Submission to the Productivity Commission's Inquiry on Reducing Barriers to Business Dynamism

Response to the Call for Submissions

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1 Introduction

This submission is authored by Scott Atkins and Harry Lawless, solicitors of Norton Rose Fulbright.[1]

We commend the Productivity Commission for undertaking this important and timely inquiry into reducing barriers to business dynamism in Australia.

We also commend Assistant Minister Leigh for championing insolvency law as a locus for productivity-enhancing reform.[2]

This submission engages with the following parts of the Call for Submissions:

1. The Principles and Objectives that underpin Australia's insolvency frameworks and the extent to which they support outcomes for people and businesses, and enable economic growth - section 2 of this submission;
2. Whether further harmonising Australia's corporate and personal insolvency frameworks would create a net benefit, particularly for small business owners - section 3 of this submission;
3. How the various corporate and personal insolvency pathways can be improved - section 4 of this submission;
4. The operation of Schedules 1, 3 and 4 of the *Treasury Laws Amendment (Combatting Illegal Phoenixing) Act* 2020 (Cth) - section 5 of this submission.

As an initial observation, we wish to bring to the Productivity Commission's attention the fundamental importance of effective, well-functioning restructuring and insolvency systems in contributing to financial stability and long-term innovation, productivity and economic growth in Australia.

Despite its economic importance, Australia's last comprehensive review and reform effort for its corporate insolvency law took place in 1988, one year before the internet arrived in Australia.[3]

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[1] Author details are annexed. This submission contains the personal views of the authors and they do not necessarily reflect the views and opinions of Norton Rose Fulbright.
[2] Hon Dr Andrew Leigh MP, 'Credit where it's due: insolvency, trust and economic dynamism' (Address to the Australian Restructuring Insolvency and Turnaround Association National Conference, 19 June 2026). Available at: https://ministers.treasury.gov.au/ministers/andrew-leigh-2025/speeches/address-australian-restructuring-insolvency-and-turnaround
[3] The 'Harmer Report' which is referred to throughout this submission and which was the genesis of our modern national corporate insolvency law contained in the Corporations Act 2001, was authored in 1988. There have been various piecemeal reviews and reforms since then. Australian universities first gained access to the internet in 1989. The Harmer Report: Australian Law Reform Commission, 'General Insolvency Inquiry', Report No. 45 (1988), available at: https://www.austlii.edu.au/au/other/lawreform/ALRC/1988/45.pdf?__cf_chl_f_tk=BYXv1isoIhSwVRQtp3h1NR8yKoLN9IqSX62nhnVHh6Y-1782789072-1.0.1.1-ncw_IDKWYamIH10CsHYyQuIiNGD4i2uX.tbhhfM861o

Effective restructuring and insolvency laws:

- enhance creditor returns, provide a pathway out of systemic indebtedness, facilitate the quick exit of unproductive firms and free up scarce capital to be invested in dynamic new ventures in a rapidly changing economy;
- preserve jobs and livelihoods and encourage an entrepreneurial culture where business failure is not stigmatised; and
- result in lower risk premiums and capital costs (in the form of interest rates) for businesses and individuals and increase the supply of credit for enterprises, due to a greater level of assurance among creditors that their rights will be protected and competing claims will be coordinated in a coherent, orderly manner in the event a debtor encounters financial distress. This results in stronger capital flows and investment in the economy in the "good times" as well – leading to expansion, growth, jobs creation, housing supply, and long-term economic and community sustainability.

Recent empirical research compiled by the World Bank provides meaningful practical evidence of the substantial role that an efficient insolvency system plays in supporting entrepreneurial activity, job creation, productivity and economic growth.[4]

According to the World Bank:

- reforms that reduce the time and costs of insolvency proceedings – such as simplified reorganisation – have increased the likelihood of preserving viable but financially distressed companies, and jobs that would otherwise be lost when a company fails;
- reforms in personal insolvency laws that promote the discharge of debts and a fresh start for individual entrepreneurs have increased the average rate of self-employment by around 3.8%; and
- evidence from Japan, South Korea and various OECD countries suggests that insolvency reforms which facilitate the exit of inefficient, non-viable companies can lead to productivity growth and encourage investment and new jobs.[5]

The OECD has released various studies suggesting that inefficient insolvency systems are one of the primary barriers to productivity growth in OECD countries. This arises because "inefficient firms increasingly linger – as opposed to exit – the market, which can consume scarce resources and crowd-out the growth of more innovative firms" and cause "the misallocation of labour, capital and skills".[6]

Similarly, a recent working paper published in the Asian Development Bank Economics Working Paper Series provides strong empirical support for the importance of insolvency reforms for economic productivity, using firm-level data from 22 economies over the period 2003 to 2024, finding that insolvency law reform generates productivity increases by reducing capital misallocation.[7]

At a time when Australia's economy is in deep distress, and businesses and consumers alike are facing sustained cost of living pressures, economic uncertainty and increasing risks domestically and geopolitically, laws which promote efficient business exit and restructuring outcomes are of the utmost importance.

