

Is Corporate Rescue a Realistic Ideal? Business as Usual in Australia and the United Kingdom

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Foreword

1 We are delighted to partake in Professor Fletcher's Festschrift. It is an honour. We hope we do it justice. For each of us, Ian Fletcher is a source of encouragement, a colleague and a friend. We appreciate his tremendous effort in bringing academic content to the world's leading insolvency meetings and we look forward to meeting with him and our specialist collegiate at future meetings.¹

2 This paper seeks to review the operation of Australian corporate law rescue regimes in the context of those originally contemplated by Sir Kenneth Cork and more latterly in Australia, primarily in the hands of Ron Harmer. In doing so, it draws upon some of the observations made by Professor Fletcher in the second wave of 20th century corporate rescue reform in the United Kingdom.

Introduction

3 Failure is a part of taking risk;² business failure is a consequence of the misjudgement of operating risk.³ Failure does not seem to be as readily as accepted a possible outcome of taking risk in more modern times.⁴

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² See, for example, I. Fletcher, *The Law of Insolvency* (4th ed) (2009, Sweet & Maxwell, London), at paragraphs 1-009-1-011; See also R. Goode, *Principles of Corporate Insolvency Law* (4th ed) (2011, Sweet & Maxwell, London), at 2.

4 Personal insolvency does not seem to attract as much by way of a negative reaction as corporate insolvency. Perhaps one reason for this is that personal failure impacts primarily upon the individual and extends to those within the person's contemplation. Business failure, on the other hand, extends to a wider group of people, being those with an economic interest whether directly (employees and creditors) or indirectly, (government and society stakeholders more generally). It seems, at least in Australia, that business failure generates more noise than personal failure and that this is possibly a function of the number of affected stakeholders.⁵

5 The fact that personal bankruptcy does not reach the headlines as often as business insolvency does not mean that the incidence or reasons for failure are different between the two. Indeed it might reasonably be suggested that the aetiology of any business failure is the result of personal failure or multiple person failure.⁶

6 Nonetheless, it is axiomatic that failure will always be a possibility of a business venture because it is one outcome on a range of possible outcomes for the taking of risk. Since the taking of risk is a human endeavour, it is impossible to prevent failure occurring in at least some ventures. The occurrence of failure on a less frequent basis seems to imbue stakeholders with optimism around day-to-day activity, rarely questioned until failure occurs.⁷

³ For coverage of the economics of the firm see M. Jensen, *A Theory of the Firm: Governance, Residual Claims and Organisational Forms* (2000, Harvard University Press, Harvard MA), in Chapter 4.

⁴ The concept of "rescue" as a goal of corporate insolvency laws has merged strongly in the last 20 -30 years in many jurisdictions. For recent Australian discussions see Australian Restructuring, Insolvency & Turnaround Association (ARITA), *A Platform for Recovery 2014 Dealing with Corporate Financial Distress in Australia: A Discussion Paper*, available at: <<http://www.arita.com.au/docs/default-source/Though-leadership/a-platform-for-recovery-2014.pdf>>; "...an undue focus on the rights of creditors at every stage of the process (a perceived feature of the current Australian system) can risk diminishing the overall economic value of the process. Instead, a more balanced group-focused process may provide the best opportunity for restructuring, and the best overall outcome in the long run". The Productivity Commission, *Business Setup, Transfer and Closure Draft Report May 2015*, at 331, available at: <<http://www.pc.gov.au/inquiries/completed/business/draft/business-draft.pdf>>; Fletcher discusses the push in the United Kingdom towards this thinking when covering the reforms of the Enterprise Act 2002 (United Kingdom), for which see Fletcher, above note 2, at paragraph 1-042.

⁵ It is arguable however that small company failure impacts on about the same number of external stakeholders as a small-unincorporated venture of similar size. Since the foundation principles of corporate law for both Australia and the United Kingdom are broadly similar, the assumption that all companies regardless of size or operational reach are equally subject to those various foundation principles is flawed. This applies to stakeholders and company operation impact upon them.

⁶ In Australia, there is a dearth of research around personal insolvency (both business related to the use of non-corporate structures such as partnerships and consumer bankruptcy), reflecting more interest in corporate failure.

⁷ When failure occurs, it is most often followed by focus on investigation with a view to recrimination rather than reflection thus entrenching the view of the undesirability of failure and minimising the reality of its inevitability.

7 The relationship between personal and business failure arises from the developmental transition from the partnership to the use of the proprietary company as the structure for the carrying on of business, the legal acceptance of the company structure,⁸ and the concurrent increased availability of loosened constraints on the provision of credit. These were all 20th century developments. The consequence in Australia at least, is that in excess of 90% of private companies are incorporated by small turnover, “mum and dad” business owners. Owners of capital who, but for the availability of cheap to incorporate limited liability insurances afforded by the structure, otherwise will trade as sole traders or in partnership with each other to run the closely held family business.

8 The availability of credit has allowed individuals trading solely or collectively to include more stakeholders in their business operations, however the real growth in stakeholder numbers is derived from public and public stock exchange listed companies and it is these companies that garner more resources from the community. These are the companies that when in financial difficulty cause more significant turmoil. There is no distinction between the likelihood of private company failure from public company collapse save and except for the number of stakeholders affected and in the 21st century, the amount of publicity the business failure garners.

9 Therefore the distinction between personal and business failure is not as clear-cut as it appears to be when looking at modern day rules around corporate rescue. The path dependence of the development of current corporate rescue does not point to different causes of business failure. However, the legislative means of dealing with failure is different as between business entity structure use.

