The UK Rescue Moratorium and the Australian SBR

Independence and Investigation Difficulties for Practitioners

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New rescue processes have been introduced in both the United Kingdom and Australia in the last 12 months. While the passage of the implementing legislation was catalysed by the significant economic and financial impact COVID-19 has had since March 2020 in both countries, and the world, these new processes are now permanent features of each insolvency regime. Alongside these permanent changes the duration of the temporary pandemic relief measures has continued to be extended.[1]

Overview

In the United Kingdom, a new formal rescue process was enacted, in the form of a restructuring plan with a cross-class cram down in the *Companies Act 2006* (UK) *(**"Companies Act"**)* which is (apart from the cram down provisions and various other modifications) modelled on the scheme of arrangement in Part 26 of the *Companies Act*. In addition, the same legislation, the *Corporate Insolvency and Governance Act 2020* (UK), also introduced a standalone moratorium in new Part A1 of the *Insolvency Act 1986* (UK) ("***Insolvency Act***") designed to promote *informal* rescue.

The moratorium is the focus of this article. In essence, this process enables eligible companies to file for a minimum 20 business day moratorium, effective against both secured and unsecured creditors and under the supervision of an independent monitor, in circumstances where it is likely to result in the rescue of the company as a going concern. In practice, during this time, directors will work to negotiate an informal restructuring plan or otherwise position the company for a formal rescue process.

In contrast, the new small business restructuring ("**SBR**") process in Australia, which has applied since 1 January 2021 by way of amendments to the *Corporations Act 2001* (Cth) ("***Corporations Act***"), is limited solely to SMEs. It takes place under the supervision of a small business restructuring practitioner ("**SBRP**") while directors remain in possession of the company. Unlike the United Kingdom Part A1 moratorium, the Australian SBR process also expressly incorporates the development of a formal restructuring plan as an intrinsic part of its operation rather than as a distinct process that can result in an informal restructuring, a plan or a scheme, or a formal insolvency process.

Despite those differences, however, a monitor under the Part A1 moratorium and a SBRP under the SBR process face the same lack of clarity about what is expected of them in terms of their independence and investigatory duties. Given the collaborative working relationship contemplated by each of the debtor in possession ("**DIP**") modelled processes between directors and the monitor/SBRP, a broader interpretation of a practitioner's independence obligations might potentially be supported by the existing legislation. That said, in Australia, it is unlikely the courts would take this view given the traditional strict approach to the independence requirements of other insolvency practitioners, especially in the context of pre-appointment work. To date, the United Kingdom courts have not taken a similarly strict approach to independence requirements, in particular in the context of pre-pack sales in administration (but see further below).

In relation to investigations, there is a strong argument that, given the intention for Part A1 and the SBR process to operate as simple, expedient and cost-effective insolvency alternatives, it would not be feasible for a monitor or a SBRP to engage in the level of investigations expected of a liquidator or administrator. Unfortunately, that limitation of the monitor's role is not reflected in the express wording of the current legislation.

It is suggested that clarifying regulations should be introduced to provide practitioners with the certainty they require, in order to avoid a disincentive to the acceptance of future appointments and to avoid such appointments being prohibitively expensive, and instead to promote the use of the new processes in a manner that will enhance the rescue culture in both countries.

The United Kingdom moratorium

The new Part A1 moratorium is intended to facilitate the rescue and restructure of a company as a going concern. It is designed as a standalone pre-formal insolvency moratorium. It does not itself provide for the development and implementation of a restructuring plan, but rather is intended to encourage that outcome by giving a company breathing room from enforcement actions as it seeks to negotiate its future. Those negotiations may lead to an informal plan, or the company may enter into the new plan or the

