's insolvency is on the line, or both.

An IP registered as both trustee and liquidator will only be able to take a bankruptcy *or* a liquidation and refer the owner on to another firm. This is because of the strict independence rules in insolvency which sees the individual director and the company as separate legal entities.[28] There may have been unfair dealings or transfers of property or contested liabilities between the company and the director. There can be exceptions made for IPs to take both appointments in some cases, ordered by the court.[29]

Co-ordination/consolidation of personal and corporate liabilities of a business has been recommended for consideration internationally, by UNCITRAL and the World Bank. Other options include disallowing the enforcement of personal guarantees but that would have wider implications.[30]

The PJC inquiry itself could take a broad and more holistic view of how insolvency law should address "small business insolvency". The terms of reference do call for inquiry into the law's effectiveness in protecting and maximising value for general economic benefit.

The separation between corporate and personal insolvency has been raised as a productivity issue with the Productivity Commission, and with the government, both by the

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[28] See ARITA Code of Professional Practice; APES 330 – Insolvency Services.

[29] See for example *Application by Solomons* [2013] FCA 1273. New Zealand law goes further. It has both a government company liquidator and a government bankruptcy trustee, the Official Assignee, and in certain cases the OA can be appointed to both a bankruptcy of the director and liquidator of the director's company: s 241 Companies Act 1993.

[30] See also the recently launched International Insolvency Institute – Asian Business Law Institute, *Guide on the Treatment of Insolvent Micro and Small Enterprises in Asia,* at p 17*: "…*many jurisdictions in Asia do not provide an effective DISCHARGE of debts for individuals. Even if they do, a discharge of debts usually requires the commencement of a separate procedure. Therefore, as sole proprietors and shareholders/managers often act as guarantors for the debts of MSEs, there should be greater coordination between the systems of corporate and personal insolvency. Otherwise, honest but unfortunate sole proprietors as well as the shareholders of MSEs who guarantee the debts of the MSEs will not find the corporate insolvency framework appealing. In that case, they might minimise the risk of insolvency by reducing their levels of debt and risk-taking or postponing (if possible, even avoiding) the commencement of insolvency proceedings. Thus, value can be destroyed for the society if, for example, those forms of behaviour lead to suboptimal investment decisions or delay the response to a situation of financial distress, reducing the likelihood of promoting an effective reorganisation of viable MSEs and an efficient liquidation of non-competitive MSEs".[30]

ASBFEO.[31] As a matter of law reform, it would be difficult to simplify legally and conceptually and would require extensive consultation. The need to maintain proper standards of corporate business compliance and conduct is important, that any such reform may disrupt. But a small step would be to consider procedural co-ordination or consolidation of such proceedings, as UNCITRAL suggests. The use of the one court – the Federal Circuit and Family Court - for handling small business insolvency matters would assist. Moving personal insolvency policy to Treasury from Attorney-General's would also help.

Part 5.3B Corporations Act

The relatively recent introduction of Part 5.3B (Restructuring) in 2021 provides a procedure available to companies with less than $1 million in outstanding liabilities. Take up of the procedure has been slow, with few appointments (only 177 since 1 January 2021, compared with 313 in the first 6 months of Part 5.3A voluntary administration in 1993 alone and 2210 in the first 2 years of the procedure).[32]

There are several shortcomings of the Part 5.3B procedure that may be contributing to its low take up.[33] In particular, the maximum liabilities threshold of $1 million seems too low. The small business Chapter 11 procedure in the United States (Subchapter V of 11 USC) has a debt limit of US$2.7m, although during the pandemic this was temporarily increased to US$7.5m.

The prohibition on access to Part 5.3B where a company has not paid employee entitlements in full also cuts off a large proportion of small businesses from using the procedure. The restructuring plan should be allowed to include employee entitlements to be made up during the period of the plan, which would also require employees to be recognised as creditors under Part 5.3B (which they currently are not).

Simplified liquidation

We need not spend much time discussing simplified liquidation because it has only been used in 37 cases since it was introduced in January 2001. In our view, the procedure offers some cost reductions to a standard liquidation, but these are not sufficient to provide a meaningful increase to creditor returns. The timeframes in the procedure are very tight and the compliance reductions for liquidators are minimal.

There is a need for a streamlined insolvency procedure for low/no asset companies, but simplified liquidation can't effectively fulfil that role. Our recommendation is that this procedure could be replaced by an administrative procedure conducted by, or under the supervision and funding of an Official Receiver's office.

The unlawful phoenix reforms

These reforms include the creditor defeating disposition provisions (a type of voidable transaction that can be challenged by a liquidator), and a new power being given to ASIC

[31] See Submissions | ASBFEO.
[32] The VA figures are drawn from Professor Harris' dataset produced for his PhD thesis on voluntary administration. For Part 5.3B appointment data see ASIC Insolvency Statistics Series 2, Table 2.1 (28 November 2022).
[33] For a detailed discussion see, Jason Harris and Christopher Symes, 'The chimera of restructuring reform: An opportunity missed for MSMEs in pt 5.3B' (2021) 36 *Australian Journal of Corporate Law* 182 (Attachment B to this submission).

to issue administrative notices to recover assets that are creditor defeating dispositions. A similar power exists in personal bankruptcy law (under s 139ZQ of the Bankruptcy Act), but ASIC has not been active in issuing the notices. In our view the creditor defeating disposition provisions were unnecessary because Part 5.7B already contained a range of provisions to claw back transactions that were uncommercial or unfair. The problem was not a lack of legal power, but rather a lack of financial resources to bring proceedings. We recommend that legislative guidelines be produced to guide how ASIC uses the creditor defeating disposition power and that the power be extended to other forms of voidable transactions to assist with saving money in recover proceedings. In particular, we recommend that such guidelines impose a time limit on ASIC issuing the notice. Parties to commercial transactions should not be left in limbo as to whether ASIC will issue a recovery notice, which is punishable by a criminal offence if not complied with. A 12 month or 2 year time limit would seem appropriate.

Operation of the PPSA in corporate insolvency

The interaction of the PPSA with corporate insolvency is a complex issue that involves both policy, economic and legal factors. We note that the government's review of the PPSA undertaken by Mr Bruce Whittaker in 2014 has still not yet been responded to. This inquiry is not a suitable forum to be reconsidering that detailed review and its hundreds of recommendations. We suggest however that some small measures would be beneficial in corporate insolvency.

First, repealing ss 588FL and 588FM of the Corporations Act and leaving vesting of unperfected security interests as a matter for the Personal Property Securities Act 2009 (Cth) (PPSA) itself.

Second, we recommend implementing the Whittaker Review's recommendations to simplify the PPS Register registration process (by reducing the collateral classes) and to reform the system of amendment demands so that asset sales in insolvency are not held up by frivolous and vexations registrations that are not based on perfected security interests.

Third, we support the Whittaker Review's suggestion to harmonise grantor registration details involving trusts so that ACNs are used, which would address the ACN/ABN errors that have taken up much court time.

Last, if s 588FL is not repealed, we recommend that the law be amended to ensure that security interests granted by insolvency practitioners are not automatically invalidated by s 588FL which requires a court extension of time prior to executing the agreement (which is just a waste of time and money that serves no one's interests).[34]

TOR 3

Preferences

The right to recover a preferential payment to a creditor is fundamental in insolvency law. The rationale for it is that the creditor has "jumped the queue" in obtaining payment of its debt and it should repay the money and stand in line with other creditors. Preferences are therefore supposed to promote "equality among creditors" and to deter a "race to the courthouse".[35] While these appear valid reasons, for one thing, the demand and receipt by

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[34] For a discussion see Jason Harris, 'Giving security after insolvency and PPSR extensions of time' (2020) 34(1) *Commercial Law Quarterly* 18.
[35] See Murray and Harris, *Keay's Insolvency,* Thomson Reuters, 11th ed, 2022, [5.135-5.140].

a creditor of what is later found to be a preference, even if with full knowledge of the debtor's insolvency, is not unlawful. It is simply a payment liable to be set aside when, or if, the person goes bankrupt within the requisite time period and when other requirements of the law are satisfied by the trustee. In *Nationwide v Franklins* [2001] NSWSC 1120 at [9], the court said:

> "There is nothing compelling a creditor somehow to remain pure by shunning a payment in respect of which there exists some theoretical future possibility of its proving to be preferential. A normally motivated creditor would be inclined to accept such a payment conscious of any risk of disgorgement, and with fingers crossed to the extent indicated by the circumstances."

The creditor, from whom the trustee or liquidator recovers a preference, is then permitted to lodge a proof of its debt in the bankruptcy: s 122(5) BA; s 588FI(3) CA.

Importantly, and this goes to our threshold issues, with funds so limited in many insolvencies, we suspect that many preference claims are made to recoup the liquidator's fees. Indeed the courts endorse that, the court in a preference recovery case saying that:

> "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 in liquidation, if liquidators could not recover their remuneration or litigation funders could not recover the funding which they provided".[36]

While that is not unlawful or even inappropriate, it does not directly support the policy basis of sharing all the funds among the creditors. Also, litigation to recover preference claims can be expensive thereby only large claims might be pursued. Also recovering money from creditors whose debtor has gone into liquidation creates ill will. The law has in fact placed a $30,000 limit on the recovery of preference recoveries in the simplified liquidation process.[37]

Finally, we re-emphasise that the recovery of money for fees through preference claims confirms the limited funds available in many insolvencies.