10 This paper seeks to examine the English and Australian treatment of business failure and poses the question whether, to quote Professor Fletcher, it is “business as usual”,⁹ notwithstanding the supposed rhetoric around (a) a stated Parliamentary interest in business rescue and (b) various “reforms” around (a). Some comment is made as to business structure differences, although they are of interest to influence rather than pointing to likely future changes around business failure. The paper therefore forms the view; at least to the extent that any conclusions drawn are at best part of the picture, that business rescue is at best an ideal, rather than a practicality. The analysis may be made no other way due to the unique features of

⁸ The high water mark of the separate legal entity doctrine being *Salomon v Salomon* [1896] UKHL 1 and in Australia: *Walker and Wimborne* [1976] 137 CLR 1; although for an Australian perspective, see P. Lipton, “The Mythology of Salomon’s Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective” (2014) 40(2) *Monash University Law Review* 452.

⁹ I. Fletcher, “UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements – The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002” (2004) *European Business Organization Law Review* 119, at 151.

the corporate entity and the equally unique means of financing it, including of course the circulating security interest (floating charge).

The Idea of Rescue

11 Corporate rescue, is as its name implies, is the idea that companies in financial distress can be rescued and that there ought to be some kind of “arrangement” that might be legislatively provided for that can assist that rescue. In this sense it seems that such a legislative based procedure must be flexible and lie somewhere between the two extremes of compulsory liquidation and the direct adjustment of private bargains by agreement with creditor stakeholders. Both the United Kingdom and Australia view the idea of “rescue” as being a valuable ideal, and that rescue may occur outside formal provisions.¹⁰

12 In the United Kingdom, the Cork Committee opined that the scheme of arrangement procedure then in place required a “painstaking perusal of documents by Court officials with little or no experience of commerce or finance” and failed to provide “any real protection for creditors or contributories”.¹¹ The Cork Committee proposed two alternatives for corporate debtors, namely the appointment of an administrator to implement a process somewhat like the appointment of a receiver but with the administrator acting for all creditors and second, a scheme similar to that suggested for individual debtors earlier in the Cork Report. The administration process provided an immediate moratorium allowing for meetings of creditors to formulate a scheme of their own choosing but requiring court approval. The alternative idea proposed involved allowing the board of directors to determine that the company enter into an arrangement with creditors and to disclose the arrangement.¹²

13 In Australia, Part 5.3A, suggested by the 1988 Harmer Report, which stated that schemes of arrangement, official management and creditors’ voluntary winding up did not offer a satisfactory range of alternatives for a company in the zone of insolvency to deal with its affairs.¹³ The Report recommended that a new voluntary “procedure” was needed that allowed companies to take action where they had a debt problem, not requiring them to be insolvent *per se*, to appoint an administrator, with appropriate notice including notification to creditors but like the United Kingdom recommendations with a stay on action to enable productive cooperation

¹⁰ Note that there are no clear boundaries or definitions as to when a company is in need of rescue, and this is partly due to the difficulty in being precise about insolvency and whether or not a company is insolvent insofar as the relevant regulation is concerned.

¹¹ Insolvency Law and Practice, Report of the Review Committee (June 1982) Cmnd 8558 (“Cork Report”), at paragraph 419.

¹² *Ibid.*, at paragraphs 419–430.

¹³ Australian Law Reform Commission, “General Insolvency Inquiry” (Report No 45) AGPS Canberra (1988) (“Harmer Report”), at paragraph 8.

between the directors and administrator to help ensure the company's prospects for recovery.

14 Neither the United Kingdom nor the Australian recommendations were implemented fully as set out by their respective reform committees, although it is fair to suggest that the Australian model perhaps had more "success" in the sense that the final legislated version looked most like the recommendations that preceded it. The one key factor that both regimes maintained was that of creditor primacy, at least in terms of the legislated outcome. The Cork Report, however, made clear its view in the context of the floating charge, perhaps seeking to pre-emptively rebut the inevitable regulatory dilution of the Committee's recommendations:¹⁴

"We specifically reject any suggestion that our proposals will lead to a diminution in the amount of credit available to commerce and industry. There is no evidence to suggest that any such diminution occurred in 1897 following the intervention by statute to subordinate the floating charge to the claims of preferential creditors, or in 1975 following the substantial increase in the monetary limits on the preferential claims of employees: yet each involved a far greater erosion of the priority accorded to the floating charge than anything we now propose. The Committee of London Clearing Banks refuted the suggestion that even the outright abolition of the floating charge would lead to a significant withdrawal of credit from companies which would otherwise obtain it; though they thought that it might lead to the introduction of alternative forms of security."

15 Either way, in Australia, the Committee did not at any point suggest that the path dependent strengthening of the creditor's position be altered, other than the initial temporary stay at the commencement of proceedings, with exceptions of course.¹⁵

16 So it seems fair to suggest that any "pure" idea of rescue is difficult to implement legislatively¹⁶ and it appears not to be particularly dependent on jurisdiction, insofar as the Commonwealth is concerned.¹⁷ Perhaps then, it ought not be surprising where creditors have relatively more significance as the company approaches the zone of insolvency, directors will deal with those circumstances in ways that limit their exposure to the creditor as stakeholder.

17 In the United Kingdom, where the regulatory changes made after the reform recommendations appeared to be significant in terms of the changes brought on by the Enterprise Act 2002 (United Kingdom), the statistics on the use of the

¹⁴ Cork Report, at paragraph 1535.

¹⁵ Nor does the current Australian experience suggest that debt finance is difficult to get: in fact the contrary is suggested by the Productivity Commission, although with a creditor friendly regime this is hardly surprising: Australian Government, Productivity Commission, Completed Business Draft Report, Overview, at 13, available at: <<http://www.pc.gov.au/inquiries/completed/business/draft>>.

¹⁶ K. Cork, *Cork on Cork* (1988, Macmillan, London), at 195, where he opined that in order to save a company, it is necessary to take action much earlier than when the bank is appointed as receiver.

