**Global Insolvency Practice Course 2021/2022**

Take Home Case Study - Module A

Name: Jason Opperman

**Flow Management**

1. **What were in your opinion the causes of financial distress at Flow Management (see e.g. Mellahi & Wilkinson, 2004)? Could the financial distress have been prevented? If yes, explain how. If no, why not?**

Although it may be argued on the basis of the facts presented in the case study that blame for the financial malaise at Flow Management should be laid at the feet of the company's management, it is my view that such an argument would be an oversimplification of the causes of the company's financial difficulties and both external and internal factors must be examined in order to ascertain the underlying causes of its financial decline. For the reasons set out below, I also argue that the company's financial distress could have been mitigated but ultimately not avoided.

While there may be disagreement as to what constitutes organisational failure, financial distress is a recognised symptom of such failure, as noted by Mellahi & Wilkinson, 2004. Identifying and examining the causes of extant financial distress should therefore be instructive in anticipating organisational failure and in identifying lessons which can be, and should be, learned and applied by management to avoid the terminal outcome of liquidation when faced with poor or declining financial performance in an organisation.

At a superficial level, three reasons are given for the financial distress experienced within Flow Management in 2013:

* the payment of unearned management bonuses;
* trading losses due to incorrect pricing; and
* inaccurate management information and reporting systems.

Flow Management Work BV (**Work BV**) and the 5 foreign subsidiaries in Spain, France, Australia, South Africa and the USA (**Foreign Subsidiaries**) were loss making and seem to have been in a financial 'death spiral' with losses increasing with each results announcement by management. In November 2013, management downgraded pre-tax profit for the period up to September 2013 from a profit of €8 million to a loss of €5.4 million while expecting a profit to be made again from January 2014 due to price increases and spending cuts. Then in December 2013, Flow Management's total losses, including those incurred by its subsidiaries, were disclosed as being €23.1 million. A relative short time later, on 20 December 2013, the company announced an actual loss of €36.4 million. Rather than the expectation communicated to the Banks on 16 November 2013 that the company would return to profitability from January 2014, by 20 December the result for 2014 was estimated to be a loss of €5.7 million.

From the perspective of the Banks, the constant cycle of bad news and declining results announced by management makes it almost irresistible to conclude that management was to blame for the company's financial distress. In my view, however, the integrative framework of determinants of organisational failure provided by Mellahi & Wilkinson is an important and valid lens through which to examine the causes of Flow Management's parlous financial state. Mellahi & Wilkinson believe a better understanding of organisational failure is developed through a comprehensive analysis of the interaction of external and internal influences in relation to an organisation and they combine the theoretical principles and ideas developed by the separate deterministic and voluntaristic schools of thought.

More specifically, the factors which are internal to the organisation, such as the perceptions and decisions of management, must be examined in the context of the environmental and ecological influences impacting a business. In other words, the behaviours and attitudes of management should be considered within the broader context in which Flow Management was operating in order to better assess the root causes of its financial distress. I first turn to examine the actions of management in more detail before considering the broader context in which the organisation was operating in 2013.

There is clear evidence in the case study of mismanagement at a basic accounting, operational and systems level. For example, in 2013, financial information was inaccurate and misleading due to errors in a cost price calculation resulting from a "formula error" in a spreadsheet coupled with a failure to periodically check the calculation against real costs, resulting in prices being too low and trading losses being incurred. The errors in the accounting information and pricing formulas were avoidable and the financial implications, namely lower revenue and profit, as a result of not charging appropriately high enough prices for the company's products and services could have been prevented by management.

Further, management failed to adequately perceive and understand the willingness of the organisation's customers to pay for its products and services. This is illustrated by the fact that Flow Management's main clients agreed to price increases and only a few negative responses were received when approximately 5,000 clients were informed that prices would increase. Management also failed to minimise costs as demonstrated by the savings which were expected to be realised through improved loss recovery, higher excess premiums and savings on car repairs.

Management's flawed perception of the revenue and cost factors of the business in conjunction with the decision to pay bonuses and the operational inadequacies and system flaws demonstrates a degree of culpability on the part of management which manifested in the organisation's substantial losses. That management is at least partially responsible for those losses and the organisation's financial distress is underscored by the conclusion of an independent turnaround consultancy agency that, based on market share and turnover, the company is viable. In short, there is a basis for concluding that the causes of financial distress emanated from management rather than external conditions given that the business is said to have been operating properly and there was market demand for its products and services.

While I accept that the payment of bonuses to management at a time when Flow Management was not making a profit was clearly a bad decision and exacerbated the company's cash flow problems, the fact that the company was not sufficiently profitable in the first place to pay bonuses in my opinion speaks of a more fundamental cause of financial distress.

One way to test whether a factor is, in fact, causative of an outcome is to remove or neutralise that factor and consider whether the same or a similar outcome is produced. In the case of Flow Management, prices were increased and reporting systems were gradually improved yet the business continued to incur losses throughout the case study. The fact that the company increased its prices and took other steps to improve its financial performance and cash flow position during the stabilising phase (Adriaanse & Kuijl, 2006 (at 140)) to little or no avail suggests that the strategies and measures implemented by management were inappropriate, insufficient or poorly executed or, alternatively, there were other reasons for Flow Management's financial distress.

Putting aside the potential internal causes of the company's financial distress to consider other possible explanations, the environmental and ecological factors discussed by Mellahi & Wilkinson provide a broader picture of the context in which Flow Management's financial distress may have arisen. Those factors include technological change and uncertainty, regulatory change, demographic shifts, macro-economic factors, organisation size and age and industry life cycle.

An obvious starting point is computer technology and booking systems. Technological innovation during the 2000s disrupted many industries and vehicle leasing was not immune. One of the external shifts taking place in the sector around 2011 to 2013 included the advent and growth of ridesharing which was enhanced by the application of Global Positioning System technology, smart phones and electronic payment systems.[[1]](#footnote-1) The creation and growth of organisations such Uber, Lyft and Didi must have had an impact on Flow Management's existing business model and customer relationships.