Yet, currently, Australia's restructuring and insolvency laws operate as a barrier to business dynamism and productivity growth. In several ways, they fail to meet the core objectives of a best practice insolvency system to allow unviable entities to enter a simple, cost-effective and quick liquidation

[4] See, for example: World Bank, World Development Report 2022 (chapter 3), available at: https://www.worldbank.org/en/publication/wdr2022
[5] World Bank, Andres F Martinez, Aurelio Gurrea-Martinez and Harish Natarajan, "The Crucial Role of Insolvency Law in Job Creation and Preservation", 1 July 2025, available at: https://blogs.worldbank.org/en/psd/the-crucial-role-of-insolvency-law-in-job-creation-and-preservat
[6] OECD, Muge Adalet McGowan and Dan Andrews, "Insolvency Regimes and Productivity Growth: A Framework for Analysis", OECD Economics Department Working Papers No 1309, July 2016, available at: https://www.oecd.org/en/publications/insolvency-regimes-and-productivity-growth_5jlv2jqhxgq6-en.html.
[7] Asian Development Bank, 'Zombies, Insolvency Reform and Misallocation of Capital' (June 2026). Available at: https://www.adb.org/sites/default/files/publication/1149926/ewp-849-zombies-insolvency-reform-misallocation.pdf

process, while giving viable entities the maximum chance possible to effectively restructure their affairs.

Some of the key weaknesses and limitations are addressed in more detail in the balance of this submission.

2 The Principles and Objectives that underpin Australia's insolvency frameworks and the extent to which they support outcomes for people and businesses, and enable economic growth

What are the principles and objectives of Australia's insolvency law?

A bystander to our legal system would be forgiven for not being able to answer this question. The principles and objectives underpinning the Australian corporate insolvency system are articulated in the *Corporations Act* in an incomplete and piecemeal manner:

1. There is no general statement of the objectives of the insolvency law as a whole.
2. The objectives of the voluntary administration framework are described as being to maximise the chances of the company or parts thereof continuing in existence, or, if that's not possible, achieving an outcome with better results for creditors and members than an immediate winding up.[8]
3. The objectives of the small business restructuring framework are described as being to provide a restructuring framework to allow eligible companies to retain control of their business while developing a plan to restructure it with assistance of a small business practitioner, and to enter into a restructuring plan with creditors.[9]
4. Liquidation, schemes of arrangement and receivership have no stated objectives.

The question of what ought to be the proper objectives of our insolvency system is too broad to answer in this submission. It was considered in depth by the Parliamentary Joint Committee on Corporations and Financial Services in its 2023 report on Corporate Insolvency in Australia (**2023 insolvency review**).[10] Noting the Productivity Commission's focus on productivity, we confine ourselves in the following section to some limited suggestions on that theme.

Putting economics at the centre of insolvency law's objectives

Were a statement of the objectives of insolvency law to be written today, to reflect the economic ambition of recent legislative reforms, it would need to encompass two key structural changes to Australia's insolvency law:

- first, the 2017 "safe harbour" reforms, which sought to facilitate company rescue by giving directors the comfort (by providing them with a defence to insolvent trading offences) to not turn over their financially distressed company to administrators if there is a viable pathway for turning the company's financial position around;
- second, the 2021 small business restructuring reforms, which, among other things, provided another way for directors to retain control of their small business while effecting a turnaround plan.

