



**Strengthening Australia's Corporate Rescue  
Framework: Insolvency Law Reforms to Promote  
Entrepreneurship, Business Dynamism and  
Economic Resilience**

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## About the Author

This submission is based on my doctoral research undertaken at the Adelaide University, which examines corporate rescue through a comparative and functional analysis of the corporate insolvency frameworks of the United States, Australia and India. My research evaluates how insolvency systems balance the competing objectives of business rescue, creditor protection, economic efficiency and entrepreneurial risk-taking, with particular emphasis on the effectiveness of restructuring mechanisms in preserving viable businesses.

The research draws extensively upon the United States Chapter 11 regime,<sup>1</sup> Australia's voluntary administration framework under Part 5.3A of the *Corporations Act 2001* (Cth),<sup>2</sup> and India's Insolvency and Bankruptcy Code 2016.<sup>3</sup> It adopts doctrinal methodology and analyses not only legislative provisions but also judicial decisions, insolvency practice, policy reports and empirical evidence to identify reforms capable of improving restructuring outcomes while maintaining market integrity.

The recommendations contained in this submission represent the culmination of several years of comparative research into corporate rescue and reflect both academic analysis and practical legal experience. I have served as a legal academic with Adelaide Law School since 2019. Prior to commencing doctoral studies and work in Australia, I served as an In-house Legal Counsel at one of India's largest public sector banks (Canara Bank, India) for fifteen years advising on commercial lending, distressed assets, insolvency, debt recovery and corporate restructuring. This combination of academic research and industry experience has provided practical insight into the challenges faced by businesses experiencing financial distress and by creditors seeking efficient restructuring outcomes.

Australia is presently at an important point in the development of its insolvency framework. The Parliamentary Joint Committee on Corporations and Financial Services' *Corporate Insolvency in Australia* Report (2023) recognised that Australia's insolvency laws have developed incrementally over several decades and now require a comprehensive review of their underlying objectives, operation and effectiveness.<sup>4</sup> The Committee concluded that the existing framework has become overly complex, costly and fragmented and recommended a root-and-branch review of Australia's corporate and personal insolvency systems.<sup>5</sup>

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<sup>1</sup> Chapter 11 of Title 11 of the United States Code (United States Bankruptcy Code).

<sup>2</sup> *Corporations Act 2001* (Cth) pt 5.3A.

<sup>3</sup> Insolvency and Bankruptcy Code 2016.

<sup>4</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency in Australia* (Report, July 2023)

<sup>5</sup> Ibid.

The Productivity Commission's current inquiry provides a timely opportunity to build upon those recommendations.<sup>6</sup> Rather than proposing incremental amendments, Australia has the opportunity to develop a modern corporate rescue framework that encourages entrepreneurship, reduces the stigma associated with business failure, improves creditor confidence and promotes business dynamism. Drawing upon comparative lessons from Chapter 11, these submissions identify reforms that could strengthen Australia's restructuring framework while remaining consistent with Australia's legal, commercial and institutional environment.

## **Reducing Stigma, Lowering Restructuring Costs and Building a Rescue-Oriented Insolvency System**

A modern insolvency framework should not only facilitate the orderly exit of non-viable businesses but also promote the rescue of viable enterprises. Building on the Parliamentary Joint Committee on Corporations and Financial Services' *Corporate Insolvency in Australia* Report (2023),<sup>7</sup> the following recommendations propose targeted reforms to reduce the stigma of business failure, encourage early restructuring, lower restructuring costs and strengthen creditor confidence. Drawing on comparative lessons from the United States Chapter 11 regime, these recommendations aim to support entrepreneurship, business dynamism and a more effective corporate rescue culture in Australia.

### **1. Reframe Australia's insolvency framework to reduce stigma and recognise honest business failure**

Australia should expressly reframe its corporate insolvency framework so that financial distress is not automatically treated as commercial failure or misconduct. One of the most significant barriers to business dynamism is the stigma attached to insolvency. This stigma affects directors, small business owners, employees, suppliers, lenders and the wider market.<sup>8</sup> Directors often delay seeking advice because entering external administration is perceived as reputationally damaging. By the time formal restructuring begins, the business may have lost supplier confidence, employee stability, customer goodwill, access to finance and going-concern value. In practical terms, stigma reduces the chances of rescue.<sup>9</sup>

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<sup>6</sup> Productivity Commission, *Reducing Barriers to Business Dynamism in Australia: Call for Submissions* (Call for Submissions, May 2026) Attachment A ('Terms of Reference').

