Reducing Barriers to Business Dynamism in Australia

Submission to the Productivity Commission

Toward a coherent and efficient insolvency framework for Australia

Dr Amanda-Jayne Bull

and

Mr Michael Murray

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Executive Summary

This submission addresses a specific barrier to business dynamism in Australia as to the design and operation of the corporate and personal insolvency frameworks (TOR 1(b)) – and more particularly, the failure of the insolvency framework to respond coherently to small business distress where corporate and personal liabilities are economically intertwined.

Small businesses make up the overwhelming majority of Australian businesses. Many operate through companies, but the financial operations of those businesses commonly extend beyond the company itself. Owner-directors may provide personal guarantees, grant security over personal assets, use personal funds or credit to support the business, and incur personal tax or other liabilities arising from business activity. In those circumstances, the insolvency of the enterprise cannot be understood as purely corporate or purely personal.

Australia's insolvency laws nevertheless remain divided between corporate insolvency under the *Corporations Act 2001* (Cth) and personal insolvency under the *Bankruptcy Act 1966* (Cth). That division may be workable for many cases, but it produces particular difficulties for small business failures where the same economic event gives rise to both corporate and personal financial distress. One enterprise failure and its exit may require separate advice, separate processes, separate practitioners, different regulators and different legal consequences. This increases cost, delay and complexity at the point when speed, clarity and value preservation are most important.

The consequences are not merely procedural. Fragmented insolvency pathways can reduce the effectiveness of restructuring, impede efficient exit, diminish returns to creditors, and delay the reallocation of capital and labour to more productive uses. They may also discourage entrepreneurial risk-taking where the consequences of business failure are uncertain, prolonged or personally disproportionate. In this respect, insolvency design is directly relevant to the Productivity Commission's inquiry into business dynamism.

This submission does not recommend immediate wholesale unification of Australia's corporate and personal insolvency laws. A single insolvency framework may warrant longer-term consideration, but it would require substantial consultation, institutional design and empirical support. The more immediate and practical reform priority is procedural coordination: mechanisms that allow linked corporate and personal insolvency issues arising from the same small business failure to be identified and managed together where appropriate.

Procedural coordination would better reflect the way small business distress is experienced in practice, while preserving creditor rights, commercial certainty and appropriate safeguards. It would allow reform to proceed incrementally, with design issues tested through consultation and supported by improved data collection and evaluation.

This submission recommends that the Productivity Commission identify the corporate/personal insolvency interface for small business as a priority area for staged reform and recommend that the Australian Government pursue targeted measures to better coordinate these interconnected insolvency pathways.

In particular, the submission recommends:

- targeted review of the treatment of personal guarantees in the Part 5.3B small business restructuring regime;
- the development of coordinated pathways between the Part 5.3B small business restructuring regime and relevant personal insolvency processes; and
- improved integration and collection of data across corporate, personal and tax-related insolvency events to support evidence-based reform and evaluation.

We are available to assist the Commission further as needed, in hearings or as required.

Dr Amanda-Jayne Bull
Lecturer
QUT Law School
Faculty of Business & Law
Queensland University of Technology
E: [redacted]

Michael Murray
Murrays Legal
E: [redacted]

1. Scope and evidence base

This submission focuses on the process by which the law resolves the insolvency of small corporate business enterprises. From an economic perspective, that process is central to facilitating the timely exit or restructuring of non-viable firms and the reallocation of capital and labour to more productive uses (see section 3.2). From a social and legal perspective, it must also address the personal and business circumstances of the small business owner.

Because integrated data on the interaction between corporate and personal insolvency remains incomplete (see section 4), this submission recommends staged, evidence-informed reform rather than immediate wholesale structural unification. The immediate priority should be procedural coordination between linked corporate and personal insolvency pathways where they arise from the same small business failure.

This approach recognises the need to avoid legislating without adequate empirical support and is consistent with approaches adopted in some foreign jurisdictions (see section 3.4 and Annexure B). Further data collection, comparative analysis and consultation should inform the detailed design of any reform. However, the absence of complete data should not prevent the Commission from identifying the corporate/personal insolvency interface for small business as a priority area for staged reform.

2. The problem: small business insolvency crosses the corporate/personal divide

In Australia personal and corporate insolvency frameworks have developed separately. In order to contextualise the problem, it is first necessary to have regard to the historic context in which this divided regime originated and has continued - not only as separate bodies of law, but separate areas of practice and government policy.

2.1 Historic foundation

Constitutional issues at federation led to bankruptcy remaining as federal law and corporate and insolvency law remaining with the states. As a result, for most of the 20th century, the States and Territories had their own corporate insolvency laws, and courts, regulators and professions.[1]

The 1988 Harmer Report recommended closer alignment between the two regimes,[2] but that recommendation was not pursued.

It was not until the *Corporations Act 2001* (Cth) that federal law applied to companies and corporate insolvency, although state and territory courts retained their jurisdiction,

[1] 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.

[2] *General Insolvency Inquiry* (Inquiry No 45, The Law Reform Commission, 30 September 1988) ('*Harmer Report*').

and the personal and corporate insolvency regulators and the professions remained separate.

In the late 1980s and early 1990s, it became evident that the practical protection afforded by incorporation was narrowing for small business directors. Creditors increasingly required personal guarantees from small business directors to support business-related debts. The introduction of personal tax liabilities for directors in 1993 added another source of business-related personal exposure.[3] Together, these developments meant that small business failure was increasingly capable of resulting in both corporate insolvency and personal financial distress for the same director.

Meanwhile, a Senate committee recommendation in 2010 that the ALRC inquire into the opportunities to harmonise Australia's personal and corporate insolvency legislation and that practitioner regulation be taken over by the Inspector General in Bankruptcy was rejected because of its impact on ASIC.[4] Parallel recommendations that there be common data collection and reporting were also not progressed.[5]

By the mid-2000s, international bodies had started to call for insolvency laws to address the unique needs of small businesses, rather than relying on the "one size fits all" models. In Australia, this highlighted the limits of general corporate restructuring processes including voluntary administration for small businesses in financial distress.[6]

The *Insolvency Law Reform Act* 2016 (Cth) attempted to harmonise the two bodies of insolvency law, although the separate nature and surrounding structures have remained largely the same.

