INSOLVENCY LAW TO THE RESCUE—AND ZOMBIES ARISE

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I INTRODUCTION

At the end of 2019, a severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) emerged in China, and the disease spread globally, coming to be known as "COVID-19".[1] The first case of COVID-19 in Australia was confirmed on 25 January 2020,[2] and in the United Kingdom on 31 January 2020.[3] Lockdowns were imposed in certain jurisdictions in March 2020 in response to the pandemic.[4] Whilst COVID-19 'is first and foremost a very major public health problem … it has also become a major economic problem'.[5] Social distancing measures and other government-imposed restrictions have made it challenging or even impossible for many businesses to continue their operations.[6] Insolvency law reforms were swiftly implemented in the United Kingdom, effective from 26 June 2020,[7] and in Australia, effective from 1 January 2021.[8] While such measures may be viewed as 'emergency legislation … to help businesses deal with the serious economic consequences resulting from the … pandemic',[9] they are also a product of the gradual evolution in the law's view of unpaid debts and defaulting debtors (both human and corporate).

This article traces the history of some of the ideas that have dominated personal bankruptcy and corporate insolvency law in the United Kingdom and in Australia. Part II of the article examines the basic relationship at the heart of bankruptcy law: the one between the human debtor and his or her creditors. The law's aims in relation to both over recent centuries are recapped, and the primary economic normative theory of bankruptcy and insolvency law is introduced. Part III sets out the escalating concern worldwide that the collapse of businesses may adversely affect third parties, especially employees. That concern, which led to the enactment of current administration mechanisms, inter alia, is then critically analysed in light of empirical data in Australia and appraised through an economic lens. Part IV considers insolvency law's recent emphasis on corporate rescue (as distinct from informal workouts)—

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[1] See, eg, *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 ('*Financial Conduct Authority*'), [7] (Lords Hamblen and Leggatt, Lord Reed agreeing); *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 ('*Dolan*'), [3] (Lord Burnett of Maldon CJ, King and Singh LLJ); *Coronavirus Act 2020* (UK) s 1(1).

[2] See, eg, *Rockment Pty Ltd v AAI Limited* [2020] FCAFC 228, [9] (Besanko, Derrington and Colvin JJ).

[3] See, eg, *Financial Conduct Authority* (n 1) [9] (Lords Hamblen and Leggatt, Lord Reed agreeing); *Dolan* (n 1) [5] (Lord Burnett of Maldon CJ, King and Singh LLJ).

[4] See, eg, *Dolan* (n 1) [1], [8], [80] (Lord Burnett of Maldon CJ, King and Singh LLJ); *Gerner v Victoria* [2020] HCA 48, [2] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

[5] Philip Lowe, 'Responding to the Economic and Financial Impact of COVID-19' (Reserve Bank of Australia, Sydney, 19 March 2020) <https://www.rba.gov.au/speeches/2020/pdf/sp-gov-2020-03-19.pdf>.

[6] See, eg, Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 4 [3], 11 [50], 63.

[7] *Corporate Insolvency and Governance Act 2020* (UK) s 49(1).

[8] *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) s 2.

[9] Department for Business, Energy and Industrial Strategy, *Corporate Insolvency and Governance Bill: ECHR Memorandum for the Bill as Introduced in the House of Commons* (15 May 2020) [3] <https://publications.parliament.uk/pa/bills/cbill/58-01/0128/ECHRMemo.pdf>.

and the growing phenomenon of zombie firms. Against this background, Part V surveys the latest insolvency law reforms. It is submitted that corporate rescue mechanisms, if unchecked by the consideration of creditors' interests, could be harming economies by contributing to the proliferation of barely viable companies.

II DEBTORS AND CREDITORS

A Debtors

1 Imprisonment

Failure to pay one's debts was traditionally regarded as highly reprehensible by the law, since *pacta sunt servanda* ('agreements are to be kept').[10] Centuries ago, dishonest debtors in the United Kingdom were liable to have an ear nailed to a pillory and then cut off, or even faced execution.[11] However, imprisonment was the typical legal consequence for failing to satisfy one's creditors.[12] Lord Brougham once summarised the history of this as follows:

> 'Under the common law, there was no imprisonment for debt unless there was actual force; gradually, however, one exception after another arose. Still, in the times of the Plantagenets, the right to imprison was not universal; and, indeed, it was not until the reigns of Henry VII and Henry VIII that the law which made universal the right of the creditor to arrest the debtor was adopted. … The first instance of an Insolvent Act having been framed was … in the time of … the Stuarts and the Brunswicks. Under that Act a man might get out of prison, provided his debts did not exceed £100, but upon condition that he enlisted in the army.'[13]

Thus for centuries debtors in the United Kingdom could be found languishing in prisons. For instance, Charles Dickens poignantly depicted the plight of those confined in an English debtors' prison in his 1857 novel titled *Little Dorrit*.[14]

By the mid-19th century, popular sentiment in the United Kingdom was turning against the idea of sending debtors to prison. On 11 March 1857, Mr Apsley Pellatt was arguing for the abolition of imprisonment for debt (though in vain) in the House of Commons:

> '[A]lthough he was aware that it was hopeless to proceed with his Bill, yet he wished to be allowed to explain his object, which was *to abolish imprisonment for debt in all cases except those of fraud*. By a Return which he had moved for last year, it appeared that there were then 1,098 prisoners for debt in England and Wales, of whom 250 were for sums under £6, and some of those persons had been in prison so long as forty years. That caused a great expense to the country. … After fifty years' experience in business, he could state that he had never received a dividend from the Insolvent Debtors Court, and he never knew anything got by sending a man to prison. … The existing system was peculiarly English, and that of a barbarian and uncivilized

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10 LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (online), 'pacta sunt servanda'. See, eg, Muir Hunter, 'The Nature and Functions of a Rescue Culture' (1999) 104(4) *Commercial Law Journal* 426, 436.

11 See, eg, Alfred De Lissa, *Bankruptcy and Insolvency Law: Proposal for a New System and of Theories for More Comprehensive Legislation for the Protection of Property and Control of Credit Operations* (Sydney, June 1881) 43; PD Phillips, *A Treatise on the Insolvency Law in Force in the Colony of Victoria* (Melbourne, 1899) 12, 14-15; Insolvency Law Review Committee (UK), *Insolvency Law and Practice* (Cmnd 8558, 1982) 16 [37] ('Cork Report').

12 See, eg, Phillips (n 11) 22; Cork Report (n 11) 15 [31], 17 [40]; Bruce Kercher, 'The Transformation of Imprisonment for Debt in England, 1828 to 1838' (1984) 2(1) *Australian Journal of Law and Society* 60.

13 United Kingdom, *Parliamentary Debates*, House of Lords, 12 February 1858, vol 148, col 1254 (Lord Brougham) <https://hansard.parliament.uk/Lords/1858-02-12/debates/321e14af-57f0-48fe-b583-94cee2297e89/ImprisonmentForDebt>. See also, eg, Dennis Rose, *Lewis' Australian Bankruptcy Law* (11th ed, LBC Information Services, 1999) (n 11) 9-11.

14 Charles Dickens, *Little Dorrit* (Bradbury and Evans, 1857). See, eg, *Hussain v Vaswani* [2020] EWCA Civ 1216 ('*Hussain*'), [22] (Arnold LJ, Baker LJ agreeing). See further, eg, Cork Report (n 11) 17 [41].

> nation, treating with so little respect the liberty of the subject. … His object was to prevent a debtor, not being a fraudulent one, from being *treated worse than a criminal*.'[15]

It was not until the *Debtors Act 1869* (UK) that imprisonment for debt was generally abolished in the United Kingdom,[16] although the practice continued pursuant to certain exceptions.[17]

Australia's bankruptcy law was from inception aligned with that of the United Kingdom.[18] Yet when it comes to imprisonment for debt, Australia was almost three decades ahead of the curve.[19] In the colony of New South Wales, the *Insolvency Act 1843* (NSW) introduced the trailblazing s 26, which stated in full:

> 'And whereas the present *power of arrest for debt has been found to be oppressive and unnecessary* Be it enacted That after the thirty-first day of March now next ensuing *no person shall be arrested or imprisoned* on any civil process issuing out of any Court of Law or on any execution issuing out of any Court of Equity in any suit or proceeding instituted for the recovery of any money due upon adjudgment or decree founded upon contract or due upon any contract expressed or implied or the recovery of any damages for the non-performance of any contract except in the cases and in the manner hereinafter provided or in actions of trespass trover or case.'[20]

Granted, a significant list of exceptions to this prohibition on arrest or imprisonment for debt remained.[21] The law on this topic was subsequently simplified in the *Imprisonment for Debt Abolition Act 1846* (NSW). But imprisonment of merely hapless debtors was no more.

2 Discharge

A ground-breaking 1705 statute in the United Kingdom provided that debtors who failed 'to discover or deliver' their property could meet with death,[22] whereas compliant debtors could 'be *discharged* from all debts … owing at the time that … they did become bankrupt'[23] (and in some cases could even receive a portion of the estate).[24] However, bankruptcy statutes, and so the boon of discharge, were only applicable at that time to those in trade. The Lord Chancellor once explained the reason for this discriminatory treatment as follows:

> 'The insolvent trader was a man who contracted debts from necessity; and, therefore, in many instances, became insolvent from unforeseen misfortunes in trade. Debt was a part of the business of a trader; he could not get on without it; but, in ninety-nine cases out of an hundred, that was not the case with the non-trader insolvent. It was not by any necessary risks that the insolvency

[15] United Kingdom, *Parliamentary Debates*, House of Commons, 11 March 1857, vol 144, col 2184-2185 (Mr Pellatt) (emphasis added) <https://hansard.parliament.uk/Commons/1857-03-11/debates/c5d67dc4-9b2b-45af-9227-2d17b0994994/ImprisonmentForDebtAndCBill>.