<sup>7</sup> n 4.

<sup>8</sup> Parliamentary Joint Committee, *Corporate Insolvency in Australia* (n 4) 139.

<sup>9</sup> Howell, Nicola and Rosalind Mason, 'Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce' (2015) 38(4) *University of New South Wales Law Journal* 1529; For more on stigma see Emilie Ghio and Donald Thomson, 'Is Insolvency Stigmatised?' (2023) 32(3) *International Insolvency Review* 397.

The PJC recognised that Australia’s insolvency law requires a comprehensive review, including reconsideration of the principles and objectives of insolvency law.<sup>10</sup> This is crucial because the present framework has developed incrementally and does not clearly articulate a modern rescue-oriented philosophy. Part 5.3A of the *Corporations Act 2001* does include business rescue within the objectives of voluntary administration, but in practice the system often operates as a pathway to liquidation, asset sale or compromise rather than genuine rehabilitation.<sup>11</sup>

The United States Chapter 11 regime offers a useful comparative lesson.<sup>12</sup> Chapter 11 does not remove risk or guarantee business survival. However, it normalises restructuring as a legitimate legal and commercial process. A company entering Chapter 11 is not necessarily treated as having failed; rather, it is given an opportunity to restructure its debts, continue trading and preserve enterprise value under court supervision. Australia need not copy Chapter 11 wholesale, but it should adopt this central cultural lesson: insolvency law should create room for honest rescue. The Australian framework should therefore distinguish more clearly between honest business failure, poor market conditions, temporary liquidity distress and deliberate misconduct such as illegal phoenixing. At present, the same broad stigma can attach to all forms of insolvency. This discourages responsible directors from acting early and may push businesses into informal delay, creditor pressure, tax debt accumulation and eventual liquidation. A rescue culture requires the law to send a different signal: early restructuring is responsible governance, not evidence of failure.

A statutory reform could be introduced through an amended objects provision for corporate insolvency law. This provision should state that the purpose of insolvency law includes preserving viable businesses where reasonably practicable, maximising returns to creditors, protecting employees and other affected stakeholders, promoting confidence in markets, and distinguishing honest failure from misconduct. This would not undermine creditor protection. Rather, it would align creditor protection with value preservation. Creditors are usually better served where viable businesses are restructured early instead of being liquidated after value has already been destroyed. Such reform would also support entrepreneurship. Entrepreneurs are more likely to take productive risks if they know that the legal system allows an orderly and fair response to failure. Business dynamism requires both entry and exit. However, exit should not always mean liquidation. For viable businesses, insolvency law should offer a structured pathway for renewal.

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<sup>10</sup> Parliamentary Joint Committee, *Corporate Insolvency in Australia* (n 4) rec 2.

<sup>11</sup> *Corporations Act 2001* (Cth) pt 5.3A.

<sup>12</sup> Chapter 11 of Title 11 of the United States Code (United States Bankruptcy Code).

**Recommendation:** Australia should amend its corporate insolvency framework to include a clear rescue-oriented statutory objective that recognises honest business failure, promotes early restructuring, preserves enterprise value and distinguishes genuine rescue from misconduct.

## **2. Promote a genuine rescue culture through earlier intervention and a stronger Safe Harbour framework**

Australia should strengthen early intervention mechanisms so that directors can seek restructuring advice before financial distress becomes irreversible. A rescue culture cannot be achieved if businesses only enter formal processes after they have exhausted cash, lost key contracts and accumulated unmanageable creditor pressure. The timing of intervention is often the difference between rescue and liquidation.

The PJC 2023 report recognised the importance of Safe Harbour reform and recommended implementation of the Safe Harbour Review recommendations.<sup>13</sup> This is significant because Safe Harbour was intended to encourage directors to pursue restructuring without immediate fear of insolvent trading liability. However, in practice, Safe Harbour is often viewed as uncertain, technical and more accessible to larger companies with sophisticated legal and financial advisers. Many small and medium enterprise directors do not fully understand it or cannot afford the advice required to rely confidently on it.

Australia's insolvent trading regime has historically been creditor-protective, but it can also create a chilling effect. Directors who fear personal liability may cease trading too early, appoint administrators prematurely, or avoid informal restructuring efforts even where the business has genuine prospects of survival. Conversely, some directors delay too long because they fear the reputational consequences of seeking formal advice. This combination is problematic. The law should encourage responsible early action, not panic or denial.