1. For example, in Australia, between 25 March 2020 and 31 December 2020, the minimum statutory demand threshold was increased from $2,000 to $20,000 and the period for a debtor to respond to a demand was increased from 21 days to six months. Additionally, directors were provided with a moratorium on insolvent trading liability during that time. In the United Kingdom, in response to the economic consequences of the pandemic, since 27 April 2020 creditors have been prevented from presenting a winding up petition based on a statutory demand served since 1 March 2020 and is also prevented from presenting a winding up petition based on a company's inability to pay its debts unless the creditor has reasonable grounds to believe that COVID-19 had not had a financial impact on the company or that the company would have been unable to pay its debts irrespective of the impact COVID-19 had on the company. The periods during which these temporary measures continue to apply have been extended on a number of occasions. In the UK, the temporary restrictions on the use of statutory demands and winding up petitions, as well as further temporary relief for small suppliers from the prohibition of *ipso facto* provisions and the suspension of wrongful trading liability for directors, were extended to 30 June 2021 under the *Corporate Insolvency and Governance Act 2020* (Coronavirus)(Extension of the Relevant Period) Regulations 2021. The statutory demand and winding up petition restrictions were then further extended to 30 September 2021 under the Corporate insolvency and Governance Act

long-established scheme under the *Companies Act*, or a formal insolvency process pursuant to the *Insolvency Act*.

The moratorium is available to 'eligible companies',[2] a term that excludes important categories of companies such as banks, insurance companies, electronic money institutions, operators of payment systems, investment banks and investment firms and parties to capital market arrangements. In addition, a company that would otherwise be within the concept of 'eligible companies' cannot enter into a moratorium where the company has been subject to certain insolvency processes within the previous 12 months, although at present these criteria have been temporarily relaxed until 30 September 2021.[3]

It is a DIP model, under which the company's directors remain in office and can continue to cause the company to trade, but subject to the oversight of a monitor.

Upon an eligible company's directors filing the relevant documents with the court (there is no need for a court order[4] except where the company is already subject to a winding up petition[5] or is an overseas company[6]), the moratorium is available for an initial 20 business day period.[7] This period is then capable of being extended by the company's directors for up to a further 20 business days without creditor consent.[8] The moratorium can also be extended so that it applies for a maximum of 12 months (including the initial 20 business day period) with creditor consent,[9] or indefinitely with a court order.[10]

The moratorium is broad-based and applies to prevent enforcement by secured creditors (except in relation to the enforcement of a collateral security charge or security arising under a financial collateral arrangement), unsecured creditors and landlords during the moratorium period without the consent of the court.[11]

There are important underlying preconditions to the operation of the moratorium. Notably, the 'relevant documents' in connection with a moratorium filed by directors must include a statement from directors that the company is, or is likely to become, unable to pay its debts and statements from the proposed monitor that not only is the company an eligible company but also that, in the proposed monitor's view, it is likely that a moratorium for the company would result in the rescue of the company as a going concern.[12]

There are a number of issues limiting the effectiveness of the Part A1 moratorium in practice, arising from the wide scope of entities excluded as 'eligible' companies and the carve-outs in favour of creditors. Notably in the latter regard, debts and liabilities arising under a contract involving financial services, including loan agreements, are classified as 'pre-moratorium debts without a payment holiday' (whether falling due before or during the moratorium) that must continue to be paid for the moratorium to continue,[13] meaning that if substantial financiers do not support the moratorium, it will almost certainly need to be terminated. These limitations are not the focus of this article, which is concerned with the duties owed by the monitor, and how the current uncertainties in relation to those duties may impact on the uptake of the moratorium if left unresolved.

In addition to the requirement for a monitor to form the initial view that a proposed moratorium would likely result in the rescue of the company as a going

2020 (Coronavirus) (Extension of the Relevant Period) (No 2) Regulations 2021.

2. *Insolvency Act*, Part A1, s A2 and sch ZA1.

3. *Insolvency Act*, Part A1, sch ZA1 and the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021.

4. *Insolvency Act*, Part A1, s A7.

5. *Insolvency Act*, Part A1, s A4 (although the need for a court order is suspended until 30 September 2021 under the regulations referred to in footnote 3).

6. *Insolvency Act*, Part A1, s A5.

7. *Insolvency Act*, Part A1, s A9.