Trusts with corporate trustees

This is a complex issue, and any reforms would need to take into account how the changes may affect the operation of non-commercial trusts (such as charitable and non-express trusts). We note that the 1988 Harmer Report recommended amendments to corporate and trust law to address the problems posed by commercial trading trusts and insolvency. We endorse those recommendations. We also endorse the submission of the Law Council of Australia, which has made several detailed submissions to Treasury regarding how to adequately address the problem. In short, many trading trusts enter insolvency with minimal assets but many trust deeds remove a trustee who becomes insolvent which turns the trustee into a bare trustee who is unable to deal with the trust assets, even if the trustee has a right of indemnity against the trust assets. This requires the trustee to seek a court appointment as a receiver for sale, but this may cost $20,000 or more to obtain, and many of these trusts have not much more than that remaining. It is perverse that the cost of seeking power to administer the assets will itself exhaust the assets. No one's interest is served by this state of the law. While we endorse the recommendations in the Harmer Report and the Law Council submission, at a minimum

[36] *Re Cardinal Group Pty Limited (in liq)* [2015] NSWSC 1761 at [34].
[37] Corporations Regulation 5.5.04

we strongly recommend amending the Corporations Act to make it clear that external administrators appointed over a company that has been acting as trustee and has a right of indemnity available against the trust assets should be able to deal with those trust assets as property of the company using their statutory power of sale under the Corporations Act (see for example, s 477).

Insolvent trading safe harbours

We note that there has been a detailed review of the safe harbour for company directors against insolvent trading liability in s588GA. We recommend that the committee endorse the implementation of the recommendations from that report.

International approaches

There are many lessons that could be learned from the insolvency law of foreign jurisdictions. As a starting point it is important to consider how the jurisdiction wishes to balance the interests of debtors and creditors, how secured creditors are treated prior to and during insolvency, how government debts are treated in insolvency, how employee claims are dealt with and who has the power to administer insolvent estates. These are big policy choices that require extensive consultation. For example, Australia could move to a broad-based debtor-in-possession regime (beyond what currently exists under Part 5.3B) but this would require a conversation about the role and powers of creditors, the capacity of debtor company management and early warning signs for financial distress. It is difficult to cherry pick particular measures in foreign insolvency regimes and implement them in Australia, because insolvency law is enmeshed within the broader commercial, financial and legal system so that one change can have unintended ripple effects throughout the economy.

We recommend that the Committee consider the streamlined insolvency measures that have been implemented in Singapore and India, as well as no-asset procedures in New Zealand and the UK. Informal, out of court and non-external administration procedures are becoming more popular around the world as a recognition of the low/no asset status of many insolvent debtors means that the cost of external administration (at least by a private profession) can't be justified. This is why we advocate for a greater role for government in corporate insolvency through an Official Receiver's office.

International norms and principles

At a more general but important principles-based level, international agencies of which Australia is a participant member gave particular focus to insolvency law during the period of disruption caused by the virus. The *World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes*, 2021[38] and the *UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises* 2022[39] both offer guidance on laws for MSE insolvency, as does the recently launched International Insolvency Institute – Asian Business Law Institute, *Guide on the Treatment of Insolvent Micro and Small Enterprises in Asia*.[40] In particular UNCITRAL offers guidance for its member states on laws concerning the insolvency of MSEs with particular focus on prompt, accessible and quick resolution of

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[38] Principles for Effective Insolvency and Creditor/Debtor Regimes, 2021 Edition (worldbank.org)
[39] UNCITRAL Legislative Guide on Insolvency Law for Micro- and Small Enterprises
[40] *Guide on the Treatment of Insolvent Micro and Small Enterprises in Asia* 2022, Principle 1. The Guide includes Australia and New Zealand in Asia. < https://abli.asia/ >.

their financial difficulties either by way of a restructuring or by a prompt liquidation. Any reform of Australia's laws should at least be measured against the principles in these guidelines.

Importantly, UNCITRAL also gives guidance on insolvent assetless companies, being those businesses that have traded to a point where they are insolvent with few or no remaining assets. The question that then arises is as to whether these require regulatory attention or whether they might simply be allowed to be deregistered. For two reasons UNCITRAL considered that they need attention according to certain principles.

Principles concerning assetless companies

We have explained that a significant number of small companies that may well be insolvent are simply deregistered by ASIC by a default process available under s 601AB of the Corporations Act. his number appears to be increasing.

There are two particular reasons given by UNCITRAL why such companies, even though apparently assetless, should receive some regulatory attention rather than being permitted to fade away by default.

The first is that the lack of assets may be by design, that is, the assets may have been transferred prior to the company's "failure" for use in a new business leaving the old business and its debts behind, sometimes called phoenixing. Or two, the assets may have genuinely depleted such that there is none remaining and no remuneration available for a practitioner to wind up the enterprise, despite the desire of the directors, or the creditors, including employees.

UNCITRAL advises that although there may be no remaining assets, the state should nevertheless play a role in oversighting and as necessary investigating or assisting these assetless companies. In the case of phoenixed companies, it goes against the integrity of the regime and business confidence generally to allow a business to deplete itself of assets and thereby make it difficult for its creditors to recoup their losses. On the other hand, if there is a genuine loss of or run-down of assets by the business there should be an avenue available for the directors to wipe the slate clean and attend to creditors and employees by way of liquidation before any final disposal of the company.[41]

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[41] Those two important policy issues involving assetless insolvent companies are identified and explained by UNCITRAL in this way.

"[73] …. 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 with no fear of investigation or the application of avoidance provisions or other civil or criminal provisions of the law.

[74]. A mechanism for administration will assist in overcoming any perception that such abuse is tolerated and may provide a return for creditors where antecedent transactions can be avoided, as well as a means of investigating the conduct of the management of such debtors".

The guide gives positive reasons also:

"It may also encourage entrepreneurial activity and responsible economic risk-taking through the provision of a discharge and fresh start for entrepreneurs and others engaging in economic activities—the punitive and deterrent aspects of insolvency laws will be less appropriate where the debtor is honest. For example, where an application to commence insolvency proceedings might otherwise be denied, some insolvency laws provide an exception for individuals with insufficient assets to fund the administration of proceedings, enabling the affairs of that debtor to be investigated to determine if there are assets that can be recovered and whether the debtor should receive a discharge".

It is for that and related reasons that we are suggesting that a government role or government funded role be provided for assetless companies.

UNCITRAL offers mechanisms[42] for pursuing the administration of such estates including levying a surcharge on creditors to fund the administration; establishing a public office or using an existing office, (such as an Official Receiver); establishing a fund out of which the costs may be met; or appointing a listed insolvency professional on the basis of a roster or rotation system.

In that last example, the guide suggests the IP be paid a prescribed fee by the State or the costs be borne directly by the IP and cross-subsidized by their other matters, with their remuneration rates being adjusted accordingly.

TOR 4

Supporting business access to advice

We recommend that greater attention be given to supporting business managers well before the tipping point of formal insolvency. Many small businesspeople lack the financial management skills needed to monitor their financial position which means that they only face up to the problems of the business after it is too late, such as when the ATO issues a director penalty notice or a garnishee notice. We strongly endorse the policy proposal by the ASBFSO to introduce a “business viability review voucher” so that small businesses can get access to quality advice at an affordable price. An ounce of prevention is worth a pound of cure.

TOR 5

The role, remuneration, financial viability, and conduct of corporate insolvency practitioners etc

The role of the insolvency practitioner is central to the operation of any insolvency regime. It has been said that the two pillars of insolvency are the practitioners and the courts.[43] For that reason the nature of the role, the clarity of their powers and duties and the expectations of conduct are each important. These are contained in the law itself, in court decisions and in codes of conduct such as that of ARITA And APES 330.

We consider that in most respects those powers and duties are clear although the expectation of practitioners in relation to unremunerated estates needs to be clarified.

This is not to say that we accept that all of the duties imposed on a practitioner are valid. As we say in *Keay’s Insolvency*,[44] “neither insolvency law nor its practitioners are the panacea for the losses and other harmful outcomes that can occur when a formal insolvency is invoked”. Yet some seem to:

> “expect the insolvency practitioner … to act as a protector of the insolvent company or individual, as an asset recovery agent and asset protector, a commercial investigator and problem solver, a public inquisitor, and then, as needed, a distribution agent … [with the practitioner] expected to do this with limited or, in some cases, no funds, or where funds

[42] At [75].
[43] “In the field of insolvency there are two actors whose integrity and expertise are central to the functioning of the insolvency system: judges and administrators’: Westbrook, Booth, Paulus and Rajak, *A Global View of Business Insolvency Systems,* The World Bank and Brill, 2010, at 203.
[44] At [1.170].

> are available, in the knowledge that these expenses compete with funds which the creditors might see, unrealistically, as theirs".[45]

Our argument is that these unrealistic expectations of the system and its practitioners, are exacerbated by a failure to recognize that many of the tasks of an insolvency practitioner are conducted on behalf of the state, being in the nature of public interest duties. These should be either recognised financially or carved out from the IP's responsibilities to be performed by a public officer. That issue goes to the financial viability of IPs in that the figures we have extracted indicate that in a high proportion of matters liquidators are administering estates in effect for free because there are no funds available to pay their remuneration.

We also note that a new registration and disciplinary regime was introduced in 2017 with a review due in five years' time, that is, 2022.[46] While we don't raise any particular issues here about the regulation of practitioners by ASIC, we do consider that it is inefficient for insolvency practitioners to be regulated both by ASIC and by AFSA in particular where practitioners are one and the same. This is also unsatisfactory given that the Insolvency Law Reform Act 2016, which followed several prior inquiries into ASIC and insolvency,[47] introduced harmonised processes, to the extent possible, between corporate and personal insolvency, which at present are regulated in different ways by each of ASIC and AFSA. Any review of insolvency practitioner regulation should consider whether joint regulation would be desirable. We also note that regulation was delegated in part to a large number of industry bodies who in the five years operation of the new regime appear to have taken no part in the regulation of practitioners; their role may need to be reconsidered.[48] We note also that a broader scope of experience and qualifications was introduced for small business practitioners but that at our last inquiry only one had been so appointed. There would be merit in reconsidering the qualifications and experience required of an insolvency practitioner in order to broaden the perspective of those administering the process on behalf of such a wide range of businesses and individuals in very much a novel 21st century environment.