In 2021, the small business restructuring regime under Part 5.3B of the *Corporations Act* (Cth) (Part 5.3B small business restructuring) was introduced into the Australian insolvency framework. The aim of this regime was to provide eligible small businesses with a cheaper, faster and less complex restructuring alternative than the 'one-size-fits-all' voluntary administration regime. While the regime recognised the need for a

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[3] *Insolvency (Tax Priorities) Legislation Amendment Act 1993 (Cth)*.

[4] Government response to the Senate Economics References Committee report, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*.

[5] Senate Economics References Committee, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: The Case for a New Framework* (Senate, Economics References Committee, September 2010) Recommendation 1 and Recommendation 17 ('*The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia*'); Department of Treasury, *Proposals Paper: A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (Australian Government, December 2011).

[6] World Bank Group, *Report on the Treatment of MSME Insolvency* (World Bank, Washington, DC, 2017); World Bank Group, *Saving Entrepreneurs, Saving Enterprises: Proposals on the Treatment of MSME Insolvency* (World Bank, 17 September 2018) <<https://documents1.worldbank.org/curated/en/989581537265261393/pdf/Saving-Entrepreneurs-Saving-Enterprises-Proposals-on-the-Treatment-of-MSME-Insolvency.pdf>> ('*World Bank Report 2018*'); UNCITRAL, *Part 5: Legislative Recommendations on Insolvency of Micro and Small Enterprises* (Recommendations No A/76/17, UNCITRAL, 2021) 1 ('*UNCITRAL Legislative Guide*').

procedure designed specifically for small business, it did not address the extent to which small business distress commonly crosses the corporate/personal divide, particularly where directors' personal assets or personal guarantees are involved.

2.2 The current problem

This is a significant economic issue. Small businesses now make up more than 97 per cent of Australian businesses.[7] A substantial proportion operate through small proprietary companies, while others operate as sole traders or partnerships.[8] While many small businesses are successful, many will also face financial and other difficulties, and, in some cases insolvency.

Where a small business operates through a company, the company may have limited assets and capital, particularly in its early stages. Creditors may therefore require directors to provide personal guarantees or security over personal assets. Directors may also use personal funds or personal credit to support the business. Director tax liabilities may further add to this personal exposure. In practice, this can blur the distinction between business debts and personal liabilities.[9]

The Australian Small Business and Family Enterprise Ombudsman ('ASBFEO') has reported that close to half of small business loans are secured over the family home.[10] This illustrates the practical extent to which small business finance can connect business debts with personal assets and liabilities.

The division of Australia's insolvency laws between personal insolvency and corporate insolvency does not adequately reflect the reality of small business operations, where personal and corporate liabilities are often deeply intertwined.

The ASBFEO has described this problem in the following terms:[11]

> *'The current insolvency system assumes a neat distinction between a business and an individual, whose distressed financial circumstances do not intersect with one another. Small and family businesses are rarely so neatly arranged. ... Even for incorporated entities, directors' guarantees, personal collateral used to secure finance, and statutory sanctions that create a personal director obligation*

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[7] Australian Small Business and Family Enterprise Ombudsman, 'Number of Small Businesses in Australia' (June 2024) <https://www.asbfeo.gov.au/small-business-data-portal/number-small-businesses-australia>. ("ASBFEO Small Business Data Portal").
[8] ASBFEO Small Business Data Portal.
[9] *Insolvency Regimes and Productivity Growth: A Framework for Analysis,* OECD Economics Department Working Papers No. 1309, July 2016 at [65].
[10] Australian Small Business and Family Enterprise Ombudsman, *ASBFEO Quarterly Report - Quarter 3 2024* (Australia Small Business and Family Enterprise Ombudsman, 1 September 2024) 5.
[11] Australian Small Business and Family Enterprise Ombudsman, Submission No 31 to the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Corporate Insolvency in Australia* (2 December 2022) (Recommendation 3).

or liability, add to the blending. The utility of the insolvency system would benefit from a better recognition of this blending of business and personal interests'.

Although personal liabilities in sole trader businesses were raised as a potential area for law reform during the COVID-19 period, no substantive reform followed.[12] It was not until the PJC inquiry of 2022-23 that this issue received substantial attention concerning the enterprise as a whole, rather than the legal form through which the business is operated.[13]

The history shows that while personal and corporate insolvency frameworks have remained separate, business itself has significantly changed. The result is that insolvency law has largely evolved in silos: corporate insolvency under the *Corporations Act* and personal insolvency under the *Bankruptcy Act*, without fully dealing with the reality that many small business failures involve both.

This submission argues that the most immediate response to this disconnect is not wholesale legislative reform, but the development of procedurally coordinated pathways that recognise the economic reality of small business failure.

3. The core submission (TOR 1(b))

This submission's central proposition is that Australia should prioritise procedural coordination between corporate and personal insolvency pathways where they arise from the same small business failure. While broader unification may warrant longer-term consideration, procedural coordination offers a practical, incremental and evidence-based reform process.

As we have noted, insolvency law distinguishes between two groups of debtors – companies under the *Corporations Act*, and individuals under the *Bankruptcy Act*. However, this is not the commercial reality for many small businesses.

Where one small business failure results in both corporate and personal insolvency issues, the current framework may require separate advice, separate processes and separate decision-making pathways. This increases cost and complexity and can delay restructuring or exit.

In economic terms, this failure of insolvency law to meet the changed structure of small business increases friction in exit and restructuring processes, slowing the reallocation of capital and labour and reducing the benefits of business dynamism.

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[12] Attorney-General's Department, 'The Bankruptcy System and the Impacts of Coronavirus - Consult Hub', *Australian Government: The Treasury* (Government, 2021) <https://consult.treasury.gov.au/c2021-688392>.

[13] Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency in Australia: Final Report* (Final Report and Recommendations, July 2023).

