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## In search of a Corporate Rescue Culture: A review of the Australian Part 5.3A Legislation

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**Description**

In the context of the financial turmoil following the recent global financial crisis and the threat of a global double dip recession at our doorstep, the importance of a strong rescue framework in Australia has never been more relevant. The current dynamic economic environment has inevitably focused the spotlight on the current Part 5.3A Voluntary Administration legislation as the mechanism responsible for facilitating the survival and restructure of distressed Australian companies. With the rapid decline in the use of Voluntary Administration since the introduction of the Corporations Amendment (Insolvency) Act 2007 (Cth), this relegation of the corporate rehabilitation framework poses significant challenges to the advancement of a corporate 'rescue-based' culture in Australia. With only one in four distressed companies using the Voluntary Administration procedure in 2009, the diminishing prevalence and use of the Voluntary Administration procedure against the backdrop of increasing Australian insolvency trends has led many to advocate that the current Australian rescue regime is not sufficiently 'rescue focused'. These criticisms surround the inability of the existing Voluntary Administration framework to facilitate the restructuring of companies as a matter of course. A review of literature in the restructuring field indicates a substantial body of information that identifies the following fundamental barriers to successful restructuring in Australia.

**Location**

iC - SBS Teaching Facility

## **“In search of a Corporate Rescue Culture: A review of the Australian Part 5.3A Legislation”**

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### **Abstract**

In the context of the financial turmoil following the recent global financial crisis and the threat of a global double dip recession at our doorstep, the importance of a strong rescue framework in Australia has never been more relevant. The current dynamic economic environment has inevitably focused the spotlight on the current Part 5.3A Voluntary Administration legislation as the mechanism responsible for facilitating the survival and restructure of distressed Australian companies. With the rapid decline in the use of Voluntary Administration since the introduction of the Corporations Amendment (Insolvency) Act 2007 (Cth), this relegation of the corporate rehabilitation framework poses significant challenges to the advancement of a corporate ‘rescue-based’ culture in Australia. With only one in four distressed companies using the Voluntary Administration procedure in 2009, the diminishing prevalence and use of the Voluntary Administration procedure against the backdrop of increasing Australian insolvency trends has led many to advocate that the current Australian rescue regime is not sufficiently ‘rescue focused’. These criticisms surround the inability of the existing Voluntary Administration framework to facilitate the restructuring of companies as a matter of course. A review of literature in the restructuring field indicates a substantial body of information that identifies the following fundamental barriers to successful restructuring in Australia.

Following the recent economic instability seen during the 2008/09 Global Financial Crisis (“GFC”) and financial market turbulence relating to the European sovereign debt predicament in 2010, the importance of a strong rescue framework in Australia has never been more relevant. Recent statistics indicate that in Australia during the depths of the GFC alone “the value of new asset impairment charges of the banks more than tripled in the year to September 2008 to \$13.3b” (www.restructuringworks.com.au). Such statistics have inevitably focused the spotlight on the current Part 5.3A legislation as the mechanism responsible for facilitating the survival and restructure of distressed Australian companies. Indeed, empirical research into Voluntary Administration shows that creditors generally receive a better return under the procedure compared with immediate liquidation. This increasing recognition of the linkage between enterprise continuity and the stakeholder impact of failure indicates the important role companies play in ensuring the continued economic prosperity (or otherwise) of a nation’s economy.

## **Background**

Significantly, Australia has never had a separate insolvency statute, with its corporate insolvency legislation incorporated within Chapter 5 of its general company legislation, now known as the Corporations Act 2001 (Cth). Through the successive cycles of recession and corporate failure experienced in the late 20<sup>th</sup> century, Part 5.3A Voluntary Administration titled “Administration of a company’s affairs with a view to executing a deed of company arrangement” was born. The fundamental objective of Voluntary Administration is to rescue viable companies from being wound up, where the threat of insolvency would otherwise likely result in steps being taken by creditors to place the company into liquidation. The Voluntary Administration regime is effectively a formal moratorium type administration, which seeks to facilitate a unique stay on creditor actions. This provides an opportunity for a company to restructure, thereby increasing the likelihood of saving it from insolvency and producing a situation ultimately beneficial to creditors and other stakeholders when compared with liquidation.