¹⁷ By contrast, in the United States of America, the often lengthier Chapter 11 proceedings, allow more generous restructuring opportunities but with potential for abuse and in a different credit market.

procedure (discussed below) were not remarkably altered. In Australia however, there was movement, although various commentators have questioned the motivations for that movement since implementation of the provisions. The use in Australia of the corporate rescue provisions is encapsulated below at Table 23.4, and when penalties for directors were altered the popularity of rescue dropped (Table 23.5). So “business as usual” seems an apt descriptor for Australian director and legislator behaviour incentives.

England and Wales

Background

18 The Insolvency Act 1986 (United Kingdom) resulted from work conducted in 1981 and 1982 in the Report of the Review Committee chaired by Sir Kenneth Cork.¹⁸ The Cork Report was charged, *inter alia*, with making recommendations relating to the possibility of:

“less formal procedures as alternatives to bankruptcy and company winding up proceedings in appropriate circumstances.”¹⁹

19 Many of the recommendations of the Cork Report, including recommendations around less formal procedures for companies in financial distress, were adopted by the legislature and included in the Insolvency Act 1986 (United Kingdom). Unfortunately, some of the Cork Report’s more interesting and progressive recommendations around corporate rescue were not included in the legislation that followed or as Professor Fletcher points out, were adopted but so fundamentally altered such that the legislation was destined for reduced “efficacy as vehicles for corporate rescue”.²⁰

The Floating Charge Debenture

20 In England, the 1982 reforms to the administration order procedure and the changes to company voluntary arrangements are relevant. The administrative receivership provisions arose from the prevalence of fixed and floating charge debentures. Prior to the amendments, the ability of a creditor to charge the circulating capital of the company and to appoint a receiver and manager out of court (privately in accordance with the debenture deed) and as agent of the company, allowed for the creditor secured by the debenture to capture the value of

¹⁸ Above note 11.

¹⁹ The Insolvency Act 1986 (United Kingdom) was released alongside the Company Directors Disqualification Act 1986 (United Kingdom) and the Insolvency Rules 1986 (United Kingdom), the last of these replacing separate companies and bankruptcy rules.

²⁰ Fletcher, above note 9, at 121.

the company. The Cork Report noted²¹ the floating charge's widespread use such that most companies were subject to them.²² Professor Fletcher in setting out the reasons for the use of the floating charge stated:²³

“The primary purpose of floating charge receivership can be seen as having been to provide the maximum prospect for the secured creditor of recouping his claim out of such value as remained in the company by the time of crystallisation. The concept of corporate rescue formed no part of the original blueprint for receivership and neither the appointing creditor nor the appointee were under any duty to towards the company, as a defaulting mortgagor, to seek an optimum outcome from the latter's point of view.”

21 Professor Fletcher notes that even where the business survived by being on sold, the company is inevitably wound up in insolvency, although in some instances the receiver might allow for a restructuring with some prospect of survival. Such generosity however rests with the receiver and their economic incentives. The Cork Committee in considering various possibilities were of the view that:

“the general body of creditors should participate, not like preferential creditors in priority to the holder of the floating charge, but *pari passu* with him (sic) in the distribution of the proceeds of assets comprised in the charge.”²⁴

22 The administration order procedure provisions introduced by the 1986 amendments sought to counter some of the concerns raised by the Cork Committee, but not sufficiently, as pointed out by Professor Fletcher, to displace the power of the charge holder.²⁵ The decision to preserve the rights of the floating charge holder within the zone of insolvency and the somewhat complex nature of the administrative order procedure, including its required initiation via court order,

²¹ Cork Report, at paragraph 100.

²² Ibid, at paragraph 1531: “We are satisfied that the floating charge has become so fundamental a part of the financial structure of the United Kingdom that its abolition cannot be contemplated. But we are equally convinced that reform is needed... The reduction in the number and amount of preferential debts which rank in priority to the debt secured by a floating charge, and the imposition of a temporary stay on the enforcement of fixed charges, are likely to lead to a significant increase in the sums realised which, if no other changes were made, would be available to the proprietor of the floating charge. It is neither inappropriate nor unfair to insist upon some concession in return for the benefit of the general body of creditors, particularly as former preferential creditors will be numbered among them.”

²³ Fletcher, above note 9, at 123.

²⁴ Cork Report, at paragraph 1532, noting the following beneficial consequences including: (a) making a larger sum of money available for unsecured creditors and encouraging ordinary creditors to play more of a part in the administration of a winding up; (b) by increasing the dividend or unsecured creditors, lessening the impact upon them reducing their likely insolvency and reliance on retention of title clauses and other means of avoiding floating charges and (c) give ordinary creditors proximity with receivers.

²⁵ Fletcher, above note 9, at 124: “It had been no part of the plan of the 1986 legislative reforms to downgrade or diminish the rights and powers of the holder of floating charge security – indeed, great care was taken in designing the administration order procedure to allow any holder of a floating charge granted by the company to exercise an effective power of veto over the appointment of an administrator, by preemptively appointing an administrative receiver (selected exclusively by the chargeholder) to serve in the customary manner.”

effectively ensured that there was no marked shift towards corporate rescue, notwithstanding the good intentions of the Cork Committee.

23 The company voluntary arrangement provisions, introduced in 1986, with a nod to the United States Chapter 11 provisions, allowed for a “cram down” of dissenting creditors subject to the majority creditors was designed for all creditors to be treated as a single class for voting purposes. The absence of a moratorium for creditors to consult with the company on making a suitable and mutually satisfying arrangement is the main reason why the company voluntary arrangement provisions failed to take hold. The result was a lack of use of the provisions.

