The evolution of bankruptcy and insolvency laws and the case of the deed of company arrangement

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This article considers the process of historical development of the bankruptcy and insolvency laws in the United Kingdom, the United States and Australia. The central point is to demonstrate that the process has been one of progressive liberalisation of consequences accompanied either by increased regulation or new and innovate flexible techniques of creditor involvement. We conclude the article with an examination of the operation of the deed of company arrangement, or DOCA, in Australia and a recent liberalisation involving a practitioner-led

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The following abbreviations are used in the footnotes:

Allsop & Dargan: JLB Allsop and L Dargan, "The History of Bankruptcy and Insolvency Law in England and Australia", in JT Gleeson, JA Watson and E Peden (eds), *Historical Foundations of Australian Law* (Federation Press, 2013), vol.2, 415;

Anderson & Morrison: Colin Anderson and David Morrison, "The Commencement of the Company Rescue: How and When Does it Start?", in Paul J Omar (ed), *International Insolvency Law: Themes and Perspectives* (Ashgate, 2008) 83;

Clyne Report: *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth* (1962);

DOCA: deed of company arrangement;

GFC: global financial crisis;

Jelf: EA Jelf (ed), *Encyclopaedia of the Laws of England*, 3rd edn (Sweet & Maxwell, 1938), vol.2;

Fletcher: Ian F Fletcher, *The Law of Insolvency*, 5th edn (Sweet & Maxwell, 2017);

Friedman: Lawrence M Friedman, *A History of American Law* (Simon and Schuster, 1973);

Harmer Report: Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988), vol,1;

Insolvency Service, *Encouraging*: The Insolvency Service, *Encouraging Company Rescue—a consultation* (2009);

Insolvency Service, *Restructuring*: The Insolvency Service, *Proposals for a Restructuring Moratorium—a consultation* (2010);

Keay: Andrew Keay, "A Comparative Analysis of Administration Regimes in Australia and the United Kingdom", in Paul J Omar (ed), *International Insolvency Law: Themes and Perspectives* (Ashgate, 2008) 105;

Kornberg & Paterson: Alan Kornberg and Sarah Paterson, "Corporate Debt Restructuring" in Rodrigo Olivares-Caminal et al (eds), *Debt Restructuring* (OUP, 2011) 3;

Rajak: Harry Rajak, "The Culture of Bankruptcy", in Paul J Omar (ed), *International Insolvency Law: Themes and Perspectives* (Ashgate, 2008) 3;

van Zwieten (ed), *Goode*: Kristin van Zwieten (ed), *Goode on Principles of Corporate Insolvency Law*, 5th edn (Sweet & Maxwell, London, 2018).

innovation colloquially described as a "holding DOCA", an innovation which the judiciary declined to invalidate, thus allowing the effect of potentially extending periods of administration.

INTRODUCTION

Modern corporate insolvency regimes are committed to "company rescue", that is, intervention in order to revive and rehabilitate companies in financial distress. This commitment has historically evolved in England, the United States and Australia by a process of concurrently (i) liberalising the strict consequences of bankruptcy and insolvency for debtors and (ii) reforming the regulation of bankruptcy and insolvency regimes to protect creditors, either by tighter regulation of debtors or regulation that includes innovative forms of creditor involvement. The focus of this article is upon these two elements of this process in each jurisdiction and their development as popular and commercial attitudes towards defaulting upon repayment of debts shifted. An examination of both of these elements shows that they resulted from a combination of legislative change, often prompted by law reform or executive bodies, and the interpretation of the evolving statutory regimes by the courts, frequently in response to innovations by practitioners.

The article concludes with an illustration of this process by recent developments in Australia which have followed the emergence of the deed of company arrangement, or DOCA, as a mechanism for a company with solvency issues to deal with its affairs on a voluntary basis. The DOCA was then used, in a practitioner-led innovation, as a holding device to create a potentially lengthy period of administration. That development survived a challenge in June 2018, when, in *Mighty River International Ltd v Hughes*,[1] the High Court of Australia heard two appeals brought by a creditor of a mining company that had been placed into voluntary administration and approved such use of what is colloquially known as a "holding DOCA". The decision in *Mighty River* may represent, in Australia, a high water mark of the modern, liberal approach to corporate insolvency. However, this liberalising innovation was again accompanied, as so often occurred in the history of development of insolvency law, by tighter regulation of debtors or innovative forms of creditor involvement in the company. Only months after the *Mighty River* decision, the High Court of Australia delivered its decision in an appeal concluding that the standard of conduct of directors that had been required, including by amendments made by Parliament to the Corporations Act 2001 (Cth), was stricter than many had previously appreciated.[2]

1. [2018] HCA 38; 92 ALJR 822.
2. *Australian Securities and Investments Commission v Lewski* [2018] HCA 63; 93 ALJR 145.

THE EVOLUTION OF ENGLISH BANKRUPTCY AND INSOLVENCY LAWS

It is convenient to begin with English law, although bankruptcy laws are far older. The antecedents of the English law of bankruptcy, as Sir Henry Maine observed, were striking in the harsh manner in which they treated defaulting debtors.[3] In Athens, until Solon's *seisactheia*, debtors were enslaved.[4] In Rome, the 12 tables, if applied literally, had the effect that failure to pay a debt within 30 days could render a debtor liable to imprisonment, enslavement or even execution, with his body being divided equally amongst his creditors.[5] However, even amongst the harsh antecedents of bankruptcy law, some isolated incidents of a liberal attitude could be seen, at least with respect to "innocent" or "unfortunate" debtors.[6] For instance, by the time of the Empire, an "honest" debtor could be discharged from a debt by "giving up everything to his creditors" in a *cessio bonorum*, escaping liability to arrest and imprisonment.[7] That process also protected the debtor against future claims by creditors and is sometimes said to have marked the beginning of what became known as the law of "bankruptcy".[8]

Sir Edward Coke said that the word "bankrupt" was derived from the French *banque route*,[9] but it might also be traced to Italian traders, who, upon becoming insolvent, were said to have a "broken bench": a *banco rotto*[10] or, in Latin, a *bancus ruptus*.[11] In 1542, the first English statute dealing with bankruptcy, *An Act against such persons as do make Bankrupt*[12] (the Statute of Bankrupts), empowered the Lord Chancellor and various Privy Councillors to imprison debtors and distribute their assets, *pari passu*, amongst their creditors. The principle of equal distribution, which was affirmed in *Smith v Mills*,[13] remains a fundamental tenet of insolvency law, and further Acts built on these foundations.

Perhaps one explanation for the severity of early bankruptcy regimes is that the general insolvency law, by which a creditor could seek various writs against both the property and person of a debtor, provided little hope of recovery for creditors. Debtors could avoid recovery by "keeping house", which, being founded on the uniquely English principle that "a man's home is his castle", was as simple as barring the door and remaining inside.[14] Debtors could also take sanctuary in churches or monasteries—pursuing a debtor into those

3. *Jelf*, 80.
4. *Ibid*, 80.
5. 2 Bl Comm 472.
6. Louis Edward Levinthal, "The Early History of Bankruptcy Law" (1918) 66 *U of Pennsylvania Law Review* 223, 237–238.
7. *Jelf*, 80. See also Levinthal (1918) 66 *U of Pennsylvania Law Review* 223, 238.
8. *Jelf*, 80.
9. 4 Co Inst 276. See also 2 Bl Comm 472; Louis Edward Levinthal, "The Early History of English Bankruptcy" (1919) 67 *U of Pennsylvania Law Review* 1, 2.
10. *Judine v Da Cossen* (1805) 1 Bos & Pul (NR) 234, 235–236; 127 ER 450, 451. See also Levinthal (1919) 67 *U of Pennsylvania Law Review* 1, 2.
11. 2 Bl Comm 472; Levinthal (1919) 67 *U of Pennsylvania Law Review* 1, 2.
12. 34 & 35 Henry VIII, c 4.
13. (1584) 2 Co Rep 25a, 26a; 76 ER 441, 473–474.
14. I Treiman, "Escaping the Creditor in the Middle Ages" (1927) 43 LQR 230, 233.

places could lead to excommunication.[15] Further, the available writs excluded intangible property and items subject to "personal immunity", including jewellery and other personal items, and gave limited recourse against real estate.[16] The harshness of the consequences in initial bankruptcy regimes was seen as a necessary response due to the loose regulation of the conduct of debtors by the general insolvency law. The Statute of Bankrupts[17] recited in its preamble that it was directed to debtors who "do suddenly flee to parts unknown or keep their houses".[18] In 1571, *An Act touching Orders for Bankrupts*[19] recited that, despite the Statute of Bankrupts, "those kind of persons have and do still increase into great and excessive numbers", and defined "acts of bankruptcy" to include "keeping house" and "taking sanctuary". In 1604, *An Act for the better Relief of the Creditors against such as shall become Bankrupt*[20] expanded compulsory powers to investigate the "secret and so subtle" practices of bankrupts. A debtor who committed perjury during an examination became punishable by being placed in the stocks and having one ear cut off.[21] In 1623, *An Act for the Description of a Bankrupt and Relief of Creditors*[22] extended this punishment to a debtor who "failed to show that bankruptcy was due solely to misfortune".[23]

However, following the boom of international trade and commerce in the sixteenth century, there developed a need and an attitude for a better system of administration and creditor recovery.[24] By the latter half of the seventeenth century, attitudes towards bankruptcy and risk in a commercial context had shifted. Taxes were not always sufficient to fund exploration or war, so credit was seen as vital to the public and private economy. Blackstone reflected a widespread and longstanding view in his statement that "[t]rade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary".[25] With debt seen more as a commercial necessity and less as necessarily demonstrating a moral shortcoming, it could also become possible for liberalisation of the harsh consequences imposed upon insolvents to be countenanced.

These shifting attitudes were reflected in slow liberalisation of bankruptcy laws. In 1705, legislation provided, for the first time in English law, for discharge of a bankrupt, freeing person and property from continuing liability for past debts.[26] One reason for this was "the gradual realisation of the fact that in many cases the bankrupt might be properly an object of pity, and that the unlimited incarceration of the debtor did not tend to reimburse the creditors at all".[27] However, the immediate extent of the liberalisation of bankruptcy law by the enactment of a discharge was only small, because the law

15. Levinthal (1919) 67 *U of Pennsylvania Law Review* 1, 10–11.
16. Allsop & Dargan, 424.
17. 34 & 35 Henry VIII c 4.
18. I Treiman, "Escaping the Creditor in the Middle Ages" (1927) 43 LQR 230, 230, 237.
19. 13 Eliz I c 7.
20. 1 Jac I c 15. See also Levinthal (1919) 67 *U of Pennsylvania Law Review* 1, 18.
21. 1 Jac I c 15, s.4.
22. 21 Jac I c 19, s.6.
23. Levinthal (1919) 67 *U of Pennsylvania Law Review* 1, 17. See also *Jelf*, 81–82.
24. Allsop & Dargan, 424–425.
25. 2 Bl Comm 474.
26. 4 & 5 Anne c 4 (c 17 in the common printed editions).
27. Levinthal (1919) 67 *U of Pennsylvania Law Review* 1, 18.

was soon amended to require four-fifths of creditors to consent to a discharge.[28] Further, non-commercial debtors still suffered the harsh consequences of the general law of insolvency for what was considered their "dishonesty" in delaying payment.[29] The progressive development of the law was slow because it was caught between the Scylla of a progressive desire not to inflict disproportionate punishment upon traders in essential credit and the Charybdis of insufficient regulation of and protection from unscrupulous traders. As Lord Bowen explained:[30]

"'To the honest insolvent the bankruptcy court was a terror.' To the evildoer it afforded means of endlessly delaying his creditors, while the enormous expense of bankruptcy administrations rendered it the interest of few to resort to the remedy, except with the object of punishing the fraudulent or vexing the unfortunate."