[16] See, eg, *Bunney v Burns Anderson Plc* [2007] EWHC 1240 (Ch), [57] (Lewison J); *Leaway v Newcastle City Council (No 2)* (2005) 220 ALR 757 ('*Leaway*'), [46] (Campbell J).

[17] See, eg, Kercher, (n 12) 62, 74; Cork Report (n 11) 18 [45]; *Hussain* (n 14) [22] (Arnold LJ, Baker LJ agreeing); *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* [2019] NSWSC 193, [107] (N Adams J).

[18] See, eg, Corey Byrne, 'Rescuing the Rescue Culture? Australian Corporate Restructuring After the Safe Harbour and Ipso Facto Reforms' (2019) 27 *Insolvency Law Journal* 122, 124; Paul J Omar and Jennifer Gant, 'Corporate Rescue in the United Kingdom: Past, Present and Future Reforms' (2016) 24 *Insolvency Law Journal* 40, 40; Michael Murray and Jason Harris (eds), *Keay's Insolvency: Personal and Corporate Law and Practice* (10th ed, Thomson Reuters (Professional) Australia Ltd, 2018) 50 [2.05].

[19] See, eg, Kercher (n 12) 62; *Leaway* (n 16) [49] (Campbell J).

[20] *Insolvency Act 1843* (NSW) s 26 (emphasis added).

[21] Ibid ss 27-28.

[22] 4 Anne c 17 (1705) s XVIII <https://statutes.org.uk/site/the-statutes/eighteenth-century/1705-4-anne-c-17-frauds-frequently-committed-by-bankrupts/>.

[23] Ibid s VII (emphasis added).

[24] Ibid ss VII-VIII. See also, eg, Cork Report (n 11) 16 [37]; De Lissa (n 11) 43-44; Phillips (n 11) 15-16.

> of the non-trader was brought about, but by his reckless conduct and his spending the money of others.'[25]

The 'whitewashing'[26] achieved by discharge did not become available to '[a]ll Debtors, whether Traders or not' in the United Kingdom until 1861.[27]

The discharge of debtors from claims by their creditors is now a principal aim of bankruptcy law in Australia.[28] Its emergence as an aim was rapid. For instance, Sir George Stephen (having practised as a barrister in Victoria's bankruptcy court for some 14 years)[29] wrote in 1868 that the pendulum had swung too far in favour of debtors:

> '[T]he collection and equal distribution of assets is the essential as well as the primary object of every system of insolvency or bankruptcy, while the relief of the insolvent debtor is a secondary purpose, conditional on the first being secured so far as lies in the insolvent's power. Under our colonial law, however, this order is reversed, and the debtor's release, regardless of his possessing any *distributable* estate, is held to be the primary object of the insolvency statutes.'[30]

He saw no problem with allowing those who had become paupers through 'unavoidable misfortune … to begin the world *de novo*',[31] but was alarmed by the idea 'that distributable property is not essential to entitle an insolvent to relief.'[32] Bankruptcy practice in Victoria in the 1860s made it seem 'that the primary object of the law is to relieve from liabilities, at whatever loss to the creditors'[33]—such that any dividend was 'a lucky accident'.[34]

B Creditors

As early as the 16th century there appeared in the bankruptcy statutes of the United Kingdom provision for the seizure, sale, and equal distribution of the proceeds of the debtor's property among his or her creditors.[35] Since that time, this has developed into a principal aim of bankruptcy law in Australia and elsewhere.[36] It was already uncontroversial by the time that 'the first comprehensive normative framework for thinking about bankruptcy law' was first put forward in the United States of America.[37] Known as the creditors' bargain theory ('CBT'), it was expounded in Professor Thomas Jackson's 1980s publications, including his seminal text titled *The Logic and Limits of Bankruptcy Law*.[38] That text begins with the proposition that

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[25] United Kingdom, *Parliamentary Debates*, House of Lords, 12 February 1858, vol 148, col 1257 (Lord Chancellor) <https://hansard.parliament.uk/Lords/1858-02-12/debates/321e14af-57f0-48fe-b583-94cee2297e89/ImprisonmentForDebt>. See also, eg, Simon Stern (ed), *The Oxford Edition of Blackstone's Commentaries on the Laws of England* (Oxford University Press, 2016) vol II, ch 31, 319-320 ('*Blackstone's Commentaries*').

[26] United Kingdom, *Parliamentary Debates*, House of Lords, 12 February 1858, vol 148, col 1258 (Lord Chancellor) <https://hansard.parliament.uk/Lords/1858-02-12/debates/321e14af-57f0-48fe-b583-94cee2297e89/ImprisonmentForDebt>.

[27] *Bankruptcy Act 1861* (UK) s 69. See also, eg, Cork Report (n 11) 17 [42]; Phillips (n 11) 22.

[28] See, eg, Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988) 16 [33] ('Harmer Report'); Rose (n 13) 1, 240; Murray and Harris (n 18) 18 [1.105].

[29] Sir George Stephen, *Insolvency Abuses* (AJ Smith, 1868) 15.

[30] Ibid 4 (emphasis in original).

[31] Ibid 4 (emphasis in original).

[32] Ibid 5.

[33] Ibid 4-5. See further at 10.

[34] Ibid 5. See further at 13, 17.

[35] See, eg, Phillips (n 11) 7, 20; Cork Report (n 11) 16 [36]; Rose (n 13) 12-13.

[36] See, eg, De Lissa (n 11) 18, 43; Cork Report (n 11) 54 [198]; Harmer Report (n 28) 15-16 [33]; Rose (n 13) 1.

[37] Thomas H Jackson, 'A Retrospective Look at Bankruptcy's New Frontiers' (2018) 166(7) *University of Pennsylvania Law Review* 1867, 1867-1868.

[38] Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986) ('*Logic and Limits*'). See also, eg, Thomas H Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91(5) *Yale Law Journal* 857.

bankruptcy law is debt-collection law.[39] Yet it is ancillary to the usual system of debt-collection because it only applies in the scenario where there are not enough assets to fully satisfy all the creditors.[40] Without bankruptcy law, creditors of an insolvent debtor would generally be paid on a "first come, first served" basis, with the last creditor(s) missing out.[41] This of itself might strike one as unfair. But the chief problem identified by Jackson 'is that the system of individual creditor remedies may be bad for the creditors *as a group*'.[42]

A "first come, first served" model would be expensive for creditors as they would need to separately monitor the debtor's solvency, individually incur collection costs, and possibly miss out on payment entirely if their lawsuit is among the last.[43] But above all, the debtor's assets may be worth more *together* than if they are sold singly.[44] Drawing on economics, Jackson explained that creditors of an insolvent debtor are faced with a type of prisoner's dilemma or a species of the common pool problem.[45] He elaborated:

> 'The use of individual creditor remedies may lead to a piecemeal dismantling of a debtor's business by the untimely removal of necessary operating assets. To the extent that a non-piecemeal collective process … is likely to increase the aggregate value of the pool of assets, its substitution for individual remedies would be advantageous to the creditors as a group.'[46]

The CBT justifies bankruptcy law primarily on the basis that it ameliorates the common pool problem 'by imposing a *collective* and *compulsory* proceeding' on creditors, thus forcing them to 'act as one'.[47] That is, bankruptcy law stops creditors from harming one another.[48]

Jackson acknowledged that bankruptcy law also has 'an independent substantive policy' of discharge, whereby human debtors are allowed 'a financial fresh start'.[49] This is kept in check by other considerations, such as the availability and cost of credit.[50] But apart from discharge, he argued that bankruptcy law must not create new rights.[51] Rather, it should vindicate pre-bankruptcy rights as far as possible.[52] This means that bankruptcy law 'should take the value of entitlements as it finds them',[53] and preserve 'the relative standing among claimants that would exist outside of bankruptcy's collective framework.'[54] Thus the *pari passu* distribution of a bankrupt's estate among unsecured creditors makes sense under the CBT.[55] Jackson contended that failure to respect the relative values of pre-bankruptcy entitlements would invite strategic use of bankruptcy law to attain the change.[56] Yet if a bankruptcy process is instigated to take advantage of a legal change in favour of one group, it may prove harmful to creditors

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[39] Jackson, *Logic and Limits* (n 38) 3.
[40] See ibid 4.
[41] Ibid 9.
[42] Ibid 10 (emphasis in original).
[43] Ibid 15-16.
[44] Ibid 14.
[45] Ibid 10-11.
[46] Ibid 14. See further at 24.
[47] Ibid 13 (emphasis in original). See further at 16-17, 20.
[48] See ibid 5, 8.
[49] Ibid 4. See further at 225-226.
[50] Ibid 4.
[51] Ibid 22.
[52] Ibid 22.
[53] Ibid 33. See further at 62-63.
[54] Ibid 29.
[55] Ibid 29-30. See also, eg, *Blackstone's Commentaries* (n 25) vol II, ch 31, 328.
[56] Jackson, *Logic and Limits* (n 38) 58, 195.

as a whole.[57] Thus Jackson believed that bankruptcy law would not be able to effectively solve the common pool problem if it also created new rights.[58]

The CBT, as refined over the years, remains the 'dominant and most influential' economic justification for bankruptcy and insolvency law.[59] However, it has been questioned even from within its own Law and Economics movement.[60] Another American, Professor Barry Adler, has argued that parties can fashion contractual relationships that provide for collective action, thus obviating the need for bankruptcy or insolvency law.[61] All that would be required from the law is 'contract enforcement'.[62] So why do we not see widespread efforts to adopt such contracts?[63] Adler has put forward the startling hypothesis that perhaps creditors do not actually want a *collective* process.[64] Perhaps they prefer to rely on the statutory system for another reason altogether: namely, 'free-and-clear dispositions.'[65] After all, the sale of assets through a bankruptcy or insolvency process has a 'cleansing' effect, such that those assets are transferred to (solvent) purchasers or creditors unencumbered.[66] Thus Adler has proposed 'asset laundering' as an alternative economic justification for bankruptcy and insolvency law.[67] However, while this justification may shift the CBT's footing, it does not appear to detract from the normative imperative of maximising returns to creditors.