8. *Insolvency Act*, Part A1, s A10.

9. *Insolvency Act*, Part A1, ss A11-A12.

10. *Insolvency Act*, Part A1, s A13.

11. *Insolvency Act*, Part A1, s A21.

12. *Insolvency Act*, Part A1, s A6.

13. *Insolvency Act*, Part A1, s A18.

14. *Insolvency Act*, Part A1, s A35.

15. *Insolvency Act*, Part A1, s A38(1)(a).

16. *Insolvency Act*, Part A1, s A38(1)(d).

17. *Insolvency Act*, Part A1, s A34.

18. *Insolvency Act*, sch B1, para 64.

19. See, for example, the remarks of Hoffman J in *Re Arrows Ltd* [1992] BCC 121 at 123F-H and Warren J in *Sisu Capital Fund Ltd v Tucker* [2006] BCC 463 at [106]-[110].

concern (as part of the preconditions for an original filing by the company's directors), Part A1 also places a positive duty on a monitor, once appointed, to oversee the company's affairs and also to assess (presumably on a continuing basis) whether it remains likely that the continuation of the moratorium will result in the rescue of the company as a going concern.[14] The monitor also has a further positive duty to bring the moratorium to an end by filing a notice with the court if, among other things, the moratorium is no longer likely to result in the rescue of the company as a going concern[15] or the company is unable to pay moratorium debts or pre-moratorium debts for which the company does not have a payment holiday during the moratorium.[16]

Part A1 also provides that a monitor is an officer of the court.[17] A useful summary of the standards expected of insolvency practitioners as officers of the court, which derive from the decision in *Ex parte James; In re Condon* (1874) LR 9 Ch App 609, was provided recently in *Lehman Brothers (Australia) (in liq) v MacNamara* [2021] Ch 1, [35]-[66]:

- officers must not (and the court will not permit them to) act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or society would think should govern the conduct of the court or its officers;
- the standards expected of an officer of the court therefore look beyond bare legal rights and duties;
- the question is determined with reference to what is fair and just in all the circumstances and the court will intervene to prevent an officer acting unfairly (even if the officer does not act or propose to act unconscionably); and
- this principle is applied to a failure to act as much as to positive acts.

However, in determining a monitor's independence and investigation obligations, it must be the case that it is necessary to have regard to the overarching purpose of Part A1.

Unlike the new SBR process in Australia, the Part A1 moratorium does not expressly contemplate a restructuring plan, whether informal or formal, as the means for rescuing the company as a going concern (the stated aim of the Part A1 process) and for a monitor to work with the company's directors to develop and implement such a plan.

Yet, in practice, in the absence of work to develop an informal plan, or otherwise to position the company for a formal restructuring, it may well be thought to be difficult for a monitor to form the required view (being a fundamental condition for the moratorium being able to remain on foot) that a moratorium will likely lead to the rescue of the company as a going concern. In that regard, the monitor will, necessarily, need to play an active role in reviewing the company's affairs and the intentions of directors with respect to the company's future and engaging with directors to suggest ways in which a contemplated plan may be cast and refined to meet the satisfaction of the monitor. The relationship between a monitor and the company's directors, who remain in office under the distinct DIP model adopted in the Part A1 moratorium, will therefore necessarily be more collaborative than the relationship between an administrator and directors, where it is the administrator who assumes sole control of the company's affairs and takes responsibility for developing a proposal for the company's future for the consideration of creditors while directors' powers are suspended.[18]

And yet, in the United Kingdom, unlike in Australia, to date courts have taken a broad view of administrators' independence obligations and have been less willing to canvass challenges to independence, including in the context of an administrator working with directors on a pre-pack sale before being appointed. The primary motivation has been to ensure efficiency and cost-savings, with a focus on practical measures to reduce the risk of any actual conflict such as requiring independent legal advice on distinct issues. Otherwise, 'a considerable amount of time, money and effort' spent on examining a company's affairs and working towards the best outcome for creditors could be wasted, when any potential conflict could be better dealt with through proactive and effective management.[19] It remains to be seen whether courts in the United Kingdom change their approach to independence obligations once the United Kingdom Government has acted on its intention, announced on 9 October 2020, to strengthen the professional regulatory standards of insolvency practitioners in the context of pre-pack sales made by administrators to connected persons.