TOR 6

The role of government agencies in the corporate insolvency system

Our threshold position is that the state should take a more prominent role in relation to the establishment and operation of the insolvency regime. That is the case in particular because of the inherent limited funds available for the private sector to provide the services required. Also, many of the purposes and tasks in insolvency are inherently the role of government; for example regulation and prosecution of offences. It is for that reason that we have recommended an official receiver role comparable to that in personal insolvency although with an overarching responsibility over the two regimes.

Beyond that there are a number of government agencies involved in insolvency administration apart from the two regulators ASIC and AFSA. Other government agencies involved are largely creditor based and include the ATO the Fair Entitlements Guarantee scheme (FEG) and other miscellaneous government bodies; for example, the ACCC in

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[45] *Keay's Insolvency,* p 32.
[46] Explanatory Memorandum to the Insolvency Law Reform Bill 2015.
[47] See J Harris, 'Corporate Insolvency Law Reform: Reframing the Dialogue' in Sheelagh McCracken, Shelley Griffiths (Eds.), *Making Banking and Finance Law: A Snapshot*, 2015, Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney University, pp. 53-76.
[48] Michael Murray, 'Bodies everywhere - the role of professional bodies in regulating insolvency practitioners' (2018) 17 & 18 BCLB [351].

relation to consumer law or liabilities for other such breaches. The fundamental position of insolvency law is that the government is an ordinary unsecured creditor unless the law dictates otherwise. The ATO was removed as a priority creditor some decades ago but in its place it was given direct rights of claim against directors of companies and it has some other protected arrangements in respect of preferences and the like.

Its main focus in insolvency is that it is reportedly the main instigator of winding up applications against companies for unpaid taxes and hence the most significant creditor in liquidations including at meetings of creditors. Our comment about the ATO probably goes beyond the nature of this inquiry but the large accumulated unpaid tax date is a problem in insolvency. Tax liabilities are usually the most significant debt in any insolvency and the amount and time over which they have accrued can result in other creditors being "swamped" by the ATO liability. The general approach in any insolvency regime is for early action to be taken by companies in relation to their liabilities and delayed action by the ATO does not help that process.

Australian Small Business and Family Enterprise Ombudsman (ASBFEO)

As to the ASBFEO, his office performs a very useful role in bringing together the disparate range of businesses falling within the small business sector. They identify particular common issues among businesses, irrespective of the type of business involved. In that respect and as defined in the legislation he looks at a business as an economic entity not as one divided between sole trader and company.

As we have explained, the distinction between corporate and personal insolvency in relation to small companies is increasingly less relevant. It seems for that reason that the Ombudsman has made submissions that both corporate and personal insolvency should be better aligned in order to accommodate the realities of how small business operates.

We also note that the ombudsman is now located within Treasury along with the Tax Office and ASIC and it is in the context of that alignment that we suggest that bankruptcy also move to Treasury.

ATO

While the priority in insolvencies of the tax office was removed some decades ago it was replaced to an extent by particular remedies against the directors of the company. The "director penalty notice" is one example and the indemnity required to be given by directors under section 588FGA is another. The concern we have is that tax liabilities appear to accumulate to a considerable degree in the SME sector resulting in a large claim being made by the tax office when the company fails. Insolvency law can only do so much by way of recouping creditors their losses in particular if the creditor allows a debt to accrue over a period. We appreciate that this is a matter of tax law not insolvency law, but the reality is insolvency law has to pick up the pieces of whatever law applies to the insolvent company.

We also note that the mix between priorities under the tax law and priorities under the insolvency law are often in conflict. This is despite both tax and corporate insolvency coming within the one department. A process should be in place to ensure that there is communication if changes to the tax law would impact upon insolvency law. The principle of equal sharing, or *pari passu*, in insolvency law is fundamental. However, it remains subject to the legislature elevating certain groups, for example employees, and thereby FEG, above unsecured creditors. When this is done, including in the tax context, the law should be clear, including as to the policy reasons for the change; and the priority of the remuneration of the IP should not be compromised without a clear basis.

FEG

FEG is a creditor in many estates because it pays certain entitlements to employees' unpaid at the date of the liquidation and then stands in their shoes as a creditor: s 561, 556 Corporations Act. Employees and therefore FEG have priority over circulating assets of the company – such as work in progress payments, receivables etc - and the liquidator must take care to use such assets with that priority in mind. There is coupled with uncertainty as to the extent of the priority of the liquidator's remuneration.

Historically, the priority dates back to the 19th century when employees were given priority for their wages over floating charge assets of an insolvent enterprise. The juggling and calculations required of a liquidator in administering a trade-on of the company's business, using circulating assets, can be difficult and has the potential to lead to disputes; this is so in particular when there is a Part 5.3A administration, where FEG/employees have no priority, followed by a liquidation, where the priority arises.

We suggest that the law be clarified by way of law change or regulatory guidance as to the expectations of external administrators in relation to the use of circulating assets and their proceeds to fund trade-on activity. Given that remuneration is also subject to legal uncertainty, we suggest that its position be secured, in order to provide clear priority to insolvency practitioners for payment of their remuneration and expenses. Ultimately, we suggest the PJC take submissions on alternative bases for securing priority payments to employees, that are more certain and less prone to dispute.[49]

The Courts

While the courts are vital to the operation of the insolvency regime, the costs and time involved in seeking court approval for certain actions must be weighed against the benefits. IPs themselves exercise significant quasi-judicial authority and their decisions are subject to court review.

As an example, we suggest that consideration should be given to replacing the requirement for court applications for extensions of time under s 439A of the Corporations Act with an administrative process or alternatively a default approval process. Similarly, there should be no need for IPs to seek court approval for entry into a funding agreement or compromising a debt: see s 477(2A)(2B). Such court approvals are not required for trustees in bankruptcy in identical situations under the *Bankruptcy Act.*

TOR 7

Corporate insolvency covers an extensive field of law and range of interests, one in particular being the duties of directors of an insolvent company and their enforcement. At the same time, there is a balance needed to ensure that genuine failure of a business is not penalised, and that there are no unreasonable impediments to further entrepreneurial efforts. We endorse the recommendation from the Safe Harbour review report that a broad review of director liability laws should be undertaken.

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[49] Fully discussed in The Protection of Employee Entitlements in Insolvency, MUP Academic, H Anderson, 2014, including as to international precedents.

Part 3

We do not add further to this submission but do suggest that Chapter 1 of our textbook, *Keay's Insolvency*, 11th ed, 2022, provides much of the views we would otherwise offer to this Committee.

Beyond that, we are available to assist the committee further as needed, in hearings or as required.

Michael Murray

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Bulletin

ATTACHMENT A

Rebuilding the structure of the Australian insolvency system

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As many have commented, including ourselves, it has been well over 30 years since the last major inquiry into insolvency law in Australia, resulting in the Harmer Report of 1988.[1] That has led to calls for a further inquiry, in particular in light of what is a different commercial and social world, in another century.[2]

It is important that any such review not be too narrow in scope, to focus solely on improving the existing law. The review needs to evaluate the system or structure within which the existing insolvency law operates, and its resourcing and funding, in order to ensure that there are sufficient means to apply whatever law reform recommendations are made. That is where we suggest that the current structure, most of which dates back to the 19th century (and some of which goes back all the way to the 1500s), is deficient. It is argued that the current system involves market failure and requires a greater role for government — the state — for the system to operate efficiently and effectively. We suggest a government Official Receiver role, but newly designed to meet the needs of a reformed insolvency law system.

The focus on resourcing is important because an insolvency regime presents particular practical and commercial issues that need to be acknowledged and addressed in any law reform. The nature of the public and private interests served by insolvency is an overarching issue, and who is to be responsible for those, respectively. Insolvency inherently involves limited funds, which although limited, are intended to be available for the creditors, but only after the costs of the administration of the insolvency are paid. Those costs must bear not only the work done in attending to the private interests of creditors but also the public interest demands of insolvency, in particular of investigating misconduct and maintaining the integrity of the system.

There is not enough money to go around

In that regard, what statistics are available reveal that there is not enough money remaining in insolvent estates to properly fund the costs of administrations, let alone pay dividends to creditors.[3]

An Official Receiver role across both corporate and personal insolvency would address what we say is a market failure with the current system. Among other concerns, that role would address another issue, the high cost of access to the insolvency system for debtors and creditors in corporate insolvency.

Allocating responsibility fairly between public and private interests

It is initially important to acknowledge that insolvency needs to deal with both public and private interests. The nature of those interests and who attends to them and who should bear responsibility for them must first be examined and balanced appropriately. The approach to clarifying those respective responsibilities in insolvency has been explained as being that "private functions should be performed by the private sector and paid out of funds otherwise available for distribution among creditors, while public functions should be performed by public officials and paid for out of public funds . . .".[4]

To a large extent that is a useful division subject to the various overlaps of functions that inherently exist; for example, while investigation of misconduct may be seen as a public role, it may well also serve to recoup money for creditors. However, that overlap can also exist by default, because the separation between public and private functions has not been understood and applied in past law reform.

The need for public funding of various public functions of insolvency is relatively uncontentious in relation to the system of courts, a public register, and relevant laws.[5]

Beyond that, the problem is not that there are insufficient resources to administer the system, with both an experienced private insolvency profession in Australia and a government staff with varied experience in insolvency matters. It is the allocation and delineation of responsibilities within that system that we suggest need rethinking and readjustment.

An initial law reform inquiry

To begin the process of law reform it is important to assess what work is actually needed in insolvency matters in terms of principle rather than what work is required to be done as the present law requires. Some tasks the law requires may no longer be necessary — we query, as we explain, the high level of attention the law requires to be given to informing creditors; other tasks may be needed — greater attention to and access for assetless businesses.