III OTHER STAKEHOLDERS

A Business rescue

Before Jackson began to articulate the CBT in the 1980s, a review committee chaired by Sir Kenneth Cork GBE was appointed on 27 January 1977 to report on insolvency law and practice in England and Wales.[68] Indeed, Jackson's breakthrough article was only published in April 1982,[69] just a couple of months before the presentation of that committee's report ('Cork Report').[70] The committee did not have the benefit of a comprehensive normative theory like the CBT to guide its work. So what 'principles of bankruptcy law' did it adopt?[71] The Cork Report quotes a passage from a second reading speech delivered in the House of Commons by

[57] Ibid 26, 61, 193.
[58] Ibid 26.
[59] Samuel E Etukakpan, 'The Lost Voice in Insolvency: Theories of Insolvency Law and Their Implications for the Employees' (2014) 23 *Nottingham Law Journal* 34, 46 (citations omitted). See also, eg, Sarah Paterson, 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 36(4) *Oxford Journal of Legal Studies* 697, 698; Productivity Commission, *Business Set-up, Transfer and Closure* (Inquiry Report No 75, 30 September 2015) 347; Jason Harris, Michael G R Gronow and Helen Anderson, *Insolvency Law: Cases and Materials* (Lawbook Co, 2015) 13 [1.170]; Peter Walton, 'When is Pre-Packaged Administration Appropriate?—A Theoretical Consideration' (2011) 20(1) *Nottingham Law Journal* 1, 3-4; Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge University Press, 2009) 32-33 ('*Corporate Insolvency Law*'); Colin Anderson and David Morrison, *Crutchfield's Corporate Voluntary Administration* (3rd ed, Lawbook Co, 2003) 2-3; James Routledge, 'Part 5.3A of the Corporations Law (Voluntary Administration): Creditors' Bargain or Creditors' Dilemma?' (1998) 6 *Insolvency Law Journal* 127.
[60] See, eg, Jackson, 'A Retrospective Look at Bankruptcy's New Frontiers' (n 37) 1870, 1877-1879.
[61] Barry E Adler, 'The Creditors' Bargain Revisited' (2018) 166(7) *University of Pennsylvania Law Review* 1853, 1857.
[62] Ibid 1857.
[63] Ibid 1860.
[64] Ibid 1861.
[65] Ibid 1864.
[66] Ibid 1864.
[67] Ibid 1865.
[68] Cork Report (n 11) iii.
[69] Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (n 38).
[70] In June 1982: Cork Report (n 11) i.
[71] Ibid 19 [49].

Mr Joseph Chamberlain on 19 March 1883 (almost a century earlier).[72] In that speech, Chamberlain claimed that bankruptcy law should strive for (a) 'the fair and speedy distribution of the assets among the creditors', and (b) the promotion of 'honest trading' with fewer 'failures'.[73] His material point was that Parliament must 'endeavour, as far as possible, to protect the salvage, and also *to diminish the number of wrecks*.'[74] Notably, Chamberlain was speaking of personal bankruptcy—not insolvent companies.

In discussing the bankruptcy statute to which Chamberlain's speech pertains, the Cork Report identifies the 'cardinal new principle … that bankruptcy is a matter which affects the community at large.'[75] Accordingly, it characterises insolvency law as 'a compact' between 'the debtor, his creditors *and society*.'[76] Regarding 'an insolvent company, society … may have a legitimate concern in the preservation of the commercial enterprise.'[77] This is because its failure may have adverse repercussions for a wide array of stakeholders, including suppliers and employees[78] (who might be creditors, but are also likely to want the business to continue).[79] The committee's views on this culminated in the following passage:

> 'We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which *may well be the lifeblood of a whole town or even a region*, is a legitimate factor to which a modem law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, *employees* and the *community* that it must not be overlooked.'[80]

Accordingly, the Cork Report asserts that one aim of modern insolvency law is 'to provide means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country'.[81]

Although some point to the United States in the 1930s as its true origins,[82] the Cork Report has been lauded as 'the first recorded attempt at a detailed formulation of the concept of a Rescue Culture.'[83] In it, the committee proposed two new insolvency procedures that could be used to save a commercial enterprise: company voluntary arrangement[84] ('CVA') and administration.[85] The latter was recommended expressly 'to preserve viable commercial enterprises and to maintain employment'.[86] Both CVAs and administration became available in the United Kingdom pursuant to the *Insolvency Act 1986* (UK). Meanwhile, the Cork Report 'quickly acquired a near-mythic status' and went on to inspire 'numerous reform committees throughout

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[72] Ibid 19 [49]. See further, eg, Hunter (n 10) 435.
[73] United Kingdom, *Parliamentary Debates*, House of Commons, 19 March 1883, vol 277, col 817 (Mr Chamberlain) <https://hansard.parliament.uk/Commons/1883-03-19/debates/ecb4ce11-0219-42a0-b54c-8ebdc566df69/SecondReading>.
[74] Ibid col 817 (emphasis added).
[75] Cork Report (n 11) 20 [53].
[76] Ibid 53 [192] (emphasis added). See also at 62 [235], 390 [1734].
[77] Ibid 53 [193].
[78] Ibid 56 [203]. See also, eg, Sandra Frisby, 'Of Rights and Rescue: A Curious Confluence?' (2020) 20(1) *Journal of Corporate Law Studies* 39, 45; Byrne (n 18) 123.
[79] See, eg, Etukakpan (n 59) 35, 55-56, 59.
[80] Cork Report (n 11) 56 [204] (emphasis added). See also at 17 [38], 117 [495]. See further, eg, Hunter (n 10) 435-436, 460.
[81] Cork Report (n 11) 55 [198](j).
[82] See, eg, Byrne (n 18) 123. But see further at 124-125. See also, eg, Ahmed Terzic, 'Turning to Chapter 11 to Foster Corporate Rescue in Australia' (2016) 24 *Insolvency Law Journal* 5, 13-14.
[83] Hunter (n 10) 435.
[84] Cork Report (n 11)102-103 [428]-[430].
[85] See especially ibid 117 [497]-[498], 120 [509].
[86] Ibid 219 [942]. See also at 117 [498](a), 446 [1980](2).

the world'.[87] On 20 November 1983, the Law Reform Commission was tasked with inquiring into the law and practice of insolvency in Australia.[88] Ronald W Harmer was the Commissioner-in-charge.[89] The resulting report of 1988 ('Harmer Report') was clearly influenced by the Cork Report.[90] Written submissions were also received from someone in America named 'Thomas Jackson' in 1985,[91] but they are not mentioned in the body of the Harmer Report.

Unlike the Cork Report, 'the principles that should guide the development of a modern insolvency law' identified in the Harmer Report do not include the promotion of business rescue *per se*.[92] Nonetheless, the latter begins by observing that, apart from just debtors and creditors, insolvency law can impact 'employees, families, customers and agencies of government [and] … therefore, is a matter of considerable importance to the Australian community.'[93] The Law Reform Commission went on to lament:

> 'There is very little emphasis upon or encouragement of a constructive approach to corporate insolvency by, for example, focussing on the possibility of saving a business (as distinct from the company itself) and preserving employment prospects.'[94]

It proposed a new regime for insolvent companies that *prima facie* looks like an amalgam of the United Kingdom's administration and CVA procedures: namely, voluntary administration ('VA') with the option of executing a deed of company arrangement ('DOCA').[95] The enactment of the *Corporate Law Reform Act 1992* (Cth) introduced this regime into the *Corporations Law* (which has since become the *Corporations Act 2001* (Cth)) as Pt 5.3A.[96]

B Preserving employment (in Australia)

From the foregoing it is evident that the aim of business rescue is primarily motivated by a desire to save jobs. Young J remarked in the 1997 case of *Sydney Land Corporation Pty Ltd v Kalon Pty Ltd (No 2)* that Pt 5.3A focuses on a company and its business because it is 'employing Australians and it [is] … in the interests of Australia that as much employment as possible be maintained.'[97] As recently as 2020, implicitly quoting the Harmer Report, judges have asserted that 'the apparent purpose and object of Part 5.3A' involves 'focusing [on] the possibility of saving a business and preserving employment prospects.'[98] The courts accept that continued employment can be a legitimate interest in Pt 5.3A applications.[99] Insolvency