Despite the obstacle of insufficient regulation, the liberalisation of the severity of consequences of bankruptcy by the introduction of a discharge from debts, one of the features of modern bankruptcy regimes, laid one of the foundations upon which further Acts continued the liberalisation of bankruptcy and insolvency law. In 1825, *An Act to amend the Laws relating to Bankrupts*[31] consolidated existing bankruptcy laws and made substantive reforms, including a new petition by which a debtor could voluntarily declare bankruptcy. Significant reforms were then made in 1831, spearheaded by Lord Brougham, who created a Court of Bankruptcy, which acquired the supervisory jurisdiction previously exercised by the Court of Chancery,[32] and a system of official assignees appointed by the Lord Chancellor and answerable to the Court of Bankruptcy.[33] Creditors retained an assignee in the process, but the official assignee had real control of the estate.[34] Further reforms in 1842[35] and 1849[36] increased judicial control of discharge and arrangements, reducing the influence of creditors.[37]

With the increased judicial regulation of insolvency, the need for severe consequences diminished. Reforms were made to a particularly harsh feature of bankruptcy and insolvency law, namely imprisonment for debt. Arrest on mesne process had been abolished in 1838[38] and imprisonment for debt on final process was abolished in 1869, although certain classes of debtors remained liable to imprisonment.[39] Thus, by the middle of the nineteenth century, many significant features of modern bankruptcy and insolvency law were beginning to emerge.

28. 6 Anne c 22, s.2. See also Allsop & Dargan, 432.
29. 2 Bl Comm 473–474.
30. Charles Synge Christopher, Baron Bowen, "Progress in the Administration of Justice During the Victorian Period", in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History* (Little, Brown and Co, 1907), vol.1, 516, 545–546.
31. 6 Geo IV c 16. See also Allsop & Dargan, 438–439.
32. An Act to establish a Court in Bankruptcy (1 & 2 Will IV c 56), s 1; Sir William Holdsworth, *A History of English Law*, 7th edn (Methuen & Co, 1956), vol.1, 470–473; V Markham Lester, *Victorian Insolvency* (Clarendon Press, 1995), 45.
33. An Act to establish a Court in Bankruptcy (1 & 2 Will IV c 56), s.22.
34. Markham Lester, *Victorian Insolvency* (1995), 45; Allsop & Dargan, 439.
35. See, eg, An Act for the Amendment for the Law of Bankruptcy (5 & 6 Vict c 122), s.37.
36. See, eg, Bankrupt Law Consolidation Act 1849 (12 & 13 Vict c 106), ss 198, 211–222.
37. Allsop & Dargan, 441.
38. Judgments Act 1838 (1 & 2 Vict c 110).
39. Debtors Act 1869 (32 & 33 Vict c 62), s.4; but see s.5.

Early bankruptcy regimes were limited to commercial debtors, leaving non-commercial debtors to be regulated by the general insolvency law. However, the law regulating insolvency of non-commercial debtors also experienced a slow liberalisation of the severe consequences and a corresponding increase in regulation. In 1813, Lord Redesdale's *An Act for the Relief of Insolvent Debtors in England*[40] created a system resembling bankruptcy for non-traders, administered by a new Insolvent Debtors' Court. Provided they had not committed certain acts, including fraud,[41] debtors would be released from prison at the conclusion of court proceedings, although this did not discharge any unpaid liabilities, such that claims could be brought against the insolvent non-trader's future estate.[42]

The general law of insolvency and statutory law of bankruptcy were then united in 1861 in *An Act to amend the Law relating to Bankruptcy and Insolvency in England*[43] (Act of 1861), which provided that "[a]ll Debtors, whether Traders or not", were subject to its provisions.[44] One manner in which the Act of 1861 increased the regulation of bankruptcy and insolvency, this time by increasing creditor involvement rather than judicial oversight, was the provision for a creditor-initiated mechanism as an alternative to bankruptcy. By the resolution of three-quarters of creditors, an estate could be wound up by a deed of arrangement, which upon being confirmed by the Court of Bankruptcy would then bind the minority.[45] This procedure was reformed and strengthened by the Bankruptcy Act 1869,[46] which also permitted extra-judicial settlements by composition.[47] However, this regulation was not successful and the Act was short-lived. Faced by increasing incidences of fraud, the same merchant classes that had propounded the Act of 1869 now sought its repeal.[48]

That repeal was carried out by the Bankruptcy Act 1883,[49] which reverted to increased regulation by judicial oversight, but still sought to combine this with some involvement of creditors.[50] Thus, the 1883 Act created a new form of regulation by an "official receiver", who was responsible for investigation,[51] and a trustee, who was responsible for administration of the estate.[52] The Act also permitted the court to approve compositions and schemes of arrangement, unless they were found to be unreasonable.[53] In 1890, these procedures were also incorporated into the corporate insolvency laws, which at the time were set out separately in the Companies Act 1862.[54]

40. 53 Geo III c 102.
41. *Ibid*, s.55.
42. *Ibid*, s.10.
43. 24 & 25 Vict c 134.
44. *Ibid*, s.69.
45. *Ibid*, ss 185–187. See also Allsop & Dargan, 444.
46. 32 & 33 Vict c 71, s.125.
47. *Ibid*, s.126.
48. Michael Lobban, "Bankruptcy and Insolvency", in William Cornish and others, *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (OUP 2010) 779, 823; Allsop & Dargan, 445.
49. 46 & 47 Vict c 52.
50. *Jelf*, 82.
51. 46 & 47 Vict c 52, s.69.
52. See, eg, *ibid*, ss 50, 54, 56, 57, 62.
53. *Ibid*, s.18.
54. 25 & 26 Vict c 89.

The twentieth century brought with it further innovative changes to bankruptcy and insolvency regulation, which allowed the consequences to be further liberalised. The new regulatory reforms were prompted by a series of committees to review aspects of the bankruptcy and company laws. As Associate Professor van Zwieten has observed, the many bankruptcy statutes passed during the late-nineteenth century culminated in the codifying Bankruptcy Act 1914.[55] In addition to consolidating the laws on bankruptcy, that Act and the Bankruptcy (Amendment) Act 1926 were said to have "introduced alterations designed to remove hardship or inconvenience and imposed stricter obligations on traders in connection with the conduct of their business".[56] Once again, the amelioration of the severity of consequences was accompanied by a concern for adequate regulation.

These reforms, however, were incomplete. Deeds of arrangement were governed by a separate Act and were subject to strict conditions.[57] And, although receivership and management provided an alternative to immediate winding-up, it was available only to secured creditors who held a charge over all or substantially all of the company's property.[58] Significant disquiet also remained about the severity of insolvency law's effect upon "honest but unfortunate" debtors.[59] The 1957 Report of the Blagden Committee on the law of bankruptcy and deeds of arrangement observed that bankruptcy laws had three primary objects which, in addition to penalising the dishonest bankrupt and permitting the community to distinguish between the honest and dishonest bankrupt, included a third object "to assist the honest and possibly unfortunate bankrupt by relieving him of the incubus of debts". The Committee said that "[p]ractical experience has shown that the present law fails and, it is suggested, fails badly in all these primary objects" .[60]

The stagflation in the 1970s greatly increased the incidence of financial failures for both corporations and individuals.[61] In response to a critical report from JUSTICE, the British section of the International Commission of Jurists, the Insolvency Act 1976 (UK) was enacted to "provide an interim alleviation of some of the most serious shortcomings of the law of insolvency, pending the carrying out of a wholesale review".[62] That wholesale review was completed in 1982 with the comprehensive report of the Review Committee on Insolvency Law and Practice, chaired by Sir Kenneth Cork. The Cork Committee's rationale was one of corporate rescue where possible, which called for further liberalisation to alleviate the consequences upon debtors and increased flexibility in insolvency regimes to provide adequate protection for creditors. Insolvency should be avoided if it were possible to maintain a viable commercial enterprise.[63] The Cork Committee concluded that the company arrangement procedures under the Companies Act 1948 (UK) were burdensome

55. van Zwieten (ed), *Goode*, 11 [1.10].
56. *Jelf*, 83.
57. Deeds of Arrangement Act 1914 (UK).
58. Keay, 107.
59. *Fletcher*, 14 [1.028].
60. Cmnd 221, para.55.
61. *Ibid*, 14 [1.028].
62. *Ibid*, 14 [1.028].
63. See Insolvency Law and Practice, *Report of the Review Committee* (Cmnd 8558, 1982), para.198. See also David Morrison, "Deeds of company arrangement and secured creditors" (2015) 23 *Insolvency Law Journal* 181, 182.

and unsuitable.[64] One solution suggested by the Cork Committee was to extend the laws permitting voluntary arrangement for individuals to companies.[65]

Part I of the Insolvency Act 1986 (UK), enacted in response to the Report of the Cork Committee, thus enabled a company to enter into a voluntary arrangement with its creditors, called a company voluntary arrangement, or CVA. At its heart, the CVA involves a proposal by directors, to the company and its creditors, for a composition in satisfaction of its debts or a scheme of arrangement of its affairs.[66] It requires the approval of at least 75 per cent of creditors (by value).[67] The procedure is supervised by a qualified insolvency practitioner.[68] The proposal may also be made by an administrator or liquidator where the company is, respectively, in administration or being wound up,[69] but, otherwise, the directors remain in control of the company and may conclude a stand-alone CVA without any prior or subsequent insolvency proceeding.[70]

As Professor Fletcher has observed, between 1987 and 1993 the CVA was the least used of all of the new insolvency procedures introduced by the Insolvency Act 1986 (UK).[71] One factor said to contribute to this failure was the lack of a statutory "moratorium" on creditors' enforcement of remedies during the period of active efforts to conclude an arrangement.[72] In short, the balance had tilted too far in favour of creditor control at the expense of liberalising companies' ability flexibly to manage their ailing affairs. In 2000, following a new government review of company rescue and business reconstruction, amendments to Pt I of the Insolvency Act 1986 were made by the Insolvency Act 2000 (UK). That regime, which remains today, provides that the directors of an eligible company (essentially, a small company) may take steps to obtain a moratorium for the company in support of a proposal for a CVA.[73] The rights of the various parties to the arrangement are restricted during the operation of the moratorium. Subject to extension, a moratorium lasts for the earlier of 28 days or the date the requisite company meeting is held or the company's creditors decide whether to approve the proposed CVA.[74] While CVAs could be commenced within a Pt II administration procedure, which does provide for a comprehensive moratorium,[75] the vast majority of CVAs are undertaken by small companies entering stand-alone CVAs without an administration, and very few of them use the small company moratorium.[76] Unlike in a

64. See Insolvency Law and Practice, *Report of the Review Committee* (Cmnd 8558, 1982), paras 400–430.
65. *Ibid*, para.428.
66. Insolvency Act 1986 (UK), s.1(1).
67. Insolvency (England and Wales) Rules 2016 (UK), r.15.34(3).
68. Insolvency Act 1986 (UK), s.1(2).
69. *Ibid*, s.1(3).
70. *Fletcher*, 456 [15.012]; van Zwieten (ed), *Goode*, 492 [11.34], 588–589 [12.27].
71. *Fletcher*, 450 [15.003].
72. *Ibid*, 451 [15.004]. See also Insolvency Service, *Encouraging*, 4 [4], 14 [36–37]; van Zwieten (ed), *Goode*, 491 [11.33], 593 [12.36].
73. Insolvency Act 1986 (UK), s.1A.
74. Insolvency Act 1986 (UK), Sch.A1, para.8.
75. See *Centre Reinsurance International Co v Freakley* [2006] UKHL 45; [2006] 1 WLR 2863, 2865–2866 [6–7]; van Zwieten (ed), *Goode*, 591 [12.31].
76. Peter Walton, Chris Umfreville and Lézelle Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (R3 2018), 15 [4.1.2.1]; van Zwieten (ed), *Goode*, 591 [12.31].