The Deed of Company Arrangement process can be utilised to achieve a wide spectrum of arrangements specific to the distressed company’s requirements. This may include a simple compromise of debts, complete corporate restructure, capital raising or a moratorium followed by resumption of normal business operations. It seeks to strike the fine balance between making the legislation sufficiently attractive to facilitate a corporate rescue culture, without making the procedure susceptible to abuse by short-circuiting ordinary safeguards (Fridman, 2003). An effective rescue regime requires this finite balancing of the various and often disparate interests of the stakeholders involved, in particular with regard to the unsecured and secured creditors. The benefit of the Voluntary Administration framework in this context is that this process can occur without the need for negotiation with each creditor individually, whilst having the advantage of being binding on all creditors and without the requirement of unanimous approval. Through this creditor focused process of obtaining approval for rehabilitating the distressed company, Part 5.3A seeks to provide a “rescue based legislative environment [whereby] Voluntary Administration is the means, corporate restructuring is the end” (Sloan, 2008, p6).

## Corporate Rescue Framework

The significance of an effective corporate rescue framework is emphasised by the number of Australian companies that were placed under external administration in 2009 totaling 9,437, representing a substantial 118% increase over the past decade. Figure 1 shows the number of companies entering external administration over the 10 year period between 1999 and 2009.

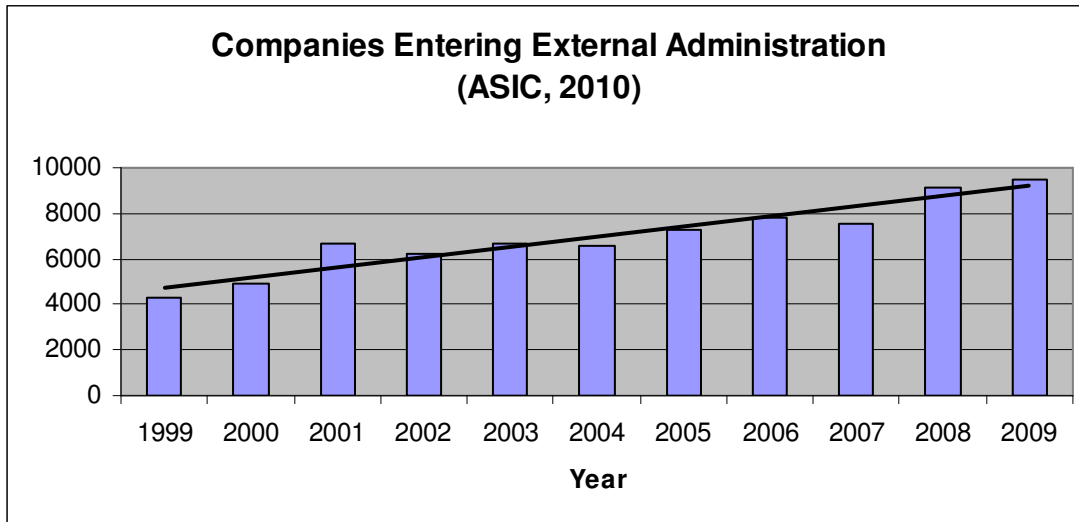


Figure 1: Number of Australian Companies Entering External Administration

Under the Corporations Act, Australia has a three tier insolvency regime for companies entering external administration, broadly broken down as follows:-

- 1) Liquidation (Creditors' Voluntary and Court Liquidation);
- 2) Voluntary Administration (Part 5.3A) Corporate Restructuring Legislation; &
- 3) Receivership (Secured Creditor or Court)

Further analysis of the trends in external administration type, by form, indicate that the prevalence and use of the Voluntary Administration procedure has been diminishing against the backdrop of increasing Australian insolvency trends.