In parallel with that process there is a need to consider how or whether there is a structure within which those tasks can be resourced and executed. The traditional approach of examining the regime as a series of component parts — winding up, voidable transactions, examinations, discharge etc — can be best assessed only once a viable structure is built that is adequate to support the interests of the various parties, and the community, using it or seeking access to it.

Initial data

As many inquiries have said before,[6] Australia lacks good quality data on the operation of Australia's insolvency system, which is all the more unsatisfactory given the quantitative nature of much of the data needed. What limited data we ourselves have extracted gives us cause for concern, suggesting, as we have said, that funds are limited, that many public interest tasks are performed by the profession and charged to creditors, and that the access to the system is limited.

For example:

- A 2013 study showed that liquidators conducted unfunded work in external administrations to the value of over $48m annually.[7]
- 92% of external administrations pay no dividend returns to creditors.[8]
- A high proportion pay no remuneration to the liquidator at all[9]
- Around 58% of companies that enter liquidation have less than. $10,000 in assets, and 37% of companies have no assets.[10]
- A study of reports to creditors in voluntary administration revealed a mean dividend estimate of just 5.5c in the dollar.[11]
- A 2020 AFSA report showed that 31% of bankrupt estates handled by private trustees paid no remuneration.[12]
- Dividend returns to creditors in bankruptcy are in the order of 1.6 cents.[13]
- Five or more times as many companies are deregistered by default, through s 601AB of the Corporations Act, as are deregistered following an external administration.[14]
- Liquidators refer over 4,000 statutory breach reports to ASIC each year, and trustees in bankruptcy refer a similar proportion.[15]

Drawing on these figures, it is apparent that much of the work in insolvency is performed by the private profession to the extent that is commercially feasible, which involves accepting a certain proportion of risk-based non-paying estates. While there is little other information on that deficiency, it seems to be inherent, with a 1979 inquiry finding that 70% of court ordered liquidations were "unremunerative" or assetless.[16]

This suggests that, on a commercial basis, practitioners' unpaid costs are recouped from other high value estates — through cross-subsidisation,[17] otherwise known as "swings and roundabouts"[18] — which was said to be the system that supported the long-established official liquidator role.

It was through concern about decades of cross-subsidisation that the government in 2017 abolished the role of official liquidator, on the basis that liquidators should not have to do unfunded matters. Creditors would need to fund liquidations, although it was accepted that this may result in more assetless companies by-passing the system.[19] Whether that outcome has occurred is yet to be analysed.

That did not expressly address voluntary liquidations, which Treasury raised in later proposals in the context of proposed reforms to deal with unlawful phoenix activity. Its two proposals were:

i. to provide access to government funded liquidators on a cab rank system for voluntary liquidations of low or no-asset companies to "replace the current widespread practice of directors indemnifying registered liquidators for their costs";
ii. to establish a government liquidator to conduct a streamlined external administration of SMEs with the option of appointing a private registered liquidator if circumstances warranted it.

Neither proposal proceeded further with the matters left to the market.[20]

The apparent outcome is well explained by Professor Helen Anderson, referring to losses to creditors from abandoned companies, being those where the directors have not initiated any form of external administration, that ". . . both employees and general unsecured creditors . . . are in a difficult position. They will need to fund the company's liquidation themselves if they hope to recover anything of what they are owed, and risk further losses if it eventuates that company has no assets. As a result, many of these creditors do nothing, and the abandoned companies are eventually deregistered by ASIC for failure to return documents or pay annual fees".[21]

A director of a company that is insolvent may literally just abandon the company and start again in a new company. There are risks in doing so, in particular where there are unpaid tax liabilities.[22] Anderson found that five times as many companies are deregistered by this default process as those which proceed through an external administration. The suggestion is that they are insolvent entities that can't be wound up because they have no funds to do so, or because their directors do not want the scrutiny of their possible phoenix use of the company.[23]

That data is disconnected between corporate and personal insolvency, for example as to the extent of directors' personal insolvency arising from corporate failure. That would most likely show that the corporate vs non-corporate distinction in assets and liabilities is often blurred for small firms, through personal guarantees and other such liabilities, to the extent that it has been said that it is personal insolvency regimes that are often the more relevant for small businesses.[24] AFSA now usefully gives some data about what it terms business bankruptcies.

Initial law reform ideas

The limited data referred to on which we rely is relatively accessible on public databases. While there is much more that could be obtained, we draw some basic law reform conclusions from that data, indicating where structural reform seems to be needed, and a government role, some of which are these.

Too much attention given to unsecured creditors?

First, we query the attention given by the law to unsecured creditors in insolvencies, in particular since the Insolvency Law Reform Act 2016 which set up additional reporting, inquiry and authorising roles for creditors. As the basic figures show, unsecured creditors rarely benefit financially in any insolvencies. While insolvency serves creditors' purposes more than by way of any dividend return, we say that too much time and effort is required to be done by the practitioner notionally on their behalf. Not only is that inefficient, but it leads to an expectation gap that can produce negative consequences.[25]

To some extent, developing information technology (IT) mechanisms and government portals should replace the report-based approach of informing creditors, and mitigate the costs involved,[26] although that is as yet some time away.

Offence reporting over-emphasised?

Second, a significant number of offence investigations and reports are conducted by liquidators and trustees, and, as we have said, funded from moneys otherwise available for creditors. What might have been a general concern about abuse of limited liability in times past may not apply today, or at least should be reassessed, including in light of other better detection and enforcement mechanisms.[27]

In any event, this is a public interest task, that should be publicly resourced. Subject to any law reform finding, that may properly lead to a more refined and more co-ordinated risk-based approach to be taken, again, using artificial intelligence (AI) and IT resources.

Administration or oversight of assetless insolvent companies?

Third, the large number of companies that are simply deregistered by default of compliance with the law brings into focus the question whether all companies, including ones that are insolvent, should be formally wound up or overseen to some extent, or whether that process can be left to the creditors and the debtor, as at present. We ourselves do not see the need for an insolvent company to necessarily be wound up, if some lesser process is suitable.[28]

We acknowledge that over decades and in practice many companies with no or low assets are nevertheless accepted for winding up by the private sector. But the extent to which companies were not wound up because of costs can't really be known though the large number of companies being deregistered by default was identified as a concern back in at least 1995. The then ASC's research paper into phoenix activities and insolvent trading reported that around 92% of Phoenix companies were deregistered by default.[29]

This needs attention, if only initially to oversight and gather data on what comprises these large numbers of deregistered companies, an early task for the Official Receiver.

National interest insolvencies

As a further example, while we have examined whether an Official Receiver is needed for what might be seen as national or public interest insolvencies, we leave open the option of this being developed. As a precedent, in the UK, the Official Receiver is the liquidator of British Steel,[30] with its extreme environmental and health risks; of Thomas Cook, the failure of which called for the largest peace time repatriation of British citizens; of Carillion Constructions, which had extensive government contracts for the construction of schools and hospitals; and most recently a failed electricity supply company on whose electricity supplies local authorities depended.[31] In each case, the Official Receiver was appointed by the court with large private firms appointed as special managers to handle the work under the supervision of the Official Receiver. That default option is not available in Australia.

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A new official receiver role

While there is more data to be extracted and explained, we say that on financial and policy bases the role of government must be extended beyond providing the court and register infrastructure. An official receiver in corporate insolvency is required, as there is in comparable jurisdictions — the UK, New Zealand and Singapore — but with an extended role.

Policy debates at the end of the 19th century in England resolved the proper role of the state, following unsatisfactory periods when the law put creditors in control. Official Receiver roles were created in both personal and corporate insolvency.[32] New Zealand went through a similar process of deciding upon the need for such a role with its Official Assignee,[33] as did Singapore in more recent times.[34]

At federation, in 1901, Australia did not appear to reject such a role as to find that the new federal structure and its perceived constitutional limitations prevented a national corporations law.[35] Australia readily adopted the need for an Official Trustee role in personal insolvency. Australian states instead relied upon the "official liquidator" role in their different corporate law statutes or over a century, providing in effect pro bono services to the courts. This continued under federal corporations law before the government accepted, in 2016, that it no longer remained appropriate.[36] Nothing was offered to replace it beyond the continued laissez-faire reliance on the market.

While those overseas jurisdictions offer useful models, we see the role as more expansive than, as in the UK, confined to court appointed liquidations. At the same time, we would not go so far as New Zealand in having bankruptcies administered only by a government Official Assignee.[37] Singapore's structure, which is the result of a relatively recent review which considered Australian law, among others, is also instructive.

An important feature of the model we suggest for Australia is that the official receiver should have authority over the insolvency system as a whole, with a view to removing much of the duplication and inconsistencies that exist between the separate personal and corporate insolvency systems in Australia. Also, with greater recognition is being given to the intermingled nature of small business personal and corporate debt, and the need for insolvency law to provide coordinated holistic solutions,[38] the official receiver could play a role in the development of insolvency law to address such cases. Certainly, better processes for dealing with the insolvency of small business would be a significant issue for any law reform inquiry.

The official receiver, or whatever appropriate name it might be given, would have a number of diverse functions of the nature of those within AFSA — an administration role, registration and oversight, investigation and regulation, and data collection and analysis. Such an agency would:

- enable a complete collection and oversight of all insolvencies;
- provide a filtering or triage process to give attention to those estates requiring attention and those that, on a risk analysis basis, do not;
- more clearly delineate the role of the state and the role of the private profession and the consequent charging of remuneration;
- allow for better regulation of IPs and the system itself, through the provision of appropriate rules, guidelines and also in a more direct manner, by supporting the various tasks and responsibilities of insolvency practitioners that are conducted in the public interest;
- allow more comprehensive data to be collected in order to better assist the law reform process.