scheme of arrangement,[77] the CVA binds only those creditors who were entitled, with notice, to vote in the qualifying decision procedure by which the creditors' decision to approve the voluntary arrangement was made,[78] and cannot bind a secured creditor without their consent.[79] It is possible that these were some of the reasons why an initial proposal to extend the small company moratorium to medium and large companies[80] was considered to have "limited benefits",[81] and why the government's most recent consultation on this issue includes a proposal to develop a new, 12-month restructuring procedure including "a cram-down mechanism and the ability to bind secured creditors into a restructuring plan, on the basis that creditors will not receive less in a restructuring than they would in a liquidation".[82]

The increased focus upon company rescue and flexibility of insolvency laws was also reflected in the complementary administration procedure under Pt II of the Insolvency Act 1986 (UK), which was later streamlined by the Enterprise Act 2002 (UK).[83] The Enterprise Act 2002 (UK) was described by the Department of Trade and Industry as seeking to transform attitudes towards the insolvent failure of companies and individuals into the "acceptance of the right to fail", more similar to the United States, with the ultimate aim being a more entrepreneurial and therefore prosperous society.[84] The appointment of an administrative receiver was substantially abolished.[85] Qualifying charge-holders retained certain privileges, including the power to appoint an administrator, but the changes operated to "strengthen the position of ordinary unsecured creditors".[86] As Lord McIntosh said in the House of Lords, "we are restricting administrative receivership and revising administration to focus on rescue and to make it more accessible to companies as well as their creditors".[87] The Enterprise Act 2002 (UK) also sought to make collective insolvency proceedings cheaper and more efficient.[88] Administration could now be commenced without the need for a court order,[89] although there was still an option to petition for one.[90]

77. Under the Companies Act 2006 (UK), Pt 26.

78. Insolvency Act 1986 (UK), s.5(2)(b).

79. *Ibid*, s.4(3). See also van Zwieten (ed), *Goode*, 54 [1.55].

80. Insolvency Service, *Encouraging*, 14 [39].

81. Insolvency Service, *Restructuring*, 29.

82. The Insolvency Service, *A Review of the Corporate Insolvency Framework—A consultation on options for reform* (2016), 23 [9.10].

83. van Zwieten (ed), *Goode*, 104 [2.23].

84. See Department of Trade and Industry, *Insolvency—A Second Chance* (Cm 5234, 2001), paras 1.1, 1.7–1.9; *Fletcher*, 21 [1.042].

85. Insolvency Act 1986 (UK), s.72A. See Enterprise Act 2002 (UK), s.250; van Zwieten (ed), *Goode*, 462–463 [11.05].

86. *Ibid*, 16 [1.15].

87. (29 July 2002) 638 *HL Debates*, col.766.

88. Keay, 109. But for empirical evidence, see John Armour, Audrey Hsu and Adrian Walters, "The costs and benefits of secured creditor control in bankruptcy: evidence from the UK" (2012) 8 *Review of Law and Economics* 101.

89. Insolvency Act 1986 (UK), Sch.B1 paras 14, 22. *Cf* Insolvency Act 1986 (UK), s.9(1), repealed by the Enterprise Act 2002 (UK), s.248. See also Keay, 107, 109.

90. Certain persons can still petition the court for an administration order: Insolvency Act 1986 (UK), Sch. B1 para.12. A number of failing British football clubs may have applied for administration orders "to avoid the potentially adverse impression conveyed by an out-of-court appointment with the attendant lack of publicity":

The movement over time was therefore to a more liberal regime, tolerant of failure, but accompanied either by tighter regulation or by new and innovative forms of control, to contain the possibility of abuse of the system by debtors. The search for an appropriate balance involved legislative developments in a series of "experiments" reflecting the "changing conditions and sentiments of the community".[91] But the story was broadly one of liberalisation of consequences and attitudes being accompanied by tighter creditor control or more innovative methods of ensuring creditor protection.

It was against that landscape that the Global Financial Crisis struck with its attendant increase in the number and size of entities in financial distress. Some of the best examples were in the banking sector. The collapse of Northern Rock, the unsuccessful merger of Lloyds TSB and HBOS, and the near-failure of the Royal Bank of Scotland came at a £650 billion cost to the taxpayer[92] and led to a comprehensive regulatory response, including a power for a bank liquidator in the special procedure prescribed by Pt 2 of the Banking Act 2009 (UK) to propose a CVA.[93]

Although there were subsequently developments in relation to smaller businesses, such as the Small Business, Enterprise and Employment Act 2015 (UK),[94] the Government was particularly concerned with larger, more complex businesses. A concern was that the regulation of bankruptcy and insolvency remained too rigid. Accompanying the regulatory response has therefore been consideration of changes to increase flexibility of the regime to permit corporate rescue of massive enterprises where a rigid insolvency regime could reduce the prospect of survival and have an adverse effect upon the country's macroeconomic health.[95] A major issue was the need for an effective moratorium for large companies, "for whom the costs and risks of restructuring without a moratorium are likely to be most significant".[96] In 2010, the Insolvency Service expressed its concern that, following the global financial crisis (GFC), many highly leveraged companies would need to restructure their existing borrowings.[97] As was noted then:[98]

> "When a large number of creditors is involved, it becomes more difficult to agree or enforce an informal standstill to provide a breathing space for negotiations. There is a greater risk that individual creditors will threaten to destabilise a negotiation process in the hope of extracting financial gain at the expense of the other creditors. Smaller creditors also have less incentive to participate in the negotiations or respond to compromise offers. In addition, the higher costs and uncertainty associated with extended negotiations can impact negatively on the value of the business."

One proposal, not yet implemented,[99] is for a three-month "restructuring moratorium" based on the United States' Ch.11 concept of the "debtor in possession",[100] giving

Louis Doyle and Andrew Keay, *Insolvency Legislation: Annotations and Commentary 2007 Edition*, 2nd edn (Jordans, 2006), 630.

91. *Jelf*, 82.
92. van Zwieten (ed), *Goode*, 56 [1.58].
93. Banking Act 2009 (UK), s.113.
94. See van Zwieten (ed), *Goode*, 19–20 [1.17].
95. See *Ibid*, 56 [1.58].
96. Insolvency Service, *Restructuring*, 9–10 [2.9].
97. *Ibid*, 8 [2.2].
98. *Ibid*, 9 [2.5].
99. *Ibid*, 12 [3.5–3.6]; The Insolvency Service, *A Review of the Corporate Insolvency Framework—A consultation on options for reform* (2016), 11 [7.7].
100. van Zwieten (ed), *Goode*, 574 [12.11].

management "flexible breathing space during which a restructuring can be negotiated and implemented, outside of a formal insolvency procedure".[101] In its initial consultation, the Insolvency Service acknowledged the complexities of this reform:[102]

> "We recognise that larger companies are likely to have more complex affairs than smaller ones. They may need additional time to put together proposals and institute protection from the risks of further value destruction by a formal restructuring announcement. Equally, it is important that creditors' interests are adequately protected."

However, there are concerns with further relaxation of the regulation of insolvency law through the introduction of the proposed restructuring moratorium. It has been said that there is a need for various eligibility and qualifying conditions for use of the restructuring moratorium, along with a requirement for court sanction,[103] to prevent the "unacceptable" circumstance where "a moratorium [is] used by a failing business simply to buy time with its creditors, when in practice there [is] no realistic prospect of a rescue or compromise being reached".[104] In the United Kingdom, therefore, the further relaxation of the regulation of corporate insolvency might lie in the margins between various existing and prospective procedures. The proposed restructuring moratorium seems likely to make the CVA and scheme of arrangement significantly more effective, especially for large and complex enterprises. In the meantime, as Associate Professor van Zwieten notes in the latest edition of *Goode on Principles of Corporate Insolvency Law*:[105]

> "practitioners have innovated, making creative use of existing procedures (particularly, administration in pre-packaged form, sometimes combined with a scheme of arrangement) to achieve restructurings for financially distressed companies."

THE EVOLUTION OF UNITED STATES BANKRUPTCY AND INSOLVENCY LAWS

The divergence of United States bankruptcy law from its English roots began at its inception.[106] The significantly different attitudes to individual and corporate financial failure in the United States permitted much more liberal laws, with little provision for creditor control. Although the content of US bankruptcy laws almost immediately diverged from the English laws, the development of US bankruptcy law nonetheless exhibited a similar overall trend towards liberalisation of consequences accompanied by tighter regulation or more flexible and innovative means of regulation for the protection of creditors.

As Professor Rajak notes, the early development of US bankruptcy law was dominated by two themes: the transformed perception of bankruptcy from a moral to an economic failure, and the conflict between proponents and opponents of a federal Bankruptcy Act.[107] As to the first theme, imprisonment for debt was progressively abolished in almost

101. Insolvency Service, *Restructuring*, 4.
102. Insolvency Service, *Encouraging*, 16 [44].
103. Insolvency Service, *Restructuring*, 16 [4.2–4.3].
104. *Ibid*, 13 [3.10].
105. van Zwieten (ed), *Goode*, 18 [1.15].
106. Lewis [2001] *Utah Law Review* 189, 190.
107. Rajak, 15.

all States between 1821 and 1857, with complementary federal protections enacted from 1839.[108] The second theme arose from the different constitutional context within which the US laws developed. The US Constitution authorised the federal legislature "[t]o establish ... uniform laws on the subject of bankruptcies throughout the United States",[109] but, as the Supreme Court decided in 1819,[110] this did not impliedly prohibit consistent State bankruptcy laws.

State bankruptcy laws favoured debtors and were therefore preferred by agrarian interests who viewed commerce as a threat to their independent, self-sufficient livelihoods.[111] On the other hand, commercial interests viewed the State laws as having tipped the balance too far in favour of debtors at the expense of protection of creditors and promotion of commerce, and called for a federal bankruptcy law.[112] The different constitutional context meant that, unlike in the UK, where even the progressively improved treatment of debtors was driven in part by creditors' self-interest in reducing the number of bankruptcies and increasing the prospects of recovery from debtors, "there was a much stronger sense of an even-handed battle between debtors and creditors".[113]

Early attempts at counterbalancing the liberalisation of the consequences of bankruptcy in State legislation, through the enactment of federal bankruptcy legislation protecting creditors, were unsuccessful. The federal Bankruptcy Act of 1800, which was based heavily on the prevailing UK legislation,[114] and had been drafted "primarily to protect the creditors of an insolvent man",[115] lasted only three-and-a-half years.[116] Another attempt in 1841 did not even last for two years, despite having been "at least equally interested in the other goal of a bankruptcy law: to wipe clean a debtor's slate".[117] In the absence of federal law, although State legislatures continued to pass laws in favour of debtors, they were attentive to certain forms of creditors' rights and did not neglect entirely the interests of creditors.[118] A third attempt at a federal bankruptcy statute was made in 1867. The Bankruptcy Act of 1867, allowing both voluntary and involuntary bankruptcy for all (not just traders), had been opposed by agrarian interests who were concerned that the "'free and easy but honest and true men of the West', the 'farmers and merchants', could be 'squeezed' into a 'straitjacket' more 'befitting the madmen of Wall Street'."[119] But it too was "cumbersome, badly administered, corruptly applied" and, notwithstanding Senate amendments in 1874 to add a provision for composition of debts over a period of years,[120] an option that reduced

108. *Ibid*, 15.
109. Constitution of the United States, Art.1 §8.
110. *Sturges v Crowninshield* (1819) 17 US 122, 196.
111. Rajak, 16. See also Friedman, 243.
112. Friedman, 242–243.
113. Rajak, 18.
114. Charles Jordan Tabb, "The History of the Bankruptcy Laws in the United States" (1995) 3 *American Bankruptcy Institute Law Review* 5, 24; Rajak, 18–19.
115. Friedman, 239. See also Tabb (1995) 3 *American Bankruptcy Institute Law Review* 5, 14.
116. Rajak, 16.
117. Friedman, 238–239.
118. *Ibid*, 243; Rajak, 16–17.
119. Friedman, 480.
120. 18 Stats 178, 182–184 (Act of June 22, 1874), §17.