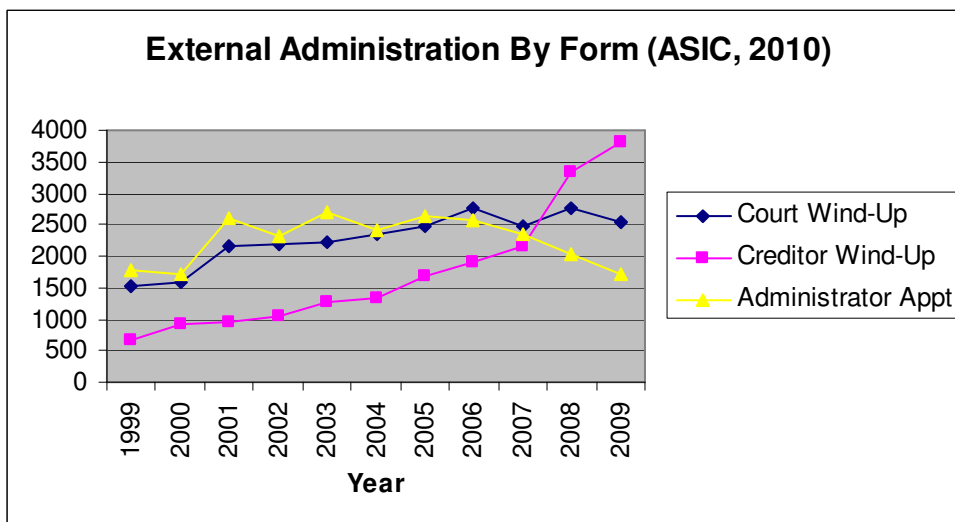


Figure 2: Number of Australian Companies Entering External Administration

Figure 2 demonstrates that 'Court Wind-up' and 'Creditor Wind-up' have now surpassed Voluntary Administrator appointment as the preferred insolvency procedure in Australia. Available empirical research data suggests that of the companies entering external administration under Voluntary Administration, around half were unsuccessful in rehabilitating under the procedure (Routledge, 1998). This in turn caused creditors to incur unnecessary costs when pursuing the prospect of rehabilitation, only to discover that any re-organisation proposed was not viable (Routledge, 1998). These success levels formed the impetus for the 2007 amendments to Australia's insolvency legislative framework, to facilitate the easier entry of distressed companies directly into the creditors' voluntary liquidation process. The 2007 amendments sought to streamline the existing creditors voluntary liquidation procedure by removing the requirement to 1) hold the members and creditors meeting on the same day and 2) require the appointed liquidator to convene the meeting of creditors. This effectively removed the role of the Part 5.3A legislation as a 'filtering device' for companies without ongoing viability or the prospect of restructure, prior to proceeding to the dissolution of non-viable companies through liquidation (Bickerdyke & Ors, 2000).

The rapid decline in the use of Voluntary Administration since the introduction of the Corporations Amendment (Insolvency) Act 2007 (Cth) has seen Voluntary Administration fall to the third most popular insolvency procedure used by distressed companies (refer Figure 2 above). This relegation of the corporate rehabilitation framework poses significant challenges to the development of a corporate 'rescue-based' culture in Australia, with only one in four distressed companies using the Voluntary Administration procedure in 2009. To the extent that the above statistics represent changes that prevent unmeritorious use of Voluntary Administration - including by smaller 'shell' type companies - can be seen to partially negate the significance on this deterioration in the popularity of the procedure. However, the question posed by the increase in selection of the Liquidation process rather than Voluntary Administration is whether the amendments to the Corporations Act now reflect an improved ability for selection of the most effective regime for the distressed company. That is, to maximise stakeholder benefit and ability to facilitate corporate rescue, whilst remaining careful to ensure that these goals are not inefficiently or fruitlessly pursued to the detriment of all stakeholders.

### **Model Characteristics for a Rescue Culture**

The concept of corporate rescue and the Australian Voluntary Administration regime seeks a balance between the Latin rules of "ut res magis valeat quam pereat" and "pacta sunt servanda". That is, a rehabilitation regime that facilitates and encourages rescue so that "the transaction shall not perish, but flourish", whilst respecting the broader policy objective for protection of the principle that "contracts must be carried out". It represents achieving the fine equilibrium between those championing the promotion of corporate rescue at the expense of the creditor's absolute priority rights and those who see the rights of creditors in insolvency and rehabilitation as paramount (Skeel, 2001). The feature of the Voluntary Administration framework is the facilitation of efficient corporate rehabilitation in scenarios where expected creditor returns from corporate rescue outweigh those returns in the event of winding up (Anderson, 2001). These returns also need to consider the impact of social costs following corporate collapse, which are often difficult to quantify and significantly

