Murrays Legal

w www.murrayslegal.com.au

a Sydney

Submission of Michael Murray to the Productivity Commission

Barriers to Business Dynamism

3 July 2026

While I am making separate submissions jointly with my colleagues Dr Amanda Bull and Professor Jason Harris, I wish to make some particular comments myself not in any disagreement or qualification and drawing on my experience over some years.[1]

I make these several points with a general conclusion at the end.

1. Competition and insolvent restructuring

A significant debate in the UK and the EU but not here is what is said to be a clash or tension between competition law principles of Darwinian survival of the fittest and insolvent restructuring's assistance to underperforming though maybe viable businesses. The question is whether competition and its desirable outcomes for society be compromised by restructuring principles of saving businesses that are not efficient innovative and tax compliant enough to survive? Competition is "demanding and ruthless" and serves important economic purposes, of business dynamism. In that respect

"Competing in the marketplace is tough. Competitors try to injure one another by taking away business. This is normal behaviour, expected in a competitive market. New entrants enter the market. Some survive and some do not. Efficient enterprises expand, while others contract."

But as the author explains, it is "the competitive process, not the position of the competitors, that competition law seeks to protect and enhance".[2]

That is, business exits are an inevitable and even desirable outcome of competition.

The severity of the competition process is said to be justified by its ultimate objective of achieving the beneficial consequences of competition "… low prices, higher quality goods, higher levels of service, greater variety of goods and services reflecting consumers' wants and incentives to innovate".[3]

---

[1] As an AGS government lawyer in litigation; solicitor assisting on the HIH Royal Commission; member of CAMAC, as legal director over 9 years of what is now ARITA, with textbooks and articles, and presentations in Australia and across Asia, the US, UK and the EU. Since 2016 www.murrayslegal.com.au is my authoritative referenced series of articles largely on insolvency and related laws in tax, environment, competition and crime. Fellow of the Australian Academy of Law.

[2] *Miller's Australian Competition Law and Policy,* 3rd ed, 2028, LBC, [7.260] citing *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* [1989] HCA 6; (1989) 167 CLR 177.

[3] *Corones' Competition Law in Australia,* 8th ed, Thomson Reuters, Y Svetiev, at [1.50].

An undue focus on business survival has been termed ‘restructuring euphoria’ in the EU. Concern is expressed that insolvency can be seen as tainted by taking too much an uneconomic view of the proper use of restructuring tools, thereby moderating business dynamism.

A related issue is that restructuring seeks to avoid liquidation and a break-up of the business and loss of employment. The liquidation process should be reformed and streamlined. Those claimed negative outcomes should be reassessed; for example, while employees are typically protected in an insolvency and are often a key factor in favour of a restructure, yet the retention of the struggling business, and its employees, can be an impediment to business dynamism. Also, a Reserve Bank study has shown employees quite readily find new jobs, and with better employers: *Financial Stability Review*, Graph 4.3.9, April 2025, with US studies similar.

A seminar on this competition issue was held at Sydney University in April 2025. Dr Arthur Emmett, formerly a judge of the Federal Court wrote an account of the session questioning whether insolvent restructuring had “gone too far”.

“Under principles of Darwinism, the fittest survive and the weakest succumb. Businesses that fail to respond to the challenge of competition will ultimately fail. In that regard, insolvency law had its origins in assisting in the removal of unfit or insolvent enterprises by facilitating their winding up and dissolution. It is arguable, however, that insolvency law has moved from assisting in the removal of unfit businesses towards rescuing and assisting in the survival of weaker or unfit enterprises. Competition and market forces will normally result in the demise of inefficient, weaker enterprises and the survival of more efficient enterprises.

Rescuing inefficient enterprises, through mechanisms such as voluntary administration, thereby affording them advantages in the marketplace, can be seen as affording an unfair competitive advantage to inefficient enterprises. Rescue mechanisms are designed to ward off the winding up of business enterprises. One might fairly ask, however, why it would be in the interests of the business community generally to preserve inefficient enterprises”.[4]

The arguments necessarily go deeper and rather than take it further now I refer to my article to that effect.[5]

My preliminary thinking, yet to appear in a further article, condenses to four points of law reform inquiry. One, that the criteria for entry into restructuring should be tighter or more inquiring and be more based in economics; two, that to leave not only the fate of the company but its re-entry into the economy in the hands of self-interested creditors is not sound. Meetings of creditors should be open more broadly, for example, to competitors and others who might have a view about whether a business of this nature should be permitted to resume trading. This is separate from any merger or other issues under competition law. Three, that the criteria for approval and the recommendation by the IP be more broadly based. Four, that there be some following accountability from the business as to its survival and contribution to the economy or otherwise.