Business dynamism is not only concerned with business exits. It also depends on entrepreneurs being willing to enter the market and take risks.

A well-designed insolvency system supports that process by providing predictable and proportionate consequences when businesses fail. If the personal consequences of business failure are unnecessarily severe, complex or prolonged, they may discourage entrepreneurial activity and entry into the market in the first place.

The issue is not only one of insolvency law design. It is also a question of economic policy. Where insolvency frameworks have the effect of impeding efficient restructuring, delaying business exits or imposing unnecessary complexity on small business owners, they may indirectly impede business dynamism by slowing the reallocation of resources and discouraging entrepreneurial activity.

3.1 Example

The problem is best illustrated by an example.

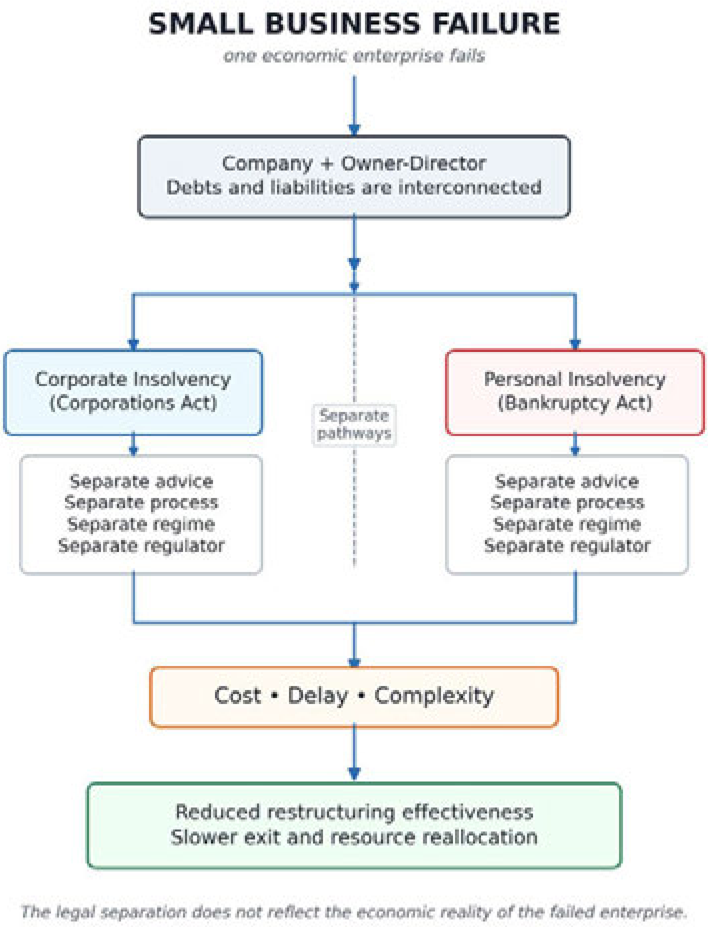
Person P operates a plumbing business through a company registered as Plumbing Pty Ltd. Plumbing Pty Ltd needs to buy expensive equipment and technology, and to secure funding for those purchases, P has been required to give security over her home as well as a personal guarantee. Other credit arrangements with suppliers, such as hardware stores, may also require personal guarantees. The capital position of the company is such that lenders would regard it as an insecure borrower.

The business struggles and unpaid taxes accumulate. The business has liabilities, and so does the owner, including contingent liabilities under the guarantees. Although there is only one business in financial distress, the liabilities are spread across both the company and the owner/director.

If the company is eligible for Part 5.3B small business restructuring, the process may deal with the company's debts but not necessarily the owner-director's related personal exposures. Separate personal insolvency advice may be required. Where the same creditors are involved in both the company and personal positions, the owner may face parallel processes, overlapping information requirements and uncertainty about the practical value of restructuring the company if related personal guarantee liabilities remain unresolved.

The example demonstrates the problem (see Figure 1). What is economically a single business failure may be divided between two separate legal procedures, each with different practitioners, regulators, procedures and outcomes. This fragmentation unnecessarily increases the cost, complexity and duration of a business exit at a time when the business (and its directors) is already struggling financially.

Figure 1: The Central Problem



3.2 Economic context

The Productivity Commission's terms of reference refer to the importance of regulatory settings that support the constant renewal of business activity. Productivity growth is promoted when innovative businesses can enter the market easily, efficient businesses can expand, and unsuccessful businesses can exit quickly and without unnecessary delay. In this context, business exits are not a market failure; they are a natural consequence of healthy competition and an essential feature of a dynamic economy.

Insolvency law is directly relevant to that inquiry because it shapes the way unsuccessful businesses exit, and the way entrepreneurs re-enter economic activity after failure. Of course, a substantial body of insolvency law also assists insolvent but viable businesses to restructure. The question for present purposes is not whether businesses fail, but whether the insolvency framework facilitates efficient restructuring or exit when that failure occurs.

For present purposes, the relevant barriers are not only the substantive rules of insolvency law. They are the fragmentation of legal pathways that attempt to deal with a small business failure but ultimately result in both corporate and personal financial distress.

Exits

We have explained that if regulatory settings make exit processes slow or costly, inefficient businesses can remain in the market or exit in an unnecessarily drawn-out way. This can hamper the movement of labour and capital to young, growing firms, or to more mature firms that could use those resources more productively.

Our focus is on the efficiency of the exit process. Insolvency inevitably raises questions about creditors' rights, competing claims and procedural safeguards. Those matters are necessary, but if the process is unnecessarily fragmented, costly or slow, it can delay exit and reduce the speed with which labour and capital are reallocated to more productive uses.

If the problem is one of friction within insolvency pathways, attention must be directed not only to substantive legal rules, but also to the design of the insolvency system itself.

3.3 Systems and pathways

For clarity, this submission distinguishes between harmonisation, procedural coordination and unification.

- Harmonisation refers to alignment of rules, concepts or policy settings across existing regimes.
- Procedural coordination refers to mechanisms that allow linked corporate and personal insolvency processes to be identified, sequenced or managed together where they arise from the same small business failure.
- Unification refers to the replacement of separate regimes with a single insolvency framework. This submission recommends procedural coordination as the immediate reform priority, while leaving broader unification for longer-term review.