Both reforms were implemented with an eye to economic outcomes:

[8] This is a slightly abridged version of the full statement of objects. Corporations Act s 435A.
[9] This is a slightly abridged version of the full statement of objects. Corporations Act s 452A.
[10] Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Insolvency in Australia' (2023), pp. 27-35. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report

- the safe harbour reforms were introduced to "drive cultural change among company directors by encouraging them to keep control of their company, engage early with possible insolvency and take reasonable risks to facilitate the company's recovery instead of simply placing the company prematurely into voluntary administration or liquidation."[11]

- the Small Business Restructuring reforms were introduced to "help more Australian small businesses restructure and increase their chance to survive the economic impact of the coronavirus."[12]

The effect of both sets of reforms has been to delay (or at least, enable a company's directors to decide to delay) the point at which a business leaves the hands of its directors and enters the hands of an independent administrator or liquidator. In this way, both reforms represent small steps away from the UK approach, characterised by control of an insolvent company passing from its directors to an independent insolvency practitioner (sometimes called the "practitioner-led" model of insolvency), and towards the US "debtor-in-possession" model of insolvency, wherein the directors retain control of the business during the restructuring process.

The question of the respective merits of the "debtor-in-possession" and "practitioner-led" approaches to insolvency is contested and beyond the scope of this submission. It also goes to broader questions of how we view our Australian society, and therefore cannot be considered in a vacuum.

The interconnectedness of the insolvency framework with broader structural factors is helpfully articulated in the US context in the following extract from Professor Nathalie Martin (as quoted in an excellent 2019 paper charting the evolution of Australia's insolvency law by High Court Justice Edelman and others):

> *"The current US bankruptcy system grew directly out of the United States' unique capitalist system, which rewards entrepreneurialism as well as extensive consumer spending. It makes sense that a society in which dollars rule would have a forgiving personal bankruptcy system in order to keep consumer spending high, and an equally forgiving business reorganisation system to encourage risk taking and economic growth. Both systems are part of a larger scheme to keep economic players alive and active in the game of capitalism. US bankruptcy systems are among the country's few social programs and they address many of society's ills. Thus, they are broad and form an integral part of the social system from which they sprung."*[13]

The above extract is part of a larger piece of work cautioning against exporting wholesale the US debtor-in-possession model to societies that do not share the same societal / economic characteristics as the US. Australia is, of course, a different society to the US with different approaches to, among other things, social programs. The safe harbour and small business restructuring reforms seem to reflect a qualified and partial movement towards the debtor-in-possession approach. This Productivity Commission inquiry seems an appropriate forum in which to consider holistically the merits and trade-offs involved.

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[11] Minister's second reading speech, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017, Thursday, 1 June 2017, p 6011.
[12] Minister's second reading speech, Corporations Amendment (Corporate Insolvency Reforms) Bill 2020, 12 November 2020, p 9631.
[13] Nathalie Martin, "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation" (2005), cited in Edelman, Meehan and Cheung, 'The evolution of bankruptcy and insolvency laws and the case of the deed of company arrangement' (2019). Available at: https://www.hcourt.gov.au/sites/default/files/assets/publications/speeches/current-justices/edelmanj/EdelmanJ14Jan2019.pdf

Should the law state its objectives?

The lack of an overarching statement of objectives in Australia's corporate insolvency law is not unusual. A brief survey of the corporate insolvency laws in peer jurisdictions reveals that none utilise an overarching statement of objectives in the law itself:

Country	Does the corporate insolvency law state its objectives?
Singapore	Piecemeal only[14]
New Zealand	No[15]
United Kingdom	Piecemeal only[16]
United States	No[17]
Canada	Piecemeal only[18]

Nonetheless, it would be appropriate for our corporate insolvency law to state its objectives on its face. This was ultimately the recommendation of the 2023 insolvency review.[19] A statement of objects would increase the predictability, and aid the interpretation of, our insolvency law, potentially with positive downstream impacts on creditor willingness to lend.

Objects clauses are increasingly common in Commonwealth legislation. Objects clauses assist because "[i]n the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."[20] Naturally, the fact that Australia's corporate insolvency law sits within the Corporations Act, rather than in a standalone piece of legislation, would complicate the insertion of an objects clause. We say more about the prospect of standalone legislation in the following section.