---

[4] Butterworths Corporation Law Bulletin, Quarterly Commentary, July 2025, [521] *Does the regime for corporate rescue currently in force go too far?* A Emmett AO KC. He offers a more positive conclusion.

[5] M Murray, *The interaction of insolvency law and market competition* — (2025) 23(9&10) INSLB 75

2. The ATO

My second point is that briefly stated the Tax Office has considerable authority in the insolvency system as a trade-off for its loss of priority back in 1993. It is in my view the real insolvency regulator save that its primary role is that of a creditor.[6]

More significantly, and broadly stated, the tax and tax recovery systems maintain, in effect, the insolvency system. The lax way that businesses can accumulate large amounts of tax debt and then be involved in a constant toing and froing with the tax office as to repayment, often through a small business restructuring, is a game that should be ended. The courts were saying that 30 years ago but, in my view, some misguided acceptance that undercapitalised businesses should rely on tax funds for cash flow prevailed.

In 2002, a court said that

"the evils of tax payers deducting taxation payments from employees' wages and not passing them to the authorities are considerable and perhaps widespread. The evils are not limited to the tax avoided: they extend to the use made of the money, namely either theft or use as working capital, thereby permitting companies to continue to trade which in truth are not capable of continuing to trade lawfully": DCT v Saunig [2002] NSWCA 390.

That evil continued despite an attempt in 2016 to at least control it, being rejected by the then government, announcing on 10 June 2015 that it recognised the *"cash-flow implications for business of real time payments"* for under-capitalised businesses. This was despite the fact that Australia

"[stood] out internationally as having some of the longest lag times between employees being paid and taxes being remitted to the Government" and that "this may be a contributing factor to the significant collectable debt owed by businesses".

The answer seems to be a complete revamp of the tax system, with the ATO envisioning full digitisation by the end of the decade with systems designed for real-time tax collection.[7]

That is, "*where tax obligations are paid automatically in a way that is integrated into the systems that people and businesses already use to transact and manage their affairs",* adopting the OECD's *Administration 3.0: From Vision to Strategy, 2025.*

That future is not yet here; that lies in schemes whereby "tax will just happen". But pending that change, we should realise what underperformance is accepted in the economy by allowing this to continue. ATO should take a stronger response to non-payment.

As the ATO has also pointed out, non-payment of tax takes an unfair competitive advantage over those that do, in fact putting them at some risk.[8]

The current tax system has a negative impact on the insolvency system and on business dynamism.

3. Bankruptcy labelling

---

[6] See M Murray, *The ATO as an Insolvency Regulator* (2007] Arita J.
[7] APSC, Capability Review of the ATO, 2025.
[8] *Commissioner's address at the Australian Chamber of Commerce and Industry event | Australian Taxation Office (ato.gov.au)*

My third point, and I am alone in this, is that I query why there is a period at all in bankruptcy from which a person seeks to be discharged.[9] My main focus is on the 'labelling' that occurs but not on the statutory obligations that the person might retain. It harks back to being required to wear a yellow and brown bonnet in the public square.[10] The response to this will be that trustees need the overhanging threat of that labelling to continue to cause the person to comply. That to me is a rather serious and unnecessary approach, with some parallels with probation and criminal law, from which bankruptcy is trying to disassociate.

Putting that aside, the long drawn-out agonising over reducing the period of bankruptcy labelling from 3 years to 1, first announced in 2015, is evidence of a culture less forgiving of unpaid debt and business failure. Breach of the obligation to repay a debt is seen throughout history as censurable and punishable. An alternate view is that an insolvency regime should be viewed as representing 'a sort of trade-off for deregulation of consumer lending. If natural persons are to be exposed to inevitable risk that they do not and likely cannot understand or avoid, insolvency restores fair equilibrium by offering insurances against those risks, with the "premiums" financed through small and appropriately distributed increases in the costs of credit."[11]

In that respect, research reported by the World Bank suggests that a more forgiving bankruptcy regime, with a short period of discharge, promotes entrepreneurial conduct, and self-employment. Exclusion of certain assets from bankruptcy was also positive. The Bank noted however the likely impact of "pro-debtor" reforms on the cost and availability of credit.[12]

The PC's 2015 report gave focus to insolvency laws for that reason, saying that while government has few "levers" to prompt business dynamism, it recommended reforms to insolvency law targeted at reducing the penalties and stigma associated with business failure as a means of improving entrepreneurial culture.