I agree with Anthony, 2016[[2]](#footnote-2) that it is necessary for an organisation in an industry faced with technological disruption to go further than observing and deploying such new technology. Instead, an organisation must truly embrace the new business model opened up by the technology. It is possible, if not likely, however, that management failed to adequately perceive those external factors impacting Flow Management's business model and plan and implement internal changes to adapt to the consequential threats and shifts. But even if the changes were observed and synthesised into the organisation's strategising and planning, the onset of those external changes may have been so rapid that the company would have inevitably experienced financial distress. The task facing management would have included replacing Flow Management's existing and 'hard baked' business model for vehicle leasing, the type of which had been in existence probably since at least the 1980's, in an organisation with 3,000 employees, 200,000 cars and 5,000 clients. The enormity of this challenge should not be underestimated.

Even if Flow Management's financial distress had been mitigated by better management decisions and improved information systems, inevitably the effects of disruption were an external factor which required the company to quickly adapt and to adopt both the evolving technology and the new business model enabled by it in order to survive. In the debate of financial distress versus economic distress[[3]](#footnote-3) as the cause of organisational failure, I believe the combined forces of Schumpeter's 'creative destruction' and Adam Smith's 'invisible hand'[[4]](#footnote-4) were irresistible in the case of Flow Management and that economic distress would ultimately have caused Flow Management's downfall and was the cause of its financial distress.

2. **What are in general advantages and disadvantages of an out-of-court restructuring**

**(workout) as compared to a formal bankruptcy procedure? More specific, what are the**

**advantages versus disadvantages *in your country*?**

The advantages and disadvantages of an informal workout compared to a formal rescue attempt by way of voluntary administration[[5]](#footnote-5) conducted under the auspices of Australian insolvency law are driven by the key differences between the two alternative approaches. Those differences include:

1. Administration provides the subject company with the protection of a moratorium[[6]](#footnote-6) against the enforcement of debts and other rights by creditors and counterparties subject to certain exceptions and limitations. An informal workout provides no such protection.
2. All extant creditors of a company in administration are informed of the appointment of an administrator and have the opportunity to participate in the formal restructuring process whereas an informal workout has no such requirement and, in my experience, usually involves a limited number of significant or influential creditors and stakeholders, often the company's lenders or landlord.
3. Unlike an out-of-court restructuring, administration is a public process in the sense that notification of the appointment of an administrator must be lodged on the public register maintained by the Australian Securities and Investment Commission (**ASIC**) and the words "(administrator appointed)" must be included after the company's name wherever it appears on every document and piece of correspondence issued or executed by the company during the administration period.
4. Administration involves the appointment of an independent administrator[[7]](#footnote-7) who takes control of the company's business, property and affairs[[8]](#footnote-8) to the exclusion of the company's directors[[9]](#footnote-9). In contrast, the directors retain their powers in the case of an informal workout involving a debtor-in-possession approach to the restructuring.
5. It follows from the preceding paragraph that a director's duty to prevent a company from trading and incurring further debts if it becomes insolvent[[10]](#footnote-10) is suspended once an administrator is appointed. In an informal restructuring, directors remain subject to the duty to prevent insolvent trading, unless certain 'safe harbour' protections apply.[[11]](#footnote-11)
6. Administration allows a company to bind its creditors, subject to certain limited exceptions particularly in relation to secured creditors, to a deed of company arrangement if the majority of its creditors by value and number vote in favour of the deed proposal. An informal restructuring requires the agreement of all relevant creditors affected by the proposed restructuring to voluntarily agree and be bound by the terms of the restructuring, including any discount or 'haircut' in relation to each creditor's debt, in order for the arrangement to be effective and enforceable.

These differences mean that an informal restructuring process is likely to have the following advantages:

* It is possible to maintain confidentiality and conduct an informal restructuring in private, including the negotiation of amendments to existing facility and security arrangements, without other stakeholders, such as trade creditors, landlords, customers and employees, necessarily becoming aware of the company's financial distress and losing confidence and imposing stricter terms or increasing pricing to reflect an increased credit risk of default. A public process may also damage enterprise and asset value if prospective purchasers anticipate a forced sale or discounted price for the realisation of company assets available to repay creditors. For a publicly listed company with market disclosure obligations, a public announcement may need to be made in respect of certain material aspects of the restructuring which may make the potential confidentiality of an informal workout less relevant or important.
* Flexibility is likely to be greater in an informal workout situation compared to an administration given that the company and its creditors involved in a workout may agree and implement any lawful solution in respect of which they are able to reach a consensus. By comparison, while administration offers a degree of flexible, the range of options is confined by the requirements of Part 5.3A of the Act.
* An informal workout may be far less expensive given that administration involves a series of creditor meetings, investigations by the administrator and the preparation and dissemination of reports. These tasks result in fees and expenses that deplete the company's already scarce financial resources.

On the other hand, the disadvantages of an informal workout compared to administration include:

* An informal workout does not prevent creditors from commencing and pursuing recovery action or court proceedings. The moratorium provided by administration is a distinct advantage offered by the formal process and provides the company with breathing space to explore options for restructuring without the risk of court action.
* If the debtor company is financially distressed and insolvent, or likely to become insolvent, then the directors are potentially exposed to both civil liability and criminal sanction under Australian law for a breach of their duty to prevent the company from trading while insolvent. This means, for example, that the directors may not agree to borrow working capital during an informal workout when it is needed most at a time of financial distress.

The fact that an independent administrator will assume control of the company's business, property and affairs in a formal process but not in an informal workout could be either an advantage or a disadvantage depending on the circumstances, such as the capability and diligence of the company's management and their conduct and behaviour. If creditors have doubts about management's ability to formulate and implement a turnaround strategy or if there are suspicions of misconduct then placing the company and its assets in the hands of an independent administrator may be a material advantage for attempting to achieve a successful restructure. However, if there are no concerns regarding management and a debtor-in-possession approach is likely to increase the chances of a successful turnaround then an informal workout is obviously preferable, at least in so far as the element of control is concerned.