We consider the main focus of any reform should first be on the systems, the pathways of insolvency, and their design. A staged approach is required.

The architecture or framework is as important as the content, such that, "a reform that leaves the substantive insolvency law unchanged but improves its effective implementation could yield significant benefits".[14]

[14] Antonia Menezes and Akvile Gropper, 'The Economic Impacts of Insolvency Regimes: Evidence, Challenges and Opportunities'.

To achieve this result, we consider there is need to apply a systems-based analysis,[15] as recommended by the PJC,[16] to reduce friction across various insolvency pathways, an approach that becomes even more critical when contemplating the consolidation of two distinct insolvency regimes. The focus should be the *operation* of the system and the extent to which it achieves the relevant principles and objectives of insolvency, including how the various corporate and personal insolvency pathways can be improved.

This submission recommends procedural coordination as the immediate reform priority. The issue is not the existence of separate corporate and personal insolvency regimes as such, but the friction that arises where one small business failure engages both systems.

3.4 How the insolvency pathways can be improved

The practical question therefore is how those pathways can better interact where they concern the same business failure.

While a 'root and branch' review of Australia's insolvency framework might serve to implement the gold standard, i.e. a single law that governs insolvency of all debtors irrespective of their legal identity and form, we propose a more pragmatic approach – that is, to start with procedural coordination involving shared courts, common administrators/IPs, or restructuring plans that can address business-related debts (especially personal guarantees) together with corporate insolvency.

In considering how procedural coordination might best be achieved, we have had regard to the approaches adopted in several foreign jurisdictions including India, Singapore, Switzerland, Colombia and the United Kingdom (See Annexure B), and most recently, Sri Lanka. These jurisdictions were chosen for comparative purposes because they have either moved towards integrated insolvency frameworks that address corporate and personal debts within a single, unified framework or through procedural coordination. Given the vastly different approaches in each of these regimes (as well as their different political, historical, economic and social contexts), [17] we have not yet undertaken a direct comparison of legislative provisions but instead adopted a functional comparative approach to identify how each of those regimes has sought to overcome the corporate and personal divide in the small business space (see Annexure B).

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[15] See *Systems Approach to Law*, Lo Pucki, (1997) 82 Cornell Law Review.

[16] Parliamentary Joint Committee on Corporations and Financial Services (n 13), for example, recommendation 6.

[17] Vivian Grosswald Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law' (1998) 46(1) *American Journal of Comparative Law* 43 <https://heinonline.org/HOL/P?h=hein.journals/amcomp46&i=53>; Amanda Bull, 'Small to Medium Sized Enterprises: Destined to Fail or Supported to Thrive? A Critical Analysis of the Australian Restructuring Framework as It Relates to Small to Medium Sized Enterprises' (PhD Thesis, Queensland University of Technology, 2025) Chapter 3.

The comparative examples in Annexure B demonstrate that reform need not take the form of immediate legislative harmonisation. Across a range of jurisdictions, practical solutions include coordinated procedures, common forums, integrated practitioner models and mechanisms for dealing with personal guarantees within broader restructuring procedures.

Consistent with our suggestions, the common thread across these approaches is not always a uniform law, but often procedural coordination where that better reflects the economic reality of small businesses.

3.5 Suggested pathway connections between corporate and personal insolvency

The main friction points requiring attention in Australia are the different statutory timeframes, creditor voting requirements, practitioner roles, separate regulators and separate court pathways that apply across corporate and personal insolvency.

As we have discussed in detail above, personal guarantees, which often sit at the intersection of the two procedures, result in the enlivening of both the corporate and personal insolvency frameworks. This overlap can result in duplicated processes, increased costs, delays and reduced prospects of achieving a coordinated restructuring outcome. These practical difficulties (as reflected in Figure 2 below) assisted in our consideration of the reform options proposed in this submission.

Figure 2: Small Business Insolvency Friction Points

4. Evidence base and data gaps

The case for procedural coordination is supported by several converging sources. Domestic research has identified that bifurcated insolvency regimes fail to recognise the commercial reality of many small businesses, where personal and business liabilities are frequently intertwined.[18]

International bodies have reached similar conclusions. The World Bank, UNCITRAL and the OECD have identified the blurred distinction between small businesses and their directors as a significant policy concern.[19]

Industry participants and regulatory agencies have also recognised the practical and economic consequences of maintaining separate personal and corporate insolvency pathways (See detailed discussion in section 5.2). As well as the ASBFEO, both AFSA and the PJC have recognised that the legal form of a business may not reflect its economic form.[20]

However, the available evidence also reveals important gaps in the data. Existing corporate and personal insolvency datasets do not reliably identify when both processes relate to the same small business failure. In part, this reflects differences in the way information is collected and reported by the relevant regulatory agencies.[21] At present, the size and scale of the problem cannot be measured with confidence.

Further information is needed on the incidence of personal guarantees, owner-director exposure, pathways through financial distress, costs, timing and outcomes. For example, it would be useful to know how often personal guarantees are required, how often creditors enforce them, how often enforcement contributes to personal insolvency, and whether enforcement is economically worthwhile for creditors.

Without that data, there is a risk that reform will be designed around assumptions drawn from large corporate insolvency, rather than the economic and legal reality of small business failure. This is an issue common across jurisdictions, although Australia appears to have comparatively strong data by international standards.

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[18] Bull (n 17) 82–83; Jason Harris, 'Promoting an Optimal Corporate Rescue Culture in Australia: The Role and Efficacy of the Voluntary Administration Regime' (PhD, University of Adelaide, 2021) 182–183, 208–210; Aurelio Gurrea-Martínez, 'Implementing an Insolvency Framework for Micro and Small Firms' (2021) 30(S1) *International Insolvency Review* S46, S46, S49, S63 [Footnote 39] <http://onlinelibrary.wiley.com/doi/abs/10.1002/iir.1422>; Ronald B Davis et al, 'The Modular Approach to Micro, Small, and Medium Enterprise Insolvency' (SSRN Scholarly Paper No 2904858, 8 July 2016) <https://papers.ssrn.com/abstract=2904858>.