3 Whether further harmonising Australia's corporate and personal insolvency frameworks would create a net benefit, particularly for small business owners

Procedural harmonisation

The Harmer report considered whether to harmonise Australia's corporate and personal insolvency frameworks into one law. It noted that submissions on the costs and benefits of doing so were divided. It ultimately concluded that the question of harmonisation was "not a major issue" and did not recommend harmonisation.[21]

Most civil law countries have a bankruptcy system for business and non-business debts that do not discriminate based on the corporate form of the debtor. Many then have a separate law dealing with the non-business-related debts of individuals. For example, in France, the *Code de Commerce* applies to companies and any person engaged in commercial activity, while purely consumer debts are dealt with under the *Code de la Consommation.*

Most common law countries (including Australia) inherited the United Kingdom's historic approach of a bankruptcy law that deals with the insolvency of natural persons, and a companies law that deals with, among other things, the insolvency of companies. The United Kingdom switched in 1986 to the

[14] For example, s 89 of the *Insolvency, Restructuring and Dissolution Act 2018.*
[15] *Insolvency Act 2006.*
[16] For example, s 3 of Schedule B1 of the *Insolvency Act 1986.*
[17] US Bankruptcy Code (11 USC § 362).
[18] Bankruptcy and Insolvency Act 1985, s 267.
[19] Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Insolvency in Australia' (2023), p. 35. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report
[20] Acts Interpretation Act 1901 (Cth) s 15AA.
[21] Australian Law Reform Commission, 'General Insolvency Inquiry', Report No. 45 (1988), p 31.

harmonised approach of housing the laws on personal and corporate insolvency in a consolidated *Insolvency Act 1986.* This approach has since been followed in countries including New Zealand[22] and Singapore.[23]

Small businesspersons operate at the margins between the personal and corporate insolvency laws and have the most to benefit from a more harmonised approach to the law. The reality is that for many small businesses, personal and corporate affairs are fundamentally intermingled by way of personal guarantees. The affairs of sophisticated unincorporated sole traders may resemble those of corporations, but are dealt with under a law for natural persons. Having two separate laws and regulators for corporations and natural persons makes it more challenging to address these issues.

It is worthwhile to revisit the benefits of a consolidated law summarised in the Harmer report, which are just as relevant today:

- Many aspects of insolvency law affecting the individual and the corporation are, or should be, the same;

- With a single statutory scheme, one regulator[24] would have effective control of policy in relation to insolvency and changes could be made expeditiously; and

- Greater efficiency and cost savings would be achieved by common procedures.[25]

The Productivity Commission should consider recommendations for a consolidated personal and corporate insolvency law with a single regulator.

<u>A pressing issue for substantive harmonisation – insolvent trading trusts</u>

Redefining the treatment of insolvent trading trusts is of particular significance in the Australian insolvency industry and the broader business community, given the increased incidence of discretionary, fixed and unit trusts being used to conduct small and medium-sized enterprises in recent years, and the significant role that such trusts play in business activity in Australia.

We note that the Harmer Report originally recommended bespoke measures to deal with insolvent trading trusts in its final report in 1988. Yet, 38 years later, despite the expansion of trading trusts and their prominence in the Australian economy, nothing has changed. Without any legislative guidance, the courts have sought to fit trusts into an insolvency regime in Australia that is inept to deal with them.

One possible solution was identified by the Australian Restructuring, Insolvency and Turnaround Association (**ARITA**) in its December 2021 submission to the Commonwealth Treasury's Consultation Paper, "Clarifying the Treatment of Trusts Under Insolvency Law".

ARITA's policy position is that, consistent with the recommendations of the Harmer Report, for the purpose of insolvency law, trusts (or, more pertinently, trust funds) should be treated as *economic entities* (but not legal entities). This would mean that the trust (or trust fund) should be explicitly recognised in the Corporations Act (for corporate trustees) and the Bankruptcy Act (for individual trustees) as being an economic entity that is separate and distinct from its trustee, with its own assets and liabilities, creditors and equity participants (i.e. beneficiaries) that will be different from the assets and liabilities, creditors and equity participants of any other trust the trustee controls, and of the trustee personally in its own right. The benefit would be that, if the trust fund was insolvent, its

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22 *Insolvency Act 2006* (NZ).
23 *Insolvency, Restructuring and Dissolution Act 2018* (Singapore).
24 The Harmer Report used the word "government" since one of the issues at the time was how to divide the regulation between state and federal governments. Today, with those debates settled, the benefit would be from having one rather than two regulators.
25 Australian Law Reform Commission, 'General Insolvency Inquiry', Report No. 45 (1988) at p 13, available at: https://www.austlii.edu.au/au/other/lawreform/ALRC/1988/45.pdf?__cf_chl_f_tk=BYXv1isoIhSwVRQtp3h1NR8yKoLN9IqSX62nhnVHh6Y-1782789072-1.0.1.1-ncw_IDKWYamIH10CsHYyQuIiNGD4i2uX.tbhhfM861o

creditors could be protected under the provisions of the Corporations Act and the Bankruptcy Act, even if the trustee remained technically solvent.