the strictness of the regime for debtors whilst also enabling creditors to be involved in protecting their interests, the Act of 1867 was repealed in 1878.[121]

As commercial influence began to dominate agrarian interests, calls to replace the "brief and spasmodic" earlier attempts with a permanent law "in the nature of a regimen of diet and exercise to the body financial and commercial, in its very nature partly restrictive and partly remedial",[122] grew louder. Such an Act—long, carefully drafted, with provision for individual voluntary bankruptcy and an exception from involuntary bankruptcy for "a wage-earner or a person engaged chiefly in farming—was passed in 1898.[123] The Bankruptcy Act of 1898 has been described as "usher[ing] in the modern era of liberal debtor treatment in United States bankruptcy laws", introducing measures including abolishing numerous restrictions upon discharge of debts.[124] However, and consistently with the pattern of concurrent liberalisation of consequences of bankruptcy and tighter regulation for protection of creditors, the Act did not focus solely upon debtor relief. It also contained mechanisms "facilitating the equitable and efficient administration and distribution of the debtor's property to creditors".[125]

Nevertheless, there were concerns that the relaxation of the consequences had not been sufficiently counterbalanced by regulation and protection of creditors' interests. In subsequent years, there were periods where, contrary to the overall trend towards liberalisation of US bankruptcy law, amendments were made "to ameliorate the perceived extreme pro-debtor orientation of the 1898 Act", including by adding grounds for denial of discharge and strengthening penal provisions.[126]

Consistently with the usual basis for significant reform to national bankruptcy laws, namely economic panic and commercial failure,[127] the watershed codification of US bankruptcy law was a response to the Great Depression.[128] Emergency legislation was followed by the Chandler Act 1938,[129] which substantially amended the Bankruptcy Act of 1898, codifying equitable receivership principles developed in response to widespread failures in the railroad industry after the Civil War "as the basis for rehabilitating and reorganising distressed businesses".[130] Chapter X of that Act, entitled "Corporate Reorganisations", was intended to provide for reorganisation of large, public companies, and Ch.XI, "Arrangements", was intended only to deal with smaller debtors with unsecured debt.[131] However, the Supreme Court held that publicly owned corporations could also use Ch.XI, noting that large public companies "may have as much need for a simple composition of unsecured debts as a smaller company".[132] This interpretation of Ch.XI,

121. Friedman, 480–481.
122. Samuel Wagner, "The Advantages of a National Bankrupt Law" in *Report of the Fourth Annual of the American Bar Association* (EC Markley & Son 1881) 223, 227–28. See also Friedman, 481.
123. Friedman, 482.
124. Tabb (1995) 3 *American Bankruptcy Institute Law Review* 5, 24.
125. *Ibid*, 25.
126. *Ibid*, 27.
127. See, eg, Friedman, 238, 239, 482; Tabb (1995) 3 *American Bankruptcy Institute Law Review* 5, 14.
128. Lewis [2001] Utah L Rev 189, 207; Harvey R Miller and Shai Y Waisman, "Is Chapter 11 Bankrupt?" (2005) 47 *Boston College Law Review* 129, 134.
129. 52 Stat 840 (Act of June 22, 1938).
130. Miller & Waisman (2005) 47 *Boston College Law Review* 129, 137.
131. *Ibid*, 137–138. See also HR Rep 95-595 (1977), 222.
132. *General Stores Corp v Shlensky* (1956) 350 US 462, 466.

originally intended for debtor relief, greatly increased the flexibility of reorganisation procedures available even to the largest companies in insolvency.

The bankruptcy laws were amended many times over the next 40 years, but generally in relation to discrete issues.[133] Unlike its predecessors, the Bankruptcy Act of 1898 endured for 80 years until it was replaced in 1978. In 1978, the Bankruptcy Reform Act,[134] the first federal bankruptcy legislation "not enacted on the heels of domestic economic turmoil",[135] codified the bankruptcy laws as Title 11 of the United States Code, from then known as the "Bankruptcy Code". Chapter XI and the "effectively dead"[136] Ch.X were merged into a new Ch.11.[137]

Chapter 11 allows for reorganisation of a debtor. Commencement of that procedure is by court filing only—either voluntary, where it is initiated by the debtor itself; or involuntary, where at least three creditors initiate the proceeding.[138] One of the most significant differences between Ch.11 and the Anglo-Australian position is that any Ch.11 debtor[139] can file a petition for voluntary bankruptcy; insolvency is not a requirement. Whilst the court has a power to dismiss the case "for cause",[140] there is no implicit good faith requirement or *de facto* insolvency test for voluntary filings.[141] Upon filing, the debtor becomes a "debtor in possession",[142] remaining so until a reorganisation plan is confirmed, the case is dismissed or converted to a liquidation under Ch.7, or a Ch.11 trustee is appointed.[143] Filing also attracts an automatic stay of nearly all judicial and administrative proceedings, and most informal debt collection actions by creditors.[144] At the same time, Ch.11 provides for tight regulation of the bankruptcy procedure. The reorganisation plan is subject to court approval, at which point it is generally binding on all creditors.[145] A plan will be confirmed only if it satisfies certain requirements, including that the debtor's creditors will not receive less than they would under a Ch.7 liquidation (the "best interests test"),[146] the plan is feasible[147] and, if there are dissenting creditors, that the plan does not "discriminate unfairly" and is "fair and equitable" (the "absolute priority rule").[148]

133. Tabb (1995) 3 *American Bankruptcy Institute Law Review* 5, 30.
134. 92 Stat 2549 (Act of November 6, 1978).
135. Miller & Waisman (2005) 47 *Boston College Law Review* 129, 141–142. See also Tabb (1995) 3 *American Bankruptcy Institute Law Review* 5, 32.
136. Lewis [2001] *Utah Law Review* 189, 208.
137. Tabb (1995) 3 *American Bankruptcy Institute Law* Review 5, 35.
138. 11 USC §§301, 303.
139. Defined in 11 USC §109(d), which, subject to minor exceptions, allows any debtor permitted to file under Ch.7 to file under Ch.11.
140. 11 USC §1112(b).
141. Lewis [2001] Utah L Rev 189, 218; Ali MM Mojdehi and Janet Dean Gertz, "The Implicit 'Good Faith' Requirement in Chapter 11 Liquidations: A Rule in Search of a Rationale?" (2006) 14 *American Bankruptcy Institute Law Review* 143, 144.
142. 11 USC §1101.
143. 11 USC §1107(a).
144. 11 USC §362.
145. 11 USC §§1121, 1129, 1141.
146. 11 USC §1129(a)(7).
147. 11 USC §1129(a)(11).
148. 11 USC §1129(b)(1).

As can be seen, the focus of Ch.11 is upon developing a flexible, debtor-friendly mechanism for company rescue and rehabilitation, while "balanc[ing] the interests of all parties involved in the Chapter 11 reorganization process".[149] Congressional records reveal that the purpose of the reorganisation provisions of the Bankruptcy Reform Act was to "restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders".[150] The foundational premise stated by Congress was that "[i]t is more economically efficient to reorganise than to liquidate, because it preserves jobs and assets".[151] As the US Supreme Court noted in 1983,[152] "[b]y permitting reorganisation ... Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap'". More recently, Professor Martin has neatly explained the broader societal context:[153]

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

In Ch.11 "the rescue plan is an essential part of the process".[154] In contrast, it has been said that the administration procedures in the UK and Australia are "gateways" to an arrangement procedure, which facilitate, but do not themselves effect, a company rescue.[155] Chapter 11 also, in theory, more strongly embraces the debtor in possession concept, meaning that, in the absence of fraud or other misconduct perpetrated by management,[156] the "prepetition board of directors and officers will continue to manage the debtor's affairs and make decisions regarding both the debtor's business and its reorganisation efforts in the chapter 11 case",[157] under the supervision of the specialised Bankruptcy Courts.[158] This approach may encourage timely entry into administration, avoiding delays that negatively impact the quality of the ultimate outcome. Further, as the Congressional records note, "very often the creditors will be benefited by continuation of the debtor in possession, both because the expense of a trustee will not be required, and the debtor, who is familiar with his business, will be better able to operate it during the reorganisation case".[159]

149. See Miller & Waisman (2005) 47 *Boston College Law Review* 129, 143–144.
150. HR Rep 95-595 (1977), 220.
151. *Ibid*, 220.
152. *United States v Whiting Pools Inc* (1983) 462 US 198, 203.
153. Nathalie Martin, "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation" (2005) 28 *Boston College International & Comparative Law Review* 1, 3 (citations omitted).
154. Anderson & Morrison, 84.
155. *Ibid*, 85; Keay, 106.
156. *Ibid*, 112.
157. Michelle M Harner, *Final Report of the ABI Commission to Study the Reform of Chapter 11* (American Bankruptcy Institute, 2014), 21.
158. 28 USC §157 (2012).
159. HR Rep 95-595 (1977), 223.

The liberalisation in Ch.11 of the consequences of insolvency for debtors has been accompanied in the main by tighter regulation in the form of judicial supervision, rather than by increasing flexibility for involvement and control of the process by creditors. Given that "[c]reditors effectively own bankrupt firms",[160] some have argued that the limited rights of creditors under Ch.11 is a key failing of the regime.[161] On the other hand, some commentators have noted that, despite the avowed focus of Ch.11 upon the "debtor in possession", there is in practice a "creditor-in-possession phenomenon"[162] whereby "creditors with senior, secured claims have come to dominate the Chapter 11 process".[163] Particularly among large companies, "[e]quity holders and managers exercise little or no leverage during the reorganisation process", the dynamics of which are dictated by creditors.[164] Although the degree of creditor involvement might on one view now exceed that which was contemplated by the legislature, it is nonetheless consistent with the trend for the liberalisation of bankruptcy and insolvency law as being accompanied by measures for the protection of creditors.

Other criticisms of the US model have included that it is "slow, expensive, and administratively cumbersome".[165] In the aftermath of the GFC, one study from 2009 calculated 11 months as the median time that companies spend under Ch.11 administration,[166] considerably longer than the time periods prescribed by the UK and Australian regimes. In consequence, insolvency practitioners have developed, and courts have approved, a practice of using Ch.11 to facilitate an expedited sale of the entire business.[167] Just as in the UK, this represents a practitioner-led innovation of further liberalisation of corporate bankruptcy regulation, although this may in some instances be partly due to pressure from an "oversecured" creditor whose interest "is always biased toward an immediate resolution of the case" rather than maximising the value of the bankruptcy estate.[168] Putting aside such cases of excessive creditor control, the practice can be explained by reference to two major corporate failures following the GFC—Chrysler and General Motors.

Section 363 of the Bankruptcy Code relevantly provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate".[169] Such sales are usually used to sell a debtor's subsidiaries,

160. *Kham & Nate's Shoes No 2 Inc v First Bank of Whiting* (1990) 908 F 2d 1351, 1360.

161. Lewis [2001] Utah L Rev 189, 189–190.

162. Miller & Waisman (2005) 47 *Boston College Law Review* 129, 152–155.

163. Kenneth M Ayotte and Edward R Morrison, "Creditor Control and Conflict in Chapter 11" (2009) 1 *Journal of Legal Analysis* 511, 512 [2]. See also Armour, Hsu & Walters (2012) 8 *Review of Law and Economics* 101, 101, 104–105.

164. Ayotte & Morrison (2009) 1 *Journal of Legal Analysis* 511, 538 [62–63].

165. Lewis [2001] *Utah Law Review* 189, 191.

166. Elizabeth Warren and Jay Lawrence Westbrook, "The Success of Chapter 11: A Challenge to the Critics" (2009) 107 Michigan L Rev 603, 626 (although noting that a substantial number of cases were resolved more quickly).