On the present approach to administration, it is difficult to see how there could be an objection on the basis of purportedly compromised independence where there has been pre-appointment involvement between a monitor and directors which then continues throughout the moratorium. Indeed, it would seem to be a necessity that there is such involvement.

This is the approach the United Kingdom Government takes in the non-binding 'Guidance for Monitors' ("**Guidance**") published on 26 June 2020 in connection with the new Part A1 process. In the Guidance, it is stated:

> *'Prior to the moratorium the prospective monitor will need to engage with the directors and seek information about the company's assets, liabilities and business so that they are able to assess the company's financial position, prospects and eligibility for a moratorium. This will be a good opportunity for the prospective monitor to obtain a*

list of the company's creditors, the amounts owing to them, details of any security held together with their contact details (postal and email addresses), which the monitor will need when appointed…[20]

'To ensure that the monitor can carry out the role with objectivity and independence, it is vital that any conflicts of interests are avoided or managed appropriately to safeguard the interests of all stakeholders[21]*…*

'The monitor is not prevented from taking up a subsequent appointment subject to the insolvency practitioner making an assessment of any threats to compliance with the fundamental principles.'

The Government also recommends that, as insolvency practitioners,[22] monitors comply with the new Insolvency Code of Ethics that came into effect on 1 May 2020. It is difficult to see how this will work in practice, as the Code is not adapted for the unique circumstances of a monitor, and the examples given to managing perceived conflicts occur in the context of prior involvement with a company and its directors in the case of an administrative or other receiver, an administrator, a liquidator or a bankruptcy trustee. Specific guidance in the case of monitors, recognising the enhanced level of consultation and engagement with directors that is part and parcel of the role of a monitor, would be useful in order to provide certainty for practitioners in navigating the new laws.

The management of any perceived conflict could, for example, be appropriately achieved by requiring a monitor to exercise his or her duties to conduct proper investigations of the company's affairs as part of the assessment of whether a moratorium is in fact likely to result in the rescue of the company as a going concern.

Again, however, those duties should properly be seen in the context of the nature of the Part A1 moratorium. The moratorium is not intended to be a long process, even with the extensions of time that are available, and it will inevitably not be possible for a monitor to complete the level of investigations expected of a liquidator or administrator with the benefit of a complete forensic examination of all of the company's affairs and records.

Moreover, in the Guidance, the United Kingdom Government states that the moratorium is intended to operate as a '*light touch procedure*'. Yet the Guidance offers little in terms of the standard of investigations a monitor must complete. It simply states (in the context of pre-appointment work that is required to be undertaken to enable the monitor to take his or her initial view as to whether a proposed moratorium is likely to result in the rescue of the company as a going concern), that the extent of investigations '*will be for the insolvency practitioner using their professional experience and judgement to decide on and should be proportionate to the size and complexity of the company'*.[23]

The assessment of 'likely' in relation to the prospects of the company being rescued as a going concern, which a monitor has a duty to consider before and throughout the period of the moratorium, is also unclear and adds to the uncertainty for prospective monitors.

The issues concerning independence and investigatory duties are critical for monitors. If the existing uncertainty is not resolved, there is a real concern that it will be a deterrent to practitioners accepting monitorships. Indeed, the risk for monitors is that they may face personal liability if they are found to have breached their duties, and if it is not clear precisely what those duties are and the standards of performance that are expected of monitors, the risk may become too significant to take on. That outcome would undermine the very objective of the introduction of the Part A1 moratorium in enhancing corporate rescue in the United Kingdom. The introduction of clarifying regulations in relation to independence and investigations, including the interpretation of the 'likely' criterion of satisfaction, ought to be designed to reflect that overriding objective more clearly.