24 As a result it was left to the later White Paper²⁶ and the subsequent Enterprise Act 2002 (United Kingdom) to significantly curtail the role of receivership and the rights of the floating charge holder. Viewing these later developments from the far away fields of Australia, these subsequent changes seem to have been a brave move as, like the United Kingdom, the receivership option is a tool used by powerful commercial interests in Australia. Further, the area is so lacking in clear data in Australia that it is difficult to be sure that a move to restrict its use would on a net basis be beneficial.²⁷ Interestingly Professor Fletcher notes that:

“Although the right of recourse to administrative receivership has been greatly attenuated, it survives to a far greater extent than the government had originally envisaged.”²⁸

25 Thus it may yet be too soon to tell if the moves in this regard were significant in boosting a rescue culture there.

Data

26 In referring to the statistics available from the period of 1997 through to 2002, Professor Fletcher points out the:

“negligible role played by both of the new procedures against a background of generally high levels of company liquidations and administrative receiverships, particularly during the economic recession from 1990 to 1995.”²⁹

²⁶ *Productivity and Enterprise: Insolvency –A Second Chance* (July 2001) Cm. 5234, available at: <<https://www.gov.uk/government/publications/insolvency-a-second-chance>>.

²⁷ There is some data available in the United Kingdom, though again it is hardly plentiful: see J. Armour *et al.*, “The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK” (2012) 8(1) *Review of Law & Economics* 101; J. Franks and O. Sussman, “Financial Distress and Bank Restructuring of Small to Medium Size UK Companies” (2005) 9(1) *Review of Finance* 65.

²⁸ Fletcher, above note 2, at paragraph 1-043.

²⁹ Fletcher, above note 9, at 212, footnote 2, citing statistical tables of insolvency proceedings for the years 1987-2000; Appendix III in I. Fletcher, *The Law of Insolvency* (3rd ed) (2002, Sweet and Maxwell, London) and the United Kingdom Insolvency Service website: <www.insolvency.gov.uk>.

27 We extract a table from Professors Walters and Frisby³⁰ (Figure 23.1), the bottom two lines of the graph showing the interaction between the new procedures. Further reference to the data shows that the trend has not changed very much (Figure 23.2).³¹

Incidence of Insolvency Procedures: 1987 - 2010

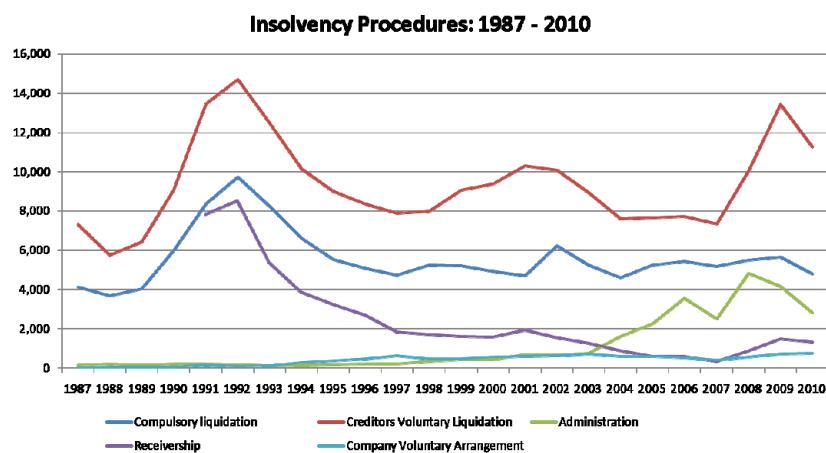


Figure 23.1: Incidence of Insolvency Procedures: 1987 – 2010 (Walters and Frisby)³²

³⁰ A Walters and S Frisby, "Preliminary Report to the Insolvency Service into Outcomes in Company Voluntary Arrangements", available at: <http://www.researchgate.net/publication/228177942_Preliminary_Report_to_the_UK_Insolvency_Service_into_Outcomes_in_Company_Voluntary_Arrangements>.

³¹ The United Kingdom Insolvency Service, *Insolvency Statistics – July to September 2014 (Q3 2014)*, available at: <<https://www.gov.uk/government/statistics/insolvency-statistics-july-to-september-2014>>.

³² Data excludes CVLs following administration as these do not represent a new company entering into an insolvency procedure for the first time. Receiverships include Law of Property Act receiverships, which are not insolvencies but which cannot be identified separately. The data is quarterly data and seasonally adjusted except compulsory liquidations, receiverships and CVAs that do not require seasonal adjustment.

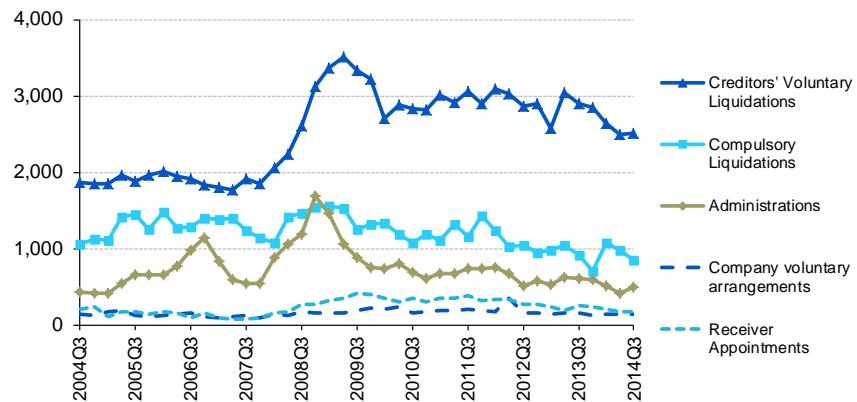


Figure 23.2: Company Insolvencies in England and Wales: 2004 – 2014 (Insolvency Service United Kingdom)

Australia

Background

28 Part 5.3A was added to the Corporations Act 2001 (Cth) following the Harmer Report Committee³³ recommendations, pursuant to the Corporate Law Reform Act 1992 (Cth). Corporate rescue initiated in the United Kingdom, by way of legislative scheme via the introduction of schemes of arrangement and those schemes were adopted in Australia subsequently.