In the end, all of these factors must be weighed up and a decision made on balance as to the appropriate course of action for attempting to resolve prevailing financial distress while the directors continue to comply with their duties, including the duty to prevent the company from trading insolvent. It is possible that an informal workout may be initially appropriate and beneficial and that a formal administration is necessary to implement the whole or certain parts of the informal restructure, such that a hybrid formal-informal approach is the preferred process.

3. **Were the turnaround/reorganization approaches as presented in the reading material (see e.g. Adriaanse & Kuijl, 2006, Pajunen, 2006, Sudarsanam, S, Lai, J., 2001, Schmitt, A., Raisch, S., 2013) applied in this case? If yes, explain in what way. If no, detail what in your opinion should have been done differently.**

In summary, some but not all of the restructuring and turnaround strategies identified in the literature are evident in the case study. For reasons which I explain, those strategies were poorly implemented and executed. It has been said that implementation is the graveyard of strategy. In this case, the graveyard is littered with tombstones of poor execution by Flow Management's management.

In November 2013, management presented to the Banks a plan which outlined business and operational restructuring measures to stabilise the organisation by giving it "breathing space" (Adriaanse & Kuijl, 2006) and improving margin in order to return the company to profitability (Sudarsanam, S., Lai, J., 2001). Price increases and spending cuts, in particular labour costs, were the initial focus and those measures were subsequently implemented, including the redundancy of 130 employees and contractors. These types of retrenchment activities are designed to increase profitability in the short term (Schmitt, A., Raisch, S., 2013) but in my view constitute a "fire-fighting" approach to the company's financial distress (Sudarsanam, S., Lai, J., 2001) and are unlikely to have a sufficiently material impact on profitability in the medium to long term to save the company.

Funding was obviously a resource which was critical to the survival of Flow Management while it was suffering financial distress. With aggregate loan facilities exceeding €400 million, it was clear that the Banks were, both potentially and actually, highly influential stakeholders in the turnaround and restructuring of the company. Gaining their support would have improved the chances of the organisation surviving. It is not surprising then that at the first sign of financial distress in the case study (in November 2013), management was seen to be engaging with the Banks as part of a strategy of "stakeholder management" (Pajunen, 2006) commencing with the meeting in November 2013 and by management presenting its plan.

Although it is not expressly stated in the case study, management's approach of 'coming clean' by disclosing to the Banks the flaws in the financial accounts, incorrect price calculations, wrongful payment of large bonuses and, importantly, restatement of profit results (which turn out to be a loss) was an attempt to gain the support of the Banks as "governing stakeholders" (Pajunen, 2006) by creating a level of trust and a perception of confidence in management through open, active and transparent communication. This strategy was enhanced by a face-to-face meeting between management and the Banks.

Despite the negative nature of the news delivered by management, a level of support from the Banks was forthcoming as evidenced by the fact that the Banks agreed to discuss the situation without any threat of legal or punitive action. However, the Bank's used their influence as governing stakeholders to call in an accountancy firm to investigate the company's procedures and to require the reporting of actual costs and turnover.

In response to management's disclosures and operational turnaround plans, the Banks moved into the analysis phase of business restructuring (Adriaanse & Kuijl, 2006) and called in an accountancy firm to investigate the company's procedures and required the reporting of actual costs and turnover. The Banks also proposed a somewhat light-touch financial restructuring (Adriaanse & Kuijl, 2006) by requesting Lease Group Holding United Kingdom Ltd (**Shareholder**) to pay-off equity capital in order to improve the ratio of equity to total assets, being the company's solvency rate. Additional "risk-bearing" equity would have improved Flow Management's balance sheet by increasing available cash and liquidity, thereby improving the company's chances of continuing to bear the losses it had incurred without falling further into financial distress or possibly failing altogether.

After further losses were identified in December 2013, the Banks continued to pursue a strategy of financial restructuring by deciding to put pressure on the Shareholder to raise €47.5 - €50 million to repay debt and recapitalise the company's balance sheet, albeit the solvency position was not assisted by the Banks charging default interest in the meantime.

The Banks also began to look at implementing a managerial restructure (Sudarsanam, S., Lai, J., 2001). In light of the company's previous accounting misstatements, the attention of the Banks was focused on the CFO, whose replacement was announced in January 2013. The CEO was also replaced by the board of the Shareholder shortly afterwards. These changes may be viewed as a strategy of stakeholder influence (Pajunen, 2006) with the Banks having the most significant say in relation to the survival of the company from a resource dependency perspective and also by reason of their relatively central position as a 'governing stakeholder', making their support of management critical to the company's survival. By August 2014, as a consequence of the positive results associated with the change in CEO and CFO, the Banks' perception of management improved markedly and they ultimately agreed to a standstill in June 2014. This suggests the strategy of stakeholder influence was, in fact, successful.

In the meantime, managerial and financial restructuring continued to be a focus in March and April 2014 with the Shareholder providing funding in the form of a €10 million loan on the basis that interest would be capitalised, presumably to assist with the company's cash flow difficulties. In my experience, further debt funding in the midst of financial distress is questionable as it does not address an undercapitalised balance sheet in the medium to long term even though it may temporarily help to relieve a company's cash flow pressures in the short term.

It was not until May 2014, that asset restructuring (Sudarsanam, S., Lai, J., 2001) and recovery activities (Schmitt, A., Raisch, S., 2013) form part of the turnaround strategy with the company's product-range being reassessed and shares of the companies outside the Benelux-countries to be sold off. There is an indication in the case study that these activities were planned but may not have been implemented simultaneously or at all. In my view, the plan to increase turnover and make large "cutbacks" while changing the company's product mix and also selling shares of non-Benelux companies and foreign branches would be difficult for the company to implement simultaneously given the combination of retrenchment and recovery activities (Schmitt, A., Raisch, S., 2013) required a type of 'cognitive dissonance' in the minds of management. Contemporaneously achieving these retrenchment and recovery strategies was most likely beyond the capability of management given they were already struggling to effect existing business-as-usual strategies. Such a duality of approach would most likely require a turnaround specialist with particular cognitive, behavioural and emotional skills (ibid, in particular, at 1239).There is also mention in the case study of the sale of "surplus assets" and the possibility of reinforcing (Adriaanse & Kuijl, 2006) the company by selling Flow Management Holding BV (**HoldCo**) to a financially healthy party.