Our bankruptcy laws in particular might be said to be a barrier to business dynamism, even if indirectly - as indicating a severe societal attitude to business failure and unmanageable debt. This was recognised in the 2015 Productivity Commission Report.

4. Safe Harbour

My comment about safe harbour is rather fundamental and it probably represents, in my view, a risk aversion that is said to prevail in our society.

The thinking was that Australia had a what was said to be a severe insolvent trading provision – s 588G Corporations Act - and the way to remedy that was not to change the section, which would have been the logical thing to do, but to retain and allow it subject to providing a safe harbour defence to it. In some ways the practical outcome may have been similar but the way it was done represented an over-cautious and more legally complex

[9] "Removing the label of bankruptcy", paper delivered at a workshop on the proposed Minimal Asset Procedure, University of Melbourne, 12 December 2025.

[10] *Punishment for bankruptcy – wearing a yellow and brown bonnet in the public square* – Murrays Legal

[11] T Keeper, (2014) QUT Law Review 14(3) 79 - *New Zealand's No Asset Procedure: A Fresh Start at No Cost?* She suggests that with the deregulation of consumer lending and increased risks for consumers, insolvency offers insurances against those risks, with the "premiums" financed through increases in the costs of credit.

[12] A Menezes and A Gropper, *The Economic Impacts of Insolvency Regimes,* World Bank 2025

approach - 588GA, 588GAAA, 588GAAB, 588GAAC, 588GB, etc that has to be telling of our dynamism problems.

In my view, the threat of insolvent trading has low deterrent value in the majority of cases at the SME level. As I understand current criminological and behavioural responses, deterrence relies upon a likelihood of detection that occurs promptly.[13] Section 588G presents in the mind of the director a rather distant threat, requiring the sequence of a number of events over time before it might become a possibility. Also, at the SME level, it is crowded out by other more real and immediate threats and demands; tax liabilities being some.[14]

At the same time, it may have more of an impact with larger companies, whose directors seek advice and are more aware of their risks.

Nevertheless, it is an expensive litigation claim to bring.

The same comments are also made about Schedules 1, 3 and 4 of the *Treasury Laws Amendment (Combatting Illegal Phoenixing) Act* 2020 (Cth).

As to whether these provisions appropriately balance integrity and rehabilitation of viable businesses, perhaps, in theory at least.

5. Outcomes of litigation

There are many recovery rights of both liquidators and trustees in bankruptcy. In theory also these are meant to restore the company or individual to a fair asset position to try to ensure pari passu sharing of those assets. Such claims can be for unfair preferences, uncommercial transactions and the like. These involve substantial costs in gathering evidence and costs of the legal process.

My point is that we do not know how useful in terms of recovering funds available for creditors these provisions are. The law allows claims being brought that might only serve to recoup the practitioner's unmet remuneration, and costs of the lawyers and any funder: *Hall v Poolman* [2009] NSWCA 64. While that might be a legitimate outcome of a 'successful' litigation claim, it does not serve the main object of the provisions to provide a dividend to creditors.

Data is needed. We should have from the industry data showing of the realities of litigation claims. It may be that not many result in monies going to creditors. The 2023 PJC Report heard evidence that in the case of preference claims, these are often simply used as a means to recoup unmet remuneration: [13.11-13.12]. Courts could also require IPs to provide litigation outcomes.

The purpose of my inquiry is not to raise criticism of these outcomes but rather we should know the practical reality of these provisions and these claims. If as the PJC said preference claims are used to fund the conduct of the administration, then that might indicate a need for streamlining of the recovery process or confirm the under-funded state of the insolvency regime.

---

[13] M Murray, *The empty threat of insolvent trading* — (2009) 9(8) INSLB 162.

[14] See *The Review of the Insolvent Trading Safe Harbour*, November 2021 at 6.1.

In that respect, bankruptcy introduced rights of administrative recovery under section 139ZQ of the *Bankruptcy Act* in 1991, with costs savings as the aim. However, I understand that there has never been any assessment of whether that saving has ever eventuated.

In sum, we don't know enough about how efficient and effective the asset and funds recovery processes are, these being a significant element of insolvency practice.

6. Moral hazard

Professor Harris and I have said that so little goes to creditors that the law should properly reduce our attention to them. I agree with that for the purpose of removing that task of practitioners and the assumption that online access can be provided as to developments if creditors choose to search.