167. Miller & Waisman (2005) 47 *Boston College Law Review* 129, 156–157.

168. Ayotte & Morrison (2009) 1 *Journal of Legal Analysis* 511, 528 [40]. See also Edward S Adams, "Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results" (1993) 73 *Boston U Law Review* 581, 604.

169. 11 USC §363(b)(1).

unprofitable divisions, or obsolete assets.[170] Courts have adopted a "sound business reason" test for use of this procedure,[171] followed by a determination of whether the sale is an impermissible "*sub rosa*" plan of reorganisation that circumvents the protections set out in §1129 of the Bankruptcy Code.[172]

Chrysler LLC filed Ch.11 petitions on 30 April 2009. It immediately sought the Bankruptcy Court's approval of a sale under §363(b) of substantially all of its operating assets to a newly created company owned by three groups or parties: (i) Fiat SpA, (ii) the US and Canadian governments, and (iii) an employees' benefit association. The price of the sale was the new entity's assumption of certain liabilities and $2 billion. The Bankruptcy Court approved the sale.

Various interested parties appealed to the Second Circuit, which affirmed the Bankruptcy Court's order.[173] The Court held that the sale maximised the recoverable value by creditors.[174] The Supreme Court granted a petition for a writ of *certiorari*, remanding the matter with instructions to dismiss the appeal as moot.[175] The Bankruptcy Court's decision and the sale were left intact. Chrysler was in bankruptcy protection for only 42 days.[176]

Similarly, General Motors disposed of its operating assets in just 40 days.[177] After filing a Ch 11 petition on 1 June 2009, GM sought immediate approval for a sale of its assets, "free and clear" of encumbrances, to a company sponsored by the US Treasury. One objection was that a sale of GM's assets should have required a plan of reorganisation. However, following the decision in *Chrysler*, the Bankruptcy Court approved the sale, holding that there was a "good business reason" to sell the assets because GM could not obtain adequate funding for reorganisation and the business value was dropping dramatically.[178] Although there has been litigation concerning claims against the purchaser for subsequently-discovered ignition-switch defects,[179] the substance of the sale is not impugned.

Notwithstanding the obvious legal differences between the administration/CVA and Ch.11 procedures, Kornberg and Paterson have pointed a difference in perception as "perhaps the most commercially significant distinction". "For an English company", they write, "administration is perceived as being a probable death-blow, whereas in the US filing for chapter 11 relief generally is perceived as taking advantage of a valid recovery technique".[180] That difference in perception is perhaps in part responsible for the flexibility and commitment to company rescue evident in the evolution, both through legislative amendments and changes in practice, of US insolvency law, which has seen Ch.11 used

170. Kornberg & Paterson, 125 [3.143].
171. See *In re Lionel Corp* (1983) 722 F 2d 1063, 1071.
172. See *In re Braniff Airways Inc* (1983) 700 F 2d 935, 940.
173. *In re Chrysler LLC* (2009) 576 F 3d 108.
174. *Ibid*, 118–119.
175. *Indiana State Police Pension Trust v Chrysler LLC* (2009) 558 US 1087.
176. See Kornberg & Paterson, 126–127 [3.144–3.149].
177. *Ibid*, 127 [3.150].
178. *In re General Motors Corp* (2009) 407 BR 463, 474–475.
179. See *In re Motors Liquidation Co* (2015) 529 BR 510; *In re Motors Liquidation Co* (2018) 590 BR 39 (appeal filed 28 June 2018).
180. Kornberg & Paterson, 134 [3.188].

to save a significant number of household names—United Airlines, Continental Airlines, Texaco, Worldcom, Marvel, Greyhound, CIT Group Inc and Macy's.[181]

THE EVOLUTION OF AUSTRALIAN BANKRUPTCY AND INSOLVENCY LAWS

The experience in both the UK and US has demonstrated that, as the consequences for debtors under bankruptcy and insolvency laws have become more liberal, there was an associated increase in either regulation or flexibility for the involvement of creditors as insolvency practitioners innovated to develop solutions to new and emerging problems. Australia saw the same pattern, where the voluntary administration procedure under Pt 5.3A of the Corporations Act 2001 (Cth) arguably represents a hybrid of the UK and US systems. The Australian example with which this article began is the innovative use of the DOCA. However, before turning to that example, it is helpful to illustrate the same evolution of bankruptcy and insolvency in Australia towards more liberal and flexible laws.

Since the procedures of the bankruptcy statutes were administered in England, judges in colonial New South Wales initially considered that those statutes had no extraterritorial application.[182] The New South Wales Act 1823 (Imp)[183] outlined basic procedures for the distribution of insolvent estates and the grant of certificates of discharge, but the early practice of the courts was to delay execution of judgments and to encourage assignments and compositions.[184] In effect, this practice was a non-legislative amelioration of the harshness of insolvency for debtors while nonetheless protecting the rights of creditors. In addition to this early flexibility, liberalisation of laws moved fast in Australia.

The Debtors' Estates Distribution Act 1830 (NSW)[185] applied to all persons, not just traders. It provided that debtors were to be released from prison upon full and true disclosure of their effects and discharged with the consent of a majority, in number and value, of creditors.[186] Arrest on mesne process was generally abolished in 1839.[187] And the Insolvency Acts of 1841[188] and 1843[189] implemented Lord Brougham's reforms,[190] and generally abolished imprisonment for debt more than two decades before England.[191]

181. *Ibid*, 135 [3.190].
182. See, eg, *Ex parte Lyons, In re Wilson* (1839) 1 Legge 140.
183. 4 Geo IV c 96, ss 22–23.
184. See Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Federation Press 1996), 193–195.
185. 11 Geo IV No 7, s.1.
186. *Ibid*, ss 5, 7.
187. Arrest on Mesne Process Abolition Act 1839 (NSW) (3 Vict No 15), s.1.
188. Insolvency Act 1841 (NSW) (5 Vict No 17).
189. Insolvency Act 1843 (NSW) (7 Vict No 19).
190. *Ibid*, ss 12–13.
191. *Ibid*, ss 26–28; Imprisonment for Debt Abolition Act 1846 (NSW) (10 Vict No 7), ss 1–2.

These "revolutionary"[192] New South Wales Acts were not simply copied from existing English legislation.[193] Rather, as a response to the local economic crises of the 1840s, the laws in New South Wales "reflected a rare consensus between lawyers, merchants and the public that the appropriate response was the commercial reintegration of debtors".[194] The other colonies all had insolvency laws with varying degrees of similarity to the English position. South Australia[195] and Western Australia[196] took the most progressive approach to agreements outside bankruptcy.[197] Tasmania abolished imprisonment for debt absolutely in 1868.[198] Thus, the colonial bankruptcy laws followed, albeit to varying degrees, the overall trend of reducing the severity of consequences of bankruptcy whilst providing for greater regulation and flexibility.

In 1901, the new Australian Constitution conferred power upon the Commonwealth Parliament to legislate with respect to bankruptcy and insolvency.[199] At that time, the bankruptcy laws of New South Wales, Victoria, Western Australia and South Australia[200] were based on the English Bankruptcy Act 1883,[201] whereas the laws in Queensland and Tasmania[202] were based on the English Bankruptcy Act 1869.[203] "Many difficulties and much inconvenience" arose from the absence of uniform laws.[204] The States also had insufficient specialist expertise to administer the laws.[205] After "an enormous amount of labour and research",[206] the first Commonwealth bankruptcy law was passed in 1924 and began to be implemented in 1928. The Bankruptcy Act 1924 (Cth) followed the English Bankruptcy Act 1883 but adapted that legislation to Australian conditions and incorporated the innovations of the States.[207] The newly created Inspector-General in Bankruptcy[208] carried out the supervisory functions of the English Board of Trade.

There were considerable differences in the State legislation with regard to the treatment of private arrangements outside the bankruptcy procedure. Only some States recognised and protected such agreements.[209] However, by the time of the Bankruptcy Act 1924 (Cth) the English experience demonstrated that private agreements were cheaper to administrate and yielded better returns for creditors.[210] Thus, it was accepted

192. John Gava, "The Revolution in Bankruptcy Law in Colonial New South Wales", in MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds), *The Emergence of Australian Law* (Butterworths 1989) 210, 216.
193. *Ibid*, 220; JLB Allsop & Dargan, 453.
194. Allsop & Dargan, 453. See also Gava (*supra*, fn.193), 220.
195. Insolvent Debtors Act 1841 (SA) (5 Vict No 1).
196. An Act for the relief of Insolvent Debtors not in Custody 1842 (WA) (6 Vict No 11).
197. Allsop & Dargan, 454.
198. Imprisonment for Debt Abolition Act 1867 (Tas) (31 Vict No 16), s.1.
199. Constitution, s.51(xvii).
200. Bankruptcy Act 1898 (NSW); Insolvency Act 1915 (Vic); Bankruptcy Act 1892 (WA); Insolvency Act 1886 (SA).
201. 46 & 47 Vict c 52.
202. Insolvency Act 1874 (Qld); Bankruptcy Act 1870 (Tas).
203. 32 & 33 Vict c 71. See Allsop & Dargan, 455.
204. *Clyne Report*, 11 [14].
205. Commonwealth, *Parliamentary Debates*, Senate, 7 August 1923, 2197; Allsop & Dargan, 455.
206. Commonwealth, *Parliamentary Debates*, Senate, 7 August 1923, 2196.
207. Allsop & Dargan, 455–456.
208. Bankruptcy Act 1924 (Cth), s.11.
209. See *Clyne Report*, 62–63 [273–278].
210. Australia, Senate, *Parliamentary Debates* (Hansard), 7 August 1923, 2203. See also Allsop & Dargan, 456.

that "recognition of deeds of arrangement must find a place in any general bankruptcy system".[211] Deeds of arrangement were detailed in Pt XII of the Bankruptcy Act 1924 (Cth),[212] which, like the English legislation, was concerned to give such arrangements publicity and validity by providing the machinery and formalities for their registration by the court.[213] Part XI of the Bankruptcy Act 1924 (Cth) adopted the reforming South Australian[214] approach to compositions, which differed considerably from the English position. That Part provided for a debtor to call a meeting of creditors,[215] at which creditors could vote to deal with the estate by deed of assignment, scheme of arrangement or composition.[216] These differences, albeit technical, were very significant in an era when "many of the essential pieces of English commercial legislation ... were reproduced by the Commonwealth and State legislatures largely without amendment", and have been said to reflect a deliberate attempt to create a legislative scheme suited and adapted to modern commercial needs.[217] Those needs included the need to find the appropriate balance between a liberal attitude emphasising the rescue and rehabilitation of bankrupts whilst still providing adequate regulation and flexibility for the protection of creditors' interests.

Calls for a general review of the bankruptcy legislation began as early as 1932.[218] However, it was not a high priority at this time nor immediately following the Second World War, when "bankruptcy numbers were down" and "[a]ccountants were more likely to be working on income tax and company development".[219] In 1956, Sir Thomas Clyne, Federal Judge in Bankruptcy, was appointed by the Attorney-General, Sir Garfield Barwick, to chair a Committee tasked with reviewing Commonwealth bankruptcy law. The "Clyne Report",[220] as it became known, was published in 1962. It affirmed the need for a system of bankruptcy law along existing lines but recommended extensive amendments to improve the law's operation; so many that it was most appropriate to pass an entirely new Act.[221] The Committee's recommendations were adopted almost without amendment in the Bankruptcy Act 1966 (Cth), which remains in operation today.

One of the most substantial reforms adopted from the Clyne Report was the overhaul of arrangements outside bankruptcy. Parts XI and XII of the Bankruptcy Act 1924 (Cth) were replaced by Pt X of the Bankruptcy Act 1966 (Cth), which provided three alternatives to bankruptcy: deed of assignment; deed of arrangement; and composition.[222] Having increased the flexibility for the protection of creditors' interests through these

211. Australia, Senate, *Parliamentary Debates* (Hansard), 7 August 1923, 2202.

212. *Ibid*, 2202.