[19] World Bank Group, *Report on the Treatment of MSME Insolvency* (n 6) V, 5–6, 9 and 20; World Bank Group, 'World Bank Report 2018' (n 6) VII.

[20] Christophe André and Lilas Demmou, 'Enhancing Insolvency Frameworks to Support Economic Renewal' [2022] *OECD Economics Department Working Papers*.

As the International Monetary Fund has commented:

> *"Formulating sound insolvency policies is only possible with the collection of relevant data and a careful analysis of empirical information. … Legislating 'in the dark' is an anomaly in the age of big data. Impact assessments and legislative reforms that are not backed up by empirical data risk being inefficient or even detrimental."*[22]

Discussions with ASIC and AFSA indicate the value of data integration and sharing, a consistent definition of "small business" between datasets, linkable datasets, including through Director Identification Numbers, and longitudinal tracking. Aggregation of government data, academic datasets and industry roundtable insights would also assist in developing an evidence-informed reform model.

While important gaps remain in the data, the available evidence consistently identifies a disconnect between legal form and the economic reality of small business distress.

These data gaps do not weaken the case for reform; rather, they support an incremental reform pathway that begins with improved data integration, targeted review and procedural coordination before any broader structural unification is attempted.

5. Past considerations and recognition of the corporate/personal insolvency divide

In support of this submission, we set out below several examples of government, regulatory and parliamentary recognition of the corporate/personal insolvency divide as a significant issue in the Australian insolvency framework.

These materials are important because they show that the problem identified in this submission is not novel. While perspectives differ on the appropriate solution, there is increasing recognition that the current separation of the two systems does not always reflect the economic reality of small business failure.

5.1 Government view

At AFSA's summit on 18 November 2025, Assistant Minister Dr Andrew Leigh identified as a "particular concern" highlighted in the 2023 PJC Report, namely:

> *"the interface between corporate and personal insolvency. In many small businesses, the financial affairs of the individual and the company are closely intertwined. When a small business enters difficulty, the owner may face both*

[22] International Monetary Fund, *Overarching Strategy on Data and Statistics at the Fund in the Digital Age* (Policy Paper, International Monetary Fund, March 2018) <https://www.elibrary.imf.org/view/journals/007/2018/012/article-A001-en.xml>; José Garrido et al, *The Use of Data in Assessing and Designing Insolvency Systems* (Discussion Paper, International Monetary Fund, 4 February 2019).

corporate administration and personal bankruptcy considerations. Yet the pathways for each are distinct, with different processes, obligations and outcomes. The report found that for small enterprises, this can feel like navigating 2 systems at once at the very moment when stress is highest. Any future improvements will need to account for how small business owners actually experience financial distress in practice.

Stakeholders across the sector – insolvency practitioners, legal and accounting professionals, small business representatives, advocates and lenders – have expressed interest in reforms that make the system easier to navigate and more coherent in structure. While perspectives differ on the exact solutions, there is a widely shared appreciation of the need for clarity in the purpose of the system, proportionality in regulatory obligations, and transparency in process. …".[23]

5.2 AFSA submission to the Productivity Commission

In addition, this reform is supported by AFSA. In its submission to the Productivity Commission's inquiry to identify priority reforms under the government's "five pillar" productivity growth agenda,[24] AFSA stated that the division between personal and corporate insolvency law creates complexity for small and medium businesses navigating insolvency, particularly where the boundaries between personal and corporate debt are often poorly defined.

AFSA described this separation as:

> *"a key regulatory issue that contributes significantly to time-consuming, complex processes that constrain business dynamism and resilience".*

AFSA also referred to:

> "*the complexity this division can create for small and medium businesses navigating insolvency, where the boundaries between personal and corporate debt are often poorly defined".*

The effects are not confined to business owners. AFSA notes that creditors:

> "*face a significant compliance burden because they must understand and navigate two distinct and complex insolvency systems as they often deal with both individuals and registered companies".*

[23] AFSA Summit, 18 November 2025

[24] *Creating a more dynamic and resilient economy inquiry* Questionnaire response 27 Name: The Australian Financial Security Authority Submission date: 6/06/2025.

AFSA also identified duplication and inefficiency for insolvency practitioners, noting that:

> "*dual registration requirements for insolvency practitioners who deal in both company (regulated by ASIC) and personal (regulated by AFSA) insolvency lead to duplication, inefficiency, and increased costs borne by practitioners"*.

The general context is that there is a clear appetite for legislative reform to harmonise and modernise Australia's insolvency laws, ensuring they reflect current economic conditions and provide fit-for-purpose insolvency options.

5.3 The PJC Report

The PJC also recognised the issue. It expressed the problem as one which: "*whether the insolvency process of a business is governed by the personal or corporate insolvency regime depends on the legal form of that business, rather than its economic form*".[25]

The PJC referred to similar concerns and calls for reform raised by the ASBFEO, ARITA, the Society of Corporate Law Academics (SCOLA) and Chartered Accountants Australia and New Zealand (CAANZ). It also noted the growing international focus on the need for insolvency law to recognise that, for small businesses, personal and corporate finances are often intermingled. [26]

For example, the World Bank's *Principles for Effective Insolvency and Creditor/Debtor Regimes* refers to the need for a simplified insolvency regime for all personal and business debts, including guarantees, through procedural consolidation or coordination of linked proceedings.[27]

The OECD recognises that small businesses often face particular obstacles in insolvency proceedings because business and personal finances are often "intertwined". The OECD observed that this required

> *"strong coordination between corporate and personal insolvency procedures. The absence of debt discharge or a long time to discharge can hinder a fresh start for honest failed entrepreneurs. Liabilities on personal assets may prevent timely filing for insolvency and reduce prospects for restructuring*."[28]

The PJC Report also canvassed the idea of a single unified regulator for corporate and personal insolvency, largely as a corollary of broader recommendations for a unified insolvency law. That idea has been raised previously, although usually in the context of broader structural reform rather than as an immediate standalone measure.