No doubt other relevant tasks could be assigned.

An official receiver or a public fund

We acknowledge a threshold issue raised by the Harmer Report and others against the creation of a public office to deal with assetless insolvent companies. Harmer recommended an assetless companies fund be created which would address the costs involved for both the petitioning creditor and the liquidator on the winding up of a company.[39] In principle, we would ourselves be recommending that any public office created would be funded in some similar way to that suggested by the Harmer Report.[40] It may well be that an official receiver role would in fact enlist the private profession. But even under the Harmer proposal, there is the need for a public office to administer the public fund — to set priorities, gather data, and pursue misconduct.

Public v private — capability

We have noted an initial industry response that the private profession is more capable than the public sector in conducting insolvencies and should be funded to do so. In essence, the questions we raise are not so much about capability, as about appropriate allocation of public tasks and their funding. Nevertheless, as to capability, we do not accept or we reject unsubstantiated views about the relative merits of the private and the public sectors. Government is not inherently incapable of performing some of the tasks currently untaken by the private profession, nor is the private sector inherently incapable of performing public tasks. Cooperation and partnerships between the public and private sectors are

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also possible to help fund and perform the necessary work. Much also depends on the nature of the public and private tasks allocated.[41]

The reality of any change

Any law reform should acknowledge the expectation gap in insolvency, confirmed as it may be by the data collection exercise we suggest. Importantly, any proposed law reform should not reinforce that gap, rather, the limits of what insolvency can achieve in financial terms need to be explained, and costs and benefits assessed.

We ourselves do not necessarily say that any greater role of the state would lead to, for example, greater return to creditors. The reasons for the limited outcomes for unsecured creditors may be based on other changes in the economy and in society — for example, the move from "bricks and mortar" to intangibles in business.

Rather, our aim is to readjust and reallocate tasks and responsibilities. The present system does not sufficiently delineate the public and private purposes of insolvency such that the work involved, and whose responsibility they are, is unclear, and the costs allocation is opaque. One aim is to at least reveal and clarify the true position.

Law reform data

We have emphasised the need for current and comprehensive data both in relation to the structure and in relation to the utility of many of the recovery and investigative processes upon which insolvency law relies. Unfortunately, the 2010 recommendation for a body to gather and analyse insolvency data was never adopted[42] although there is potential for the new Australian Business Register to assist, and the Small Business and Family Enterprise Ombudsman.

While much data lies with government, more again lies with the private sector itself in the actual files of matters administered. Extraction and publication of that data would much assist any insolvency law reform process. We also consider that a broader input from other disciplines beyond law is needed, information technology, economics and the social sciences being some.

In the meantime, we are continuing to examine and produce ideas for what we say is a need for rethinking Australian insolvency law to ensure it is accessible and efficient and resourced appropriately.

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Footnotes

1. General Insolvency Inquiry, ALRC 45.
2. *The Changing Face of Law Reform in Australia: Commentary on the ALRC's Inquiry into Insolvency, its contribution to the current legal framework and the need for a new review given the passage of over 30 Years,* Justice Sarah Derrington: www.alrc.gov.au
3. See ASIC, Insolvency Statistics Series 3.3 — External administrators' reports time series for 1 July 2004–30 June 2017, December 2017.
4. P Heath, *Insolvency Law Reform: The Role of the State* (1999) NZLRev 569 ["Heath, the Role of the State"].
5. Heath, The Role of the State.
6. Submission to the National Data Commissioner of the writers and others of October 2019: see 27.pdf (datacommissioner.gov.au)
7. *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].
8. *Corporate Insolvency by the Numbers*, J Harris, 27 February 2018 — www.australianinsolvencylaw.com
9. *Corporate Insolvency by the Numbers*, J Harris, 27 February 2018 — www.australianinsolvencylaw.com
10. ASIC, *Insolvency Statistics: Series 3, Initial External Administrators' Reports*, Series 3.3, 2019. This report has since been discontinued.
11. Mark Wellard, 'A review of deeds of company arrangement' (2014) 26(2) A Insol J 12.
12. *Remuneration in the personal insolvency system*, 4 March 2020 www.afsa.gov.au
13. AFSA Annual Administration Statistics, 2020–2021.
14. *Insolvency — it's all about the money* (2018) 46(2) Federal Law Review 287–312, H Anderson ["Anderson, It's all about the money"].
15. ASIC Annual Report 2020–2021, *table 6.2.4*. AFSA Enforcement statistics July 2021 to March 2022.
16. *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'.
17. Ex Memo IRLB at [9.52]–[9.53].
18. Explained in *Re Greater West Insurance Brokers Pty Limited* [2001] NSWSC 825
19. Ex Memo ILRB at [9.137].

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20. *Combatting Illegal Phoenixing*, Treasury, September 2017
21. Anderson, *It's all about the money.*
22. See also RI Barrett, *The Plight of a Creditor of a Deregistered Company* (2022) 39 C&SLJ 73.
23. *The Protection of Employee Entitlements in Insolvency*, H Anderson, Melbourne University Press, 2014, at p 94.
24. *Design of insolvency regimes across countries*, OECD CO/WKP(2018)52, M Adalet McGowan, D Andrews, 6 September 2018
25. Mind the Insolvency Gap: Lessons to be Learned from Audit Expectations Gap Theory *(2014) 22 Insolv LJ 178, C Anderson and C Brown.*
26. *The impact of artificial intelligence on the insolvency profession* (2017) INSLB, J Dickfos, C Brown and L Smith.
27. *Offence reporting by insolvency practitioners* (2019) 20(4&5) INSLB 88, M Murray.
28. The need to address insolvent assetless companies is supported by UNCITRAL's Legislative Guide on Insolvency Law, both to support directors and to counter abuse of the system.
29. Treasury, *Modernising Business Registers*, Submission by Melbourne Law School and Monash Business School, 23 August 2017.
30. See *British Steel — is it a wind up?* Corporate Rescue and Insolvency August 2019, A Keay and P Walton.
31. *Counsel General for Wales v Allen* [2022] EWHC 647 (Ch) (21 March 2022)
32. See P Walton, "It's Officialism — the Uncertain Past, Present and Future of the Insolvency Practitioner Profession in the United Kingdom", Gore Browne Special Release SR97, March 2017.
33. Heath, The Role of the State.
34. Report of the Insolvency Law Review Committee, Singapore; see pp 68ff '(B) The Official Receiver as Liquidator of Last Resort'.
35. Explained in *Towards Harmonised Company Legislation — Are We There Yet?* (2012) 40 Fed L Rev 141, RI Barrett; also *Officially Receiving — a history of Australia's bankruptcy law and administration*, C Meiklejohn, ITSA 2010.
36. Ex Memo ILRA at [9.28]–[9.29].
37. New Zealand Law Commission, Study Paper 11, *Insolvency Law Reform: promoting trust and confidence*; *Latest decisions on Insolvency Law Review*, Laila Harré, 28 February 2002.
38. See World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes, revised 2021; UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises (2021). See also A Gurrea-Martinez, "Implementing an Insolvency Framework for Micro and Small Firms" (2021) 30 *International Insolvency Review* 46–66.
39. ALRC 45 Ch 8.
40. We don't at this stage discuss other funding models, such as a charge on assets realised.
41. As to abandoned companies, Anderson has said that it is difficult to see how a government funded pool of private-practice liquidators would deal with them, rather a government role is required: Anderson, *It's all about the money.*
42. Senate Committee Report, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework,* September 2010, recommendation 1.

ATTACHMENT B

Insolvency Law Update

The chimera of restructuring reform: An opportunity missed for MSMEs in pt 5.3B

Jason Harris and Christopher Symes†*

I Introduction

In 1993, corporate rescue was modernised with the introduction of pt 5.3A of the *Corporations Act 2001* (Cth) ('*Corporations Act*'). It is true to say that the new debt restructuring procedure was 'embraced' by those who could access it — companies and their directors, those who would administer it — registered liquidators and those whose debts would be attended to and perhaps paid in part — creditors. In the first 4 months of pt 5.3A, there were 142 appointments.[1] On 1 January 2021, pt 5.3B commenced which introduced a new small business restructuring process that includes the appointment of a small business restructuring practitioner to companies with liabilities of less than $1 million and acceptance of a restructuring plan by creditors. There have been five appointments in the first 4 months of the new pt 5.3B small business restructuring.[2] There is concern even at this early stage that this new regime is not going to work efficiently or effectively and is not going to be embraced by companies and their directors, registered liquidators and creditors, unlike what we experienced in 1993.[3]

Even before this year's new Part, there were, and continue to be, widespread concerns with corporate rescue and insolvency laws in Australia.[4] Some of the concerns raised relate to the low returns to creditors (more likely than not, no returns),[5] a concern that the cost of the insolvency rescue

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1 See Jason Harris, 'Comparing the Start of Parts 5.3A and 5.3B', *Australian Insolvency Law* (Blog Post, 20 April 2021) <https://australianinsolvencylaw.com/2021/04/20/comparing-the-start-of-parts-5-3a-and-5-3b/>.

2 Ibid.

3 The Treasury was advised that the new procedure had issues that would hinder its effectiveness — see the submissions on the proposal law: 'Insolvency Reforms to Support Small Business', *Treasury (Cth)* (Web Page, 7 October 2020) <https://treasury.gov.au/consultation/c2020-118203>.