4 How the various corporate and personal insolvency pathways can be improved

Simplicity

Australia's corporate insolvency law could be simpler. This point has been amply made by the Australian Law Reform Commission in its 2023 report 'Confronting Complexity: Reforming Corporations and Financial Services Legislation' and the 2023 insolvency review. That review stated that a "common theme in much of the evidence received was that the corporate insolvency legislative framework has become overly complex, adding cost and hindering access to insolvency processes."[26]

Part of the problem is piecemeal reform, which has the effect that applicable law is scattered across various parts of the Act. Another part of the problem is that the insolvency law is tethered to the Corporations Act, an enormously complex, seven-volume piece of legislation. The structural aspects of the Corporations Act as a whole, in particular defined terms, imposes an inherent limit on simplification efforts. Moving to a unified standalone law for corporate and personal insolvency (discussed in the preceding section) would solve this problem.

An example may assist to illustrate these issues.

[26] Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Insolvency in Australia' (2023), p. 35. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Report

“Simplified” restructuring law

Imagine a diligent director seeking to identify whether his company is eligible for the small business restructuring process. This is a reform introduced for the express purpose of simplifying the law of insolvency as it pertains to small businesses.

The director opens section 453C of the *Corporations Act* which is headed “Eligibility criteria for restructuring”. He finds that section 453C does not in fact contain the criteria for eligibility (other than a negative test identifying certain categories of directors who are ineligible). Instead, section 453C refers him to “the regulations”.

Eventually, perhaps with the aid of ChatGPT, the director figures out “the regulations” means the *Corporations Regulations 2001.*

He eventually finds r 5.3B.03, ‘Eligibility criteria for restructuring’. It tells him that “the test for eligibility is that on the day the restructuring begins the total liabilities of the company to pay any admissible debts and claims must not exceed $1 million.”

But wait a minute, how do I know the day the restructuring begins? The director scans the rest of r 5.3B.03. It does not say. He flicks back to section 453C of the Corporations Act. That section talks about “the day on which a restructuring practitioner for the company is appointed”, but says nothing about when “the restructuring begins”. Are they one and the same, the director wonders.

“Ok, leave that to one side”, the director thinks to himself. “I suppose what I really need to be sure of is how to calculate my ‘liabilities’ to make sure my business is under the threshold”. He flicks to the dictionary at section 9 of the Corporations Act. It contains more than a thousand definitions, so there must be something that can shed some light on a concept as important as “liabilities”. After flipping past about fifty pages of irrelevant definitions he finds the following:

> *liability:*
>
> *(a)* ***liability*** *(except in relation to a sub-fund of a CCIV):*
> *(i) includes a duty or obligation of any kind (whether arising under an instrument or otherwise, and whether actual, contingent or prospective); and*
> *(ii) in relation to a CCIV—has a meaning affected by section 1233A; and*
> *(b)* ***liabilities****, in relation to a sub-fund of a CCIV, has the meaning given by section 1233L.*

He slams closed his laptop in disgust, long before he was able to identify that <u>yet</u> another separate section, r 5.3B.01, carves out employee entitlements from the $1 million threshold.

On the question of form, we commend the New Zealand *Insolvency Act 2006* as an exemplar of well-drafted legislation.

<u>Balancing corporate rescue and creative destruction</u>

Before the rise of statutory rescue procedures, liquidation stood as the central - and in many jurisdictions the only - formal mechanism of corporate insolvency law. Liquidation involves the gathering and sale of the company’s assets, distribution of the proceeds to creditors, and deregistration of the company. It is, in effect, a mechanism to manage, formalise and finalise business failure. Business failure is essential for the creative destruction required in a market economy.

A more modern approach internationally is to emphasise the importance of business rescue (by which it is meant the business either continuing after a restructure of its debts, or being sold as a going concern). The obvious benefits of rescuing a business include job preservation and preservation of economic value. Australia’s voluntary administration procedure (and the Deed of Company

Arrangement or "DOCA" that is a commonly-used outcome of voluntary administration) is a mechanism for business rescue.

As a matter of practice, a DOCA is ordinarily entered into if a requisite majority of creditors perceive that it would result in a better outcome for them than an immediate winding up. This is not a high bar, because an immediate winding up is significantly value-destructive of a business.