20. Guidance, page 6.

21. Guidance, page 8.

22. Guidance, page 8. *Insolvency Act*, Part A1, s A54(1), which defines '*qualified person*' as '*a person qualified to act as an insolvency practitioner*'.

23. Guidance, page 6.

Australian SBR process

The new SBR process in Australia is distinctly different from the Part A1 moratorium.

While the Part A1 moratorium is a standalone process, entry into a formal restructuring plan is a necessary component of the SBR process and the enforcement moratorium that it provides for.

At the same time, however, the concept of a '*restructuring plan*' under the SBR process in the *Corporations Act* is very flexible. Indeed, the express object of the SBR process is not to maximise the prospect of saving the company or as much of its business as possible (a marked difference to the Part A1 moratorium and also the voluntary administration process in Australia) but rather, simply, to '*provide for a restructuring process for eligible companies*' which enables directors to retain control of the company's business, property and affairs while developing a restructuring plan with the assistance of a small business restructuring practitioner and then entering into that plan with creditors.[24]

Apart from that structural difference, the eligibility criteria for a SBR are much tighter than for a Part A1 moratorium. Specifically, the SBR process is limited to companies with total liabilities that do not exceed $1 million, in circumstances where the company has not been through a SBR process or a simplified liquidation process in the past seven years and current or former directors (those acting within the last 12 months) have not been a director of a company that has undergone a SBR or simplified liquidation process in the past seven years.[25]

Essentially, the process is that a SBR begins simply upon directors of an eligible company appointing a SBRP in writing, conditional on a resolution from the board that, in its opinion, the company is insolvent or likely to become insolvent at a future time and that a SBRP '*should be appointed*'.[26] The appointment triggers a moratorium on the enforcement of creditors' claims against property of the company, and the commencement of proceedings against the company or its property, absent the written consent of the SBRP or the leave of the court.[27] There is also a stay on the enforcement of ipso facto contractual rights conditional on the company's entry into the SBR process or by reason of the company's financial position while it is undergoing restructuring.[28]

In contrast to the standalone Part A1 moratorium in the United Kingdom, the moratorium during the SBR process in Australia does not apply to creditors with security over the whole or substantially the whole of a company's assets that enforce their rights within 13 business days of the appointment of the SBRP, nor to creditors that have commenced enforcing their security before the SBR begins[30] or creditors with a security interest over perishable property.[31]

The SBR process is, like the Part A1 moratorium in the United Kingdom, a DIP model, so that directors remain in office and can exercise their usual powers as they work with the SBRP to develop a restructuring plan over a 20-business day period. Once it has been executed, the plan (conditional on directors ensuring that all outstanding taxes and employee entitlements are paid) is submitted to creditors, who have 15 business days to vote on it as a single class. The plan is approved if it receives the support of at least 50% of voting creditors,[32] although it is not binding on dissenting secured creditors unless the court otherwise orders.[33] If accepted, directors then continue to work with the SBRP to implement the restructuring plan.

In relation to the specific duties of the SBRP, on the face of the legislation, the duties are less onerous than those of a monitor under the Part A1 moratorium.

Unlike the Part A1 moratorium, the appointment of a SBRP is not conditional on a practitioner forming the view that the SBR will likely result in the rescue of the company, or at least its business, as a going concern. There is also no express requirement for a SBRP to subsequently hold that view as a condition for the SBR to continue. Rather,

24. *Corporations Act*, s452A.

25. *Corporations Act*, s453C.

26. *Corporations Act*, s453B.

27. *Corporations Act*, ss 453R, 453S, 453T.

28. *Corporations Act*, s 454N.

29. *Corporations Act*, s 454C.

30. *Corporations Act*, s 454D.

31. *Corporations Act*, s 454E

32. Corporations Regulations, reg 5.3B.25.

33. Corporations Regulations, reg 5.3B.29.

the SBRP is simply required to make a declaration, once a restructuring plan has already been executed by a company and before it is submitted for a vote by creditors, whether in the SBRP's view the company is likely to be able to discharge the obligations created by the plan as and when they become due and payable.[34] A negative answer does not mean the SBR process cannot continue.