But it also goes to what I say is the undue perception of insolvency as to what it can achieve. I think it is necessary to put back upon creditors some responsibility for their own dealings on the basis that they should use PPS registration or other means to protect their position – as well as they can. There is a moral hazard if creditors are assured that the practitioner may be able to recover their money for them irrespective of the creditors' rather lax extensions of credit in the first place.

This does assume that there is open access to government databases and Director IDs, so that those transacting always know with whom they are dealing. That is a significant 'self-help' regulatory mechanism if it can be achieved.

7. Remuneration of insolvency practitioners

Remuneration is always a contentious issue, and I accept that it has the potential for abuse. The regulators also impose expectations of performance on IPs without regard to whether funds are available, and if they are, the impact upon creditors.

The negative focus on remuneration can in effect, in my view, be an unrealistic denial of the amount of work that is actually required in many insolvencies, and much of which work is not necessarily or at all directed to repaying creditors. English courts have pointed out that

"a trustee has no choice but to carry out certain statutory duties and that, in a small bankruptcy, the trustee's costs might appear disproportionately large" and that while "(t)he number and size of claims and the number and value of assets is an important, but not the only, element … there are many ways in which costs may be incurred which are not related, principally or even at all, to the assets and liabilities of the estate".[15]

Studies have shown significant unremunerated work by IPs, including in bankruptcy, with cross-subsidisation one response.

While there is always consideration of law reform to reduce complexity in order to increase dividend returns, the mathematics as I understand it might be that two cents in the dollar becomes 3 and for that to be an outcome it's hardly worth the effort.

---

[15] *Simion v Brown* [2007] EWHC 511 (Ch) and *Brook v Reed* [2011] EWCA Civ 331; [2011] 3 All ER 743. See also *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* [2017] NSWCA 38.

There might reasonably be a process whereby dividends from under $0.05 need not be distributed and go into a special fund.[16]

8. Unrealistic expectations

In our textbook – *Keay's Insolvency*, 11th ed - we point out that while insolvency comes into operation at a time of crisis, requiring prompt attention, it does not offer a panacea for all wrongs or misfortunes. This is certainly not the case for creditor losses, or employees without jobs, or suppliers unpaid, or other perceived or real senses of unfairness. It is there to do the best it can, but, in simple terms, "money cannot be got from a stone". To suggest otherwise serves only to reinforce what is sometimes an ongoing community misconception – an expectation gap – about the aims and purposes of the insolvency regime.

Similarly, while a practitioner has statutory duties and responsibilities, these are not open-ended, whatever the 'guidance' or expectations of the regulators might be. IPs are not there to attend to the tasks properly the role of the state, unless so directed by the law. IPs are not bound by creditors' wishes, and they have broad business discretions with which the courts are reluctant to disagree.[17]

These issues go to the efficiency and administration of the insolvency system.

9. The historic and current context

Difficulties in insolvency law reform lie in its culture. The history is significant in showing that personal and corporate insolvency have each continued to remain not only separate bodies of law, but separate areas of practice and government policy.

The brief history is that Australia has had a federal Bankruptcy Act since 1928 in respect of personal insolvency with its own regulator, profession and legislation.

Australia did contemplate at federation a similar arrangement in corporate insolvency but constitutional issues prevented that. Hence for most of the 20th century, the States and Territories had their own corporate and corporate insolvency laws, and state courts, regulators and professions.[18]

It was not until the Corporations Act 2001 that federal law applied to companies and corporate insolvency, although state courts retained their jurisdiction, and the regulators and the professions remained separate.

While the 1988 Harmer Report did say that it was not necessary to have the one insolvency act of parliament, it did say that there should be cohesion in further law reform: at [31]. That

---

[16] M Murray, Rethinking Insolvency Practitioner remuneration — (2022) 22(3&4) INSLB 33.

[17] C Symes and M Murray, *Australian Insolvency Practitioners as Unique Professionals: An Examination of the History of Liquidators and Trustees* (2023) 31 Insol LJ 97.

[18] Dr A Leigh, MP, Address to the ARITA National Conference, Gold Coast, Credit where it's due: insolvency, trust and economic dynamism, 19 June 2026

was ignored, or at least did not occur. That is, both corporate insolvency and personal insolvency continued to move in parallel.[19]

The separation continued. A Senate committee recommendation in 2010 that IP regulation be taken over by the Inspector-General in Bankruptcy was rejected, along with a parallel recommendation that there be a common data collection and reporting.

This separation is also apparent in the differing harsh treatment of the insolvency of a sole trader compared with that of a director of a liquidated company.[20] A capable sole trader whose business suffers an unavoidable liability for $100,000 may end up in bankruptcy, with restrictions imposed on her for three years or more. The company of an inept director whose business suffers an avoidable loss of $3 million may end up in liquidation. That director can start a new company the next day.