[87] Omar and Gant (n 18) 44.
[88] Harmer Report (n 28) xxxv, 3 [2].
[89] Ibid xxxvi.
[90] See especially ibid xxxix, 5 [7], 8 [17].
[91] Ibid Appendix B, 183.
[92] Ibid 15 [33]. See generally 15-17 [33].
[93] Ibid 3 [1].
[94] Ibid 28 [52].
[95] See especially ibid 30-32 [56]. But see Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) 9 [21]: 'a new procedure (based loosely on a United States approach)'.
[96] *Corporate Law Reform Act 1992* (Cth) s 56.
[97] *Sydney Land Corporation Pty Ltd v Kalon Pty Ltd (No 2)* (1997) 26 ACSR 427, 430 (Young J).
[98] *Re AHEPA NSW Inc* [2020] NSWSC 1626, [14] (Black J) discussing *Re Gulf Energy Pty Ltd* [2019] NSWSC 1637, [18]-[20] (Ward CJ in Eq). See also, eg, *Re Windows on the World Steel Windows Pty Ltd (in admin)* [2020] VSC 880, [83] (Sloss J).
[99] See, eg, *Re Shield Mercantile Pty Ltd* [2020] NSWSC 1545, [19] (Black J); *Re Keystone Group Holdings Pty Ltd (recs and mgrs apptd) (admins apptd)* [2017] NSWSC 454, [27] (Gleeson JA) citing *Re ABC Learning Centres Ltd (admins apptd) (recs and mgrs apptd) (No 8)* (2009) 73 ACSR 478, [28] (Emmett J); *Re Sirius Corporation Ltd (admins apptd)* [2013] NSWSC 2003, [13] (Black J) citing *Owen v Madden* [2011] FCA 295, [27] (Logan J); *Mediterranean Olives Financial Pty Ltd v Loaders Traders Pty Ltd (Subject to DOCA) (No 2)* (2011) 82 ACSR 300 ('*Mediterranean Olives*'), [201] (Dodds-Streeton J); *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510 ('*Bidald*'), [275] (Campbell J). But see, eg, *Adelaide Brighton Cement Ltd v Concrete*

practitioners in Australia similarly seem to believe that a ‘business rescue culture’ translates into ‘saving jobs and maximising value for all stakeholders.’[100] Indeed, there is apparently a *global* trend towards developing and enhancing a rescue culture in insolvency law with a view to preserving employment.[101] This is supported by various theories of insolvency law that incorporate the interests of a broad range of stakeholders, including employees.[102]

However, to what extent is business rescue likely to save jobs in practice? According to the Australian Bureau of Statistics, 63.9% of all Australian businesses operating on 30 June 2020 did not employ anyone.[103] Among the businesses that *were* employers, 68.7% had ≤4 employees.[104] Thus a mere 11.3% of Australian businesses employed ≥5 people on 30 June 2020.[105] Preserving employment is therefore a weak reason for championing business rescue in Australia, unless the businesses that resort to rescue mechanisms predominantly fall within that 11.3%. Survival rates shed light on this. Some 65.1% of businesses that were operating in Australia in June 2016 survived to June 2020.[106] When broken down based on employment categories, however, it emerges that non-employing businesses are the ones that had the lowest survival rate: just 60.4%.[107] Conversely, 83.1% of businesses with 20-199 employees and 88.0% of businesses with ≥200 employees survived to June 2020.[108] Unless these higher survival rates are a reflection of greater success in using rescue procedures, it is open to infer that businesses with few or no employees are more likely to resort to Pt 5.3A due to their higher probability of failure. This further undermines the ‘saving jobs’ justification for encouraging business rescue in Australia.

C Economic perspective

As noted above, the push for business rescue in the Cork Report and the Harmer Report coincided with the exposition of the CBT. Since the former is an end, while the latter is a normative model, business rescue can be assessed through the economic lens of the CBT. Jackson, together with Professor David A Skeel Jr, undertook this evaluation in a 2013 paper

Supply Pty Ltd (Subject to DOCA) (No 4) [2019] FCA 1846 (‘*Adelaide Brighton Cement*’), [1396]-[1397] (Besanko J).

[100] Michael Brereton and Sean Wengel, ‘Where to Next for Business Restructuring Reform?’ (2018) 30(4) *Australian Restructuring Insolvency & Turnaround Association Journal* 22, 22. See further at 23-24, 26. See also, eg, Australian Restructuring, Insolvency & Turnaround Association (‘ARITA’), *Financial Recovery 2020* (August 2019) 7.

[101] See, eg, James HM Sprayregen, ‘International Insolvency: From Punitive Regimes toward Rescue Culture’ (2020) 36(1) *Emory Bankruptcy Developments Journal* 7, 12-13; Ionel Didea and Diana Maria Ilie, ‘(R)evolution of the Insolvency Law in a Globalized Economy’ (2019) 9(1) *Juridical Tribune* 91, 101-102; Ionel Didea and Diana Maria Ilie, ‘The Development of a “Rescue Culture”. Insolvency Globalization’ [2018] 2018(2) *AGORA International Journal of Juridical Sciences* 1, 5, 13-14; Gerard McCormack, ‘Something Old, Something New: Recasting the European Insolvency Regulation’ (2016) 79(1) *Modern Law Review* 121, 121, 125; Etukakpan (n 59) 36, 62.

[102] For summaries of some competing theories: see, eg, Etukakpan (n 59) 41, 47-54; Walton (n 59) 3, 7-11; Finch, *Corporate Insolvency Law* (n 59) 38-48.

[103] Australian Bureau of Statistics, ‘Data cube 1: Tables 1-20 of counts of Australian businesses, including entries and exits’ (16 February 2021) Table 13a <https://www.abs.gov.au/statistics/economy/business-indicators/counts-australian-businesses-including-entries-and-exits/jul2016-jun2020/816501..xls>, calculated as 1,546,865 ÷ 2,422,404 ≈ 0.639.

[104] Ibid Table 13a, calculated as 601,687 ÷ 875,539 ≈ 0.687.

[105] Ibid Table 13a, calculated as (875,539 – 601,687) ÷ 2,422,404 ≈ 0.113.

[106] Ibid Table 11, calculated as 1,413,516 ÷ 2,171,544 ≈ 0.651.

[107] Ibid Table 15.

[108] Ibid Table 15.

titled 'Bankruptcy and Economic Recovery'.[109] They agreed that insolvency law can facilitate economic growth, but contended that that function may be undermined if 'employment [is] … carried outside its macro focus so as to become an independent bankruptcy policy'.[110] Businesses are constantly entering and exiting markets. Insolvency law helps to liberate assets from specific groupings so that those assets can move 'to their highest-and-best use.'[111] A business might have more liabilities than assets (a 'financial failure') yet be making the most of its assets (thus not an 'economic failure').[112] Such a business should not be dismantled, since its 'assets are worth more together'.[113] But the crucial point made in the paper is that '[i]t is *the ability (but not the requirement)* to keep the assets together that makes bankruptcy an essential tool in a free-market/entrepreneurial economy'.[114]

Business rescue makes sense when an employing business is only struggling financially, so jobs can be saved without compromising on economic efficiency.[115] But what if an employing business is economically unsound?[116] The rescue of a business which is economically weak may immediately save jobs, but at what price?[117] When inefficient businesses are artificially propped up using insolvency processes, *ceteris paribus*, production fails to shift to more efficient businesses in the market.[118] What about the consequent lack of job growth, or even cutbacks that might have to be made, in more efficient businesses?[119] Preserving employment using insolvency law can boil down to favouring 'the inefficient over the efficient'.[120] Thus Jackson and Skeel argued that 'too often the focus on "jobs" in bankruptcy has unintended, and indeed perverse, "macro" implications.'[121] It is true that the CBT fails to 'consider non-economic matters',[122] such as the personal consequences of business failure. But Jackson and Skeel's position was not that unemployment is unimportant, but that insolvency law is not the right vehicle for addressing it.[123] Since there is consensus that insolvency law contributes to economic growth by optimising asset allocation, it is unreasonable, they argued, to expect it to pursue the potentially inconsistent policy of saving jobs too.[124]

Supporters of business rescue are invariably looking to save only *viable* businesses: those that are experiencing financial, but not economic, failure.[125] In a 2018 article, two Dutch scholars

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[109] Thomas H Jackson and David A Skeel Jr, 'Bankruptcy and Economic Recovery' (University of Pennsylvania Law School, Institute for Law and Economics, Research Paper No 13-27, 2013) <http://ssrn.com/abstract=2306138>.
[110] Ibid 1.
[111] Ibid 2. See further at 5.
[112] Ibid 3.
[113] Ibid 24.
[114] Ibid 24 (emphasis added).
[115] Ibid 22.
[116] Ibid 24.
[117] Ibid 29. See also, eg, Tim Verdoes and Anthon Verweij, 'The (Implicit) Dogmas of Business Rescue Culture' (2018) 27(3) *International Insolvency Review* 398, 401.
[118] Jackson and Skeel (n 109) 31-32. See also, eg, Paterson (n 59) 699.
[119] Jackson and Skeel (n 109) 32-33.
[120] Ibid 32.
[121] Ibid 22.
[122] Walton (n 59) 5 (citations omitted). See also, eg, Etukakpan (n 59) 59; Finch, *Corporate Insolvency Law* (n 59) 34.
[123] Jackson and Skeel (n 109) 22.
[124] Ibid 21-22, 37. See also, eg, Jackson, *Logic and Limits* (n 38) 2, 25-27.
[125] See, eg, Frisby (n 78) 66; Brereton and Wengel (n 100) 26; Scott Atkins and Agnes Kang, 'Innovation Nation: An Update on Reforms to Australian Bankruptcy and Insolvency Laws' (2017) 11(1) *Insolvency and Restructuring International* 12, 14-15; Didea and Ilie, '(R)evolution of the Insolvency Law in a Globalized Economy' (n 101) 100-101, 111; Didea and Ilie, 'The Development of a "Rescue Culture". Insolvency Globalization' (n 101) 3, 5; McCormack (n 101) 125; Productivity Commission (n 59) especially 375-377.