under-estimated and overlooked. There exists a body of evidence that advocates that corporate rescue and maximisation of outcomes for creditors are best served when distressed companies are not subject to unduly delay by directors in seeking external appointment (Milman, 2004). This proposition is supported by the likelihood for directors to exhibit increased business risk-taking appetite when a company is on its last legs, in the hope of saving the company and retaining their offices. This in turn places at risk the going concern value of the company and has the potential to prejudice rescue efforts resulting in liquidation, further diminishing the value available for creditors (Hahn, 2004). Correspondingly, this needs to be balanced with the entry criteria required for companies to benefit from this type of rehabilitation regime, with advantages such as the enforcement moratorium representing significant restraints on creditor's pre-negotiated rights. The involvement and participation of creditors in the corporate insolvency process has widely been regarded as essential in any well developed corporate rescue regime, with the level and nature of this participation increasing in corporate rescue scenarios (Tomasic, 2006). Creditor participation is not only important in ensuring fairness and confidence in the corporate rehabilitation system, but is also concerned with the rescue procedure ensuring justice 'is seen to be done'.

### **Barriers to Successful Restructuring**

There is little doubt that the "Voluntary Administration process has resulted in the saving of many businesses through restructurings ... however, a significant number of administrations (if not the majority) result in liquidation" (Sloan, 2008, p6). The significant number of companies which ultimately follow this path into liquidation has led many to advocate that the current Australian rescue regime is not sufficiently 'rescue focused'. These criticisms surround the inability of the existing Voluntary Administration framework to facilitate the restructuring of companies as a matter of course (Sloan, 2006). In particular, the corporate collapse and liquidation of Ansett Airlines and HIH in 2001 re-focused the spotlight on Australia's corporate rescue framework, demonstrating the difficulty of using the Part 5.3A procedure for rehabilitating larger companies (Anderson, 2008). It also formed the basis for renewed calls for a debtor in possession corporate rescue model similar to Chapter 11 in the US, to improve the probability of successful corporate rescue for larger Australian companies. Notwithstanding the recent reforms to the corporate restructuring legislation under the Corporations Amendment (Insolvency) Act 2007 (Cth), a review of literature in the restructuring field indicates a substantial body of information that continues to identify the following fundamental barriers to successful restructuring in Australia.

#### *Secured Creditors*

The exemption of secured creditors holding a charge over the whole or substantially whole of the company, creates a limitation to the effectiveness of the Part 5.3A regime, in that secured creditors are only bound under a Deed of Company Arrangement to the extent to which they agree. Whilst the rights of limited secured creditors can be restricted by the Court under s444F<sup>1</sup>, the Court has no power to restrain a secured creditor holding a charge over the whole or substantially whole of

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<sup>1</sup> Corporations Act, 2001 (Cth) S444F(2)

the company. The result is that distressed companies using the Voluntary Administration procedure have “no protection from banks then putting the company into receivership .... saying right we’re going to get our money out of it” (Turnbull & Franklin, 2008). The potential for this type of opportunistic behavior represents a serious threat to derailing the restructure process with consequent and unnecessary value destruction. Indeed the current direction of foreign jurisdiction reforms such as in the UK, has embraced an attempt to elevate the corporate rescue goal by shifting protection away from secured creditor’s rights, prohibiting the use of receivership by charge holders. This provides redress from receivers pursuing secured creditor interests without consideration or obligation to the remaining body of creditors.

Furthermore, Administrators are often reliant on banks for the provision of funding throughout the rescue process, which will result in the banks taking a vested interest in ensuring any restructure proposal occurs under terms providing them with considerable power to influence strategy (Day & Taylor, 2001). The absence of ‘super-priority’ ranking for funding advanced to assist in the rehabilitation process has also been identified as a constraining factor in a bank’s willingness to play a facilitative role in the rescue of distressed companies. Instead, without super-priority, banks advancing additional rescue funds are likely to behave in a manner highly motivated and focused on negotiating strategies that protect their existing exposure and interests (Finch, 2005). Herein lies the considerable difficulty in raising post appointment finance to a distressed company to facilitate restructure. A rehabilitation regime for distressed companies with a moratorium inclusive of all creditors would serve to restrict the power of secured creditors in frustrating the objective of rehabilitation (Merrett, 2003). This would address the main impediment to rehabilitation created by secured creditors rights and instigation of the receivership procedure, being that it lacks a wholly creditor approach in focus (Merrett, 2003).