4 See, eg, 'Insolvency Practices Inquiry', *Australian Small Business and Family Enterprise Ombudsman* (Web Page, July 2020) <https://www.asbfeo.gov.au/inquiries/insolvency-practices> ('Insolvency Practices Inquiry'); John Winter, 'Simple, Efficient, Effective: A Call for Reform' (2018) 30(4) *Australian Restructuring Insolvency and Turnaround Association Journal* 16; Jason Harris, 'Should Voluntary Administration Remain a One-Size-Fits-All Procedure? Do We Need a Fast Track System for Small Business Rescues?' in Shelley Griffiths, Sheelagh McCracken and Ann Wardrop (eds), *Exploring Tensions in Finance Law: Trans-Tasman Insights* (Thomson Reuters, 2014) 101–26 ('Should Voluntary Administration Remain a One-Size-Fits-All Procedure?').

5 Jason Harris, 'Corporate Insolvency by the Numbers', *Australian Insolvency Law* (Blog

procedure makes it unviable, a lack of trust in the insolvency practitioners (certainly true in some quarters like politicians and the media), creditors who are rationally apathetic and disengaged, procedures that are complex, time-consuming and bureaucratic, and a lack of input and control from those already running the company.[6]

Since 1993 corporate rescue has been a one-size-fits-all and this leads to criticism that it doesn't meet the needs or expectations of small business.[7] Corporate MSMEs (micro-, small- and medium-sized enterprises) have different features that make corporate rescue different to larger companies[8] such as their low asset base (and often value comes from owner/manager's goodwill), that they are 'too poor to go broke!' in that they have poor revenue in addition to their low asset base, and they may not have secured creditors or at least ones that are willing to assist resulting in limited financing and refinancing options. MSMEs often will have family and therefore sentimental attachment to the company and would not want the company to fail or for them to lose control during a restructuring, they will have personal guarantees provided by their directors and many mix business and personal assets.[9] Additionally, there are MSMEs who rely on poor information systems, have poor management skills, unpaid tax debts, a lack of customer diversification and operate on wafer-thin margins.[10] MSMEs may also operate in low-margin and competitive industries where they may not have a market leading position which may make them unattractive to private equity and distressed debt funders. It is in this environment and a lingering COVID-19 pandemic that the new pt 5.3B has been introduced.[11]

II The new pt 5.3B from 1 January 2021

The Explanatory Memorandum for pt 5.3B expresses that

> [t]he intention of the debt restructuring process is to provide an alternative to the 'one-size-fits-all' voluntary administration regime for small [non-complex] businesses. It reduces the complexity and cost of the administration process, providing a greater role for the company directors during the process and allowing them to retain control over the company throughout. These changes are intended to

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Post, 27 February 2018) <https://australianinsolvencylaw.com/2018/02/27/corporate-insolvency-by-the-numbers/>.

6 See 'Insolvency Practices Inquiry' (n 4).

7 Harris, 'Should Voluntary Administration Remain a One-Size-Fits-All Procedure?' (n 4).

8 See further World Bank Group Insolvency and Creditor/Debtor Regimes Task Force, *Report on the Treatment of MSME Insolvency* (Report, 2017); Riz Mokal et al, *Micro, Small, and Medium Enterprise Insolvency: A Modular Approach* (Oxford University Press, 2018).

9 Australian Small Business and Family Enterprise Ombudsman, *Inquiry into Small Business Loans* (Inquiry Report, 12 December 2016).

10 Stephen Parbery, 'Assessing Voluntary Administration in Australia: Including Suitability for Workouts, Turnarounds and Pre-packs' in RP Austin and Fady JG Aoun (eds), *Restructuring Companies Troubled Times: Direct and Creditor Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2013) 99–101.

11 Josh Frydenberg and Michael Sukkar, 'Insolvency Reforms to Support Small Businesses Recovery' (Joint Media Release, 24 September 2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/insolvency>.

> encourage more small businesses to seek debt restructuring earlier, increasing their chances of recovering viability.[12]

Whilst this suggests the new Part provides an alternative to voluntary administration, it does draw heavily on pt 5.3A and existing case law will be persuasive and helpful.

The Treasurer has promised that this will be 'a single, simpler, faster, more cost-effective insolvency process for small business' and 'a move to a more flexible "Debtor in Possession" model'[13] enabling 'small business owners to remain in control' whilst providing them with an opportunity to restructure.[14]

There are some very positive provisions within the new pt 5.3B. For example, s 452A boldly states the object of the Part is to

> provide for a restructuring process for eligible companies that allows the companies:
> (a) to retain control of the business, property and affairs while developing a plan to restructure with the assistance of a small business restructuring practitioner; and
> (b) to enter into a restructuring plan with creditors.

Given the use that is made of s 435A in pt 5.3A which has similar wording, this provision too could be expected to be used in conjunction with other provisions to assist in litigation. Furthermore, the stated purpose of small business restructuring stands in contrast to the goals of voluntary administration because the new procedure is aimed at simply providing an opportunity for a plan to be put to creditors, not with trying to save the MSME (as the goals of pt 5.3A state as their top priority).

Another example of what may turn out to be one of the mostly used provisions is s 458A. This is essentially the same as pt 5.3A s 447A, which provides the court with a general power to make orders.[15] The same wording as is used in s 447A, namely '[t]he Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company' and any order can be made subject to conditions. This allows the court to effectively alter how the legislation works in relation to a particular company.[16] This section can be used by application from the company, creditors, the restructuring practitioner, the Australian Securities and Investments Commission or any other interested party. Based on the experience with the widespread use of s 447A since the introduction of voluntary administration, this new s 458A will be a frequently used tool to assist both MSMEs and their restructuring practitioners in trying to address the MSMEs' financial difficulties.

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12 Explanatory Memorandum, Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Cth) 13 [1.3].

13 For a discussion of the debtor-in-possession model in the United States, see Jason Harris, 'Restructuring Nirvana? Chapter 11 Bankruptcy and Australian Insolvency Reform' (2015) 16(3) *Insolvency Law Bulletin* 42; Ahmed Terzic, 'Turning to Chapter 11 to Foster Corporate Rescue in Australia' (2016) 24(1) *Insolvency Law Journal* 5.

14 See Frydenberg and Sukkar (n 11).

15 See further Jason Harris, 'The Constitutional Basis of s 447A: Is It a Power without Limit?' (2006) 14(3) *Insolvency Law Journal* 135.

16 *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270.

III How will the new procedure work?

The new procedure in pt 5.3B involves three phases:

(1) the *restructuring phase*, which is when the restructuring plan is being formulated by the debtor company[17] — The company has 20 business days to put its restructuring proposal to the creditors from the date of the restructuring practitioner's appointment (referred to in the legislation as 'the proposal period').[18] The restructuring practitioner or the court may extend this 20-business day proposal period.[19]

(2) the *acceptance phase*, which is when creditors are asked to vote for or against the restructuring plan proposed by the company[20] — This occurs during the company's restructuring period and will end if the creditors reject the restructuring plan, if a plan is not put to the creditors within the 20-business day proposal period or if the restructuring practitioner cancels the restructuring.[21]

(3) the *plan implementation phase*, which is when the company is operating under a restructuring plan[22] — The plan implementation phase begins at the end of the last day of the acceptance period (the time in which creditors have to vote on the plan) and ends when the restructuring plan ends.[23]

The procedure is commenced by the debtor company's directors appointing a 'restructuring professional' by resolution of the board.[24] The restructuring practitioner must be a registered company liquidator.[25] The primary role of the restructuring practitioner is to assist with the formulation of the restructuring plan by the directors of the debtor company, certify the documents to be provided to creditors and then arrange for the creditors to vote on the plan.[26] The restructuring practitioner also has a role approving transactions that may be outside of the ordinary course of the company's business.[27]

Prior to voting on the restructuring plan, the company operates 'in restructuring', which confers protection for enforcement action taken against the company, its property or property that it is using.[28] These protections are very similar to the protections given to companies in voluntary

17 *Corporations Act 2001* (Cth) s 453A ('*Corporations Act*'); *Corporations Regulations 2001* (Cth) reg 5.3B.02 ('*Corporations Regulations*').
18 *Corporations Regulations* (n 17) reg 5.3B.17 (definition of 'proposal period').
19 Ibid regs 5.3B.17(2), (4).
20 Ibid reg 5.3B.21(3).
21 Ibid regs 5.3B.02, 5.3B.20 (lapsing of restructuring plan).
22 The company is no longer under restructuring once its restructuring plan is approved by the creditors during the acceptance phase: ibid reg 5.3B.02(1)(j).
23 Ibid regs 5.3B.21, 5.3B.25. The restructuring plan ends when one of the events in *Corporations Regulations* (n 17) reg 5.3B.02 occurs.
24 *Corporations Act* (n 17) s 453A(a).
25 Ibid s 456B.
26 Ibid s 453E; *Corporations Regulations* (n 17) regs 5.3B.21, 5.3B.37.
27 *Corporations Act* (n 17) s 453L(2)(b); *Corporations Regulations* (n 17) regs 5.3B.04–5.3B.05.
28 *Corporations Act* (n 17) ss 453R–453S.

administration,[29] with exceptions for conduct with the consent of the restructuring practitioner or with leave of the court. There is a stay against seeking a winding up of the company by the court.[30] However, this does not extend to suspending the right of the company's directors to propose a voluntary liquidation to the members.[31] This may be contrasted with pt 5.3A, where the directors' management power is suspended.[32]

Secured creditors' rights are largely suspended (as they are in pt 5.3A), with secured creditors holding security over the whole, or substantially the whole, of the company's property maintaining limited enforcement rights during the decision period.[33] Part 5.3B also includes identical ipso facto protections to those that exist in pt 5.3A.[34] This is unfortunate, given the varied and complex exceptions that exist for the ipso facto protections,[35] which may increase the cost and complexity of restructuring under pt 5.3B for MSMEs, particularly as the directors will need to address any asserted exceptions to ipso facto protections, most likely by seeking advice from the restructuring practitioner and lawyers. The restructuring practitioner has the power to dispose of encumbered property provided that it is in the ordinary course of the company's business or with the consent of the secured party, owner or lessor or with the leave of the court.[36] The court may make orders limiting the rights of secured creditors, owners or lessors, provided that their interests will be adequately protected.[37]

As one can see, the procedures in pt 5.3B have similarities with pt 5.3A but with less reporting obligations and no creditor meetings. The company is deemed to be insolvent if restructuring plan is put to creditors and the company can choose to appoint an administrator or move to liquidation at any time.