29 Part 5.3A sought to provide a procedure whereby the insolvent or nearly insolvent company might move from rescue to liquidation without initiating liquidation; giving directors the chance to try to rescue the business of the company and in the event of failure, to allow for the possibility of the winding up of the company. The ideal of rescue is very much at the heart of the Harmer recommendations on the basis that it is more constructive to save a business and the jobs that go with it, than for it to fail and take some stakeholders along with it. Finally the Part sought to encourage directors to be more active within the zone of insolvency, hypothetically at least, to be constructive around a company's circumstances, rather than battling creditors until the end. Whether the aims of Part 5.3A have in fact been achieved is a matter for some discussion, but these are the principles of the legislation.

³³ Above note 13.

Data

30 The Australian position is as follows (in Table 23.3).³⁴ It looks to be fairly steady and on the same basis as the United Kingdom activity in the sense that it is by no means the most popular form of external administration. It is important to remember however that these graphs are based on activity, rather than proportion. The following table (Table 23.4) contains the raw data from the latest Australian Securities and Investments Commission (ASIC) collections and whilst the data will lag, to a certain extent, current activity, it does provide some interesting numbers. From that table, two further tables have been extracted (Tables 23.5-6) and these tables show the popularity of the Australian rescue provisions and the popularity of creditors' voluntary windings up respectively. It is instructive to note the final column in each of these tables to see the proportion of these two options as a function of total external administrations for the relevant period, showing a shift from the use of the voluntary administration to the creditors voluntary winding up.

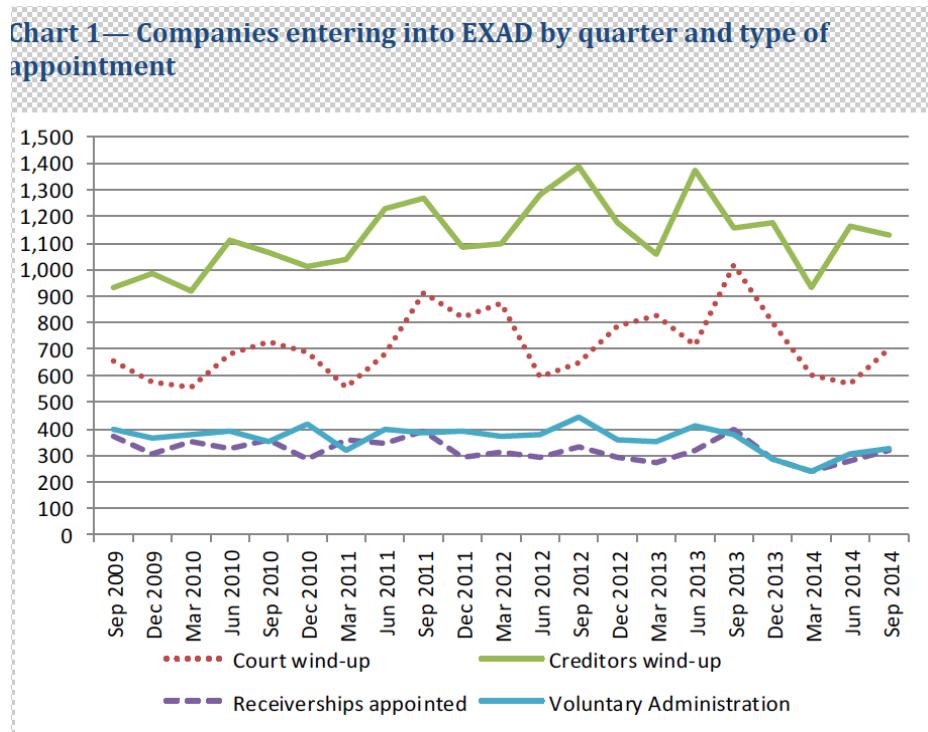


Table 23.3

³⁴ Summary analysis of insolvency statistics, September Quarter 2014, Corporate Insolvencies, available at: <<http://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/summary-analysis-of-insolvency-statistics/>>.

31 Further statistical information is provided as follows:³⁵



Australian insolvency statistics
Released: September 2015
Table 1.3 - Companies entering EXAD-Appointment type, ANNUAL, QUARTERLY

Period	Provisional wind-up	Court wind-up	Creditors wind-up	Receiver appointed	Controller (except receiver or controller)		Managing receiver (except receiver & manager)	Receiver manager appointed	Scheme administrator appointed	Voluntary Administration	Foreign/RAB wind-up	Total
					ANNUAL (1999-2015)							
1999-2000	102	1,412	691	37	135	4	291	0	1,533	0	4,205	
2000-2001	130	1,854	1,097	64	198	12	482	3	2,126	1	5,967	
2001-2002	98	2,279	694	64	150	2	441	0	2,482	1	6,411	
2002-2003	43	2,160	1,203	50	93	2	367	4	2,666	3	6,591	
2003-2004	60	2,329	1,280	30	83	5	274	0	2,488	0	6,549	
2004-2005	75	2,291	1,509	35	77	1	274	0	2,359	3	6,624	
2005-2006	63	2,727	1,790	27	99	1	326	0	2,784	1	7,818	
2006-2007	51	2,653	1,975	40	134	3	269	0	2,360	2	7,487	
2007-2008	32	2,472	2,732	44	201	5	356	0	2,064	1	7,907	
2008-2009	40	2,915	3,682	78	411	4	751	0	2,123	1	10,005	
2009-2010	17	2,446	3,939	82	490	5	773	0	1,527	2	9,281	
2010-2011	15	2,638	4,537	82	423	8	833	5	1,486	2	9,829	
2011-2012	25	3,180	4,741	58	423	11	792	0	1,523	4	10,757	
2012-2013	16	2,965	4,695	51	463	8	688	0	1,560	0	10,746	
2013-2014	17	2,971	4,428	47	547	60	544	0	1,207	1	9,822	
2014-2015	9	2,499	4,545	47	461	8	358	0	1,248	2	9,177	

Table 23.4

32 The following table is constructed from this data and shows Voluntary Administration as a percentage of Total External Administrations by year for Australia in the relevant time period (1999 – 2015):