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[25] Murray and Harris, *Keay's Insolvency*, p. 9.
[26] Parliamentary Joint Committee on Corporations and Financial Services (n 13) [5.29].
[27] World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes*, 'Part C: Legal Framework or Insolvency, subsection C19: Simplified Insolvency Proceedings,' (2021), pp. 30–31.
[28] André and Demmou (n 20) 15.

For present purposes, the significance of this discussion is that it reinforces the same underlying point made throughout this submission: insolvency law should respond to the market as it operates in practice, not only to the legal categories through which the business activity is organised.

Since the PJC Report, one pragmatic institutional development has occurred. The PJC identified the transfer of personal insolvency policy and AFSA to Treasury as a 'soft law' alternative to more comprehensive structural reform. That transfer has now occurred.

The PJC ultimately considered harmonisation and simplification of insolvency law to be worthy, high-level guiding reform objectives. It recommended the idea as a priority issue for examination in a comprehensive review involving not only extensive research and consultation but also to publish detailed issues and options papers.[29]

6. Implementation and design issues

6.1 Business debts

We are aware of the looming complexities in this project, one threshold point being that the identification of 'business debts' can be problematic.

Any reform would need to define "business-related personal debt" carefully. Relevant debts may include liabilities under personal guarantees for business credit, personal credit used to fund the business, tax liabilities arising from business activity, and liabilities secured over personal assets to support business finance. The definition should be targeted and should not automatically bring all personal debts into a business insolvency process.

UNCITRAL has noted that for MSEs:

> *"…it may not always be possible to separate their debts into clear categories. Individual entrepreneurs, owners of limited liability MSEs and their family members may all be involved in the business and use consumer credit to finance the business either as start-up capital or for operations. Business insolvency may lead to personal or consumer insolvency once a business fails, even if the business is a separate legal entity. For that reason, separate proceedings with different access conditions and procedural steps applicable to various debts involved in MSE insolvency may not be an optimal solution."*[30]

Also, US commentary suggests that business liabilities have typically been understated in favour of consumer debts, such that "the old boundaries between personal and

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[29] Parliamentary Joint Committee on Corporations and Financial Services (n 13) [5.71] and Recommendation 3.

[30] UNCITRAL (n 6); Michael Murray and Rosalind Mason Submission No 17 to the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Corporate Insolvency in Australia* (29 November 2022) 8.

business may be breaking down and reforming. The reality might be that "t*he debts to be dealt with may be largely personal debts - money borrowed to keep the debtor afloat when the income from the business began to falter"*.[31]

Other commentators have said:

> *"If you ask the average entrepreneur—especially one in serious financial trouble—whether he or she has business or consumer debt, the answer will probably be —both. For many entrepreneurs, their personal finances are so intertwined with their business finances that it is difficult to distinguish between consumer and business debt. … Furthermore, because many small businesses finance themselves with credit cards …a credit card balance can represent a personal vacation or equipment for a business just as a second mortgage can represent cash sunk into home improvements or into a business venture. The line between personal and business debt for an entrepreneur trying to get a small business off the ground may be so blurred that any subsequent effort to segregate the debt is doomed …".*[32]

More broadly, US studies have also examined the extent to which personal difficulties cause corporate business bankruptcies,[33] for reasons including the owner's matrimonial property disputes; personal and family health problems, including illness or death of key personnel; and theft and criminal loss.

A 'business-related debt' would need to be defined as a category.

6.2 Personal guarantees

Given the impact of personal guarantees in corporate insolvencies, their resolution is central to the effectiveness of any small business restructuring process. If a restructuring plan compromises company debts but leaves related guarantee liabilities immediately enforceable against the owner-director, the commercial utility of the restructuring may be substantially reduced.[34] Reform should consider whether, and in what circumstances, guarantees connected to business debts should be stayed, compromised or otherwise coordinated with the corporate restructuring process.

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[31] *The Myth of the Disappearing Business Bankruptcy*, Robert M. Lawless & Elizabeth Warren, (2005) 93 California Law Review 743 at 792

[32] See *Personal Bankruptcy Law, Debt Portfolios, and Entrepreneurship,* (2015) 76(20 Journal of Monetary Economics 157-172, Jochen Mankart and Giacomo Rodano

[33] Warren and Westbrook "Financial Characteristics of Businesses in Bankruptcy" (1999) 73 Am Bankr LJ 499, 560–561. See also *Guide on the Treatment of Insolvent Micro and Small Enterprises in Asia*, a joint project by the International Insolvency Institute and the Asian Business Law Institute, 2022, Features of MSEs, pp 14-16.

[34] Bull (n 17) 192–195.

Any such reform would require safeguards for creditors, including clear eligibility criteria, disclosure of the guarantee position, creditor participation or objection rights, and transparent consequences for secured and unsecured claims.

6.3 The role of the ATO in Part 5.3B small business restructuring

Although statutory priority rules determine the formal ranking of creditors, the ATO's practical role in Part 5.3B small business restructuring is often decisive. In many Part 5.3B small business restructuring appointments, the ATO is the sole or major creditor, meaning its position can make or break a proposed restructuring outcome. Empirical research, including findings from Dr Bull's PhD thesis, indicates that extensive ATO information requests before approving restructuring plans can increase costs, slow decision-making and affect the regime's rescue objectives.[35]

6.4 Reform implementation

The reform task is therefore not, at least initially, to collapse Australia's corporate and personal insolvency systems into a single regime. While broader unification may warrant longer-term consideration, the more immediate and proportionate reform priority is to build procedural connections between existing pathways where a small business failure gives rise to linked corporate and personal distress.

Implementation should proceed in stages.

- First, government should improve data collection and consultation so that the incidence of linked corporate and personal insolvency events, personal guarantees and business-related personal debts can be measured more accurately.
- Secondly, the Part 5.3B small business restructuring regime should be reviewed to determine how personal guarantees connected to small business restructuring should be treated.
- Thirdly, options should be developed for procedural coordination between the Part 5.3B small business restructuring regime and relevant personal insolvency pathways, including common information requirements, aligned timeframes and coordinated practitioner or regulator processes.
- Finally, any model should be evaluated before broader harmonisation or unification is considered.