### *Insolvent Trading*

Section 588G of the Corporations Act 2001 (Cth) outlines a duty on company directors to prevent insolvent trading. The insolvent trading provisions under the existing legislation have been the source of a number of criticisms and policy arguments surrounding the Australian rehabilitation system (James, Ramsay, & Siva, 2004). Implemented under the recommendations of the Harmer report, the provisions seek to deter ‘hold-out’ behaviour by directors of a distressed company approaching insolvency, through the belief that there is nothing to be lost in continuing with potential upside just around the corner. These criticisms have been predominantly premised on the insolvent trading provisions having the effect of encouraging directors to become unduly adverse to risk (James, Ramsay, & Siva, 2004), resulting in directors prematurely placing companies into Voluntary Administration to avoid the risk of personal liability. This in turn has been argued to compound the negative financial impact on unsecured creditors as a result of external administration. There exists, however, a fundamental flaw in the argument suggesting that insolvent trading prevents the effective rescue of companies which have the potential to trade out of financial distress under existing circumstances or informal restructure. Indeed, through the protection of creditors rights through insolvent trading legislation, there are very tangible reasons why the risks of corporate failure which are exacerbated in the lead up to insolvency should not be borne by creditors. A key reason is the increasingly prevalent incentive for directors to engage in excessive risk taking ‘to put



it all on the line' in their pursuit of evading insolvency. In that regard, the mechanism of personal director liability is to ensure the interests of the creditors intrude (*Kinsela v Russell Kinsela Pty Ltd* [1986]), effectively preventing further gambling using creditors' funds. In that regard, whilst such strict liability undoubtedly has merit for the protection of creditors, this raises the potential for a compromise position of a formal 'debtor in possession' restructuring model rather than the existing incentives to place the company into liquidation and to 'start again' (Robinson, 2009). This viewpoint has provided the contemporary platform for advocating for corporate rehabilitation through external administration mechanisms involving "American style bankruptcy laws that allow companies to continue trading whilst insolvent ... known as Chapter 11" (Cameron, 2008).

A further issue surrounding the insolvent trading legislation is the reluctance created for third party involvement in the rescue of a company, due to the potential for shadow director liability through the process of informal rehabilitation (Routledge & McNamara, 2005). The section 588G provisions relating to Insolvent Trading contain a broad definition under s 9 of a company director, expanding the duty to include shadow directors and de facto directors. This expanded and broad definition of 'director' has been argued to represent a significant deterrent from qualified experts becoming directors of distressed companies (James, Ramsay, & Siva, 2004); at a time their expertise is most critical. Overseas, two key trends identified in achieving the resurrection of insolvent companies are the "innovations of the placement of chief restructuring officers into a company in financial difficulty and the employment of a 'loan to own' strategy" (Sloan, 2008, p6). The feasibility of such reconstruction tools in Australia are severely limited by the shadow director provisions under the insolvent trading legislation which discourages such appointments to companies in failing corporate health. This strict legislative framework has also been argued to inhibit the proactive involvement by bankers in the re-direction of the company for fear that the shadow director liability may be imposed on them (Brown, 2009). The question thus arises as to whether narrowing the s588M definition of Director and softening the extent of such shadow director liabilities would mitigate the reluctance of such experts (non-formally appointed directors) to facilitate the restructuring process.

### *Ipsa-facto Clauses*

An ipso facto clause is the contractual clause stipulating the consequences of the insolvency of a party to the agreement. The significance of ipso facto clauses as a common provision in most contracts in Australia derives from the corresponding right of the counter party to terminate a contract in the event that a company becomes insolvent. This has the potential to become a significant inhibitor for a company seeking to restructure, as the appointment of an Administrator will often provide such grounds for termination. The absence under current Australian restructuring legislation of provisions preventing "a supplier or a customer of the company from cancelling contracts of supply on the basis solely of insolvency (as opposed to non performance or repudiation)" (*Onefone Australia Pty Ltd v One Tel Ltd* [2007]), often corresponds to a crippling and immediate cessation of a company's operations and any possibility of restructure. This lack of protection under Australian legislation relating to the enforcement of this type of ipso facto clause and the absence of a moratorium on such enforcement, will often strike at any company's ongoing ability to trade and destroy its major asset; its customer base.

Indeed, the absence of protection from ipso-facto clauses have been advocated as one of the key criticisms of the Australian framework, with the ensuing catastrophic results from voiding of contracts causing irreparable damage to business (Parbery, 2008). The standard presence in Australian contracts of ipso facto clauses, which immediately trigger upon distressed companies entering into voluntary administration, often bring down the business upon appointment and kill any restructuring prospect (Eyers, 2009). This effectively transitions the Part 5.3A provisions designed to help companies keep afloat, from a life jacket into a weight burdened by depriving the business of essential contracts. This is distinct to the operation of restructuring provisions such as in the United States, where reliance on ipso facto clauses for the termination of contracts under Chapter 11 protection on the ground of insolvency is prohibited<sup>2</sup>.