At the end of June 2014, poor execution of operational strategy eventually caught up with the company, despite the managerial restructuring, when the delay in the reorganisation in the form of price increases and cutbacks caused continuing losses. Ultimately, options for a financial restructuring or divestment and retrenchment of assets were evaluated by the Banks.

In my opinion, insufficient attention was given by management and the Banks at an early stage of the restructuring process to a recovery strategy and asset restructuring (Sudarsanam, S., Lai, J., 2001) and repositioning (Adriaanse & Kuijl, 2006). I believe these strategies could, or should, have been implemented simultaneously with the company's retrenchment activities (Schmitt, A., Raisch, S., 2013). In particular, management did not appear to analyse the company's business in terms of the individual strategic business units which make up the overall group and assess whether some of those units should be divested, grown with further investment or enhanced by the acquisition of other businesses with the same or complementary strategic positioning or assets. By way of example, divesting one or more of the company's short leasing, real estate or truck repair divisions may have freed up capital for the Shareholder to repay debt, reduced the company's losses or removed a distraction for management which was consuming valuable time required in the core business of car and truck leasing. In late 2013, the Shareholder offered to sell 350 cars to improve the solvency rate, being a rudimentary divestment strategy, but there was no evidence of any critical review of the company along strategic business unit lines.

4. **Banks C and D seem to frustrate the process at a certain point. What could have been the (rational and/or opportunistic) reason(s) for them to behave like that? What would you have done in that situation in your role as advisor of the other two banks?**

Stakeholder influence is dynamic during a turnaround process and recognising changes in influence is critical to the chances of an organisation surviving a financial crisis (Pajunen, 2006). Examining the influence of the Banks as a stakeholder group is instructive to a point, but the inter-relationships within a company's stakeholder network are equally important for understanding the degree of influence a stakeholder has in relation to the survival of the organisation.

The dynamic and inter-connected nature of stakeholder influence is highlighted in the 'rogue' behaviour of Banks C and D. In early 2014, the Shareholder was considering a restructure of the company's foreign subsidiaries and the possibility of recapitalising the balance sheet by injecting further equity and appointing a new CFO. The Banks and management were also committed to working together with a recognition that a joint approach by the Banks was preferable and an intention to sign a standstill agreement by 31 March 2014. There was an expectation that the Shareholder and management would not commit to their financial, managerial and organisational restructuring plans until "*the banks act as one party*". Similarly, Banks A and B perceived that a lack of cooperation from Banks C and D would put at risk the recapitalisation and other restructuring measures.

From mid-February 2013 to the end of March 2013, despite the clear importance of a unified approach by the Banks, there was friction and a lack of cooperation between the two groups of Banks A and B and Banks C and D and a standstill agreement was not executed at this time. I separately address below each of the possible rational and opportunistic reasons for Banks C and D not cooperating in signing a standstill agreement.

First, the Banks lacked confidence in management and this was "*most specifically felt by the bankers of C and D*". Positive personal relationships between management and stakeholders improve the probability of a successful turnaround and survival (Pajunen, 2006; see, in particular, Proposition 3 (at 1281)). It was rational for Banks C and D to resist compromising or deferring their rights by way of a standstill agreement if they perceived existing management to have been the cause of the burgeoning losses, delays in negotiating and implementing a solution and the company's difficulties more broadly. Frequent and open communications by management assists in building personal relationships with stakeholders and improve the chances of a successful turnaround (Pajunen, 2006; see, in particular, Proposition 2 (at 1280)).

Secondly and possibly as a result of the first point, consensus on long term goals may not have existed between the Banks for reasons which may have included that management had not, or may not have been perceived by Banks C and D to have, brokered a sufficient understanding of the support which Banks A and B, the Shareholder and other stakeholders were willing to provide (Pajunen, 2006; see, in particular, Propositions 4 and 5 (at 1281 - 1282)).

Thirdly, Banks C and D may have been exerting tactical pressure on the other stakeholders to move the restructure forward. This explanation is consistent with a threat by Banks C and D at the end of June 2014 to "*cancel the credit (it later emerges that this was somehow done to give off a signal to the company to hurry up)*."

Fourthly, the economic interests of Banks C and D may have been materially misaligned with the interests of Banks A and B. On one hand, the interests of the Banks were aligned in their desire to see the company survive in order to facilitate the (whole or partial) repayment of the outstanding loan facilities. On the other hand, however, the Banks were also competitors in the broader debt market with separate commercial interests and imperatives. They were also competing for the same financial resources of the company to repay their loan facilities.

Their economic interests may also have diverged if C and D had materially different exposures to Flow Management than A and B and therefore have had more or less 'skin in the game' in achieving a successful turnaround. If their exposures were significantly less than A and B, then C and D may have been willing to put at risk the success of an overall turnaround in order to press for an early outcome. A rationale for including all creditors in a class in a standstill arrangement regardless of the size of their exposure is the long term benefits to be gained from mutual support and cooperation between members of the class.[[12]](#footnote-12)

Alternatively, Banks C and D may have been misaligned with Banks A and B by reason of subordination of security and ranking of debt repayment. In addition to the exposure that C and D had in relation to working capital provided to Flow Management, it appears they had also provided additional working capital separate to Banks A and B and were subordinated to them based on the restructure agreement signed on 4 July 2015 which was said to "reflect the relative positions of the financiers involved" and their "haircut" in relation to this additional working capital to the tune of €32.5 million which was entirely written off as a term of the agreement.