213. *Clyne Report*, 67 [290]. See also Allsop & Dargan, 456.

214. See Insolvent Act 1886 (SA), Pt XI; Australia, Senate, *Parliamentary Debates* (Hansard), 15 August 1923, 2764.

215. Bankruptcy Act 1924 (Cth), s 157.

216. *Ibid*, ss 161, 162. See Clyne Report, 63–65 [280-283]; Allsop & Dargan, 457.

217. Allsop & Dargan, 457–458.

218. Carmel Meiklejohn (ed), *Officially Receiving: A History of Australia's Bankruptcy Law and Administration* (Insolvency and Trustee Service Australia, 2010), 51.

219. *Ibid*, 51.

220. *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth* (1962) ("*Clyne Report*").

221. *Ibid*, 8 [7].

222. See *ibid*, 68 [291–295].

means, there was less need for the consequences of bankruptcy to remain as severe as in the Bankruptcy Act 1924 (Cth). For instance, the discharge provisions of that earlier Act, which reflected the English Bankruptcy Act 1869 and were unfriendly to debtors, were amended in the Bankruptcy Act 1966 (Cth) to provide for discharge by operation of law after five years.[223]

Between 1983 and 1988, the Australian Law Reform Commission conducted the first ever review of corporate insolvency law in Australia.[224] The report of the Commission, known as the Harmer Report after its Commissioner-in-charge, recommended an innovative new, voluntary administration procedure for insolvent companies.[225] The rationale for this recommendation was clearly stated:[226]

"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."

At that time, liquidation was practically the only option for troubled businesses. Private administration, by the appointment of a receiver, generally benefited only the secured creditor responsible for initiating the process.[227] And schemes of arrangement were infrequently used, and generally only by large companies due to the significant costs involved.[228] Official management, which was borrowed from South Africa, was also not widely utilised,[229] and has been described as a "remarkable failure".[230]

The Harmer Report described the scheme of arrangement procedure as "cumbersome, slow and costly and ... particularly unsuited to the average private company which is in financial difficulties".[231] Even relatively straightforward schemes carried substantial legal and accountancy costs. And it was not integrated with other voluntary administration procedures, such that rejection of a proposed scheme would not then lead to an alternative procedure, such as a winding-up.[232] Submissions to the Commission suggested that the extensive procedures and costs were the reason for the relative disuse of schemes at that time.[233]

As originally proposed, the new voluntary administration procedure was designed to be "capable of swift implementation", "as uncomplicated and inexpensive as possible", and "flexible, providing alternative forms of dealing with the financial affairs of the company".[234] The Commission was also concerned to rectify the "very little emphasis upon or encouragement of a constructive approach to corporate insolvency by, for example,

223. Bankruptcy Act 1966 (Cth), s.149. The time period was reduced to three years in 1981: Bankruptcy Amendment Act 1980 (Cth), s.72(1). See Allsop & Dargan, 458–459.
224. Harmer Report, 3 [3].
225. *Ibid*, 30 [56].
226. *Ibid*, 29 [53].
227. Ron W Harmer, "Comparison of Trends in National Law: The Pacific Rim" (1997) 23 *Brooklyn Journal of International Law* 139, 149.
228. Keay, 108. See also Harmer (1997) 23 *Brooklyn Journal of International Law* 139, 149.
229. Keay, 108.
230. Harmer (1997) 23 *Brooklyn Journal of International Law* 139, 149.
231. Harmer Report, 26 [46].
232. *Ibid*, 26 [46], 28 [51].
233. *Ibid*, 28 [50].
234. *Ibid*, 29 [54].

focussing on the possibility of saving a business (as distinct from the company itself) and preserving employment prospects",[235] that it considered was evident in the legislative approach to corporate insolvency in Australia.

Although a "major issue" in the reference to the Commission had been whether the law relating to individual and corporate insolvency should be integrated into a single Act,[236] the Commission considered the goal of unity was not of "major significance" and focused instead upon the reform proposals rather than "attempting to put the two very different aspects of insolvency into one Act".[237] After the Harmer Report, it was determined that corporate and personal insolvency should continue to be dealt with separately.[238] Thus, insolvent individuals are said to be "bankrupt" and are dealt with under the Bankruptcy Act 1966 (Cth). Insolvent companies are dealt with under Ch.5 of the Corporations Act 2001 (Cth).

The voluntary administration procedure was introduced into the then-existing corporations legislation by the Corporate Law Reform Act 1992 (Cth), and is now located in Pt 5.3A of the Corporations Act 2001 (Cth). In the second reading speech on the Bill that introduced Pt 5.3A, the Attorney-General noted that "most current forms of administration suffer from the fatal flaw that individual creditors can disrupt them to the point where they become unworkable".[239] The new procedure was intended to provide a simple and efficient method for rescuing and rehabilitating businesses that would otherwise be wound up.

Voluntary administration is a temporary procedure that leads to either liquidation, resumption of ordinary trading, or an arrangement by a DOCA. Insolvency or likely insolvency is a common,[240] but perhaps not always necessary,[241] feature of the commencement of the procedure. However, unlike the CVA,[242] Pt 5.3A provides no means by which the court may appoint an administrator. Rather, administrators may be appointed (and the administration thereby commenced[243]) by the directors,[244] a liquidator or provisional liquidator already appointed by the company,[245] or the holder of a charge over all or substantially all of the company's property.[246] Administrators are most often accountants and, as in the UK, act as agent of the company,[247] must be registered insolvency practitioners[248] and have powers, including power to appoint and remove directors.[249] Under Pt 5.3A, therefore, the court plays only a limited, supervisory

235. *Ibid*, 28 [52].
236. *Ibid*, 12 [25].
237. *Ibid*, 14 [31].
238. Keay, 108. See Andrew Keay, 'The Unity of Insolvency Legislation: Time for a Re-think?' (1999) 7 Insolvency LJ 4.
239. Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992, 2404.
240. Corporations Act 2001 (Cth), ss 436A(1), 436B(1).
241. *Ibid*, s 436C(1). See also Anderson & Morrison, 89.
242. Insolvency Act 1986 (UK), s.7(5).
243. Corporations Act 2001 (Cth), s.435C(1)(a).
244. *Ibid*, s.436A.
245. *Ibid*, s.436B. See, eg, *In the matter of Origin Internet Solutions Pty Ltd (in liq)* [2004] FCA 382.
246. Corporations Act 2001 (Cth), s.436C. See, eg, *Re James Developments Pty Ltd (admin apptd)* (1998) 30 ACSR 62.
247. Corporations Act 2001 (Cth), s 437B.
248. *Ibid*, s.448B.
249. *Ibid*, s.442A.

role in what is otherwise an entirely voluntary procedure. This has been the subject of some criticism,[250] as it leaves creditors (other than qualifying charge-holders) without any means to appoint an administrator if faced with opposition by the directors. However, a concerted push towards a US-style Ch.11 for large companies was rejected by the Corporations and Markets Advisory Committee[251] and was not included in amendments by the government of the day.[252]

The object of voluntary administration, which is expressly stated in s.435A, is to provide for the business, property and affairs of an insolvent company to be administered in a way that "maximises the chances of the company, or as much as possible of its business, continuing in existence", or, if that is not possible, "results in a better return for the company's creditors and members than would result from an immediate winding up". Like the purposes of the UK regime[253] articulated earlier, the paramount consideration is saving the business of the company where possible.

The new regime was used widely from its introduction.[254] During 2003, around 40 per cent of all companies using formal insolvency procedures went into voluntary administration,[255] the "vast majority" being initiated by the company itself.[256] Professor Keay has suggested that one of the reasons for the wide-ranging use of the procedure was the absence of a need for court involvement.[257] Each of the four major reviews[258] to consider the voluntary administration procedure prior to the GFC found it to be fundamentally sound and performing well, and recommended only minor changes.[259] And analyses by industry bodies[260] and scholars[261] suggested that returns to creditors under a DOCA exceeded those that would have been obtained if the company had been placed into liquidation.

Part 5.3A gives the company, its creditors, and the court a broad discretion as to how to rescue the company's business. A key aspect of that discretion is the court's general power to make orders determining how the regime should operate in relation to a particular

250. See, eg, Legal Committee of the Companies and Securities Advisory Committee, *Corporate Voluntary Administration* (1998), paras 7.8–7.9.

251. Corporations and Markets Advisory Committee, *Rehabilitating large and complex enterprises in financial difficulties* (2004), 5–6 [1.5].

252. See Corporations Amendment (Insolvency) Bill 2007 (Cth). See also Anderson & Morrison, 98–99.

253. Keay, 111.

254. Harmer (1997) 23 *Brooklyn Journal of International Law* 139, 150–151.

255. Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: a Stocktake* (2004), 16 [2.28].

256. Keay, 114.

257. *Ibid*, 111.

258. Legal Committee of the Companies and Securities Advisory Committee, *Corporate Voluntary Administration* (1998); Corporations and Markets Advisory Committee, *Rehabilitating large and complex enterprises in financial difficulties* (2004); Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: a Stocktake* (2004); Corporations and Markets Advisory Committee, *Issues in External Administration* (2008).

259. Helen Anderson, "Voluntary administration and the protection of employee entitlements" (2012) 30 *Company and Securities Law Journal* 170, 173.

260. See *ibid*, 174 fn.26.

261. See James Routledge, "An Exploratory Empirical Analysis of Part 5.3A of the Corporations Law (Voluntary Administration)'" (1998) 16 *Company and Securities Law Journal* 4, 7; Abe Herzberg, Mark Bender, and Lee Gordon-Brown, "Does the Voluntary Administration Scheme Satisfy Its Legislative Objectives? An Exploratory Analysis" (2010) 18 *Insolvency Law Journal* 181, 192.

company,[262] which supports the intended flexibility of the procedure. The liberalisation of the consequences of insolvency for the company and the emphasis upon rescue is not primarily counterbalanced by strict judicial supervision, though the courts retain an important supervisory role. Rather, protection of creditors' interests is achieved by greatly increased flexibility and involvement of creditors in agreeing upon the outcome of the voluntary administration. The Australian regime is also designed to proceed quickly to a conclusion, whether that be a return to solvency or an orderly transition to another form of administration, liquidation or winding-up. It was intended to avoid "the indefinite administrations which can occur, for example, under the United States chapter 11 approach".[263] Therefore, although Pt 5.3A sets no overall time limit for the administration, unlike administration under Pt II of the UK regime,[264] it provides for a number of internal time limits and events that will bring the administration to an end.[265] For example, a first meeting of creditors must be held within five business days before, or within five business days after, a "convening period" of 20 business days from commencement of the administration.[266] Also unlike the UK regime,[267] the court's general power to make orders has been broadly interpreted to permit extension of the administration period even after the time limit has expired.[268]

As the purpose of voluntary administration is to give the company a "breathing space in which its future can be determined by the creditors in light of information gathered by the administrator",[269] an important feature of Pt 5.3A is the provision, in s.440D, for a moratorium on claims against the company. During the administration of a company, civil proceedings against the company or its property cannot be commenced or continued without the administrator's written consent or leave of the court.[270] In this respect, the differing treatment of creditors in the US and Australia is well-illustrated by two examples. First, under Ch.11, all creditors' claims are subject to a moratorium; but, under Pt 5.3A, some secured creditors may enforce their security interests in certain circumstances.[271] Secondly, under Ch.11, "cram down" provisions[272] may impose a reorganisation plan upon creditors against their will; but, under Pt 5.3A, secured creditors that do not vote in favour of a DOCA are not bound by its provisions.[273]

Voluntary administration may, in some cases, lead to a resumption of business activity and the normal repayment of debts. If that proves impossible, a DOCA may provide for any

262. Corporations Act 2001 (Cth), s.447A. See Keay, 124–125.

263. Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992, 2404.