saw economic benefit in rescue—but in very limited circumstances.[126] They explained that a 'market is not only an efficiency promoting mechanism but also an effective algorithm in selecting viable firms'.[127] It 'eliminates nonvaluable clusters' (i.e. drives inefficient businesses to exit) and reallocates resources 'into more valuable directions.'[128] Insolvency can simply be the result of competition.[129] It is 'a strong clue' that a business is not viable.[130] Nor is the Pt 5.3A mechanism especially adept at excluding unviable candidates from rescue, as one 1990s Australian study found:

> '[T]he results presented here are hardly reassuring. Arguably, the VA procedure appears to be problematic in terms of possible bias towards reorganisation of inefficient companies. The … failure of the VA procedure to adequately filter inefficient companies may be adding to the overall economic cost associated with corporate insolvency.'[131]

Moreover, with greater innovation and intensifying competition, it has been predicted that the likelihood of any given insolvent business being viable will continue to decline.[132]

The Dutch scholars' article also challenges the idea that a business should survive forever.[133] On the contrary, businesses are but temporary clusters.[134] 'Capitalism is a process of trial and error' in which failure is 'an essential part'.[135] Thus 'business turnover is a sign of system success.'[136] There is certainly evidence of business turnover according to the Australian Bureau of Statistics. In the 2019-2020 financial year, there were 344,472 business entries (an entry rate of 14.5%) and 297,821 business exists (an exit rate of 12.5%) across the Australian economy.[137] The Dutch scholars further argued that failure and disappearance is normal for a business—and enduring success abnormal.[138] This too is consistent with the data. Looking at businesses that were operating in Australia in June 2016: 88.0% survived to June 2017, 78.4% survived to June 2018, 71.1% survived to June 2019, and only 65.1% survived to June 2020.[139] It is unsurprising for stakeholders of a given business, when faced with the prospect of its closure, to ask, "What went awry?"[140] But that question need not arise from a macroeconomic perspective: the Dutch scholars contended that 'creative destruction' produces *value* in the economy.[141] Insolvency law should focus on the big-picture.[142]

IV CORPORATE RESCUE

A United Kingdom

The Cork Report suggests that companies *per se* are unimportant. It firmly states that 'society has no interest in the preservation or rehabilitation of *the company as such*'[143]—as distinct from

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[126] Verdoes and Verweij (n 117) 420.
[127] Ibid 401-402. See further at 403.
[128] Ibid 418. See also at 413, 415, 419.
[129] Ibid 401, 420-421.
[130] Adler (n 61) 1861.
[131] James Routledge and David Gadenne, 'Financial Distress, Reorganisation and Corporate Performance' (2000) 40 *Accounting and Finance* 233, 257.
[132] Verdoes and Verweij (n 117) 411.
[133] Ibid 398, 409, 417.
[134] Ibid 398, 406, 410, 412, 417.
[135] Ibid 398. See further at 403, 410, 413, 418, 421.
[136] Ibid 418.
[137] Australian Bureau of Statistics (n 103) Table 1.
[138] Verdoes and Verweij (n 117) 406-407.
[139] Australian Bureau of Statistics (n 103) Table 11.
[140] Verdoes and Verweij (n 117) 407-408.
[141] Ibid 409, 415, 418.
[142] Ibid 416-417.
[143] Cork Report (n 11) 53 [193] (emphasis added).

the company's business. The committee saw no material difference between restoring 'an ailing enterprise to profitability, and return[ing] it to its former owners' versus disposing 'of the whole or part of the business as a going concern', since 'the employees, the commercial community, and the general public' would benefit either way.[144] This is reiterated in the Cork Report when administration is proposed:

> 'The new procedure is likely to be beneficial only in cases where there is a business of sufficient substance to justify the expense of an Administration, and where there is a real prospect of returning to profitability *or* selling as a going concern.'[145]

Admittedly, there is no such indifference in the Cork Report regarding CVAs. Indeed, businesses are not even mentioned in the three relevant paragraphs.[146] CVAs are promoted on the basis that they 'will prove of value to small companies urgently seeking a straightforward composition or moratorium.'[147]

Contrary to the tenor of the Cork Report, 'the survival of the company' was among the statutory aims of administration first listed in the *Insolvency Act 1986* (UK).[148] This was qualified with the words 'as a going concern', but business rescue was not made an express purpose.[149] Amendments to administration were implemented by the *Enterprise Act 2002* (UK). When the corresponding Bill was before the House of Commons, Mr Nigel Waterson said:

> 'The CBI [Confederation of British Industry] makes the point, which was repeated by Opposition Members throughout Committee stage—much good it did us—that we should not be in the business of rescuing empty vessels, or companies as such; rather, *we should be in the business of rescuing businesses*. The distinction is subtle, but important. If a company has ceased trading, there is little point in rescuing it just for the sake of it. The … [proposed] amendment … would make it abundantly clear that preserving and protecting businesses and enabling them to survive is the first priority.'[150]

Mr Alistair Carmichael also felt that rescuing companies is 'fairly meaningless' and that the focus should be on 'the business itself rather than the legal entity.'[151] But the proposed amendment was withdrawn[152] in response to resistance from the government.[153]

Then on 2 July 2002, in the House of Lords, the same concern was raised separately by Lords Razzall,[154] Sharman,[155] and Hunt of Wirral.[156] They received a somewhat ambivalent reply from Lord McIntosh of Haringey that day.[157] Later that month, Lord Hunt delivered a lengthier speech in favour of saving businesses rather than companies:

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[144] Cork Report (n 11) 117 [495].
[145] Cork Report (n 11) 120 [508] (emphasis added). See also at 117 [498], 119 [507].
[146] Cork Report (n 11) 102-103 [428]-[430].
[147] Cork Report (n 11) 103 [430].
[148] *Insolvency Act 1986* (UK) as enacted, s 8(3)(a). But see, eg, Omar and Gant (n 18) 44.
[149] *Insolvency Act 1986* (UK) as enacted, s 8(3).
[150] United Kingdom, *Parliamentary Debates*, House of Commons, 17 June 2002, vol 387 col 62 (Mr Waterson) (emphasis added) <https://hansard.parliament.uk/Commons/2002-06-17/debates/664c48bc-42ef-4e52-8b3e-8e102295fef6/EnterpriseBill>.
[151] Ibid col 63 (Mr Carmichael) (emphasis added).
[152] Ibid col 65 (Mr Waterson). See also col 64 (Mr Carmichael).
[153] Ibid col 63-64 (Miss Johnson).
[154] United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2002, vol 637 col 153 (Lord Razzall) <https://hansard.parliament.uk/Lords/2002-07-02/debates/d768ba1f-c91f-4ff0-bbed-c2b237320bb7/EnterpriseBill>.
[155] Ibid col 178-179 (Lord Sharman).
[156] Ibid col 182 (Lord Hunt).
[157] Ibid col 188-189 (Lord McIntosh).

> '… *I am concerned with the objective of rescuing the company*. … It is possible to envisage under the Bill as presently drafted … that, it would be possible to keep and to preserve the company as a shell while the people, the company's most important asset, walk out through the door. … *I believe that rescuing the company on its own is a pointless objective*. … By contrast the objective of preserving all or part of the company's business would be beneficial to the employees of the business, creditors of the company who may be paid out of the proceeds of the sale of the business or from future profits, and of course it would be beneficial to the economy as a whole.'[158]

This time Lord McIntosh provided a substantive explanation: 'The emphasis on company rescue *will create more incentive for company management* to take action promptly and use the administration procedure before the situation becomes terminal.'[159]

Thus it appears that the focus on company rescue (rather than business rescue) was a compromise intended to tempt directors into instigating administration sooner rather than later.[160] The *Insolvency Act 1986* (UK) now provides in s 3(1) of Sch B1:

> The administrator of a company must perform his functions with the objective of—
>
> (a) rescuing the company as a going concern, or
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
>
> (c) realising property in order to make a distribution to one or more secured or preferential creditors.

Moreover, corporate rescue *must* be pursued except when it is 'not reasonably practicable to achieve' or when (b) would be 'better … for … creditors as a whole.'[161] It was left to the Explanatory Notes to elucidate that 'rescuing the company in this context is intended to mean the company and as much of its business as possible'[162] and that preserving 'a "shell" company … would not be considered a rescue.'[163] Yet business rescue is not a direct objective of administration in the United Kingdom.[164]

B Australia

In Australia, the Harmer Report contains inconsistent statements regarding what ought to be rescued. The Law Reform Commission asserted at one point that there should be a greater focus 'on the possibility of saving a business (as distinct from the company itself)'.[165] Yet in the very next paragraph, when introducing the nascent Pt 5.3A, the Harmer Report states:

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158 United Kingdom, *Parliamentary Debates*, House of Lords, 29 July 2002, vol 638 col 764-765 (Lord Hunt) (emphasis added) <https://hansard.parliament.uk/Lords/2002-07-29/debates/db124e29-1d48-4c42-9e7b-a3e29437e6d4/EnterpriseBill>. See also, eg, col 765 (Lord Sharman).