Chapter 11 offers a useful contrast because it permits the debtor to remain in possession of the business while restructuring under court protection. This debtor-in-possession model reflects the assumption that existing management may often be best placed to preserve value, subject to oversight and creditor protections. Australia's voluntary administration model is different because control shifts to an external administrator. That model has advantages, particularly where independent control is necessary. However, it can also intensify stigma because appointment of an administrator is often seen as a loss of control and a sign that the company has entered a terminal stage.

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<sup>13</sup> n 4

Australia should therefore develop a more effective pre-insolvency restructuring culture. Safe Harbour should be reframed not merely as a defence to insolvent trading, but as an early rescue tool. It should be supported by practical guidance, director education, affordable advisory pathways and clearer statutory criteria. For SMEs, there should be a simplified Safe Harbour pathway that allows directors to access protection where they have taken reasonable steps such as obtaining advice from a registered restructuring adviser, preparing a cash flow plan, engaging with major creditors, maintaining employee entitlements and keeping proper financial records.

This reform would also help address the concern that rescue mechanisms may be misused for phoenix activity. A clearer Safe Harbour framework could expressly exclude dishonest asset transfers, concealment of records, deliberate non-payment of employee entitlements and transactions designed to defeat creditors. By drawing a sharper line between rescue and misconduct, the law would both promote rehabilitation and preserve integrity.

Earlier intervention should also involve creditors. Creditors often distrust restructuring proposals because they receive information too late or suspect that delay is being used to shift risk onto them. A better early intervention framework would encourage early creditor engagement, transparent financial disclosure and realistic restructuring plans. This would promote confidence and reduce adversarial behaviour.

**Recommendation:** Australia should reform Safe Harbour into a practical early rescue framework by simplifying eligibility, improving SME access, clarifying director obligations, providing official guidance and distinguishing responsible restructuring from phoenix misconduct.

### **3. Reduce the cost and complexity of restructuring, with stronger control over practitioner remuneration**

Australia should reduce the cost and complexity of corporate restructuring because expensive processes undermine rescue culture. If voluntary administration or restructuring is too costly, many businesses will either avoid formal rescue altogether or enter the process too late. High costs also reduce creditor returns and damage confidence in the system.

The PJC 2023 report identified cost and complexity as central problems in Australia's insolvency framework. It recommended that a comprehensive review consider insolvency practitioner remuneration, the sustainability of public interest work undertaken for little or no payment, and the impact of remuneration structures on stakeholders.<sup>14</sup> This is a critical issue. Insolvency practitioners

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<sup>14</sup> Parliamentary Joint Committee, *Corporate Insolvency Laws* (n 4) rec 13.

perform an important function, and complex restructurings require expertise. However, the system must ensure proportionality between professional costs and the value preserved.

The Whyalla Steelworks administration provides a useful example of the public importance and cost complexity of major restructurings.<sup>15</sup> A business of that nature is not merely a private commercial entity. It has regional employment significance, supply chain consequences, strategic industry implications and public policy importance. Restructuring such a business requires specialist legal, financial, operational and commercial expertise. However, these processes can also generate substantial professional fees. Where costs become excessive or insufficiently transparent, creditor confidence is undermined and rescue may appear to benefit advisers more than stakeholders.

Chapter 11 provides a useful comparative model because professional fees are subject to court supervision.<sup>16</sup> Professionals paid from the bankruptcy estate must justify their fees, and the court has an active role in approving remuneration. This does not eliminate cost, and Chapter 11 can itself be expensive. However, it recognises an important principle: where professional costs are paid from value that would otherwise be available to creditors and stakeholders, those costs require scrutiny, disclosure and justification.<sup>17</sup>

Australia should adapt this principle within voluntary administration and larger restructuring processes. Administrators should be required to provide clearer fee estimates at the outset, updated fee budgets during the administration, and plain-language explanations of work performed. For large administrations, especially those involving significant employment, public interest or regional economic consequences, remuneration should be subject to staged approval and enhanced creditor or court oversight. Creditors should be able to understand not only the amount of fees, but also whether the fees are proportionate to the restructuring objective.

**Recommendation:** Australia should introduce stronger cost controls in restructuring, including mandatory fee estimates, staged remuneration approval, plain-language creditor reporting, enhanced scrutiny in large administrations and a simplified pathway for viable SMEs.