264. Insolvency Act 1986 (UK), Sch.B1, para.76.

265. Keay, 113.

266. Corporations Act 2001 (Cth), s.439A (or 25 business days if the administration occurs during December or before Good Friday).

267. Insolvency Act 1986 (UK), Sch.B1, para.77. See Keay, 113–114.

268. See, eg, *Re Ricon Constructions Pty Ltd (In Liq); Ex parte McDonald* (1997) 43 NSWLR 174, 177–178; *Re Vouris* (2003) 177 FLR 289, 315–317 [65–74]. *Cf Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270, 282 [26].

269. RP Austin and IM Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th edn (LexisNexis Butterworths, 2018), 1863 [27.040].

270. See *Foxcroft v The Ink Group Pty Ltd* (1994) 15 ACSR 203.

271. Corporations Act 2001 (Cth), s.441A.

272. 11 USC §1129.

273. Corporations Act 2001 (Cth), s 444D, *cf* s.444F. See Lewis [2001] *Utah Law Review* 189, 234–235.

number of arrangements agreed by the company and its creditors.[274] The Harmer Report envisioned the DOCA to be "a simplified document of much less size and complexity than the present forms of 'scheme documents' that oppress creditors and others",[275] designed to "lessen the often voluminous amount of documentation with which creditors are burdened in relation to a scheme of arrangement".[276]

Consequently, the law does not prescribe the provisions that may be included in a DOCA. It allows "any arrangement that could be agreed between a company and its creditors",[277] which can include moratoria against enforcement of debts by creditors, compromise, extinguishment of debts, debt/equity swaps, or asset sales and transfers to third parties. The key to the flexibility of the regime is that the company and administrators may design a tailored plan to attract creditor support and provide a better outcome for creditors than liquidation. While the creditors must approve the DOCA and are then bound by it, they are not parties to the deed.[278] The DOCA is not even a legal deed; it is a statutory arrangement by which all creditors are bound by a vote of the majority.[279] It may be varied or terminated by creditors[280] or by the court.[281] The statutory mechanisms for variation and termination by the court give a wide-ranging discretion as a safeguard against abuse in circumstances including the provision to creditors of false or misleading information,[282] or if a provision of the deed is oppressive, or unfairly prejudicial, or unfairly discriminatory against one or more creditors.[283] The court has also set aside the DOCA where creditors approved the DOCA against the advice of the administrator and in circumstances where there were serious commercial morality and public policy concerns demanding investigation by a liquidator.[284] This combination of a primary emphasis upon flexibility for creditors to agree upon the most appropriate arrangement, with judicial supervision as a safeguard to prevent abuse, thus accompanies the liberalisation of corporate insolvency by the voluntary administration procedure in Pt 5.3A.

Just as in the United States, the flexibility of the DOCA procedure has led to its use to facilitate corporate control transactions. Again, a high profile example illustrates the practice.[285] The TEN Network Group, operator of a major Australian free to air television network, was in financial trouble after three substantial shareholders indicated that they would no longer guarantee Ten's bank facility upon its renewal. Administrators were voluntarily appointed and the major secured creditor appointed receivers. Financial advisers appointed by the receivers solicited proposals for a sale or recapitalisation of the

274. Anderson (2012) 30 *Company and Securities Law Journal* 170, 170.
275. Harmer Report, 31 [56].
276. *Ibid*, 59 [116].
277. *Beatty v Brashs Pty Ltd* (1998) 79 FCR 551, 554.
278. Corporations Act 2001 (Cth), s.444B.
279. *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636, 644–645 [11–14], 649 [25].
280. Corporations Act 2001 (Cth), ss 445A, 445C.
281. *Ibid*, .45D.
282. See, eg, *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510.
283. Corporations Act 2001 (Cth), s.445D(1)(f)(i).
284. See, eg, *Eco Heat (Vic) Pty Ltd v Syndicate Forty Four Pty Ltd* [2018] VSC 156.
285. See RP Austin and IM Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th edn (LexisNexis Butterworths, 2018), 1843 [25.090].

TEN Network Group companies. Competing acquisition proposals were lodged by the major US entertainment group CBS and two of the substantial shareholders. The CBS proposal, which included a DOCA, was preferred by the administrators and receivers. The administrators therefore convened the second creditors' meeting to consider the proposal. When the report was challenged by shareholders, the Supreme Court of New South Wales held that the administrators had power to negotiate a DOCA to be put to creditors for approval, "even if their doing so potentially narrows the range of other options that may be available to creditors".[286] Creditors retain the power to vote to adjourn the meeting if they think that their interests may be advanced by further negotiations,[287] and a range of statutory remedies could be invoked by creditors after the DOCA is executed.[288] The Court subsequently approved the transfer of shares to CBS.[289]

Australian insolvency law was said to be "critical to the survival of many companies" during the GFC and its aftermath.[290] However, even though Australia fared significantly better than most other OECD countries, personal and corporate insolvencies still rose substantially.[291] Certain aspects of the voluntary administration procedure, including the short time period for administration,[292] were criticised as undermining effective outcomes,[293] especially for large, complex reorganisations.[294] This is especially so given that one of the major advantages of voluntary administration over liquidation is the administrator's ability to avoid a "fire sale" by taking time to get the best price for the company's assets.[295] In a recent empirical study[296] of voluntary administration outcomes for listed Australian companies between 2009 and 2015, Dr Routledge concluded that most administrations ended in liquidation or a liquidating DOCA.[297] Only 26 per cent of the 81 companies analysed achieved a reorganisation or sale of their business,

286. *Re TEN Network Holdings Ltd (admins apptd) (recs and mgrs apptd)* [2017] NSWSC 1247, [39].

287. *Ibid*, [40], [60].

288. *Ibid*, [49–51].

289. *Re TEN Network Holdings Ltd (subject to a deed of company arrangement) (recs and mgrs apptd)* (2017) 123 ACSR 253.

290. James Routledge, "Voluntary Administration Outcomes: Evidence from Listed Companies During the Financial Crisis" (2017) 35 *Company and Securities Law Journal* 322, 322. See also Michael J Blazic, Rehabilitation Regime or Corporate Graveyard: Practitioners' Perspectives of the Australian Part 5.3A Voluntary-Administration Legislation (DBA thesis, University of Wollongong 2014), 25.

291. Jason Harris, "Adjusting creditor rights against third parties during debt restructuring" (2011) 19 *Insolvency Law Journal* 22, 23.

292. See Andrew Keay, "Voluntary Administrations: The Convening and Conducting of Meetings" (1996) 4 *Insolvency Law Journal* 9, 9–10; Anderson (2012) 30 *Company and Securities Law Journal* 170, 178.

293. See, eg, Colin Anderson, "Decision-making in a voluntary administration" (2004) 22 *Company and Securities Law Journal* 163, 169; Larelle Chapple and James Routledge, "External administration in corporate insolvency and reorganisation: The insider alternative" (2015) 23 *Insolvency Law Journal* 69, 70.

294. Corporations and Markets Advisory Committee, *Rehabilitating large and complex enterprises in financial difficulties* (2004), 31–4 [2.6].

295. Anderson (2012) 30 Company and Securities LJ 170, 170–171, 186.

296. Prior empirical studies include, eg: Routledge (1998) 16 *Company and Securities Law Journal* 4; Abe Herzberg, Mark Bender, and Lee Gordon-Brown, "Does the Voluntary Administration Scheme Satisfy Its Legislative Objectives? An Exploratory Analysis" (2010) 18 *Insolvency Law Journal* 181; Mark Wellard, *A Sample Review of Deeds of Company Arrangement under Part 5.3A of the Corporations Act* (ARITA 2014); Michael J Blazic, Rehabilitation Regime or Corporate Graveyard: Practitioners' Perspectives of the Australian Part 5.3A Voluntary-Administration Legislation (DBA thesis, University of Wollongong 2014).

297. Routledge (2017) 35 *Company and Securities Law Journal* 322, 323.

supporting his view that "large, complex listed firms find it difficult to achieve effective outcomes" in voluntary administration.[298] His view, and the description of a voluntary administration as "the scenic route to winding up",[299] contrasts with Pt 5.3A's primary object: maximising the chances of the company, or as much as possible of its business, continuing in existence.

The key findings of Dr Routledge's study included:[300] (i) company size is negatively related to achieving a DOCA outcome; (ii) the "busyness" of administrators is negatively related to a DOCA outcome; and (iii) action to reconfigure the board prior to voluntary administration is positively related to a DOCA outcome. Dr Routledge relied upon the second and third findings to suggest revisiting the extent to which incumbent management and other "insiders" are involved in voluntary administration.[301] Undoubtedly, these findings highlight a particular difficulty of the administrator-trustee approach in times of financial crisis, where quality insolvency practitioners are likely to have multiple demands on their time. But a detailed examination of the relative merits of a Ch.11-style "debtor-in-possession" approach is another talk for another day. Significantly for present purposes, the first finding suggests that the voluntary arrangement procedure fails to accommodate the complexity of large company insolvencies. One reason for this may be that, despite the flexibility of the regime, it simply does not provide enough time to reorganise a large, complex entity. This leads at last to the subject matter with which this paper began, the newest innovation of Australian corporate insolvency practitioners—the "holding DOCA".

THE RECENT AUSTRALIAN INNOVATION: THE "HOLDING DOCA"

The practice of employing holding DOCAs became widespread before the GFC. In 2005, a Regulatory Guide published by the Australian Securities and Investments Commission (ASIC) cautioned that any such deeds should "exclude an open-ended or very lengthy period to formulate a concrete proposal for continuing the company or its business".[302] ASIC acknowledged that "creditors (particularly of large companies) have been asked to approve so-called 'holding' DCAs", which were described as:[303]

> "a means of providing more time for a voluntary administrator (or the directors or third parties) to develop proposals for restructuring or otherwise resuscitating the company, thereby avoiding the need for the voluntary administrator to seek an extension from the court of the convening period for the second creditors' meeting under s 439A. Typically, holding DCAs do not contain any concrete provisions on the future of the company or any immediate benefits for creditors."

298. *Ibid*, 329.
299. Ron Schaffer, 'The Rise and Fall of Voluntary Administration' (2010) 10 *Insolvency Law Bulletin* 160. See also Anderson (2012) 30 *Company and Securities Law Journal* 170, 178–179.
300. Routledge (2017) 35 *Company and Securities Law Journal* 322, 335.
301. *Ibid*, 335–336. See also Adams (1993) 73 Boston ULR 581, 621; Harner, *Final Report of the ABI Commission to Study the Reform of Chapter 11* (2014), 21–24.
302. Australian Securities & Investments Commission, *External administration: Deeds of company arrangement involving a creditors' trust* (Regulatory Guide 82, 2005), 11 [1.25].
303. *Ibid*, 11 [1.23].

The usual feature of a DOCA is the distribution of the company's property to creditors. But holding DOCAs commonly provide that no property be available for distribution to creditors. A central purpose of the holding DOCA has been said to be giving control of the company back to the directors, while allowing the administrator to plan a restructure of the company.[304] Undoubtedly, it is possible to restructure a large, complex entity without the use of a holding DOCA. The court's power to extend the convening period under s.439A(6) of the Corporations Act 2001 (Cth) is one means by which more time may be given to administer and reorganise a complex entity. However, Professor Symes has suggested that:[305]

"[t]he holding DOCA can achieve the same outcome as an application to court for an extension of time and is perhaps a more 'pure' approach in that it empowers the creditors to continue to have the 'control' of the process rather than being at the mercy of the court".

A comparison of two successful, high-profile Pt 5.3A administrations—Ansett in 2002 and Arrium in 2016—shows how holding DOCAs were used to complement court procedures to ensure a more streamlined administration process.