This approach would allow reform to proceed incrementally, with targeted attention to personal guarantees, coordinated interaction between Part 5.3B small business restructuring and relevant personal insolvency processes, improved data collection and evaluation, and safeguards that preserve creditor confidence and commercial certainty.

[35] Bull (n 17) see particularly [6.4] 201-202.

We suggest that modifying existing insolvency frameworks rather than creating entirely separate regimes is a more achievable reform proposition than a fully unified regime.

The immediate reform priority is therefore procedural coordination. A more unified framework may warrant consideration in the longer term, but only after further evidence, consultation and evaluation. In the meantime, coordination would better advance the recognised insolvency principles of efficiency, fairness, preservation of rights, creditor confidence, timely administration and appropriate control of misconduct.

7. Recommendations

This submission therefore offers recommendations for an incremental reform pathway directed to the practical coordination of linked corporate and personal insolvency issues in small business failure.

Recommendation 1: Review the treatment of personal guarantees in Part 5.3B small business restructuring

The Commission should recommend that the treatment of personal guarantees in the small business restructuring regime in Part 5.3B of the *Corporations Act* be reviewed as a priority reform issue.

Any reform should be carefully designed. It should identify which guarantees are sufficiently connected to the business, when protection or compromise should operate, whether the relevant mechanism is a stay, moratorium, compromise, release or other statutory modification, and what safeguards are required for affected creditors. The purpose should not be to remove legitimate creditor rights without justification, but to ensure that the restructuring regime can operate effectively where business liabilities and owner-director liabilities are functionally connected.

Recommendation 2: Develop procedural coordination between corporate and personal insolvency pathways

The Commission should recommend that government develop options for procedural coordination between Part 5.3B of the *Corporations Act* and relevant personal insolvency pathways under the *Bankruptcy Act*, including debt agreements, personal insolvency agreements and bankruptcy.

Procedural coordination should be available where the financial distress of a small company and the personal financial distress of its owner-director arise from the same enterprise failure. The objective would be to reduce duplicated processes, improve early triage, provide clearer information to creditors, manage related liabilities coherently and support either viable restructuring or efficient exit.

Design options may include a single entry point for assessment, coordinated appointment processes, aligned timeframes, common information requirements, streamlined court or tribunal pathways, and mechanisms for managing linked creditor claims. Any model would need to address practitioner independence, conflicts of interest, creditor participation, objection rights, court or regulator oversight, and the relationship between ASIC, AFSA and other relevant agencies.

Procedural coordination is recommended as an incremental first step. It does not require immediate replacement of the existing corporate and personal insolvency statutes. Rather, it would provide practical mechanisms for managing connected proceedings while preserving the possibility of broader structural reform after further evidence, consultation and evaluation.

Recommendation 3: Improve integrated data collection and evaluation

The Commission should recommend improved collection, integration and evaluation of data concerning the relationship between small business failure, corporate insolvency, personal insolvency and tax-related liabilities.

At present, Australia has data on corporate insolvency appointments and personal insolvency administrations, but those datasets do not readily show how often they arise from the same underlying small business failure. Nor is there sufficient integrated data on the incidence and enforcement of personal guarantees, the use of personal assets to support business finance, director exposure to tax liabilities, the costs and duration of parallel processes, or outcomes for creditors and owner-directors.

Better data is necessary to support proportionate reform. It would assist in identifying the scale of the problem, evaluating the effectiveness of procedural coordination, assessing the treatment of creditors, and determining whether longer-term harmonisation or unification of corporate and personal insolvency law is warranted.

Data reform should include cooperation between ASIC, AFSA, the ATO and other relevant agencies, a consistent definition of small business for insolvency data purposes, mechanisms for linking corporate and personal insolvency events where appropriate, and longitudinal evaluation of restructuring, exit and re-entry outcomes.

Recommendation 4: Preserve creditor confidence and commercial certainty through safeguards

Any reform to coordinate corporate and personal insolvency pathways should be accompanied by safeguards that preserve creditor confidence and commercial certainty.

Those safeguards should include transparent eligibility criteria, clear treatment of affected debts and guarantees, appropriate disclosure to creditors, voting or objection rights where creditor interests are affected, independent supervision, and accessible review mechanisms. Procedural coordination should reduce unnecessary friction without obscuring substantive rights or weakening the integrity of insolvency administration.

On that basis, the Commission should identify procedural coordination between corporate and personal insolvency pathways for small business as a priority area for staged reform.

8. Risks, safeguards and net benefit

Australia presents particular implementation issues, perhaps more so than some comparable jurisdictions. As we have explained, personal and corporate insolvency remain separate systems with different legislation, different regulators and different institutional histories.

Several complexities will require careful attention. Small business insolvency matters may require streamlined court or tribunal pathways; any integrated process would require formal coordination between ASIC, AFSA and other relevant agencies; and legislative design would need to account for constitutional, institutional and regulatory constraints.

8.1 Net benefit of procedural coordination for small business owners and creditors

The net benefit of reform lies in reducing avoidable duplication and friction. Under the current framework, small business owners may require separate advice, separate appointments and separate processes to address the same underlying business failure. Related personal guarantees or other personal exposures may remain unresolved even where the company undertakes restructuring. Procedural coordination would improve early triage, reduce duplication, provide clearer information to creditors, support efficient exit or restructuring, and preserve the possibility of entrepreneurial re-entry.

Conclusion

Australia's insolvency framework should be capable of addressing small business distress as it is experienced in practice, not only as it is classified in law. For many small businesses, the economic failure of the enterprise cannot be separated neatly into corporate and personal components. Personal guarantees, business-related personal debts, tax liabilities and the use of personal assets to support business finance mean that one business failure may produce two or more legally distinct insolvency pathways.