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<sup>15</sup> Natasha Harradine and Che Chorley, 'Whyalla Steelworks Administration Contingency Funding Reduced as State Government Reviews GFG Alliance's Financial Position', *ABC News* (online, 23 July 2025) <https://www.abc.net.au/news/2025-07-23/whyalla-steelworks-administration-contingency-funding-reduced/105562642>

<sup>16</sup> 11 USC §§ 327–330. Unlike Australia's voluntary administration regime, Chapter 11 requires bankruptcy court approval of professional appointments and remuneration, providing an additional layer of oversight over costs incurred during the restructuring process.

<sup>17</sup> *Ibid.*

## 4. Introduce a statutory Best Interests of Creditors Test modelled on Chapter 11

Australia should introduce a statutory “*Best Interests of Creditors Test*” for DOCA and any future restructuring plan procedure.<sup>18</sup> This reform would improve fairness, transparency and creditor confidence in rescue outcomes. A rescue culture cannot be built by weakening creditor rights. It must instead show creditors that restructuring produces at least as much value as liquidation and distributes that value fairly.

Under Chapter 11, the best interests test in §1129(a)(7) requires that each dissenting impaired creditor receive at least as much under the reorganisation plan as it would receive in a hypothetical liquidation.<sup>19</sup> This test performs an important protective function. It ensures that rescue is not approved merely because it benefits the debtor or majority creditors. Dissenting creditors are protected by a liquidation-value floor.

Australia does not currently have an equivalent clearly expressed statutory test in voluntary administration. Administrators commonly compare DOCA outcomes with liquidation outcomes in their reports to creditors, but this is not the same as a mandatory statutory safeguard requiring each dissenting creditor to receive at least liquidation value. The absence of such a test can weaken confidence, especially among unsecured trade creditors, small suppliers and other creditors who may feel marginalised in restructuring negotiations.

The PJC’s emphasis on reviewing insolvency objectives, pathways and creditor priorities supports this reform. If Australia is to move towards a stronger rescue culture, it must ensure that rescue is legitimate from the perspective of creditors. Creditors are more likely to support restructuring if they know there is a statutory floor beneath which their recovery cannot fall without consent. This would also reduce litigation because the test would provide a clearer benchmark for evaluating whether a DOCA is fair.

A statutory best interest’s test would require a robust comparison between the proposed restructuring outcome and the likely liquidation outcome. This would involve valuation evidence, estimated liquidation returns, likely costs, timing of distributions and treatment of creditor classes. The test should apply particularly where creditors are impaired, where a class of creditors dissents, or where related-party creditors may influence the vote.

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<sup>18</sup> 11 USC § 1129(a)(7). A Chapter 11 plan may only be confirmed if each dissenting impaired creditor receives at least as much as it would receive in a hypothetical Chapter 7 liquidation.

<sup>19</sup> *Ibid.*

This reform would also improve transparency in administrator reports. Administrators should be required to identify the estimated liquidation return and explain why the proposed DOCA or restructuring plan provides an equal or better outcome for affected creditors. Where the proposed plan pays different returns to different creditor groups, the administrator should explain the commercial justification for that treatment.

The test should not be designed to prevent rescue. Rather, it should make rescue more credible. If a viable business can produce better returns than liquidation, the test will support restructuring. If a proposed rescue plan offers creditors less than liquidation while preserving value for shareholders or insiders, the test will prevent unfair outcomes. In that sense, the test would balance rescue with fairness.

**Recommendation:** Australia should amend Part 5.3A to require that a DOCA or restructuring plan provide each dissenting impaired creditor with at least the amount it would reasonably receive in liquidation, unless that creditor consents to different treatment.

## **5. Introduce a limited court-supervised cramdown mechanism to overcome holdouts while protecting creditor fairness**

Australia should introduce a carefully designed cross-class cramdown mechanism for appropriate restructuring cases. This reform should be modelled on Chapter 11 but adapted to Australian conditions. The purpose would be to prevent commercially viable restructurings from failing because of strategic holdouts, while ensuring that dissenting creditors receive fair treatment.

Chapter 11 permits confirmation of a reorganisation plan even where one or more impaired classes dissent, provided statutory safeguards are satisfied. These safeguards include the best interests test, the requirement that the plan be fair and equitable, and the prohibition on unfair discrimination. The result is a system that allows restructuring to proceed where it preserves more value than liquidation, but only under judicial supervision and only where creditor protections are met.