### *Procedural Accountability & Abuse*

Once appointed, the company's administrator takes sole custody of the power to deal with the company's assets under s437D, acting as the agent of the company<sup>3</sup> in respect to the exercise of all powers and functions as Administrator. However, the Administrator also becomes liable under s443A for any debts incurred in the ongoing trading of the business and performance or exercise of their powers. In practice, the extent of any such exposure is usually mitigated by the entitlement under s443D for the Administrator to be indemnified from realisations of the company's property. Notwithstanding, this trading risk exposure of Administrators can be seen to weigh heavily in seeking to facilitate a restructure and thereby relegate the corporate rescue priority during the Voluntary Administration process (Agardy, 2002).

Each participant in the insolvency rescue process - ranging from the insolvency practitioner, directors and bankers - is also influenced by differing incentives and motivations surrounding the rehabilitation process. These multi-party interests may range from banks focusing on the priority protection of secured corporate asset values, directors in terms of protecting employment, and insolvency practitioners on complying with their statutory mandates and protecting creditor interests. Ultimately, under the Administration corporate rescue regime such as in the Australian and the United Kingdom legislation, this creates a complex hierarchy of objectives in setting out an Administrator's objectives in serving a broad spectrum of creditor's interests (Frisby, 2004). Furthermore, the recognition of these objectives in the context of challenges associated with commercial decision making often creates the potential that actions which at the time of taking them were known to be risky but justifiable in terms of expected benefits, seeming unjustifiable with hindsight upon the materialization of a 'bad' outcome (Armour & Frisby, 2001). In practice, this has raised criticisms surrounding the current regime insofar that it influences insolvency practitioners to behave in an unnecessarily risk adverse manner, thus creating a potential barrier to the likelihood of corporate rescue as the outcome.

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<sup>2</sup> United States Bankruptcy Reform Act 1978, Bankruptcy Code ss 365(e)

<sup>3</sup> Corporations Act, 2001 (Cth) s437B.

### *Employee Creditors & Entitlements*

With Australia's employee entitlement regime being amongst the most comprehensive in the world (Whelan & Zwier, 2005), it is no surprise that a key challenge to any restructure relates to addressing employee creditors. A company "pregnant with employee entitlement obligations is a very unfavorable take-over target in a restructuring" (Sloan, 2008, p10) as the heavy burden assumed by an acquirer of the outstanding employee entitlements, unlike general creditors, remain subject to s556 priorities. This inability to "cram down" employee entitlements under a Deed flowing from the mandatory priority of these entitlements inhibits the likelihood of restructuring, often wiping out and exceeding any residual enterprise value remaining in a business. In the continuing absence of an employee entitlement limit the ongoing threat remains to distressed companies that such entitlements will diminish the very jobs from which they have accrued.

A further important issue which arises under the current restructuring regime is that the safety net for employee entitlements provided under the General Employee Entitlements and Redundancy Scheme (GEERS) is only applicable to companies placed into liquidation, thereby excluding companies that are subject to a Deed of Company arrangement. In that regard, when confronted by a choice between the potential for the restructure of a company under a Deed or placing the company into liquidation, there is an inherent incentive for employees to pursue the latter course where employee entitlements are threatened (Whelan & Zwier, 2005). With employee creditors often controlling the majority vote by number in an administration, the resultant creditor voting pool can produce results which ironically protect entitlements at the cost of ongoing employment. Whilst there is no doubt that the importance and rights of employees - including their entitlements - is fundamental and should be protected, this presents challenges and implications in facilitating restructuring. In particular, the context in which corporate rescue is pursued needs to be reviewed as a cost benefit analysis of safeguarding not just entitlement payments, but also going concern and thereby preservation of ongoing employment.