On 12 September 2001, the Australian airline Ansett was placed into voluntary administration. The administration was extremely complex, involving 41 companies, the operations and sales of 14 discrete businesses, 133 aircraft subject to various ownership and financing arrangements, and about 350 leasehold premises.[306] 15,000 Ansett employees were affected, over 8,000 of whom were made redundant.[307] As the administrators could not achieve a sale of the airline as a whole, they proceeded to sell individual assets, including regional airlines and airports. Employee claims represented one of the largest parts of Ansett's debt.[308] Ultimately, the administration was regarded as a success—the final average payment to employees was 96 cents in the dollar.[309] However, it came at a large cost, the exact amount of which is still unknown due to missing financial reports. A 2011 *Sydney Morning Herald* investigation said that "visible or disclosed fees in the creditors' reports stand at $45.6 million. That is before disbursements. It is also before the dark period of zero disclosure in which fees range from $9 million to $30 million".[310] In the aftermath of the administration, Ansett's administrators published a paper summarising their court applications during the administration.[311] The paper

304. Jason Harris, 'Testing the limits of deeds of company arrangement' (2018) 19 *Insolvency Law Bulletin* 72, 72.

305. Christopher Symes, 'The path that makes sense: Using holding DOCAs' (2017) 32 *Australian Journal of Corporate Law* 386, 386.

306. Mark Korda and Mark Mentha, *Ansett Group of Companies: First Report to Creditors* (2002), 2-3 [1.5].

307. *Ibid*, 2-3 [1.5].

308. Anderson (2012) 30 Company and Securities LJ 170, 172. See also Joellen Riley, "Lessons from Ansett: Locating the employees' voice in corporate enterprise" (2002) 27 *Alternative Law Journal* 112, 112; Samantha Kinsey, "A Triumph for Labour Over Capital: Employee Entitlements in Insolvency in the Wake of the Ansett Collapse" (2002) 10 *Insolvency Law Journal* 132, 135.

309. KordaMentha, 'Media Release: Ansett administration makes final landing with 96 cents in the $ for employees' (2 September 2011); Anderson (2012) 30 *Company and Securities Law Journal* 170, 171.

310. Michael West, 'Mystery flight of Ansett accounts' *Sydney Morning Herald* (Sydney, 21 November 2011) www.smh.com.au/business/mystery-flight-of-ansett-accounts-20111120-1npaz.html.

311. KordaMentha, *Large and Complex Administrations: The Courts and Ansett* (2003).

described 10 separate applications, including two applications for extensions of time to execute DOCAs.[312] The willingness of the court to give directions about the propriety of administrators' actions was itself a liberalising development of insolvency law.[313] But the administrators were in the court's hands, and the back-and-forth on procedural matters must have been productive of great expense.

On 7 April 2016, administrators were appointed to the Arrium Group of companies. That group carried on a very large and complex international mining and materials business, including a highly significant steelworks at Whyalla in South Australia. 94 group companies were placed into administration, while other profitable parts of the business were not and continued to trade.[314] Arrium conducted business from approximately 160 sites globally and employed 8,662 people.[315] It was reported that Arrium owed approximately A$4.3 billion to creditors.[316] On 10 May 2016, the Federal Court of Australia made an order under s.439A(6) extending the convening period until 28 February 2017.[317] During that time, the administrators developed a strategy involving the sale of shares in at least 13 key trading companies in administration. Fundamental to this sale and recapitalisation of the business was a series of "Transaction Support DOCAs", which enabled the administrators to "align the various business units to separate legal entities by authorising the transfer of assets, employees and operations internally", allowing each business to be wholly acquired by way of share sale.[318] They were, in effect, holding DOCAs designed to "defer the decision regarding the future of the Arrium Group Companies to a later time, in line with the sale and recapitalisation program".[319] In order to overcome procedural hurdles concerning the creditors' meetings and the form of the administrators' report, the administrators sought and obtained court orders and directions approving their proposal. The Court accepted that there were "special circumstances" justifying the administrators' approach, which was held to be "both consistent with, and in furtherance of, the objects of Part 5.3A of the Act".[320]

Against this background came the *Mighty River* litigation. Mesa Minerals Ltd ("Mesa Minerals") was a mining company with key assets including a 50 per cent joint venture interest in two manganese projects. It was placed into voluntary administration and administrators were appointed. At the second meeting of creditors, a majority of creditors voted to enter a "Recapitalisation DOCA" in the form proposed by the administrators. Amongst other things, the DOCA provided for a moratorium on creditors' claims; required the administrators to conduct further investigations and report to creditors

312. *Ibid*, 7.

313. See Leon Zwier and Dany Merkel, "The scope of the court's supervisory jurisdiction under Part 5.3A: The Ansett experience" (2003) 11 *Insolvency Law Journal* 27, 37.

314. *Re Arrium Ltd (admins apptd)* (2016) 113 ACSR 302, 306–307 [5–10].

315. *Ibid*, 307 [11].

316. Amanda Walker, "The Arrium Administration breaks new ground with a novel group DOCA structure" (*Back to Black*, 22 November 2016), mcrbacktoblack.blogspot.com/2016/11/the-arrium-administration-breaks-new.html.

317. *Re Arrium Ltd (admins apptd)* (2016) 113 ACSR 302, 312.

318. Walker (*supra*, fn.317); Symes (2017) 32 *Australian J of Corporate Law* 386, 389.

319. KordaMentha, *Arrium Group Companies: Report to Creditors* (2016), 5 [1.6.1].

320. *Re Arrium Ltd (admins apptd)* [2016] FCA 1300, [27].

concerning possible variations to the Deed within six months; and provided that no property of Mesa Minerals be made available for distribution to creditors.[321]

Mighty River International Ltd ("Mighty River"), a creditor of Mesa Minerals, brought proceedings in the Supreme Court of Western Australia claiming that the DOCA was void.[322] Its claim was heard together with a claim brought by another creditor, Mineral Resources Ltd, that the DOCA was not void. At first instance, Master Sanderson dismissed Mighty River's claim and made a declaration that the DOCA was not void. The Master held: that the Deed was consistent with the object of Pt 5.3A; that the DOCA did not have make some property available to pay creditors' claims; and that the use of a holding DOCA was one "gateway" to extend the period for convening a second creditors' meeting, the other being a court order under s.439A(6).[323] Mighty River appealed to the Court of Appeal of the Supreme Court of Western Australia, which dismissed the appeals.[324]

Mighty River then appealed to the High Court. In essence, it made two submissions. First, it submitted that the Deed was not a valid DOCA, principally because it was an agreed extension of time that had not been ordered by a court under s.439A(6) and was contrary to the object of Pt 5.3A. Secondly, it submitted that the Deed should have been declared void under s.445G(2) for reasons including that the administrators had failed to form the opinions required by ss 438A(b) and 439A(4) relating to the interests of the creditors, and because the DOCA did not specify *some* property to be available to pay creditors' claims under s.444A(4)(b), or both.[325]

A majority of the High Court held that the Deed was a valid DOCA.[326] There was no violation of the terms of any of the terms of Pt 5.3A nor of its purpose. As to the consistency with terms of Pt 5.3A, the Deed had been formally executed in compliance with Pt 5.3A.[327] The Deed created and conferred genuine rights and duties.[328] It did not involve an impermissible sidestepping of s.439A(6) as it only had the incidental effect of extending the time for the administrators' investigations.[329] It was also held that the Deed was not required to be declared void due to the failure of the Deed to specify some property to be available to pay creditors' claims, and that the administrators had formed and expressed the opinions required.[330] As to the purpose of Pt 5.3A, the provision of a moratorium while Mesa Minerals' position was further assessed was consistent with the object of the Part to administer an insolvent company in a way that (a) maximises the chance of the company, or its business, continuing in existence, or (b) if that is not possible, to provide a better return for the company's creditors and members than would result from an immediate winding up of the company.[331] The joint

321. *Mighty River International Ltd v Hughes* [2018] HCA 38; 92 ALJR 822, 826 [1].
322. *Mighty River International Ltd v Hughes* [2017] WASC 69.
323. *Ibid*, [101], [108], [113–114].
324. *Mighty River International Ltd v Hughes* (2017) 52 WAR 1, 7 [5], 46 [210], 57 [259].
325. *Mighty River International Ltd v Hughes* (2018) 92 ALJR 822, 830 [29], 831 [30], 833 [41], 834 [47].
326. *Ibid*, 836 [57], [58], *cf* 838 [70].
327. *Ibid*, 831 [31–32].
328. *Ibid*, 831 [34].
329. *Ibid*, 831 [34].
330. *Ibid*, 834 [46], 836 [50].
331. *Ibid*, 831–833 [35–37] and Corporations Act, s.435A.

judgment emphasised[332] the shared premises of the provisions concerning DOCAs and those concerning schemes of arrangement,[333] which, prior to the introduction of Pt 5.3A, could also be devised with the central or sole purpose of securing a moratorium on claims.[334] Part 5.3A was not intended to step back from this flexibility that had previously been implemented.

By contrast, a minority of the High Court considered that the Deed was not a valid DOCA, and that the administrators had not formed the required opinions relating to the interests of the creditors.[335] The minority essentially considered that the practitioner innovation of the holding DOCA had swung the pendulum too far in favour of flexibility and away from the protection of creditors, since the "essence" of a DOCA was said to be that to "provide for an arrangement alternative to liquidation for the whole or partial payment or satisfaction of creditors' debts or claims against the company or, more generally, for the whole or partial resolution of creditors' debts or claims against the company by alteration of rights on one side or the other".[336] In the minority's view, the holding DOCA in the form of the Deed did not do so, and "purported to provide for no more than the continuation of the administration of the Company".[337]

CONCLUSION

The ultimate message that might be derived from this historical survey is that the liberalisation and increased flexibility in the historical development of insolvency regimes has generally been accompanied by an increased focus upon corporate governance or regulation. As insolvency regulation became more liberal, with less stringent consequences for debtors, there has generally been accompanying reform, by legislation, judicial intervention or practitioner innovation, which has seen tighter regulation of debtors or more flexible arrangements permitting creditor engagement and involvement. The courts have generally enforced or recognised those tighter controls.

The case study with which this article concluded, being the operation of the holding DOCA and the decision of the High Court of Australia in *Mighty River*, might be said to be a recent example of the long historical process of increased flexibility and liberalisation in the system of corporate insolvency regulation in Australia. As in the United Kingdom and the United States, the change in attitudes towards the incurring of debts, the development of a company rescue culture, and the constant innovation of insolvency practitioners has reduced the difficulty in accommodating the rescue of large, complex enterprises, including those that were plunged into financial distress in the aftermath of the GFC. The DOCA experience in Australia demonstrates the

332. *Mighty River International Ltd v Hughes* (2018) 92 ALJR 822, 832 [36].

333. See *Lehman Bros Holdings Inc v City of Swan* (2010) 240 CLR 509, 521 [31–32].

334. See *National Bank of Australasia Ltd v Scottish Union and National Insurance Co* (1952) 86 CLR 110, 112; [1952] AC 493, 495; *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69.

335. *Mighty River International Ltd v Hughes* (2018) 92 ALJR 822, 842 [83], 844 [91].

336. *Mighty River International Ltd v Hughes* (2018) 92 ALJR 822, 841 [77].

337. *Ibid*, 842 [83].

ongoing development of corporate insolvency laws by Parliament and insolvency practitioners who test the flexibility of statutory mechanisms. However, in another sign of counterbalance, very shortly after the *Mighty River* decision, the High Court unanimously decided in *Australian Securities and Investments Commission v Lewski*[338] that directors are under an obligation to consider and act in accordance with their duties at all stages of a decision-making process, including subsequent acts giving effect to an earlier decision. The standards to which company directors are held would provide some safeguards against abuse at any stage of a company's lifespan.

338. [2018] HCA 63; 93 ALJR 145.