Another point of divergence between Banks C and D and Banks A and B may have been in relation to the flaws in the security pledges which were identified, noting the indication in the case study that, "*It is agreed that an agreement will be signed no later than 31 March 2014 (in this way, there is also sufficient time to solve the legal problems with regard to the pledges).*"

Finally, for some or all of the four preceding reasons or more opportunistically, Banks C and D may have been holding Banks A and B to ransom by not cooperating in order to encourage or force A and B to buy out C and D at the maximum possible price or minimum discount to their par debt. If so, this strategy could have worked as the case study indicates that in about May 2014, "*banks A and B are investigating whether it would be possible to buy out banks C and D with a 15-20% discount, in order to act more decisively now that there (still) is no standstill agreement.*"

5. **Which of the eight principles of the ‘Statement of Principles for a Global Approach to Multi-Creditor Workouts II’ can be found in the workout process of Flow Management (explicit or implicit)?**

The eight principles contained in the Statement of Principles (**Principles**) are evident at various times throughout the case study, more so in spirit than as a clear expression of intention from the time at which the Banks were first invited by management to a meeting on 16 November 2013 and much more expressly when the formal standstill agreement was signed by the company and the Banks in the middle of August 2014. I explain the circumstances which gave rise to the express or implied application of the Principles by way of the following three stages which led to the signing of the restructuring agreement on 4 July 2015.

1. *First Stage - Inquiry* (December 2013)

In the period immediately following the meeting on 16 November 2013 at which management disclosed to the Banks the financial irregularities and indicators of financial distress, there was a preparedness on the part of the Banks to cooperate and coordinate so as to allow time to obtain and evaluate information consistent with the First Principle. Specifically, the Banks "*agree to discuss the company situation*" and "*it is decided that action must be taken jointly and in a controlled manner*".

Although there was no formal standstill agreement preserving the relative positions of the Banks consistent with the Second Principle, the Banks impliedly agreed to 'sit on their hands'. This can be seen from statements in the case study such as, "*Although formally the banks have sufficient legal reason to terminate the credit agreements, this is not done*" and "*legal action will not yet be taken against the company, pending the final report from the consultancy agency*".

A consistent view was being formed between the Banks in December 2013 and information was obtained and evaluated, but it was limited. For example, "*an accountancy firm (not being the company’s auditor) is called in to investigate the procedures within the company*". Advisors ("*recently hired independent turnaround consultancy*") were retained to assist with the evaluation of information provided by the company. Management was also acting in a manner consistent with the Fifth Principle that the debtor should provide and allow reasonable and timely access to relevant information.

Further information is required to determine whether the charging of "default interest" unfairly prejudiced one or more of the Banks, inconsistent with the Second Principle, given the potential for differing default rates, but all four Banks seem to voluntarily agree to this in any event. The Banks also refrained from reducing their exposure on the basis that "*a scheduled repayment of € 35 million on 31 December 2014 which will not go ahead and with regard to which the banks have given their (implicit) permission*".

1. *Second Stage - Negotiation* (January 2014 - July 2014)

In early 2014, the Banks commenced the early stages of their restructuring negotiations with the borrower and could see the value of coordination, but when it comes to formalising their cooperation the Banks only agreed to agree, noting "*It is agreed that an agreement will be signed no later than 31 March 2014*". It is not apparent from the case study that a representative or "coordinator" was selected by the Banks or an advisor appointed to represent them in their interactions with management and the Shareholder, consistent with the Fourth Principle. In my experience, the appointment of a representative and common advisor at this preliminary stage can make a material difference to the outcome of a restructuring. In fact, the interests of the Banks would have been better served by expressly agreeing to an express set of protocols for working together as a group consistent with the Principles. If they had done so, then the restructuring process would have had a much better prospect of progressing smoothly and rapidly, without compromising the analysis or diligence required for all lenders to reach a properly informed consensus. It may have also avoided the lack of cooperation and 'rogue' behaviour of Banks C and D (discussed above in answer to Question 4 and in more detail below) and the "*friction*" between the Banks at the end of March 2014.

The need for an express understanding between the Banks at an early stage was even more acute in the case of Flow Management given that, "*the expectation is that management and the shareholder will not formally commit themselves until the banks act as one party*". The company's cooperation may also have been needed for resolving the problems with the pledge security with time undoubtedly being of the essence to minimise the risk of any remedial measures taken by the Banks in relation to their security being unwound should the company subsequently enter liquidation within any relevant claw back period (generally, 6 months in Australia).

The appointment of a Chief Restructuring Officer in May 2014 at the instigation of Bank A was a positive development and helped to facilitate the flow and coordination of relevant information, including proposals, between the borrower and the Banks consistent with the Principles. This may, in fact, have been a catalyst for the proposal put forward by the Shareholder in June 2014. However, while Banks A and B were "*open to negotiations with regard to the proposal*", the views of Banks C and D were not mentioned in the case study. The absence of an appointed representative and any express agreement amongst the Banks for coordination when it was known that the Shareholder would not commit "*until the banks act as one party*" meant the opportunity to negotiate and move forward with a recapitalisation was delayed and possibly forgone. Worse still, Banks C and D threatened to cancel their credit at the end of June 2014 and, contrary to their desire to "*hurry up*" the restructuring, their tactics probably unsettled the Shareholder and created further delay in progressing the restructuring.

1. *Third Stage - Standstill and Restructure* (August 2014 - June 2015)

It is not until August 2014, some 9 months after the Banks were called to an initial meeting with management, that a formal decision was made by the Banks to pursue a standstill. During this delay in reaching a commitment amongst the Banks to put in place a standstill and prepare sale and liquidation scenarios, the company incurred another 9 months of trading losses and the financial position became even more parlous. This meant that a recapitalisation would be more difficult and capital intensive than it should have been, once again underscoring the importance of an early agreement for coordination amongst the lenders.