159 Ibid col 766 (Lord McIntosh) (emphasis added). See further United Kingdom, *Parliamentary Debates*, House of Lords, 21 October 2002, vol 639 col 1101 (Lord McIntosh) <https://hansard.parliament.uk/Lords/2002-10-21/debates/5511d035-8f4a-470e-80bf-cbe701894915/EnterpriseBill>.

160 See also, eg, Omar and Gant (n 18) 55.

161 *Insolvency Act 1986* (UK) Sch B1 s 3(3). See further, eg, *PJSC Uralkali v Rowley* [2020] EWHC 3442 (Ch), [66] (Mr Justice Miles).

162 Explanatory Notes, *Enterprise Act 2002* (UK) 88 [647].

163 Ibid 88 [649].

164 See ibid 88-89 [650]-[651]. See also, eg, Peter Blanchard, 'Approaches to Business Rehabilitation' (2005) 13 *Waikato Law Review* 46, 52.

165 Harmer Report (n 28) 28 [52].

> 'It will be worthwhile and a considerable advantage over present procedures if it saves or provides better opportunities to salvage even a small percentage of the *companies* which, under the present procedures, have no alternative but to be wound up.'[166]

Ultimately the desirability of saving a business and saving a company were equated when the Law Reform Commission recommended that the new regime could be used to achieve 'the continued existence of the company *or* the whole or a part of its business.'[167] The legislature was likewise indifferent between corporate and business rescue, introducing Pt 5.3A 'to save companies *and* businesses which are experiencing solvency difficulties, rather than destroy them in the way the current law all too often does.'[168]

Today the aims of Pt 5.3A are set out in the *Corporations Act 2001* (Cth) as follows:

> The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
>
> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
>
> (b) if it is not possible for the company or its business to continue in existence—results in a better return for the company's creditors and members than would result from an immediate winding up of the company.[169]

Pt 5.3A is considered Australia's primary corporate rescue or restructuring mechanism, with benefits accruing to stakeholders such as employees.[170] *Prima facie* it is less creditor-friendly than administration in the United Kingdom, since the requirement to strive for corporate or business rescue is not expressly subject to the best interests of creditors. Nonetheless, there seemed in recent years to be a perception that Australia's insolvency laws are unduly creditor-focused and should be realigned in favour of corporate rehabilitation.[171]

Corporate rescue in Australia is facilitated by the fact that companies can attain a clean slate using Pt 5.3A.[172] In discussing insolvency processes generally, the Harmer Report states that 'the aim is to *deal with all the claims against a company* so that its affairs can be fully wound up or so that it can resume trading.'[173] Regarding the future Pt 5.3A specifically, it says:

> 'The object is to deal with the financial affairs of a company in such a way that its debts and liabilities will be extinguished. It is not intended that a completed arrangement should leave a company still insolvent. Accordingly, all debts and liabilities which cannot be satisfied from the funds to be distributed under the arrangement must be discharged by release or capitalisation.'[174]

Since Pt 5.3A was enacted, Australian courts have embraced the idea of corporate rescue, holding that '[t]he purpose of giving the insolvent a "fresh start" is … implicit in the statutory

[166] Ibid 29 [53] (emphasis added). See also at 32 [58].
[167] Ibid 33 [59] (emphasis added).
[168] Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) 5 [15] (emphasis added). See also at 105 [515]. Cf at 16 [47] and 93 [448] (focus on corporate rescue), 109 [533] (focus on business rescue).
[169] *Corporations Act 2001* (Cth) s 435A.
[170] See, eg, Productivity Commission (n 59) 357-358; Byrne (n 18) 123; Atkins and Kang (n 125) 13. See generally, eg, Frisby (n 78) 67; Etukakpan (n 59) 34.
[171] Productivity Commission (n 59) 351-354, 363-364. See also, eg, Scott Atkins and Kai Luck, 'Corporate & Business Rescue in a COVID-19 World' (2020) 32(2) *Australian Restructuring Insolvency & Turnaround Association Journal* 16, 17, 21; Byrne (n 18) 135, 144, 154-155; Atkins and Kang (n 125) 13.
[172] See also Paulina Fishman, 'Voluntary Arrangements and the "Clean Slate" Mess' (2018) 29 *Journal of Banking and Finance Law and Practice* 109.
[173] Harmer Report (n 28) 315 [774] (emphasis added).
[174] Ibid 32-33 [58]. See further at 315 [777].

scheme'.[175] After some uncertainty as to the extent of this policy for companies,[176] it now appears that a DOCA can be used to resolve debts that are not even provable in the liquidation of the insolvent corporation.[177]

C Economic perspective

In *The Logic and Limits of Bankruptcy*, Jackson observed that the fresh start policy gives 'an honest but unlucky individual a second financial chance.'[178] A corporation, which is a legal fiction, requires no such thing.[179] A fresh start policy for *companies* would really be a policy of 'giving those individuals who "own" them a second chance.'[180] But the basic concern of bankruptcy and insolvency law is the repayment of debts to creditors—'not how to leave assets with the debtor.'[181] A going concern sale of a business, using a mechanism such as Pt 5.3A, may enlarge the funds available for distribution among creditors by avoiding a fire sale in liquidation.[182] To the extent that such business rescue maximises returns for creditors, the CBT would support it. Yet business rescue can also be achieved through corporate rescue. The CBT supports corporate rescue if the business is worth more to the creditors in its existing legal entity than if it were sold to a third party.[183] This might be because the business is undervalued by third parties (e.g. the capital market is poorly developed)[184] or because the shareholders are somehow adding value to it.[185] Yet Jackson questioned how often these circumstances would arise in practice,[186] and was far from embracing corporate rescue as an independent aim of insolvency law that must be balanced against creditors' interests.[187]

Under such banners as 'preserving enterprises' and 'saving jobs', corporate rescue efforts may in fact be hurting the economy.[188] In its 2015 report titled *Business Set-up, Transfer and Closure*, the Productivity Commission explained the importance of exists:

> 'Insolvency is one particular form of business exit. … [E]xits … perform an important role in the economy — contributing to increases in average productivity, facilitating structural change within and between industries and allowing entrepreneurs to learn and experiment, transferring skills and information between old and new businesses.'[189]

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[175] *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* (2015) 297 FLR 1, [218] (Newnes and Murphy JJA). See further at [211], [219], [238]. See also, eg, *Smith v Sandalwood Properties Ltd* [2019] WASC 109, [79]-[82] (Vaughan J); *Re Bluenergy Group Ltd (subject to a DOCA) (admin apptd)* (2015) 300 FLR 155, [55], [66] (Black J); *Brash Holdings Ltd (admin apptd) v Katile Pty Ltd* [1996] 1 VR 24, 28 (Brooking, Phillips and Hansen JJ); *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd* (1996) 63 FCR 391, 401 (Branson J); *Winterton Constructions Pty Ltd v MA Coleman Joinery Co Pty Ltd* (1996) 132 FLR 247, 249-250 (Young J).
[176] See, eg, *BE Australia WD Pty Ltd (subject to a DOCA) v Sutton* (2011) 82 NSWLR 336, [134]-[138] (Campbell JA, McColl and Young JJA agreeing); *Australian Winch and Haulage Co Pty Ltd v State Debt Recovery Office* (2005) 189 FLR 315, [7]-[10] (Palmer J).
[177] See *Corporations Act 2001* (Cth) s 553B; *Commonwealth of Australia v Leahy Petroleum — Retail Pty Ltd (subject to DOCA)* (2005) 55 ACSR 353, [1]-[5] (Finkelstein J).
[178] Jackson, *Logic and Limits* (n 38) 4.
[179] Ibid. See also, eg, *Melbourne CC v 160 Leicester Pty Ltd* [2020] VCAT 1255, [125] (Quigley J); Hunter (n 10) 461: 'corporations have neither souls nor brains nor guts.'
[180] Jackson, *Logic and Limits* (n 38) 4.
[181] Ibid 5.
[182] See, eg, Atkins and Luck (n 171) 20; Byrne (n 18) 123; Etukakpan (n 59) 57.
[183] Jackson, *Logic and Limits* (n 38) 210-212, 214.
[184] Ibid 219-221. See also, eg, Paterson (n 59) 711-712.
[185] Jackson, *Logic and Limits* (n 38) 221-222.
[186] Ibid 223-224.
[187] Ibid 1. Cf, eg, Frisby (n 78) 71; Byrne (n 18) 123; Terzic (n 82) 16, 37.
[188] Verdoes and Verweij (n 117) 401, 419.
[189] Productivity Commission (n 59) 347. See also at 310.