Australia's voluntary administration regime does not provide an equivalent general cross-class cramdown mechanism.<sup>20</sup> This can make restructuring difficult where creditors have different interests. Secured creditors, employees, trade creditors, landlords, government creditors and related-party creditors may each have different incentives. A proposal that preserves enterprise value may still fail

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<sup>20</sup> Jason Harris, 'Class Warfare in Debt Restructuring: Does Australia Need Cross-Class Cram Down for Creditors' Schemes of Arrangement?' (2017) 36(1) *University of Queensland Law Journal* 73.

if one group can block it for strategic reasons. This is particularly problematic in complex restructurings where liquidation would destroy going-concern value.

The PJC's recommendation for a comprehensive review of voluntary administration and insolvency pathways creates an opportunity to consider whether Australia's restructuring tools are strong enough.<sup>21</sup> A modern rescue framework should be able to deal with creditor holdouts while protecting minority creditors from unfair prejudice. Cramdown is not a debtor-friendly shortcut. Properly designed, it is a fairness-based mechanism that allows the court to approve a restructuring only where it satisfies objective statutory standards.

A limited Australian cramdown mechanism should include several safeguards. First, there must be proper class formation so that creditors with materially different legal and economic interests are not grouped together unfairly. Secondly, creditors must receive adequate disclosure, including valuation evidence and a comparison with liquidation. Thirdly, dissenting creditors must receive at least liquidation value through the best interest's test. Fourthly, the plan must be fair and equitable. Fifthly, the court should retain discretion to refuse approval where the plan unfairly benefits insiders, related parties or senior creditors at the expense of weaker creditor groups.

This reform would be particularly useful for larger restructurings and strategically important businesses. For example, in cases involving major employers, regional industries or complex creditor structures, a court-supervised cramdown could preserve value that would otherwise be lost through liquidation or piecemeal asset sales. However, the mechanism should not be imposed unnecessarily on small businesses where the cost of court approval may be disproportionate. For SMEs, simplified restructuring should remain the priority.

A cramdown mechanism would also encourage more serious negotiations.<sup>22</sup> If creditors know that a fair and value-maximising plan can be approved despite strategic dissent, they may be more willing to negotiate constructively. At the same time, the best interests test and court approval would ensure that dissenting creditors are not sacrificed merely to achieve rescue.

**Recommendation:** Australia should introduce a limited court-approved cross-class cramdown mechanism for DOCAs or a new restructuring plan procedure, subject to proper class formation,

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<sup>21</sup> Parliamentary Joint Committee, *Corporate Insolvency Laws* (n 4) recs 6, 9.

<sup>22</sup> For more on cramdown and Chapter 11 see Kenneth N Klee, 'All You Ever Wanted to Know about Cram Down under the New Bankruptcy Code' (1979) 53(2) *American Bankruptcy Law Journal* 133; Frank W DiCastrì and Lindsey M Greenawald, 'Cramdown for Unsecured Creditors: Since When Does "Best Interests" Mean Less Interest?' (2018) 37(5) *American Bankruptcy Institute Journal* 16.

adequate disclosure, independent valuation evidence, a best interests test, and a fair and equitable standard.

## Conclusion

These five reforms should be understood as a connected package. Reducing stigma requires more than changing language. It requires law reforms that supports early action, affordable restructuring, creditor confidence and fair approval of rescue plans. The PJC 2023 report has already identified the need for comprehensive reform of Australia’s insolvency framework. The Productivity Commission’s present inquiry provides an opportunity to build on that work by connecting insolvency law reform to business dynamism, productivity and entrepreneurship.

Chapter 11 should not be transplanted into Australia wholesale. However, it offers valuable lessons: restructuring should be normalised; viable businesses should be given room to reorganise; creditor protections should be clear; professional costs should be supervised; and dissent should not be allowed to defeat a fair and value-maximising plan. Australia can adopt these principles in a targeted and locally appropriate way.

A modern Australian corporate rescue framework should therefore promote honest business recovery, preserve viable enterprises, protect creditors, reduce unnecessary costs and distinguish clearly between genuine rescue and misconduct. Such reform would support not only distressed businesses, but also the broader economy by encouraging responsible risk-taking, innovation and productive reallocation of capital.

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