What is notable is what is not considered in that decision-making process:

- Are the "rescued" employees and capital tied up in this business being deployed in an economically inefficient way? *(the authors suggest the answer may be 'yes' in some cases)*

- Will this business rescue stifle innovation, by preserving an inefficient business at the expense of a new, more efficient competitor, or multiple such competitors? *(the authors suggest the answer may be 'yes' in some cases)*

- Has rescuing this business by enforcing a compromise of its debts given it an advantage over its unindebted competitors, and if yes, what market behaviours does this incentivise? *(the authors suggest the answer may be 'yes' in some cases, and that business rescue may incentivise indebtedness)*[27]

There is potentially a tension between business rescue and creative destruction. An effective insolvency system must have procedures to facilitate both business rescue and business exit, it is not a question of one or the other. However, what may need refinement is our method of sorting between, on the one hand, business that ought to be rescued, and on the other, business that ought to exit the market. In other words, the Productivity Commission may wish to consider whether, from the perspective of economic outcomes, the current law strikes the right balance between corporate rescue and creative destruction.

"Pre-packs"

"Pre-pack" is shorthand for a form of informal negotiation of the sale of the business of a financially distressed company with involvement from the company's directors and an insolvency practitioner, followed by the appointment of that same practitioner as the company's administrator and the implementation of the previously negotiated sale by the administrator.

A pre-pack (subject to fairness protections to prevent creditor abuse) can improve efficiency and substantially lower the costs that would be incurred in a protracted administration process, while also cutting short the delay that risks secured creditors, landlords and major suppliers enforcing their rights during administration in a manner that renders a rescue attempt impossible. A successful going concern sale also ensures optimal investment of capital in value-creating, viable businesses in the interests of broader economic efficiency.

As noted in INSOL International's *Statement of Principles for a Global Approach to Multi-Creditor Workouts*, there are often material advantages for both creditors and debtors in the expeditious implementation of informal or contract-based rescues or workouts, compared with the "unpredictable costs and uncertainties of a formal insolvency".[28]

Pre-packs are common in many countries, such as the United Kingdom, where they have been found to enhance the prospect of rescuing viable businesses, thereby preserving jobs, while avoiding the substantial cost of formal insolvency measures.[29]

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[27] This point has been persuasively made in similar terms by Michael Murray: see Michael Murray, 'The interaction of insolvency law and market competition' (2025) 23(9&10) INSLB 75.
[28] INSOL International, "Statement of Principles for a Global Approach to Multi-Creditor Workouts", Second Edition, April 2017, available at: https://www.insol.org/focus-groups/financiers-group/technical-projects.
[29] Graham Review into the Pre-Pack Administration, Insolvency Service, 16 June 2014, available at: https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration.

In Australia, pre-packs are rare in practice. This is primarily due to strict independence requirements, with the traditional approach taken by the courts that administrators cannot have any actual or perceived conflict of interest, and any substantial involvement with a company and its directors prior to administration being unlikely to meet that standard.

A pre-positioned sale framework, based on a model proposed by ARITA under which an advisor involved in pre-positioning work could not be subsequently appointed as a company's administrator and the sale negotiated would be subject to statutory review,[30] was endorsed by the Australian Productivity Commission in 2015,[31] but was not introduced by the Australian Government.

This is the model that has most industry support in Australia and should be re-explored as a means to enhance the prospect of rescuing a viable enterprise, preserving value for creditors and contributing to business dynamism in Australia.

5 The operation of Schedules 1, 3 and 4 of the Treasury Laws Amendment (Combatting Illegal Phoenixing) Act 2020 (Cth)

The existing insolvency law contains various 'voidable transactions' provisions which enable a liquidator to seek court orders reversing certain transactions that took place in or near insolvency. The form of the provisions is designed to cover a range of conduct, from innocent but unfair preferential payments through to deliberate asset stripping.

Schedule 1 of the *Treasury Laws Amendment (Combatting Illegal Phoenixing) Act 2020 (Cth)* introduced a new form of voidable transaction, the 'creditor-defeating disposition'.[32] The definition of a creditor-defeating disposition captures transactions typically within a year prior to a winding up application[33] involving disposition of property of a company where the consideration payable is less than the lower of the market value or the best price reasonably obtainable, that prevents, hinders or delays property becoming available for creditors.[34] The objective is to capture so-called "phoenix" companies – the situation where the controllers of an indebted company arrange for the transfer of its business assets to a new or related entity, place the indebted company into liquidation such that its creditors are left without recourse, and the same or related controlling persons continue to carry on substantially the same business through the new entity, unencumbered by the debts of its predecessor, effectively "rising from the ashes" like a phoenix.