Year	VA	Total EXAD	VA %age
1999-2000	1,533	4,205	36.5
2000-2001	2,126	5,967	35.6
2001-2002	2,482	6,411	38.7
2002-2003	2,666	6,591	40.4
2003-2004	2,488	6,549	38.0
2004-2005	2,359	6,624	35.6
2005-2006	2,784	7,818	35.6
2006-2007	2,360	7,487	31.5
2007-2008	2,064	7,907	26.1
2008-2009	2,123	10,005	21.2
2009-2010	1,527	9,281	16.5
2010-2011	1,486	9,829	15.1
2011-2012	1,523	10,757	14.2
2012-2013	1,560	10,746	14.5
2013-2014	1,207	9,822	12.3
2014-2015	1,248	9,177	13.6

Table 23.5

33 Creditors windings-up drawn from the same data show a reverse trend:

Year	Cred	Total EXAD	Cred %age
1999-2000	691	4,205	16.4
2000-2001	1,097	5,967	18.4

³⁵ ASIC, “Australian Insolvency Statistics”, Table 1.3 – Companies entering EXAD – Appointment type, annual, released September 2015, available at: <<http://download.asic.gov.au/media/3339810/asic-insolvency-statistics-series-1.pdf>>.

2001-2002	894	6,411	13.9
2002-2003	1,203	6,591	18.3
2003-2004	1,280	6,549	19.5
2004-2005	1,509	6,624	22.8
2005-2006	1,790	7,818	22.9
2006-2007	1,975	7,487	26.4
2007-2008	2,732	7,907	34.6
2008-2009	3,682	10,005	36.8
2009-2010	3,939	9,281	42.4
2010-2011	4,337	9,829	44.1
2011-2012	4,741	10,757	44.1
2012-2013	4,995	10,746	46.5
2013-2014	4,428	9,822	45.1
2014-2015	4,545	9,177	49.5

Table 23.6

Reason for Change

34 The figures in Australia show the significant increase in the use of the winding up procedures and a decline in the use of the voluntary administration process. There has been very little research into the use of the procedure beyond these raw figures.³⁶ Any judgment of the process based upon this data is at best a “rough” analysis. However, there is some correlation around the timing of legislative change introduced in 2007 and the decline in the use of the rescue provisions in Australia.

35 In 2007, the Corporations Act 2001 (Cth) was amended to deal with matters raised in prior reviews of the provisions in Chapter 5, Part 5.5, since the implementation of the Harmer Report reforms in 1993.³⁷ Importantly, the amendments change the time taken to commence a creditors’ voluntary winding up quicker than previously,³⁸ and at the same time simplify the process. Specifically the amendments facilitated the use of the creditors’ voluntary liquidation to avoid Director Penalty Notices that might be issued by the Australian Tax Office to directors of companies in the zone of insolvency.³⁹ Non-compliance with a Director Penalty Notice leaves a director potentially liable for certain tax obligations of the company.

³⁶ One exception being M. Wellard, “A Review of Deeds of Company Arrangement” (2014) 26(2) *Australian Insolvency Journal* 12, although unfortunately the (apparently necessarily) small sample size of the work constrains the ability to extrapolate from the data analysis.

³⁷ Corporations Amendment (Insolvency) Act 2007 (Cth).

³⁸ Ibid., section 3 and Schedule 1, items 98-101.

³⁹ For a discussion of these rights exerted by the ATO see M. Broderick, M., “Company Directors: Federal Taxation Liabilities and Obligations when nearing Insolvency: Part I” (2009) 38(1) *Australian Tax Review* 7 and M. Broderick, “Legislative Change to Director Penalty Notices and Security for Tax Payments” (2011) 40(1) *Australian Tax Review* 60.

36 The argument for making the 2007 changes to Part 5.5 of the Corporations Act 2001 (Cth) was that companies were entering VA merely because other routes to creditors' voluntary liquidation were too lengthy. Further, where there were no prospects of a successful rescue, it was thought the company ought to be placed in liquidation as soon as possible.

37 The difficulty with this approach is that it does reduce the possibility of any rescue being attempted and may encourage directors to delay taking any steps to deal with the insolvency at an earlier stage. These very concerns are those expressed by commentators when arguing in favour of rescue provisions in companies' legislation in the United Kingdom and Australia in the first place!

Possible Forthcoming Change in Australia

38 The Australian Productivity Commission, an Australian Commonwealth Government research and advisory body⁴⁰ has completed its inquiry: *Business Set-up Transfer and Closure*.⁴¹ It is a bold attempt to examine the economic impact of business barriers to entry and exit and to make recommendations on impact relating to five broad issues,⁴² including business exits for both the personal and corporate insolvency regimes.⁴³ The Draft Report suggests a "churn" of business entry and exit within Australia and that most of the activity is around small business, a very low proportion of whose activity is innovative.⁴⁴ For the few businesses that are closed or transferred without financial failure, the report suggests that whilst some legislative reform might be warranted:

"a wholesale change to the system, such as the adoption of the United States 'chapter 11' framework, is not justified"

and that:

⁴⁰ Australian Government, Productivity Commission website at: <<http://www.pc.gov.au/about>> that includes in its description of activities "a range of economic, social and environmental issues affecting the welfare of Australians."

⁴¹ The final inquiry report has been handed to the Australian Government (30 September 2015) and, in accordance with the Productivity Commission Act 1998, the Government will table the report within 25 sitting days of receipt of the report: <<http://www.pc.gov.au/inquiries/completed/business#report>>. It is not yet publically available and these comments are based upon the earlier Draft Report.

⁴² Ibid., where the Commission identifies options to reduce entry and exit barriers to include but not limit advice "on the potential impacts of: the regulation of product and service markets; transfers and subsidies to businesses, including import barriers; regulations affecting the ease of starting, operationalizing or closing a business; time spent on and cost of complying or dealing with government regulation, licensing and bureaucracy; and the personal/corporate insolvency regimes on business exits."