IV The concerns that Australia now has a maladroit system for corporate MSMEs insolvency

Arguably the new procedure is not sufficiently simple or streamlined as suggested by the explanatory material and this means that it will be costly for companies, risky for practitioners and potentially unrewarding for creditors to be involved. No doubt there will be many aspects of the new law that will be clarified by the courts in due course but some concerns that are glaringly obvious are discussed below.

29 Ibid ss 440B, 440D.

30 Ibid s 453Q. See further *Re Dessco Pty Ltd* [2021] VSC 94; *Re DST Project Management and Construction Pty Ltd* [2021] VSC 108.

31 This would bring the period of restructuring to an end under *Corporations Regulations* (n 17) reg 5.3B.02(1)(g).

32 *Corporations Act* (n 17) s 198G.

33 Ibid s 454C (generally 13 business days from commencement).

34 Ibid pt 5.3B div 2 sub-div G.

35 See further Jason Harris and Christopher Symes, 'Be Careful What You Wish For! Evaluating the Ipso Facto Reforms' (2019) 34(1) *Australian Journal of Corporate Law* 84.

36 *Corporations Regulations* (n 17) reg 5.3B.39.

37 Ibid reg 5.3B.64.

A It is not debtor-in-possession ch 11-style corporate rescue

The new Part is described by the government as a debtor-in-possession regime where the directors of the company remain in control. There are several suggested benefits of this model. Firstly, the debtor-in-possession model may result in lower costs than external administration because there is no external administrator who has to run the business and whose work (and the work of their employees) has to be paid for, whereas existing management may draw lower fees or indeed may draw no wages if it gives the business a greater chance of survival. There are also lower investigation and reporting obligations imposed on the restructuring practitioner, who does not prepare a detailed report (as is required in pt 5.3A), but merely declares whether there are reasonable grounds to believe that the company is eligible to use the procedure and that it is likely to comply with the plan.[38] This could, in theory, lower the cost of the procedure, but the restructuring practitioner faces criminal sanctions if they fail to make reasonable inquiries into, and also verify, the company's business, property, affairs and financial circumstances.[39]

The notion that pt 5.3B is a debtor-in-possession procedure with the restructuring practitioner playing a hands-off is not consistent with the restrictions imposed on management decision-making and the likely need to request permission from the restructuring practitioner for a range of common tasks involved in running a business. While ordinary course of business limitations are common in foreign SME restructuring procedures, these limitations are broader than the new pt 5.3B because they rely on general law notions of the ordinary course of business, while the new procedure specifically carves out common business decisions from the ordinary course, thus requiring restructuring practitioner permission.

The agency role given to the restructuring practitioner also demonstrates a hybrid debtor-in-possession model, certainly not external administration as seen in pt 5.3A, but not the debtor-in-possession model seen in North America. Where savings may arise is in the lower reporting and investigation obligations compared with pt 5.3A. The restructuring practitioner is not required to prepare an investigatory report for creditors or to convene creditor meetings. However, these savings may not be fully realised because of the need to continually monitor the business in order to make decisions where permission of the restructuring practitioner is needed. The restructuring practitioner is also an officer of the company and is bound by statutory duties to act in the best interests of the company and with care and diligence. The restructuring practitioner also has potential criminal liability risk in relation to the declaration to creditors about the restructuring plan, where the restructuring practitioner must make reasonable inquiries into the company's business, property, affairs and financial circumstances and take reasonable steps to verify these details. If registered liquidators acting as restructuring practitioners see these obligations as involving detailed reviews, then the fixed fees for restructuring work will be higher than the government anticipates. If

38 Ibid reg 5.3B.18.
39 Ibid reg 5.3B.18(4).

restructuring practitioners see these obligations as perfunctory, and simply rely on information provided by the company's directors, then the utility of the declaration and ultimately of the new procedure itself will be undermined as will creditor confidence in the new system.

Secondly, the debtor-in-possession model may encourage earlier appointments by the company's directors because, unlike in pt 5.3A, they will not be ousted from management and will remain in control. This factor is likely to be of greater significance in MSME and family businesses where there is a sentimental attachment to the business continuing. However, with MSME directors often having personal guarantees over the company's debt and therefore a blending between the assets and liabilities of the business and the owners/directors, there is a strong economic disincentive to initiate an insolvency process until forced to do so by external factors, such as tax office enforcement against the directors. While there is protection against the enforcement of personal guarantees,[40] this is only for the restructuring period (approximately 3 weeks) and no protection for the period of the restructuring plan (which can last for up to 3 years).[41] Furthermore, the emotional connection that many small business owners have to their business may inhibit early appointments, because doing so may admit that they have failed.

Thirdly, the debtor-in-possession model may provide greater flexibility because there are fewer tasks for the restructuring practitioner to do than a voluntary administrator has to comply with (such as creditor meetings and notices to various stakeholders) under pt 5.3A.

Finally, the debtor-in-possession model may address the stigma attached to a business entering external administration. Keeping the existing management in place reduces disruption for the company's stakeholders and may reduce the perception of failure. However, for MSMEs, the financial difficulties that led to the appointment of the restructuring practitioner may mean that creditor distrust of management already exists and retaining management may not benefit from the restructuring effort. One of the benefits of voluntary administration in pt 5.3A is to have the administrator as a circuit breaker for the relationship between the company and its creditors.

B Incomplete information for the creditors

Part 5.3B requires the company to provide the restructuring plan (for voting on by the creditors) and a restructuring proposal statement.[42] The restructuring plan may include information relating to the company's financial affairs and must set out what property of the company is to be dealt with under the plan, but need not otherwise disclose the assets of the company or other financial

40 *Corporations Act* (n 17) s 453W.

41 *Corporations Regulations* (n 17) reg 5.3B.15(4)(b). Several submissions to Treasury during the consultation period pointed out that this would be a problem for MSMEs using the new laws: see, eg, Chartered Accountants Australia and New Zealand, Submission to Treasury, *Insolvency Reforms to Support Small Business: Corporations Amendment (Corporate Insolvency Reforms) Bill 2020* (12 October 2020); Australian Restructuring Insolvency and Turnaround Association, Submission to Treasury, *Insolvency Reforms to Support Small Business* (12 October 2020).

42 *Corporations Regulations* (n 17) reg 5.3B.14(1).

matters.[43] The restructuring proposal statement must include the schedule of debts and claims, but this also does not disclose the assets of the company.[44] There is no limit on the assets of companies that may use the procedure, so creditors could be presented with an incomplete picture of the company's financial position when being asked to vote, without an opportunity for a meeting to discuss the issues. Of course, it could be argued that, in the face of incomplete information, the creditors may simply vote against the plan or refuse to vote at all, but that seems an inadequate policy response to simply suggest that the new procedure not be used if creditors are unhappy with the levels of disclosure provided. Furthermore, the restructuring practitioner is not required to report on the commercial value of the proposal, or to advise creditors whether it would be in their best interests to approve or reject the plan. The restructuring practitioner is merely required to declare whether they believe on reasonable grounds that the company satisfied the eligibility criteria, whether all required information has been provided and whether the company is likely to be able to discharge its obligations under the restructuring plan.[45]

The restructuring practitioner is required to make reasonable inquiries into the company's business, property, affairs and financial circumstances and to verify these matters,[46] but there is no requirement for a general report to creditors (or to the court) to be provided to explain the nature of the procedure, or the creditors' other options if the plan is not approved.

The apparent rationale for this minimal level of reporting is to keep the costs of the new procedure down, but this stands in contrast to the requirement to seek approval from the restructuring practitioner for a large range of decisions (classified as not 'in the ordinary course of business') affecting the day-to-day running of the business.[47] The restructuring practitioner is able to terminate the restructuring period if they believe that the restructuring plan would not be in the interests of creditors.[48] It is curious that the role of the restructuring practitioner is not more closely aligned with the interests of creditors. The restructuring practitioner is an officer of the company and owes no specific duty to act in the best interests of creditors.[49]

There is a lack of information provided to creditors, at least compared with pt 5.3A, and this is understandable given the stated purpose of the new pt 5.3B is not to save the company or any part of its business, but merely to enable companies to retain control of the business while they develop a restructuring plan and to enter into a restructuring plan with creditors.[50] The goal is not

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43 Ibid reg 5.3B.15.
44 Ibid reg 5.3B.16.
45 Ibid reg 5.3B.18.
46 Ibid reg 5.3B.18(5).
47 *Corporations Act* (n 17) s 453L; ibid reg 5.3B.04.
48 *Corporations Act* (n 17) s 453J(1).
49 Ibid s 9 (definition of 'officer'), s 181; Andrew Keay, *Company Directors' Responsibilities to Creditors* (Routledge-Cavendish, 2007); Anil Hargovan and Jason Harris, 'For Whom the Bell Tolls: Directors' Duties to Creditors after *Bell*' (2013) 35(2) *Sydney Law Review* 433. Even the power to terminate the restructuring if it is not in the interests of creditors is only expressed as a discretion (the restructuring practitioner may terminate) and not a duty to do so.
50 *Corporations Act* (n 17) s 452A.

necessarily to rescue the company in distress, but simply to present a deal (in the form of a restructuring plan) to the creditors. The restructuring practitioner does not report on whether the company will be rescued by the restructuring plan but merely whether there are reasonable grounds to believe that the company can comply with its terms.[51]

It may be argued that the minimal information provided to creditors leaves it open to creditors to be more proactive and request what information they want before making a vote on the restructuring plan, adopting an approach of 'you snooze, you lose'. However, the new pt 5.3B does not allow creditor meetings, which is the primary forum where creditors can express their concerns to the administrator — the creditors merely have the option to vote on the restructuring plan put by directors.[52]

C Incentive misalignment

The new pt 5.3B arguably contains few incentives for existing management to use the procedure, risk and questionable compensation for registered liquidators to act as restructuring practitioners and a confused set of incentives for creditors.