By saving (i.e. indirectly subsidising) insolvent companies, rescue procedures may be hampering competition.[190] Assets can end up trapped 'in "zombie" businesses that have little hope of long-term economic health'.[191] Indeed, zombies are on the rise worldwide.[192] In one analysis that covered 14 advanced economies, '[t]he number of zombies rose from about 4% of all listed firms in the mid-1980s to as many as 15% in 2017.'[193] This research did not extend to *unlisted* companies, but revealed that smaller *listed* ones were more likely to be zombies.[194] In Australia, where 98.4% of all businesses are small,[195] the zombie share in 2017 was around 30% of listed companies alone.[196]

The relationship between insolvency law and zombie companies is not completely clear. Zombies are a bigger problem in jurisdictions where insolvency proceedings are delayed or protracted.[197] Yet it has been suggested that *either* the exit of zombies *or* their 'return to better financial health' are both good outcomes.[198] However, a recent study found:

> '… that recovered zombie firms face a high probability of relapse and that this probability has increased considerably over recent years. In 2017 … a recovered zombie firms [sic] faced a probability of becoming a zombie firm in the next period of about 17% … up from a probability of about 5% in 2005. This compares to a probability of turning zombie in the next period of about 3% for firms that were never zombies before … [R]ecovered zombie firms are also systematically weaker than firms that have never been zombies'.[199]

These findings seem to contradict arguments that the problem of zombie companies should be tackled with 'insolvency reforms to reduce impediments to corporate restructuring.'[200] Indeed, they suggest that corporate rescue of unviable firm is contributing to the problem. The latest

[190] Verdoes and Verweij (n 117) 401, 416. See also, eg, Ryan Banerjee and Boris Hofmann, 'The Rise of Zombie Firms: Causes and Consequences' (2018) September *BIS Quarterly Review* 67, 75; Sadok El Ghoul, Zhengwei Fu and Omrane Guedhami, 'Zombie Firms: Prevalence, Determinants, and Corporate Policies' (Finance Research Letters, 1 December 2020) 1 <https://doi.org/10.1016/j.frl.2020.101876>.
[191] McCormack (n 101) 145. See further at 126. See also, eg, Verdoes and Verweij (n 117) 419.
[192] See, eg, Banerjee and Hofmann, 'The Rise of Zombie Firms: Causes and Consequences' (n 190) 70.
[193] Ryan Banerjee and Boris Hofmann, 'Corporate Zombies: Anatomy and Life Cycle' (BIS Working Papers No 882, September 2020) 3. See further at 7, 22.
[194] Ibid 3-4. See also at 11, 13, 23. They defined small and medium-sized enterprises 'as firms with an annual turnover of less than 50 million US dollar': at 9 (citations omitted).
[195] Australian Bureau of Statistics (n 103) Table 17, calculated as (2,422,404 – 38,209) ÷ 2,422,404 ≈ 0.984. See also, eg, Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts: Small Business in the Australian Economy* (July 2019) 8 [2.1.2], with small defined by the ATO as 'a turnover of less than $10 million' AUD.
[196] Banerjee and Hofmann, 'Corporate Zombies: Anatomy and Life Cycle' (n 193) 8-9.
[197] See, eg, Müge Adalet McGowan, Dan Andrews and Valentine Millot, 'The Walking Dead?: Zombie Firms and Productivity Performance in OECD Countries' (67th Economic Policy Panel Meeting, Zurich, 12-13 April 2018) 27; Dan Andrews and Filippos Petroulakis, 'Breaking the Shackles: Zombie Firms, Weak Banks and Depressed Restructuring in Europe' (OECD Economics Department Working Papers No 1433, 16 November 2017) 10 [19].
[198] McGowan, Andrews and Millot (n 197) 27. See also, eg, Müge Adalet McGowan and Dan Andrews, 'Design of Insolvency Regimes Across Countries' (OECD Economics Department Working Papers No 1504, 6 September 2018) 22-23 [53]; Dan Andrews, Müge Adalet McGowan and Valentine Millot, 'Confronting the Zombies: Policies for Productivity Revival' (OECD Economic Policy Paper No 21, December 2017) 19 [3.1.2].
[199] Banerjee and Hofmann, 'Corporate Zombies: Anatomy and Life Cycle' (n 193) 21. See further at 23. See also, eg, Verdoes and Verweij (n 117) 411, 415, 419.
[200] Dan Andrews and Filippos Petroulakis, 'Breaking the Shackles: Zombie Firms, Weak Banks and Depressed Restructuring in Europe' (European Central Bank, Working Paper Series No 2240, February 2019) 3. See further at 5, 10-11, 20, 30, 32. But see at 2 (emphasis added): 'an insolvency framework which impedes corporate restructuring *and reduces recovery rates for creditors* may reduce incentives for banks to *commence the process of recovery, liquidation, or* restructuring.'

research indicates that greater efficiency in debt enforcement and higher returns to creditors are the answer.[201] Notably, this is consistent with the CBT.

D Workouts

Whatever hopes legislators may have for rescue mechanisms, their utility falls to be determined by market participants. In the United Kingdom, Associate Professor Sandra Frisby has noted that 'the level of "rescue" attempted through the medium of an insolvency procedure is relatively low'.[202] (Restructuring can be achieved using a scheme of arrangement, but it is 'not a formal insolvency procedure'.)[203] A piecemeal sale of assets is a common occurrence in administration.[204] It rarely results in *corporate* rescue.[205] *Business* rescue is achieved through so-called "pre-packs", but there is a noticeable rate of recidivism (which suggests that the business was not viable).[206] In the United States of America too, Adler has remarked that insolvency processes are transforming 'from a forum of reorganization to, largely, an auction block'.[207] Commentators have remarked on the proliferation of rapid sales under § 363 of the Bankruptcy Code in recent years.[208] That provision allows the company's assets to be sold individually or together as a going concern, but either way is 'an escape hatch for debtors who no longer want to reorganise under a lengthier Chapter 11 process'.[209] The picture in Australia is similar: VA is sometimes called a 'scenic route to winding up'.[210] In practice, most VAs and DOCAs lead to liquidation or quasi-liquidation outcomes.[211]

When the recovery of a financially struggling company is economically desirable, an informal workout could be a better option than formal insolvency proceedings.[212] Although such arrangements are private, the emergence of pre-insolvency turnaround specialists is telling.[213] Over a decade ago, one distinguished practitioner in insolvency law asserted:

> '[T]he court is needed only as a fall-back where it is necessary to bind hold-out creditors, e.g. by a pre-packaging. … [R]estructurings are carried out, not by the law but in the shadow of the law. The law is used as a menacing force to induce agreement and consensus. It is the dark bulk lurking behind the curtain, axe in hand. That is as it should be. *The idea that court involvement should be positively encouraged* by the law in priority to private work-outs … could be *the least efficient approach* and the least welcome to creditors and corporates.'[214]

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[201] El Ghoul, Fu and Guedhami (n 190) 2, 4, 6-7.
[202] Frisby (n 78) 47.
[203] Ibid 44. See *Companies Act 2006* (UK) Pt 26.
[204] Frisby (n 78) 43.
[205] Ibid 68.
[206] Ibid 68-69.
[207] Adler (n 61) 1853.
[208] See, eg, Paterson (n 59) 711-712; Terzic (n 82) 15, 31-32; Omar and Gant (n 18) 57.
[209] Terzic (n 82) 31 (citations omitted). See further at 38.
[210] Ibid 9 (citations omitted). See also, eg, Byrne (n 18) 127; Atkins and Kang (n 125) 12.
[211] See especially Byrne (n 18) 128. See also, eg, Brereton and Wengel (n 100) 24; James Routledge, 'Voluntary Administration Outcomes: Evidence from Listed Companies During the Financial Crisis' (2017) 35 *Company and Securities Law Journal* 322, 323, 329, 335-336.
[212] See, eg, Productivity Commission (n 59) 23, 354-355, 363; Byrne (n 18) 144-145; Horst Eidenmüller, 'Trading in Times of Crisis: Formal Insolvency Proceedings, Workouts and the Incentives for Shareholders/Managers' in Horst Eidenmüller and Wolfgang Schön (eds), *The Law and Economics of Creditor Protection: A Transatlantic Perspective* (T M C Asser Press, 2008) 241, 245, 256, 260.
[213] See, eg, ARITA (n 100) 12; Brereton and Wengel (n 100) 22-23; Vanessa Finch, 'The Recasting of Insolvency Law' (2005) 68(5) *Modern Law Review* 713, 725-726, 735.
[214] Philip Wood, 'The Philosophy of Insolvency Rescues' (Allen & Overy LLP, 10 March 2009) (emphasis added) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-philosophy-of-insolvency-rescues>. See also, eg, Finch, 'The Recasting of Insolvency Law' (n 213) 736: 'new "preventative" approaches mean that an increasing amount of insolvency-related work is carried out in the shadow of statutory procedures.'

It is commonly thought that commencing an insolvency proceeding harms business value because it reveals the insolvency to the market.[215] Yet perhaps the market is reacting less to the financial difficulties, and more to the fact that any attempt at a workout must have failed—which implies that the company or business might not be worth saving.[216]

V LATEST REFORMS

A United Kingdom

Concerned that 'many otherwise economically viable businesses are experiencing significant trading difficulties' due to COVID-19, the *Corporate Insolvency and Governance Act 2020* (UK) was enacted in the United Kingdom to ensure that 'businesses can maximise their chances of survival.'[217] Certain temporary and tailored measures were introduced, such as:

- the extension of timeframes for holding annual general meetings and allowing them to be held in a different manner (e.g. electronically);[218]
- the prohibition on relying on statutory demands issued within a specified period or seeking the winding-up of a company within a specified period;[219] and
- the creation of a time-constrained assumption that a director who engaged in wrongful trading 'is not responsible for any worsening of the financial position'.[220]

However, this statute was also used to usher in two new corporate rescue procedures. Though promoted as being 'of particular relevance during the ongoing emergency',[221] variants thereof had been proposed years before COVID-19.[222] Given the CBT's view of rescue and the growing phenomenon of zombies, an important question that must be left to time and experience is: will these mechanisms be used to save unviable firms?