⁴³ Idem.

⁴⁴ Australian Government, Productivity Commission, Completed Business Draft Report, Overview, at 1, available at: <<http://www.pc.gov.au/inquiries/completed/business/draft>>.

“- Formal restructuring of companies through voluntary administration should be enabled as an option for when a company may become, but is not yet, insolvent;

- There should be provision for a ‘safe harbour’ to allow company directors to explore restructuring options without liability for insolvent trading;
- A simplified liquidation process should be introduced to reduce the time and expense of winding up businesses with little or no recoverable assets;
- All directors should be required to obtain a director identification number to enable the easier detection of disqualified or fraudulent directors.”⁴⁵

39 Unfortunately around these broad ideals, much of the commentary is suggested by comparisons with other OECD countries. This might be valid in the sense of “how it is usually done” but it does not accord with the idea of thinking differently about a growing problem in a particular jurisdiction with the constraints germane to it.⁴⁶

40 Business failure is usually accompanied by negative publicity and possible stigma around director reputation. One of the Draft Recommendations suggests that a “safe harbour” provision is warranted to encourage the exploration of restructure options in the absence of immediate liability.⁴⁷ It is likely that these kinds of concerns have a greater impact and therefore are stronger indicators around how larger businesses make decisions within the zone of insolvency. This is not to suggest that smaller company directors are less concerned, but it seems clear that phoenix company activity for example, is prevalent around small company operations and that director profiles are significantly less publicly identifiable for smaller companies.⁴⁸ The Productivity Commission notes that it cannot determine the extent of private restructuring undertaken by companies however it opines that anecdotal evidence suggests significant activity “particularly amongst larger businesses” and this is no doubt a reflection of the creditworthiness and negotiating abilities of the larger corporates.

41 One other factor concerning the Productivity Commission is the extent that directors are able to use sophisticated legal structures to ensure that their personal wealth is protected from a lifting of the corporate veil.⁴⁹ This renders otiose any attempt to recover from directors a fine levied by ASIC or non-criminal penalties imposed by the court. The consequence is that a director’s incentive to behave in a

⁴⁵ Idem.

⁴⁶ D. Morrison, “Barriers to Entry and Exit for Australian Businesses: The Solvency Impact of Disruption” (2015) 33 *Insolvency Law Journal* 81, at 89-90.

⁴⁷ Draft Recommendation 15.2: During a safe harbour period, “the directors would retain control of the company, but receive independent advice from registered advisers”, the recommendation however states that the advisors cannot then act as administrators, receivers or liquidators if there is further external administration with respect to the company. Australian Government, Productivity Commission, Completed Business Draft Report, Overview, at 31-32.

⁴⁸ D. Morrison, “Foundering around the Phoenix: Is it possible to use Court Proceedings effectively?” (2015) 33 *Insolvency Law Journal* 143, at 145.

⁴⁹ Australian Government, Productivity Commission, “Business Set-up, Transfer and Closure”, Draft Report (May 2015), at 323 (note 4).

particular way is shifted when an apparent cost associated with that behaviour is neutralised.⁵⁰ This also applies to other breaches including phoenix activity and breaches outside those contemplated by the analysis here.⁵¹ This is a significant issue since Australia is unique in its embracing and use of the private trust for purposes other than those traditionally used, for example in the United Kingdom. It is unlikely that the Australian Commonwealth Government will make significant changes on this front.

42 For those companies in the zone of insolvency within Australia, the Productivity Commission notes that 9 per cent of Australian companies as compared with around 21 per cent of United Kingdom companies appoint a voluntary administrator and that this compares poorly to countries such as the United States and Canada.⁵² With limited data however, it is difficult to see how one can make anything other than a cursory comparison of different external administration regimes to make the rescue point.

43 Finally, the majority of Australian companies that are put into voluntary administration, are too late for saving and in accordance with the general desire that rescue is preferable to failure,⁵³ the Productivity Commission suggested in the Draft Report that Section 436A of the Corporations Act 2001 (Cth)⁵⁴ be amended so that an administrator may not be appointed to restructure an already insolvent company and that if upon the appointment of an administrator, the administrator discovers that the company is already insolvent, then the administrator be obliged to immediately place the company into liquidation, rather than proceed with the administration.⁵⁵ This recommendation, if adopted, will re-position the voluntary administration provisions to enable companies within the zone of insolvency to:

“commence an ‘independent restructuring’ process when the directors form the opinion that the company may become insolvent at some future time”,

⁵⁰ Ibid., at 383, where the structuring of personal affairs “in a manner that limits the effectiveness of recovering fines and any incentives for future behaviour” is an issue flagged by the Productivity Commission.

⁵¹ For example, directors’ duties more broadly; subject to the expected reputation effect impact on the particular director and the perception of the seriousness of such an impact.

⁵² Australian Government, Productivity Commission, Completed Business Draft Report, Overview, at 20-21.

⁵³ Ibid., at 18: “The operation of the insolvency regime is critical to ensuring financially distressed businesses have an opportunity to restructure, or if that is not possible, providing an efficient, effective and orderly process for winding up. The regime should operate so as to avoid creating incentives for self-serving strategic behaviour by the business owners/directors or creditors, or a creditor race to the recovery of assets.”

⁵⁴ Section 436A currently provides for the appointment of an administrator by a company, where the board of directors resolves that an administrator is to be appointed because the company is already insolvent or likely to become so in the future.

⁵⁵ Draft Recommendation 15.1, Australian Government, Productivity Commission, Completed Business Draft Report, Overview, at 31.

as distinct from when the company is in fact insolvent. It remains to be seen how much of a difference this will make.