Of particular importance, the restructuring proposal which was ultimately implemented was said to expressly reflect the relative positions of the relevant creditors, which is consistent with the Sixth Principle. In practice, it is a fundamental tenet of standstill arrangements and coordination amongst lenders that no lender should be advantaged by the standstill ahead of other lenders who are also a party to it.

Another important element of the Principles which is not expressly apparent from the case study is the Eight Principle which stipulates that funding during the Standstill Period ought to be accorded priority. It is, however, implied in the case study that this Principle was effectuated, noting that "*In January 2015 a total of €25 million is paid back to the providers of the (additional) working capital*". In my experience, lenders will not provide interim funding during a standstill without clear written arrangements confirming the priority and terms for repayment of such funding consistent with the Eighth Principle.

6. **Suppose it is not possible to convince other creditors to adopt the Statement of Principles in a given situation, are there any other possibilities for “soft law” to use (perhaps specifically in your country/region)? If yes, explain in what way. If not, do you see any alternative (informal) possibilities?**

The availability and relevance of 'soft laws' in a situation involving financial distress in Australia primarily depends on factors such as:

* the type of debtor;
* the type of creditor;
* the nature and size of the loan;
* whether it is an informal workout or formal insolvency process; and
* any unique or special circumstances.

I provide examples below of the 'soft law' which exists in relation to each of these characteristics and situations.

In Australia, under its laws, in its politics and in society generally, there is a strong emphasis on protecting and supporting consumers and small to medium sized enterprises and this is reflected in the guides, information sheets and codes published by various government departments and statutory bodies. For example, ASIC[[13]](#footnote-13) and the ACCC[[14]](#footnote-14) have jointly published Regulatory Guide 96[[15]](#footnote-15) which includes statements that are intended to assist creditors in understanding consumer protection laws but which could also be of assistance when voluntarily adopted as guiding principles by creditors in corporate debt negotiations. RG96 includes statements such as, "*We encourage you to work with a debtor and to adopt a flexible and realistic approach to repayment arrangements, which includes: …. recognising that debtors experiencing financial difficulties will often have a number of debts owing to different creditors, and …. ensuring that payment arrangements are meaningful and sustainable.*"

Almost invariably, a government department or statutory body will itself be a creditor of a business in financial distress and, for these purposes, will have issued publications such as information sheets to provide guidance to debtors and other stakeholders in relation to the government's approach and expectations for repayment and variation of the debt. For example, the Australian Taxation Office publishes guidelines for taxpayers facing cash flow issues.[[16]](#footnote-16) The Commonwealth Attorney General's Department which oversees the Fair Entitlements Guarantee, a scheme designed to provide a safety net for certain employee entitlements when a business becomes insolvent, has issued "Information for insolvency practitioners".[[17]](#footnote-17)

The banking industry is a particular class of creditor that has been subject to 'soft law' in Australia for some time. Of particular note is the Banking Code of Practice[[18]](#footnote-18) (**BCOP**), a voluntary code to which all of the major Australian banks subscribe. BCOP applies to individuals and small business customers[[19]](#footnote-19) and encourages those customers to be "*open*" and "*realistic*" about their financial position and subscribing banks commit to finding a "*sustainable solution*" for the customer's financial difficulties.

While there is a raft of "soft law" focused on consumer protection and small to medium-sized enterprises in Australia, there is much less 'soft law' issued by Australian government and statutory bodies in relation to large and institutional debtors at the 'big end of town'. These larger debtors are left mostly to their own devices one would assume because they are viewed by regulators and the government as sufficiently sophisticated and as having access to expert advice and resources such that they are able to negotiate and implement an informal work out with generally understood market-driven principles coupled with contractual rights.

The market-driven approach to large and complex corporate workouts is reflected in the importance of 'soft law' publications by associations such as APLMA.[[20]](#footnote-20) Many of APLMA's precedents and guides have become market standard in relation to syndicated loan facilities in the Asia Pacific region. Those publications include templates and other documents which provide terms and forms for use by APLMA members, including terms governing the enforcement of rights and debt trading by lenders together with voting requirements in a syndicated loan context.

An example of 'soft law' arising in relation to unique or special circumstances is the COVID-19-related National Code of Conduct for Commercial Tenancies - Leasing Principles[[21]](#footnote-21) which provides that landlords "*must not terminate a lease due to non-payment of rent during the COVID-19 pandemic period*" and "*must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals*".

Even if there are no 'soft laws' which might be relevant to a particular situation, there are other informal ways of achieving cooperation and forbearance amongst creditors simply by recognising and highlighting the commercial and economic imperatives of coordination amongst creditors with aligned interests and cooperation with management. As noted by Adriaanse & Kuijl (at 151-152), "*insolvency legislation, in itself, does not have a significant impact on the chances of success of a rescue operation … economic principles and managerial behaviour really make the difference*".

In practice, the creation of an ad hoc committee supported by an agreement setting out a protocol amongst committee members together with the appointment of a representative to liaise with management is an effective and common sense way to create unanimity and coordination amongst a class of creditors. renegotiating Cooperation is also achieved through the informal use of consistent documentation, such as standstill agreements, restructuring deeds and facilitation and implementation agreements, key provisions of which are repeatedly used and form a "blue print" or precedent for future restructures. When Courts are called upon to review those documents and their validity and effectiveness is tested this in turn reinforces and validates the approaches adopted for achieving those outcomes and, in effect, normalises the behaviours that led to them.

In my experience, even if the Statement of Principles is not expressly adopted by key creditors in the context of large corporate work outs in Australia, in special situations and distressed workouts involving the major Australian banks and their advisors the Principles are reflected in the behaviours expected of those creditors. This is no surprise given that 3 of the 4 major Australian banks are listed as having been represented on the committee responsible for formulating the Statement of Principles.

7. **Explain in detail the essence and result of the restructuring agreement as signed on the 4th of July 2015.**

Essentially, the agreement signed on 4 July 2015 laid out a corporate reorganisation and financial restructure which preserved the underlying business and retained existing management, including the new CRO, while replacing the previous holding entity and its balance sheet with a new financial and corporate structure. The participation and relative positions of the stakeholders were varied by the agreement and the ultimate beneficial ownership of the business and its assets was transferred to new equity holders. The restructure included elements of the four scenarios drawn up in October 2014 but did not match any one of those options in particular.