First, a new Pt 26A was inserted into the *Companies Act 2006* (UK). It allows 'struggling companies, or their creditors or members, to propose a new restructuring plan'.[223] The regime has been described as broadly akin to the United Kingdom's schemes of arrangement.[224] However, one crucial difference is an insolvency requirement: it must be 'that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.'[225] Moreover, the compromise or arrangement being proposed must have the aim of addressing those financial difficulties.[226] Indubitably the restructuring plan procedure is 'aimed at enhancing the rescue opportunities

[215] See, eg, Atkins and Luck (n 171) 16; Byrne (n 18) 144; Jackson, *Logic and Limits* (n 38) 203-204.
[216] See, eg, Eidenmüller (n 212) 256; Verdoes and Verweij (n 117) 414: 'It is not bankruptcy that destroys value, but destruction of value that results in bankruptcy.' See also at 420.
[217] Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 4 [3]. See also *Coronavirus Act 2020* (UK) especially ss 81-83.
[218] *Corporate Insolvency and Governance Act 2020* (UK) s 37 and Sch 14. See also Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 12 [51]-[53], 45 [257]-[264].
[219] *Corporate Insolvency and Governance Act 2020* (UK) ss 10-11 and Schs 10-11. See also Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 7 [23]-[25], 37-38 [204]-[214].
[220] *Corporate Insolvency and Governance Act 2020* (UK) s 12(1). See generally ss 12-13. See also Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 8 [29]-[31], 38 [216].
[221] Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 55 (Annex B).
[222] See, eg, Department of Business, Energy and Industrial Relations, *Insolvency and Corporate Governance: Government Response* (26 August 2018) especially at 9, 41 [5.1]; The Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform* (May 2016) especially at 10, 22.
[223] Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 5 [9]. See also *Companies Act 2006* (UK) s 901F(3).
[224] Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 6 [15]-[16], 13 [60].
[225] *Companies Act 2006* (UK) s 901A(2).
[226] Ibid s 901A(3).

for financially distressed companies.'[227] With this goal in mind, some key protections that exist in the case of schemes have been eliminated. All that is required before a court may sanction a restructuring plan is that 'a number representing 75% in *value* of [those] … present and voting [in each class] … agree'.[228] Thus 'there is no need to obtain a majority in *number*'.[229] However, this is further eroded by the fact that, 'for the first time in English law',[230] Pt 26A expressly provides for "cross-class cram down".[231] The main safeguard for creditors is that the court has 'absolute discretion over whether to sanction a restructuring plan' or not.[232]

In addition, a moratorium regime was introduced as Pt A1 to the *Insolvency Act 1986* (UK) to allow 'a company in financial distress … breathing space in which to explore its rescue and restructuring options free from creditor action.'[233] Every such moratorium is overseen by a "monitor" who is an insolvency practitioner, although it is technically a debtor-in-possession procedure since the directors continue to run the company.[234] There is a clear link with insolvency as a statement is required from the directors to the effect 'that, in their view, the company is, or is likely to become, unable to pay its debts'.[235] Moreover, save for temporary modifications in light of COVID-19,[236] the monitor must end a moratorium if it 'is no longer likely to result in the rescue of the company as a going concern'.[237] Thus the procedure has a mandate (and not merely an ambition) to facilitate corporate rescue—whether using a CVA, a restructuring plan, or in some other way.[238] However, a moratorium only lasts for 20 business days after it begins, unless terminated sooner or extended.[239] Also, a moratorium can be challenged in court by a creditor, director, member and anyone else who is affected by it[240] in the sense that their interests have been 'unfairly harmed' by the monitor.[241] This might be due 'to a failure … to bring the moratorium to an end' in good time.[242]

B Australia

Having regard to 'the economic consequences of the COVID-19 pandemic and the increase in numbers of businesses facing financial distress',[243] the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) was passed in Australia. A major goal was to permanently expand opportunities for struggling small companies 'to restructure and survive.'[244] (But are

[227] Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 9 [33].
[228] *Companies Act 2006* (UK) s 901F(1) (emphasis added).
[229] *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch), [42] (Mr Justice Snowden) (emphasis added).
[230] Ibid [43] (Mr Justice Snowden).
[231] See Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 5 [9], 6 [15], 35 [191]; *Companies Act 2006* (UK) s 901G.
[232] Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 6 [15]. See further at 34 [190], 35 [192].
[233] Ibid 4 [4].
[234] Ibid 4 [4].
[235] *Insolvency Act 1986* (UK) s A6(1)(d).
[236] Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 30 [172].
[237] *Insolvency Act 1986* (UK) s A38(1)(a). See also s A35.
[238] Cf Explanatory Notes, *Corporate Insolvency and Governance Act 2020* (UK) 4 [5]. See further at 5 [7], 18 [88].
[239] *Insolvency Act 1986* (UK) s A9.
[240] Ibid s A42(2).
[241] Ibid s A42(1).
[242] Ibid s A42(5).
[243] Explanatory Memorandum, Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Cth) 9. See also at 42 [1.170]. See further, eg, *Coronavirus Economic Response Package Omnibus Act 2020* (Cth).
[244] Explanatory Memorandum, Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Cth) 9. See also at 13 [1.1].

they all economically viable?)[245] A new debt restructuring procedure was introduced as Pt 5.3B to the *Corporations Act 2001* (Cth). It is a debtor-in-possession regime which allows eligible companies, 'with the assistance of a small business restructuring practitioner' ('SBRP'), to develop and 'enter into a restructuring plan with creditors.'[246] It is an insolvency procedure as directors must, inter alia, form the opinion that 'the company is insolvent, or is likely to become insolvent at some future time'.[247] A restructuring plan can be accepted by a mere 'majority in value of those creditors' who respond to the proposal.[248] Moreover, Pt 5.3B takes Pt 5.3A as its starting point,[249] rather than schemes of arrangement—so there are no classes of creditors and no court sanction.[250] The main safeguards are that related creditors do not have a say[251] and that the court has power to, inter alia, terminate a restructuring plan.[252]

There are many differences between Pt 5.3A and Pt 5.3B, but one matter that is particularly striking is the reduced emphasis on the interests of creditors under the new procedure. The object of Pt 5.3B does not mention their interests: a restructuring plan is implicitly deemed desirable.[253] The SBRP is under no obligation to opine on creditors' best interests,[254] and *may* (not must) terminate a restructuring if he or she reasonably believes that:

> (i) the company does not meet the eligibility criteria for restructuring; or
> (ii) it would not be in the interests of the creditors to make a restructuring plan; or
> (iii) it would be in the interests of the creditors for the restructuring to end; or
> (iv) it would be in the interests of the creditors for the company to be wound up; …[255]

By contrast, a VA administrator must investigate and form an opinion as to whether any of the three possible options would be in the creditors' interests: namely, ending the VA, winding up the company, or executing a DOCA.[256] Creditors determine the fate of a company under VA at their second meeting.[257] Notice of that meeting must be accompanied by the VA administrator's report and a statement setting out, inter alia, the administrator's opinions as to each of the three options with his or her underpinning reasons.[258]

VI CONCLUSION

This article has considered the evolution of bankruptcy and insolvency law's attitude towards debtors in the United Kingdom and in Australia. It summarised the transformation from apparent anger, evinced by incarceration, to seeming pity, epitomised in the policy of discharge. It also detailed the extension of the law's sympathy to human third parties (particularly employees) who may be adversely impacted by a corporate debtor's insolvency.

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[245] See ibid 13 [1.3] (emphasis added): 'These changes are intended to encourage more small businesses to seek debt restructuring earlier, increasing their chances of *regaining* viability.' *Contra* 7, 9, 13 [1.1]-[1.2].

[246] *Corporations Act 2001* (Cth) s 452A. See also ibid 10, 13 [1.3], 15, 23-24 [1.54]-[1.58].

[247] *Corporations Act 2001* (Cth) s 453B(1)(b)(i).

[248] *Corporations Regulations 2001* (Cth) reg 5.3B.25(1).

[249] Explanatory Memorandum, Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Cth) 14 [1.8], 16 [1.13].

[250] See *Corporations Regulations 2001* (Cth) reg 5.3B.26.

[251] Ibid regs 5.3B.01, 5.3B.21(2). See also, eg, Explanatory Memorandum, Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Cth) 14 [1.9].

[252] *Corporations Regulations 2001* (Cth) regs 5.3B.63. See also, eg, *Re DST Project Management and Construction Pty Ltd* [2021] VSC 108, [11]-[12] (Steffensen JR); *Corporations Act 2001* (Cth) ss 458A.

[253] *Corporations Act 2001* (Cth) s 452A. Cf s 435A.

[254] See ibid s 453E(1); *Corporations Regulations 2001* (Cth) regs 5.3B.08, 5.3B.18.

[255] *Corporations Act 2001* (Cth) s 453J(1). See also Explanatory Memorandum, Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Cth) 37-38 [1.143]-[1.147].

[256] *Corporations Act 2001* (Cth) s 438A.

[257] Ibid s 439C.

[258] *Insolvency Practice Rules (Corporations) 2016* (Cth) r 75-225(3).

This sympathy was evinced by the introduction of insolvency regimes aimed at business and corporate rescue. These developments were considered throughout the article from an economic perspective, drawing especially on the CBT. That normative economic theory of bankruptcy and insolvency law suggests that corporate rescue will rarely be efficient in practice. Yet following the recent outbreak of COVID-19, new corporate rescue mechanisms have emerged in quick succession. Meanwhile, zombie companies are multiplying around the world. It may be that the two—corporate rescue procedures and the survival of barely viable companies—are positively correlated. This hypothesis warrants further theoretical and empirical research. But if it is right, the latest insolvency law reforms in the United Kingdom and in Australia may cause unintended harm to their respective economies.