44 This view is represented more fully by the following Productivity Commission graphic:

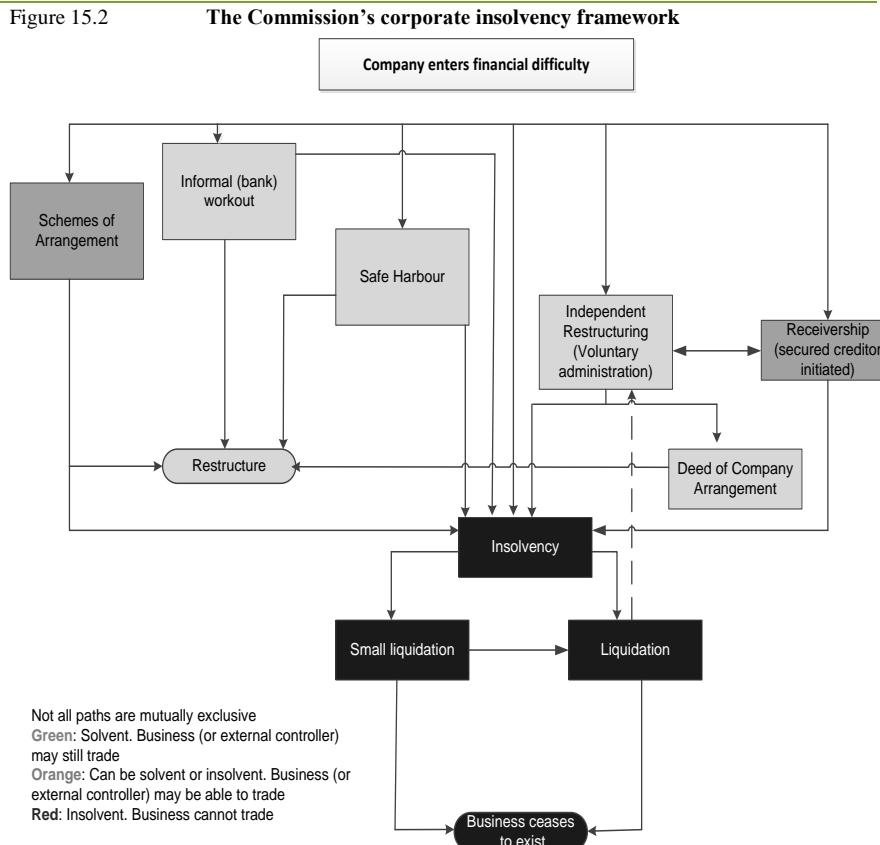


Figure 23.7

45 It therefore seems that Australia is in a similar position to that of the United Kingdom, because although a review has been undertaken around business exit and entry, Australia really needs a focussed, data-rich, properly justified examination of its external administration offerings. Professor Fletcher, sums it up best, when commenting upon the United Kingdom position where he opines:⁵⁶

“The undoubtedly necessity for a careful monitoring of the effects of the serial reforms to English corporate and individual insolvency law between 1986 and 2003 reinforces the case

⁵⁶ Fletcher, above note 2, at paragraph 1-045.

for a sustained and systematic re-evaluation of the relevant components of law and policy bearing upon matters of debt, credit, security and insolvency. In the interests of achieving balance and transparency, a comprehensive appraisal of these interlocking areas of our socio-legal fabric should be undertaken by a specially constituted body whose membership and remit should be aimed at ensuring that prevalent social values, as well as the technical qualities of the law and its procedures, are kept in focus. Piecemeal tinkering with the machinery of insolvency law may perhaps fall short of altering the core values on which the entire system is built, but may nevertheless give rise to unintended, unwelcome consequences.”

46 We think that this to be an entirely apposite representation of the Australian position.

Recommendations

47 It seems therefore that any legislature seeking to prevent failure must itself fail. This is because there is an underlying economic reality in our system that some undertakings will prove unsuccessful. It is, however, unfortunate for those stakeholders in the enterprise but the law cannot alter this.

48 Where regulators seek to provide one set of rules that applies to vastly different kinds of enterprise, and in the case of both the United Kingdom and Australia, regulates similar enterprises differently depending on their legal structure, one can surely only expect a degree of confusion and inefficient outcomes around treatment within the zone of insolvency particularly.

49 Further, and germane only to corporates, if the regulation is covering mostly “mum and dad” small business operators, then surely the application of complex large-scale enterprise legislation is going to be vastly non-complied with? If the majority of registered companies are small closely held enterprises than a new way of thinking about how they are dealt with is needed. It is possible that processes such as voluntary administration will be unsuitable because the enterprise cannot really support the infrastructure that comes with an external administrator. The trend toward so called “pre-packaged” arrangements in the United Kingdom no doubt reflects this reality, however it suggests to us that a broader question arises around the regulation of micro and small enterprises as corporations more generally. A consideration of regulating separately for smaller closely held companies (including their insolvency) is, in our view, open for consideration.

50 For larger companies, (those who at least in Australia are fewer than 5% of the population), that in fact conduct business on a large scale, there is a much greater ability to better carry the costs of attempted rescue. Again the recent United Kingdom experience, as for the Australia, suggests that the traditional schemes of arrangement provisions are useful. We argue for a comprehensive examination of the role of voluntary administration regime in Australia and its relationship with

other processes such as receivership. Such a review is worthwhile with the caveat that a serious effort is made around the collection and disclosure of relevant data to support the analysis. The need for a comprehensive and well-resourced review of the insolvency law generally (and the rescue regime in particular) in Australia is clear. Professor Fletcher's call for a careful and comprehensive review in the English context accords with our view of the necessity for the same in Australia. This is so especially in light of the Productivity Commission's observations that large business in Australia is primarily involved in innovation of products and services, a statistic that places further pressure on the divergent needs of large as against small business. Correspondingly there is also pressure on a proper consideration of appropriate legislation for each sector.

51 It therefore seems, at least for now, as Professor Fletcher suggests, that it is "business as usual".

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