It is important to note that the substance and effect of the restructure was intended to reflect the relative positions of the financiers. In other words, debts which had the benefit of security and a higher priority of repayment were treated more favourably, for example by being preserved or refinanced in conjunction with the transfer of equity in the operating companies from Flow Management Holding BV to Flow Management II BV (**NewCo**).

A preliminary issue in respect of which the Banks, the Shareholder and management would have formed an opinion before formulating and agreeing to the restructuring agreement was the value of the business as a going concern and in liquidation. By reaching a view on the value of the business, the Banks could determine the point at which 'value breaks' in the capital stack, being the level of debt in the priority waterfall of creditors below which secured and unsecured creditors were not expected to be repaid their debt in a liquidation scenario due to insufficient assets being available to repay all of the company's debts. There is often a debate between lenders and shareholders, and amongst lenders themselves, during the course of a restructuring negotiation concerning the value of the business and its assets.

In the case of the Flow Management restructure, it was apparent that the Shareholder accepted the realisable value of the business would not be sufficient to repay the company's debts which ranked ahead of the risk-bearing capital contributed by shareholders and there would be no surplus funds available to pay a shareholder dividend or distribution after the payment of all debts of the company. For this reason, HoldCo agreed to transfer its shares in the operating subsidiaries to NewCo for no consideration.

The lower the value of the company and its assets, the further up the priority ladder the 'value break' point would be positioned. In the case of Flow Management, it appears the business and its assets, or at least the assets of Work BV over which the Banks held a pledge, were valued at approximately €370 million given that the Banks agreed to accept a "haircut" and write off all but €370 million of the working capital debt which remained outstanding. The debts which did not make the cut and which were not preserved post-restructuring included the amount of €32.5 million owing to Banks C and D which was entirely written off and €97.5 which remained outstanding to all of the Banks and was waived. The loan from the Banks for €55 million was also cancelled in full and must have been below the value threshold.

Another factor to be considered when determining the appropriate amount of debt to retain in the new entity post-restructuring, and therefore how much to write off or waive, is the free cash flow likely to be available after satisfying expected operational and trading costs from anticipated revenue. The purpose of the restructuring, namely the survival of the organisation, would be defeated if the liabilities to be retained on the balance sheet were unsustainable and would cause the company to end up back in financial distress after the restructuring had been implemented or, worse still, to never actually leave its distressed state. To avoid this self-defeating outcome, a realistic assessment of Flow Management's future prospects and financial resources had to be made by the Banks and a "right-sizing" of the debt to be carried forward on the balance sheet had to occur, despite the inevitable reluctance of the Banks to forgo any part of their debt claim that might recoverable.

While recognising that beyond a certain point the burden of the existing working capital liability is unsustainable based on future projections, the Banks also knew that there was potential upside in the business as a consequence of the debt forgiveness or forbearance they were willing to provide and, rather than allow lower ranking creditors and shareholders to take the benefit of that upside, the Banks required the balance of their debt which was to be written off to be converted to equity as a part of the overall restructuring, namely a partial debt-for-equity swap. Although the precise ratio of shares per dollar of debt given up was not specified in the case study, the relative percentage shareholdings of each of the Banks in Flow Management II was likely to reflect their relative senior secured or aggregate debt write offs.

Further, it was recognised that management would be critical to the success of the post-restructuring turnaround strategy and retaining HoldCo's new management, including the CRO, who had already achieved an improvement in Flow Management's financial results would increase the chances of the Banks receiving value and a return for their new shareholding in the business through a going concern sale. In order to incentivise management and align their interests with those of the Banks, they also received shares in Flow Management II.

In order to give the restructured business a 'clean start' and reduce the risk of any known or unknown legacy claims or historical issues arising in the future and complicating a going concern sale of the business or putting the existence of the business at risk, particularly given the previous shortcomings in the management information systems and financial reporting of HoldCo, the shares in the operating subsidiaries were transferred to a shell subsidiary, Flow Management II. Two additional actions were included in the restructuring agreement to further minimise the chances of any pre-restructure claims (other than business as usual debts incurred by the operating subsidiaries in the normal course of trading) surviving against the business. First, HoldCo was liquidated and all claims against this company were cancelled by the Banks and the Shareholder. Secondly, any claims by HoldCo and the Shareholder against Flow Management II were cancelled. The liquidation and these releases, in effect, removed the Shareholder from having any further interest in or claim against Flow Management II, consistent with the 'clean start' approach intended for the restructured business owned and controlled by the Banks and management post-restructuring.

8. **Which (potential) legal and/or non-legal cross-border issues – if any – do you recognize in the Flow Management restructuring process?**

The primary focus of the Flow Management restructuring process as outlined in the case study was the Dutch-based entities, HoldCo and Work BV, and very few details are given in relation to the Foreign Subsidiaries. However, by reason of the international nature of the truck and car leasing business controlled by Holdco with operations across multiple countries, potential cross-border issues can be identified in the restructuring process.

In considering the cross border nature of Flow Management's global business, it is helpful to consider the definition of an “enterprise group” formulated by the United Nations[[22]](#footnote-22) which includes both an "economic organization" contained in a single legal entity and "two or more legal entities (group members) that are linked together by some form of control (whether direct or indirect) or ownership". I adopt this formulation for the purposes of my analysis and initially address the cross border issues which were present in relation to the underlying international business of Financial Management, putting aside the precise legal structure for the purposes of that analysis. I then turn to focus on the impact of conducting the business through separate distinct legal entities across the five other jurisdictions where the operating subsidiaries were located.