### *Globalisation & Cross Border Insolvency Convergence*

In the context of the current dynamic economic environment, there has been an increasing focus on globalisation and on increased uniformity in international standards for insolvency legislation. In that regard, the spotlight has turned to the current Part 5.3A legislation in a comparative context to its international counterparts to identify and consolidate cross-border uniformity and a best practice framework. The increasing focus on global and regional insolvency legislation and international best practice norms has increasingly been seen as fundamental in providing a foundation for the increasingly globalised market economy. In recent years extensive efforts have been made in the Asia-Pacific geographic region to incorporate and develop their insolvency legislative framework towards international standards, whilst the legal protection of creditors in this jurisdiction remains relatively weak (Tomasic & Little, 1997). The development of these broader international principles and guidelines of insolvency law have largely been derived from the insights and experiences gained from countries with established insolvency frameworks and recent reform efforts. These guidelines have sought to outline flexible internationally recognised insolvency benchmarks and standards to provide a broad-spectrum

assessment tool to assist countries and evaluate the effectiveness of insolvency systems and creditors' rights (World Bank, 2010).

However the actual practice of implementing international best practice and its compatibility with the local countries existing insolvency framework, especially in relation to less developed countries, has remained a challenge. This has reflected a need for sensitivity to the reality of existing weaknesses in legal systems, financial institutions, mechanisms for social protection and corporate governance, coupled with resource and capacity constraints and local corrupt practices (Tomasic, 2006). This appears to be largely responsible for a significant 'implementation gap', particularly in eastern Asia, whereby the existing legal systems have provided a major impediment to the adoption of international insolvency standards. In particular, effective creditor participation has remained elusive with local traditions and culture often impacting the nature and extent of creditor participation in the corporate rehabilitation process. Indeed, much of the restructuring that has taken place in Asia has represented fictional rescheduling of debt without any operational restructure, using negotiations to extract additional equity, fees or security without any commitment to long-term rescue and without any realistic expectation of survival (Vassiliou, 2006). This widening bridge between insolvency standards across the Asia-Pacific region remains an ongoing issue of concern in the adoption of standardised insolvency practices, and it has become increasingly clear that such reforms will not be fully embraced until countries recognise that such a framework is fundamental to sustainable economic development. Given the generalised and widespread lack of institutional capacity and cultural appetite for structured and formal corporate rescue - particularly in developing parts of Asia - corporate distress will likely be resolved informally in the short term as the region transitions to a convergent insolvency framework.

### *Conclusion & Further Directions*

The literature reviewed in relation to corporate rehabilitation and the Voluntary Administration legislation in Australia provides, in the opinion of the author, strong foundations for further research and ongoing commentary in the area. The purpose of the author's current research is to examine and study Practitioners' perspectives of the Australian Part 5.3A legislation in practice, with a view to identifying themes and trends relating to the existing rehabilitation regime. The author hopes that the present study will provide potential explanations for the above trends identified and increase the body of understanding surrounding the operation and effectiveness of the present legislation in achieving its objectives. It is hoped that this research will contribute to the body of knowledge through understanding the experience in practice of restructuring distressed Australian companies and avoiding the specter of corporate failure. The current focus on corporate rehabilitation by policy makers provides the opportunity to facilitate an environment conducive to corporate rescue and thereby reduces the likelihood of corporate collapse by re-conceptualising the process of rehabilitation. That is, it could potentially facilitate corporate rehabilitation accountably and expertly, whilst maintaining fairness and efficiency.

The author hopes that by identifying an in-depth understanding of the constraints of restructuring in practice, this research will contribute to the development of existing legislation of the Australian corporate rescue regime. Whilst it has been advocated that Part 5.3A is the “best system for Australian conditions while perhaps not providing a perfect solution for all companies ... subject to a dramatic downturn in economic activity” (Anderson & Morrison, 2007, p.257), the recent volatility provides this very catalyst. In the current distressed economic climate, an opportunity exists to undertake research and formulate law reform proposals in the corporate rehabilitation area, that until recently had largely been academic in practice, given the sustained period of strong economic growth (Eyers, 2009). The researcher recognises however, that we need to be careful that we do not advocate short lived legislative amendments, specifically framed to respond to individual financial crises, which cause more damage or inequity when the crises subside. In that regard, a key focus of this research will be to ensure that impediments identified to achieving successful corporate restructurings are examined sufficiently in depth. The research will also consider the operation of other international best practice rescue frameworks with a view to overcoming and further locating the barriers to effective restructuring in Australia. Whilst New Zealand has recently implemented a voluntary targeted corporate rehabilitation scheme similar to the Part 5.3A legislation, the analysis of the UK and US legislation provides a valuable platform to examine and compare the Australian framework.

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