One innovative aspect of the creditor-defeating disposition framework was that, unlike the other forms of voidable transaction, which require application for court orders, a liquidator can apply directly to ASIC for relief in respect of such a transaction.[35] ASIC can then make relevant remedial orders.[36] These can be appealed to court.[37] In theory, this framework seems to promote cost savings by saving liquidators (and thereby, indirectly, creditors) the expense of court proceedings.

An option for consideration might be to roll this framework – an appealable regulatory decision in place of a requirement for a court application – out for all voidable transactions. Before that decision is made, however, it would be essential to have regard to statistics and information (which are presently, to our knowledge, not published by ASIC) about the use of such orders to understand whether and to what extent this framework is being used in practice. It would be important that the law does not unfairly place the initial financial burden of a court application on the party seeking to defend a voidable transaction.

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[30] ARITA, Policy Positions, February 2015, Policy 15-11 (Pre-Positioned Sales), available at: https://arita.com.au/common/Uploaded%20files/Technical/arita-policies-position-paper-february-2015-v1-0.pdf.
[31] Australian Government, Productivity Commission, Business Set-Up, Transfer and Closure, Final Report, 7 December 2015, 37, available at: https://www.pc.gov.au/inquiries/completed/business#report.
[32] Corporations Act s 588FDB.
[33] There are various timing rules, this is just the simplest example: Corporations Act s 588FE(6B)(b)(i)-(iii).
[34] Corporations Act s 588FDB.
[35] Corporations Act s 588FGAA.
[36] See ASIC's information guide for such orders here: https://www.asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/asic-orders-about-creditor-defeating-dispositions/
[37] Corporations Act s 588FGAE.

As to the operation of the anti-phoenix reforms, the key problem we observe in practice is a funding gap. A company that has had its assets stripped in a phoenix transaction would, by definition, lack assets available to a liquidator to fund investigations of the affairs of the company. Therefore, unless a creditor is willing to contribute funds to the liquidator the situation may arise where a liquidator is not willing or able to perform the investigations necessary to prepare an application to court. The Productivity Commission may wish to consider seeking data from practitioners or ASIC to corroborate this observation to inform any consequent reform recommendations.

6 Whether the prohibition of insolvent trading and the safe harbour provisions appropriately balance integrity and rehabilitation of viable businesses

Directors have a positive duty to prevent the company from incurring debts while it is insolvent or where there are reasonable grounds for suspecting insolvency.[38] The director need not actually know the company was insolvent so long as there were reasonable grounds to suspect it was. Where the duty is breached, the director may be personally liable to compensate creditors for the amount of debts incurred during insolvency,[39] face civil penalties,[40] or if there is an element of dishonesty, criminal liability including imprisonment.[41] There are statutory defences to the insolvent trading provisions.[42] Harris and Keays observe that while these appear broad, the courts have interpreted them restrictively.[43] This has likely contributed to the reputation for the regime's harshness.

By way of comparison:

- In the United Kingdom, there is liability for "wrongful trading", requiring that a director must know or ought to have concluded that there was no reasonable prospect the company would avoid going into insolvency, and thereafter failed to take every step to minimise the potential loss to creditors.[44]
- In New Zealand, there is only liability for "reckless trading", and incurring obligations without reasonable grounds to believe they can be performed.[45]
- In the United States and Canada, there is no statutory equivalent of the insolvent trading offences at all.

A safe harbour from insolvent trading, which provides protection from liability for directors who incur a debt while pursuing an alternative for the business reasonably likely to achieve a "better outcome" for the company than immediate liquidation or administration, was introduced in section 588GA of the Corporations Act in September 2017. The safe harbour protections were introduced because of a perception that the existing insolvent trading provisions were stifling risk-taking.

The safe harbour was the subject of a statutory review from August to November 2021. The Final Report of the review noted the safe harbour is complex and confusing for directors, with scope for reforms to simplify the provisions so they can be "readily understood and applied" in practice.[46] The Final Report also questioned whether Australia's insolvent trading laws continue to remain "fit for purpose" and "aligned with community expectations", and indicated they have not kept pace with domestic and international capital markets and our economy.