The current separation of those pathways increases cost, complexity and delay, and may undermine restructuring, efficient exit, creditor returns and entrepreneurial re-entry. The Commission should therefore identify procedural coordination between corporate and personal insolvency pathways for small business as a priority area for staged reform. That reform should begin with targeted review of personal guarantees in Part 5.3B small business restructuring, coordinated mechanisms between Part 5.3B small business restructuring and relevant personal insolvency processes, and improved integrated data collection to support future evaluation.

Procedural coordination offers a practical and proportionate starting point. It better reflects commercial reality, preserves creditor confidence and allows future reform to be guided by evidence rather than assumption.

Annexure A: Author Summaries

This submission is made by Dr Amanda-Jayne Bull, and Mr Michael Murray. The authors have been involved in a research project that commenced in June 2025, concerning the interaction between corporate, personal and small business insolvency. This submission draws on that body of research and professional experience in insolvency law, small business restructuring and law reform.

Dr Amanda-Jayne Bull

Dr Amanda Bull is a Lecturer at the Queensland University of Technology School of Law, with over 12 years' professional experience in banking and finance, insolvency, and property law, and a decade of teaching in these areas. Her PhD, awarded the 2025 QUT Outstanding Doctoral Thesis Award, examined Australia's small business restructuring regime through empirical research with industry and comparative analysis with the US and UK.

Amanda's current research focus is a law reform project with Michael Murray proposing a single insolvency framework for small business, addressing the overlap between personal and corporate insolvency - a project drawn from her PhD thesis and the focus of her invitations to present at the World Bank in Washington DC and at UNCITRAL. She was also a key member of a Building 4.0 CRC research project on construction insolvency.

Mr Michael Murray

Michael Murray is a lawyer and writer on insolvency and related law and practice. To 2007, he was a litigation lawyer at the AGS working in insolvency, tax and competition law, during which time he was a solicitor assisting on the HIH Royal Commission and a member of CAMAC. From 2007-2016, Michael was the inaugural legal director of ARITA, the main insolvency professional body.

He is author or co-author of texts including Keay's Insolvency, 12th ed pending; Ford's Corporations Law; and the Annotated Bankruptcy Act, 10th ed. He has been closely involved in law reform and most recently with Dr Amanda Bull on MSME insolvency law. He writes on insolvency reform and related law through www.murrayslegal.com.au. Michael has presented at many insolvency conferences in Australia, as well as the UK, the EU, and the US, and South-East Asia.

He was a visiting fellow at QUT Law School from 2011 to 2020. He is a Fellow of the Australian Academy of Law and a special adviser to the Association of Independent Insolvency Practitioners (AIIP).

Michael is qualified in law and criminology from the University of Sydney and in insolvency from the University of Southern Queensland.

Annexure B: Comparative Approaches to Personal Guarantees in Insolvency

Unified Insolvency Frameworks

(Single statute covering corporate and personal debtors that includes personal guarantees)

Jurisdiction & Key Law	Key Law	Integration Type	How Integration Is Achieved in Practice	Treatment of Personal Guarantees	In Operation Since	Uptake / Use	AU Comparator/Reform Insight
India	*Insolvency and Bankruptcy Code 2016* (IBC)	Formally unified statute with coordinated tracks	One Code for companies and individuals; corporate (Part II) and personal (Part III) proceedings before NCLTs; parallel filings common and linked in practice	Corporate resolution does not automatically discharge guarantor; guarantors subject to parallel insolvency with interim/final moratoria; PPIRP permits creditor-approved plan terms extinguishing PGs	2016 (PG regime effective 1 Dec 2019)	High and growing use of PG insolvency (e.g., 547 admissions in 2022; ~53.5% admission rate)	**AU:** Separate corporate (Part 5.3B) v personal (Bankruptcy Act). Temporary PG moratoria. **IBC:** benefits to a unified framework, or at least allowing procedurally coordinated processes in the same forum

Singapore	*Insolvency, Restructuring and Dissolution Act 2018*	Formally unified statute	Omnibus Act consolidating corporate and personal insolvency; High Court jurisdiction; shared profession and procedures	PGs may be released/compromised if expressly approved in schemes/CVAs; otherwise, guarantors remain liable and may enter personal insolvency	30 Jul 2020	Regular use of schemes, judicial management, and personal bankruptcy	**AU:** Retains a bifurcated regime. **Singapore:** Single law/tribunal. Demonstrates that compromise of PGs in a restructuring plan is feasible and supports limited PG release within restructuring plans (with appropriate creditor safeguards) or, at least, a more unified approach to small business insolvency.

Procedurally Coordinated Regimes

(Separate tracks or mixed systems linked by courts, eligibility, or plan-based mechanisms)

Jurisdiction	Key Law	Integration Type	How Integration Is Achieved in Practice	Treatment of Personal Guarantees	In Operation Since	Uptake / Use	Key Legislative / Case Sources	AU Comparator/Reform Insight
Colombia	Law 1116 of 2006 (as amended)	Procedural	Unified business insolvency for natural persons, companies and 'merchants' who	If guarantor qualifies as "merchant" they may file	2006 (reforms 2010,	Mainly corporate filings;	Law 1116/2006 art 2; Law 1429/2010	**AU:** similar corporate v personal divide

		integration (partial)	carry out business; same reorganisation/liquidation; simplified MSME tracks	under Law 1116; otherwise, separate enforcement	2020, 2024)	individual-merchant cases modest	; Law 2437/2024	**Colombia:** treats individual entrepreneurs like companies. Supports division between business v consumer debts to better address small business insolvency.
United Kingdom (England & Wales)	Insolvency Act 1986 / Companies Act 2006	Procedural (judge made)	Corporate CVAs and restructuring plans may bind/release PG claims with creditor consent ("guarantee stripping"); otherwise, parallel personal processes.	PGs may be released if expressly provided and creditors receive adequate compensation; otherwise, guarantors remain liable	1986 (plans expanded 2020)	Regular CVA/plan usage; PG releases case-specific	IA 1986; CA 2006 Pt 26A; *Prudential v PRG Powerhouse* [2007]; *Newlon Housing* [2023]	**AU:** No ability to compromise PGs in small business restructuring regime. **UK:** CVA plan can incorporate PG debts with creditor consent.