Various reports including from the Commission had raised the need for legal harmonisation between corporate and personal insolvency.

It was the Insolvency Law Reform Act 2016 which finally attempted to give greater coherence between the two bodies of insolvency law, although it also cemented divisions in place. Part 5.3B of the Corporations Act was then introduced, in 2021, however specifically excluding any attention being given to the personal liabilities of the directors. The Treasurer's promotion of 'keeping more businesses in business and people in jobs' and being 'the most significant reforms of insolvency law in almost 30 years'[21] was typical of the lack of acknowledgement of the liabilities of directors.

The *Bankruptcy Act* and the *Corporations Act* each did [at 10 – 5 of the respective schedules] at least require each of AFSA and ASIC to "work cooperatively" with each other in defined situations.

It was not until the PJC inquiry and its Report of 2023 that the issue of a combined regime was directly raised by stakeholders and the Committee reported on it and recommended consideration be given.

And it was not until personal insolvency was transferred to Treasury in May 2025 that the first real step in addressing the cultural divide was made.

Throughout this century, administration of each of personal and corporate insolvency law and its reform has therefore occurred in silos, to the disadvantage of the insolvency system as a whole.[22] It is a comment on the state of federal public sector and political segmentation, without even mentioning the larger issues with the states and territories.

10. Conclusion

These are particular points of comment or criticism which I have addressed in articles on my website or elsewhere over some years.

---

[19] M Murray, The alignment of the laws of personal and corporate insolvency — (2009) 9(5) INSLB 102.

[20] M Murray & R Mason, Harmonising the responsibilities of directors of insolvent companies with those of bankrupts — (2023) 22(5) INSLB 76

[21] Bills Digest No. 38, 2020–21 Corporations Amendment (Corporate Insolvency Reforms) Bill 2020

[22] D Thodey, Independent Review of the Australian Public Service, 2019.

Overall, while on the surface we have what is seen as a modern insolvency regime supported by sound institutions – courts, registries, regulators, professionals - which may be serving good purposes, we aren't able to substantiate that to any great degree except anecdotally. It appears to me that is not nearly as efficient as it should be, nor transparent, nor is it well aligned within itself or clearly focused on stated objects. Those threshold issues bear a full review.

I do query if the often-stated benefits of a good insolvency system have the impacts commonly attributed at least in an advanced economy like Australia.[23] In relation to business exits, the system seems to me to be rather 'hit and miss', given that the exit process lies in private hands, and many companies by-pass it. When the exit process does work as planned, it is not that efficient nor effective, or at least we need data to assess the processes better.

A systems analysis of pathways is required,[24] to ensure efficiency, including in relation to SME insolvencies involving personal and corporate liabilities; and data.[25] As Dr Leigh MP advises, "productivity gains come from getting the plumbing right".[26] Given that insolvency law is based on human behaviour, for example in a person's conduct of a business or in their consumer spending, input from behavioural economics and like disciplines is also useful in framing the law.[27]

I welcome the intervention of the Productivity Commission which might well, while not ignoring the legal processes, give attention to the pathways, the structure, and the efficiencies and also the effectiveness and how that should be monitored. This would need a planned, staged series of connected reviews, guided by an initial reassessment of the aims of the system, and those aims should be backed up by data showing they are achievable and realistic.

If you need further thoughts on that, or issues generally, or copies of any articles referred to, please contact me.

Michael Murray

Michael Murray LLB, Dip Crim (Syd), FAAL

---

[23] McGowan, Müge Adalet and Andrews, Dan, Insolvency Regimes and Productivity Growth: A Framework for Analysis, (OECD Economics Department Working Papers No. 1309).

[24] Lo Pucki, Lynn M, *Systems Approach to Law,* (1997) 82(3) *Cornell Law Review* 1

[25] José Garrido et al, *The Use of Data in Assessing and Designing Insolvency Systems* (Discussion Paper, International Monetary Fund, 4 February 2019) .https://murrayslegal.com.au/blog/2025/06/29/legislating-in-the-dark-continued-imf-report/

[26] https://ministers.treasury.gov.au/ministers/andrew-leigh-2025/articles/opinion-piece-productivity-gains-come-getting-plumbing-right

[27] https://ministers.treasury.gov.au/ministers/andrew-leigh-2025/speeches/address-canberra-behavioural-lab-launch. As to which, I have had useful past discussions with Professor Uwe Dulleck, now of the University of Canberra.