Further, the legislation states that a SBRP *may* (but not must) terminate the restructuring at any time if he or she believes on reasonable grounds that, among other things, it would not be in the interests of creditors to make a restructuring plan or it would be in the interests of creditors for the restructuring to end or for the company to be wound up.[35]

At the same time, however, although a SBRP is not, in contrast to a monitor in the UK, an officer of the court, a SBRP is stated to be both an agent[36] and an officer of the company.[37] A SBRP therefore owes the company, as with directors of the company, a range of statutory duties, including the duty to act in good faith in the best interests of the company.[38] And in times of doubtful solvency, Australian courts have held that the identity of the '*company*' corresponds to the interests of *creditors*.[39]

Accordingly, the apparent discretion to terminate a SBR where it is not reasonably in the interests of creditors could be interpreted as an *obligation* in this context. This is a matter that would benefit from clarification.

Indeed, the nature of this obligation, seen in the context of a SBRP's broader duties to the company, raises difficult questions about the extent of the investigations a SBRP must undertake to be in a position to discharge those duties and the extent of a SBRP's independence obligations.

Just as with the Part A1 moratorium in the United Kingdom, there is a tension between the strict statutory description given to a SBRP and the context in which the SBRP performs his or her duties – specifically, in developing a restructuring plan in close coordination with directors and in a very short period of time during which full investigations are simply not feasible.

These contextual issues could possibly be seen to operate to attenuate the strict duties that a SBRP would otherwise owe as an ordinary officer of the company.

In relation to independence, it is to be noted that an agency relationship has been used in Australian case law as the basis for characterising a voluntary administrator (who, in the same manner as a SBRP, is described as an agent of the company in the *Corporations Act*)[40] as a fiduciary, who owes distinct fiduciary duties to the company.[41] In turn, the courts have used the characterisation of an administrator as a fiduciary as the basis for finding that an administrator 'should have imposed on him/her the same duty to act impartially as courts of equity impose on trustees.'[42] Unlike in the UK, the courts have strictly applied these independence obligations, so that any substantial involvement between an administrator and the company before his or her appointment, as well as consultation and coordination in relation to the administration itself, can form the basis of an order replacing the administrator and/or invalidating acts performed during the course of the administration.[43]

Yet it has also been said that '*differences in the circumstances in which they are required to work (especially the speed at which the administrator must work) may affect the standard*' of independence and impartiality required to be observed by an administrator in comparison to a liquidator in Australia.[44]

Similarly, the greater speed with which a SBR process is required to be completed in comparison to an administration, and the necessary close working relationship between a SBRP and directors of the company (who remain in control of the company's affairs unlike during a period of voluntary administration), could potentially be used to justify a lesser standard of independence and impartiality for a SBRP compared to that of an administrator. Indeed, the SBRP's functions include providing advice to directors in relation to the restructuring and also actively assisting them to prepare a restructuring plan.[45]

At the same time, however, the overarching duty to act in the interests of creditors, as an officer of the company, means that there is unlikely to be any relaxation of the standard of independence in practical terms. That duty can be seen to trump, and give contextual flavour, to every act that a SBRP performs during the course of an SBR. Any perception of a conflict arising, in particular, from substantial prior involvement with a company's directors, is likely to give rise to the same challenge to the appointment of a SBRP as is the case for a voluntary administrator.

Nevertheless, this ought not to be a matter of inference and supposition from reconciling alternate provisions of the new process. Rather, it should be precisely expressed in the legislation in the interests of certainty for practitioners, directors and creditors alike.

In relation to the investigations required of a SBRP, as with a monitor under the new Part A1 process in the United Kingdom, it cannot be the case that a SBRP will be able to conduct the same level of investigations as a voluntary administrator. This view is supported by the legislative intention for the SBR process, expressed in the Explanatory Memorandum to the Corporations Amendment (Corporate Insolvency Reform) Bill 2020 but not in Part 5.3B of the Act itself, to provide a simpler, less expensive restructuring option for eligible small businesses than voluntary administration.