It is too early to say whether the safe harbour provisions have solved the problem of stifled risk-taking or indeed swung the pendulum too far the other way. Currently (as reflected in the statutory review described in the preceding paragraph) there remains too much uncertainty in the nature and scope of

[38] Corporations Act s 588G.
[39] Corporations Act s 588M.
[40] Corporations Act s 1317E.
[41] Corporations Act s 588G(3).
[42] Corporations Act s 588H.
[43] Michael Murray, Jason Harris, 'Keay's Insolvency' Eleventh Edition, p 695.
[44] Insolvency Act 1986 (UK), s 214.
[45] Companies Act 1993 (NZ), sections 135 and 136.
[46] Review of the Insolvent Trading Safe Harbour, Final Report, November 2021, available at: https://treasury.gov.au/publication/p2022-p258663-final-report.

safe harbour. There have been too few cases clarifying the meaning and scope of safe harbour. There was one case in 2020 – *Re Balmz Pty Ltd (in liq)* [2020] VSC 652, in which safe harbour was held not to apply. A decision from this year – *Octet Finance Pty Ltd v Macgregor* [2026] NSWSC 103 - considered safe harbour in passing only. That is, to our knowledge, the sum of it. ASIC issued regulatory guidance in December 2024 which provides some assistance as to the approach ASIC will take to safe harbour.[47] However, it is ultimately the courts that will determine the proper interpretation of the safe harbour provisions.

The present state of affairs is that there will be directors operating today who have engaged what they consider to be a protective safe harbour process that may ultimately be determined to be, by a court, inadequate, with the result that those directors are exposed to personal liability. The uncertainty, if allowed to continue for too much longer, could lead to a reversion to the overly conservative director decision-making that the safe harbour reforms were originally intended to correct.

A solution may lie in a comprehensive review of the insolvent trading provisions, the original statutory defences and the newer safe harbour provisions, so that the question of how to strike the proper balance between integrity and appropriate, economically beneficial directorial risk-taking, can be properly weighed.

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[47] Australian Securities and Investments Commission, Duty to prevent insolvent trading: Guide for directors, Regulatory Guide 217, December 2024, pp. 23-39.

About the Authors

Scott Atkins is the Global Head of Restructuring, and Head of the Australian Risk Advisory practice at Norton Rose Fulbright. He is the immediate past Global Chair and Australian Chair.

In recognition of his contribution to the development of restructuring and insolvency systems globally, and his standing in the market, Scott was inducted as a Fellow of the American College of Bankruptcy in 2025 and subsequently, appointed as Honorary Professor of the University of Sydney, School of Law.

Scott is Past President (2021-2024) and a Fellow of INSOL International, and a Life Member and Fellow of the Australian Restructuring Insolvency and Turnaround Association. He served as ARITA's President from 2019 to 2021. He is an active member of both the International Insolvency Institute and The World Bank's Insolvency and Creditor / Debtor Initiative.

Scott is Australia's Delegate on appointment by the Attorney-General to the United Nations Commission on International Trade Law's Working Group V (Insolvency). Currently, Scott is leading a successful proposal from the Australian delegation on the preparation of a revised Guide to Enactment for the UNCITRAL Model Law on Cross-Border Insolvency.

Recognised as an Eminent Practitioner in restructuring and insolvency by Chambers & Partners, Scott has deep industry knowledge and experience, developed over three decades in practice. Scott acts on leading cross-border restructuring and insolvency mandates, debt restructuring, insolvency, bank resolution, special situations and distressed investment matters both in Australia and abroad. Scott has an extensive cross-border insolvency practice and has been involved in precedent-setting recognition and relief matters which have shaped the interpretation and application of the Model Law on Cross-Border Insolvency, and the development of cross-border judicial communication and coordination protocols.

Scott has also made an enduring contribution to global insolvency reform, having led several major reconstruction and capacity building initiatives in emerging markets, including Myanmar, Armenia, Bhutan, Tajikistan, Kyrgyzstan, Brunei, Nauru and Indonesia. In these countries, Scott has helped to design and implement new insolvency laws and frameworks and devised institutional measures that have seen the introduction of more flexible restructuring alternatives, improvements in the efficiency of liquidation processes and greater uptake of insolvency mediation and out-of-court workouts.

Scott's work in Myanmar led to the passage of the country's first ever Insolvency Law in 2020, which included a simplified insolvency process for micro and small enterprises. This has since served as a best-practice comparator internationally and has shaped similar insolvency laws in other countries.

Scott serves on the International Advisory Council of the Singapore Global Restructuring Initiative and is an Advisory Board Member of the Asia Society in Australia.

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