1 For the company and its directors

There appears to be a lack of strong incentives for the company's directors to use the new restructuring procedure. While getting a restructuring plan approved might provide financial relief for the company, the new procedure offers much less flexibility than pt 5.3A and has some features that will be disadvantageous for directors.

It is common for MSMEs to rely upon finance from the directors and shareholders, who are usually owner/managers. The new pt 5.3B treats directors and members as 'excluded creditors' because they are 'related creditors'[53] and voting by excluded creditors on the restructuring plan must be disregarded.[54] This means the person(s) who may well be the largest single creditor to the company, but who are also directors and members, are not permitted to vote on its future. There is no similar limitation for other forms of external administration.

While the restructuring period provides protection against the enforcement of personal guarantees given by directors and relatives of directors,[55] that protection will end once the company moves into a restructuring plan. This may mean that creditors holding guarantees can make the director or related party bankrupt if they can't satisfy the guaranteed debt. The guaranteed debts cannot be included in the terms of the restructuring plan because they are not an admissible debt or claim.[56] One positive aspect of the new pt 5.3B for

51 *Corporations Regulations* (n 17) reg 5.3B.18(2)(a)(ii).
52 Ibid regs 5.3B.21, 5.3B.25.
53 Ibid reg 5.3B.01.
54 Ibid reg 5.3B.25(2)(c).
55 *Corporations Act* (n 17) s 453W.
56 *Corporations Regulations* (n 17) reg 5.3B.01.

directors is that entry into restructuring will provide potential relief from director penalty notices under tax administration laws.[57]

There are also limits on what a restructuring plan is able to achieve that will hinder its utility for addressing MSME debt problems. The restructuring plan must be a cash payment as a dividend (so no debt/equity swaps or in specie distributions),[58] and all creditors must rank equally.[59] This means that directors or related parties who are also creditors must be paid the same rate of dividend as unrelated creditors. The requirement to pay pari passu is a standard term that must be included in all restructuring plans and can't be waived or varied.[60]

Crucial to the operation of pt 5.3B is the 'eligibility criteria' and this is defined to include that the company will have liabilities of less than $1 million.[61] Additionally, no director (or former director in the last 12 months) has been a director of a company that has used restructuring or the new simple liquidation within 7 years prior and that all of the company's employee entitlements that are due and payable must be paid before putting a plan to creditors.[62] Furthermore, the company's lodgment of tax needs to be up to date.[63] The requirement to have tax lodgments up to date and all employee entitlements to be due and payable before a restructuring plan is put to the creditors will mean that many/most MSMEs will be unable to use the new procedure as levels of compliance in that sector are notoriously low.

2 For creditors

The new pt 5.3B seems aimed at simply presenting a restructuring plan to creditors, rather than formulating a sustainable restructuring plan that is in the best interests of creditors. The lack of detailed information being provided to creditors will not engender confidence within the creditor body. The parliamentary intention of keeping the reporting and investigations to a minimum, as well as the debtor-in-possession rather than the external administration model, supposedly to keep the costs down, is not supported by the number and complexity of the provisions being inserted into the *Corporations Act*, *Corporations Regulations 2001* (Cth) ('*Corporations Regulations*') and *Insolvency Practice Rules (Corporations) 2016* (Cth) (which are much longer than for pt 5.3A). The new procedure for voting,[64] using a novel schedule of debts and claims determined by the directors[65] and then leaving it up to creditors to challenge the assessment,[66] will also lead to confusion within the creditor body and no doubt disputes about the directors' assessment. The process for resolving such disputes is also cumbersome,

57 *Taxation Administration Act 1953* (Cth) s 269-15(2)(ba).
58 *Corporations Regulations* (n 17) reg 5.3B.15(4)(a).
59 Ibid regs 5.3B.27(1)(a)–(b).
60 Ibid reg 5.3B.27(2).
61 *Corporations Act* (n 17) s 453C; ibid reg 5.3B.03.
62 *Corporations Act* (n 17) s 453C; *Corporations Regulations* (n 17) regs 5.3B.03, 5.3B.24.
63 *Corporations Regulations* (n 17) reg 5.3B.24.
64 Ibid reg 5.3B.25.
65 This is included as part of the 'restructuring proposal statement', which is given to creditors: ibid reg 5.3B.16.
66 Ibid regs 5.3B.22–5.3B.23.

including the potential for multiple rounds of creditor voting,[67] and will result in multiple pieces of correspondence between the restructuring practitioner and the creditors and variations to the proposed payments under the restructuring plan. The uncertainty this causes is likely to incentivise restructuring practitioners to increase their level of up-front fees, as only litigation allows for variable fees to be charged for the restructuring period.[68]

The voting mechanism is also highly problematic because it is based only on a simple majority in value of the creditors who respond to the restructuring practitioner's notice requesting voting, meaning that a small number of creditors could approve of the restructuring plan.[69] This may mean that large creditors, such as the Commissioner of Taxation, have effective control over the plans because they will usually be the single largest unsecured creditor who is eligible to vote. In other forms of insolvency administrations, the voting threshold always includes both majority in number and value.[70]

The new pt 5.3B is modelled on voluntary administration, but there are significant differences that are averse to the interests of creditors. Principally, the fact that the restructuring practitioner is not managing the company means that they do not have the same personal liability that voluntary and deed administrators have.[71] This is problematic because it means that creditors who continue dealing with the company during the period of restructuring will not be assured of payment, as they are during pt 5.3A (because of the administrator's personal liability). This is likely to lead to creditors insisting on pre-payment or cash on delivery, which may further constrain the company's cash resources. There is also a risk for creditors that if the company enters liquidation, then payments made to creditors during the period of restructuring (or during a restructuring plan) will be claimed as unfair preferences.[72] It should be noted, however, that this is also a risk for transactions during a deed of company arrangement under voluntary administration.[73]

The circumstances that follow the termination of restructuring or the failure of a restructuring proposal are also problematic for creditors, when compared with the position under voluntary administration. Where a period of administration ends, the company will usually automatically transition to a creditors' voluntary liquidation.[74] However, there is no automatic transition from pt 5.3B to a creditors' voluntary liquidation, with the position left to the directors to consider whether they wish to continue trading (which may involve the risk of insolvent trading) or seek to appoint an external administrator. The failure of a vote on the restructuring plan will bring the period of restructuring to an end.[75] The court could use its general power under

67 Ibid.
68 *Insolvency Practice Rules (Corporations) 2016* (Cth) r 60-1B ('*Insolvency Practice Rules*').
69 *Corporations Regulations* (n 17) regs 5.3B.21, 5.3B.25.
70 *Insolvency Practice Rules* (n 68) r 75-115.
71 Such as liabilities for debts incurred during the restructuring period. Cf during voluntary administration: *Corporations Act* (n 17) ss 443A–443B.
72 Ibid ss 588FA, 588FC, 588FE(2C), 588FF.
73 Ibid ss 588FE(2A)–(2B).
74 Ibid ss 446A–446AA.
75 *Corporations Regulations* (n 17) regs 5.3B.02(1)(c), 5.3B.20.

s 458A to terminate the restructuring and appoint a liquidator. It is curious that the restructuring practitioner and the creditors lack the power to terminate a restructuring plan, unlike in pt 5.3A.[76] The *Corporations Regulations* provide for a plan approved by creditors to be terminated by a court order or by a breach of the terms that lasts for 30 business days without being rectified.[77] It is open for the restructuring practitioner to seek a court order to terminate the plan.[78] The reliance on court orders to terminate a plan is particularly troubling in circumstances where the creditor vote to approve of the restructuring plan does not require a majority of the creditors to approve the plan. This is a further reason that the new procedure is unlikely to offer lower cost savings or to engender creditor confidence as voluntary administration does.

3 For the restructuring practitioner

The new pt 5.3B requires fixed fee arrangements for the restructuring practitioners to be determined by the commencement date of the procedure[79] and requires a percentage of dividend distributions to be used at the method for calculating remuneration under a restructuring plan.[80] The restructuring practitioner also has potential criminal liability if they do not undertake reasonable endeavours to investigate and verify the company's business property and affairs,[81] despite (supposedly) not being in a management role. It is uncertain as to what level of detail will be needed to satisfy this requirement. With so much uncertainty involved in the new procedure and the modified debtor-in-possession model chosen where the restructuring practitioner is likely to be asked to make many management decisions for the debtor company, these remuneration requirements seem unduly restrictive and are likely to result in higher charging practices to account for that risk and uncertainty.

V Conclusion

The federal government's move to introduce a debt restructuring law for corporate MSMEs is understandable given how badly they have been affected by the COVID-19 pandemic and the lobbying on behalf of this sized company that they be provided with relief beyond what exists in pt 5.3A. However, as this update shows, there are broad concerns that the new Part will not be embraced as the reform falls short in a number of key areas for debtors, creditors and the professionals who are expected to recommend and then implement it.

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76 Cf *Corporations Act* (n 17) s 445E.
77 *Corporations Regulations* (n 17) reg 5.3B.31.
78 *Corporations Act* (n 17) s 458A, sch 2 s 90-15.
79 *Insolvency Practice Rules* (n 68) r 60-1B.
80 Ibid r 60-1C.
81 *Corporations Regulations* (n 17) regs 5.3B.18(4)–(5).