34. *Corporations Act*, s 453E(1)(c); Corporations Regulations, reg 5.3B.18.

35. *Corporations Act*, s 453J(1)(a).

36. *Corporations Act*, s 453H.

37. *Corporations Act*, s 9 (definition of 'officer').

38. *Corporations Act*, s 181(1)(a).

39. A company need not be *actually* insolvent before officers will be required to consider the interests of creditors in making a decision on behalf of the company. Rather, it is sufficient if there is a real and not remote risk of insolvency – see, for example, *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557, 589.

40. *Corporations Act*, s 437B.

41. *Correa v Whittingham* (2013) 278 FLR 310, [148]; *Re Eaton Electrical Services Pty Ltd (in liq)* (2006) 58 ACSR 403, [10]–[12].

42. *Commonwealth Bank of Australia v Fernandez* (2010) 81 ACSR 262, [63].

43. See *Commonwealth v Irving* (1996) 144 ALR 172 and *Domino Hire Pty Ltd v Pioneer Park Pty Ltd* [2000] NSWSC 1046.

44. *Bovis Lendlease v Wily* [2003] NSWSC 467, [133] (emphasis added).

45. *Corporations Act*, s 453E(1)(a) and s 453E(1)(b).

This view has also been supported in *obiter dicta* remarks in the only two decisions made to date in Australia in relation to the new SBR process, *Re DST Project Management and Construction Pty Ltd*[46] and *Re Dessco Pty Ltd*.[47]

Yet the new legislation expressly provides that a SBRP commits an offence if he or she makes a declaration in relation to the viability of a company under a proposed restructuring plan without making reasonable inquiries into the company's business, property, affairs and financial circumstances and/or taking reasonable steps to verify the company's business, property, affairs and financial circumstances.[48] This, along with ongoing tension in relation to role as officer of company, is a substantial source of uncertainty in practice and prevents SBRPs taking any real comfort in the potential to complete investigations to a lower standard than administrators. Again, this may serve as a deterrent on accepting appointments in the absence of further regulatory guidance.

Conclusion

Despite certain differences in eligibility and structure, the new Part A1 moratorium in the United Kingdom and the new SBR process in Australia share a common aim. They are both intended to incentivise corporate rescue by providing a more flexible, efficient and cheap insolvency process than the existing legislative alternatives. They also share a common weakness. Both processes suffer from a lack of certainty in relation to the duties owed by monitors and SBRPs, particularly in relation to their independence and investigatory obligations.

Regulatory amendments making it clear what standards of independence apply for each officer, including in the context of pre-appointment advice and other work, would be beneficial in the unique DIP operating context of both models.

Identifying the distinct investigatory obligations of both monitors and SBRPs would also resolve the tension that exists in treating each set of practitioners as officers of the court or of the company respectively, and the intention for Part A1 and the SBR process to operate as cheap and flexible insolvency alternatives.

Amendments of this nature would limit the current disincentives that exist for monitors and SBRPs accepting appointments due to the risk of being found personally liable for breaching their duties as they attempt to navigate the existing uncertainties in the interpretation of their obligations.

This is ultimately critical to ensure that the rescue objective is achieved in practice at a critical juncture in the broader economic and financial stability and future growth in the United Kingdom and Australia. ■

46. [2021] VSC 108. Steffenson JR said that '*there is some force*' to the argument that '*the level of investigation required of the restructuring practitioner in respect of the company's affairs is less than that required under Part 5.3A*' for a voluntary administrator (at [30]).

47. [2021] VSC 94. Irving JR said, in the context of a SBRP's view on the company's eligibility to undergo restructuring and the value of outstanding claims of creditors, that '*the restructuring practitioner must have reasonable grounds for ascribing a particular figure to the claim but is not, at this very early stage, required to carry out a comprehensive detailed enquiry*' (at [31]).

48. Corporations Regulations, reg 5.3B.18.