It has been said that '*all M&A is local*', meaning the drivers of a successful merger and acquisition depend on the circumstances of the individual transaction and that generalisations do not provide useful insights.[[23]](#footnote-23) In my opinion, not *'all'* restructuring is *'local'* but a successful restructuring of a global enterprise will be influenced by the circumstances in each country in which it is implemented. In the case of Flow Management, the practical implementation of the turnaround and reorganisation approaches discussed in answer to Question 3 above must take into account domestic matters.

First and foremost, cultural issues can vary significantly from country to country and are likely to play an important part in the success of any cross border turnaround strategy, particularly in relation to operational restructuring and stakeholder influence with respect to employees. If the behaviour of management and employees in the context of global mergers and acquisitions can be shaped by national and organisational culture, with the former being more influential than the latter[[24]](#footnote-24), then there is no reason in principle why the same cultural challenges would not exist in the context of restructuring and turnaround. Both situations involve organisational change and the behaviours of employees and their willingness to be guided in their actions by management's attempts to implement strategy. The implementation of a cross border turnaround at each of Flow Management's domestic operations must account for differing local cultures and a 'one size fits all' approach is unlikely to have been successful.

The environmental and ecological factors discussed by Mellahi & Wilkinson and considered in the answer to Question 1 above, will also vary from country to country. Although technological uncertainty has been a common thread through most domestic markets for some time due to globalisation, there have been varying rates of technological adoption, particularly in developing nations. In the case of Flow Management, the external influences which were most likely present and relevant to its cross border restructuring are regulatory, demographic and economic factors. For example, regulatory differences in relation to labour laws coupled with the presence or absence of workforce unions in France, Spain and the USA could make the implementation of redundancies in one of more of those countries more or less difficult and costly for Flow Management.

A more practical cross border issue arises from Flow Management's poor management information systems. Adequate financial reporting is critical in a multinational group with decisions regarding the operational turnaround being made by senior executives who may be geographically remote from the day to day operations of the business. The group's history of poor financial reporting systems and accounting processes are likely to be exacerbated in a cross border context.

Turning now to consider the impact of the legal structure of Flow Management, it is at the stage of drawing up the four options in October 2014 when the use of separate legal entities in each jurisdiction, as opposed to foreign branches of the same legal entity across borders, is likely to have had the most impact. In particular, the outcome for the Banks in a liquidation scenario could be very different depending on the approach taken to finding the centre of main interest (**COMI**) for the separate foreign entities as a consequence of that structure. Importantly, there is concern that the concept of COMI under the recast European Insolvency Regulation does not apply beyond single entity insolvencies and in order for the same insolvency laws to apply to a group of internationally domiciled subsidiaries with a parent company headquartered in Europe, it must be affirmatively established that the COMI for each subsidiary is not the local jurisdiction in which that subsidiary is registered.[[25]](#footnote-25) In the case of Flow Management, this introduces additional risk and uncertainty for the Banks in attempting to predict the likely return in a group wide liquidation having regard to the different insolvency laws and priority regimes that would apply in multiple jurisdictions.

The implications of the legal structure and the location of COMI for each Foreign Subsidiary for the purposes of determining the return to the Banks in a liquidation scenario becomes even more acute if the Banks do not hold priority security over the assets in all jurisdictions and they are, in effect, structurally subordinated to local creditors. If one proceeding applied to the liquidation of the HoldCo, Work BV and all Foreign Subsidiaries then the Banks could be much more confident of the outcome.

Other differences between jurisdictions that could be relevant to Flow Management's restructuring and give rise to cross border issues include:

* differing tax treatments;
* financial restrictions on the payment of dividends and profits; and
* foreign investment restrictions and approvals, for example in relation to the transfer of effective control of Flow Management and the Foreign Subsidiaries to the Banks and some of the directors.

The restructuring agreement signed on 4 July 2015 avoided these legal and structural issues, at least for the time being, by not including liquidation or any other formal proceeding as part of the terms and process for reorganisation and, instead, effected a transfer of the assets (ie the shares in the subsidiaries) held at the HoldCo level to a shell company in The Netherlands, namely Flow Management II.

9. **In October 2014 four scenarios have been drawn up. Why *was* or *wasn’t* calling for a moratorium (see scenario 4) a good option given the situation at that time? [you are**

**allowed to give your opinion based on your own countries’ Bankruptcy Act; be as detailed as possible]**

Consistent with the reasons for drawing up the four scenarios in October 2014, the objective of the Australian administration process under Part 5.3A of the Act is to maximise the chances of the company, or as much of its business, continuing in existence or, if that is not possible, achieving a better return for creditors and shareholders than immediate liquidation.[[26]](#footnote-26) As discussed in the answer above in relation to Question 2, administration provides the company with the protection of a moratorium and other advantages but there are also disadvantages and those disadvantages are also relevant when comparing administration to the options of an informal recapitalisation, sale or restructuring as mentioned in scenarios 1 to 3 respectively.

The obvious benefit of a formal administration is the moratorium and 'breathing space' it provides the company and its management by imposing a stay on creditors commencing or pursuing claims and legal action against the company. At the time the restructuring options were being considered, however, there was no indication that the company was under pressure from its creditors aside from the Banks and, despite the losses the company was incurring, cash flows from the sale of surplus assets allowed the company to satisfy its day to day trade and other creditor obligations.

Selling the company in a 'controlled manner' seems more likely to have achieved a higher return than in a rapid 'fire sale' process, but the question is whether this was the appropriate comparison when scenarios 1 (recapitalisation) and 3 (debt-for-equity restructure) would also have allowed flexibility in the timing of a sale. A bridging loan from the Banks was required under scenario 4 and would have been possible in the context of an administration under Australian law but the Banks would need to have been satisfied that lending more money at that time would have improved the value of the business and their overall return. A higher return to the Banks seems highly uncertain in the circumstances, particularly given the turnaround strategy was only recently showing early signs of having a positive impact and only a slight result improvement had been seen.

The company's critical financial pressure point was its loan facilities with the Banks but all four Banks entered into a 120 day standstill agreement with the company in the middle of August 2014. This means that, as at October 2014, the moratorium provided by a formal administration did not appear to add any material benefit to the efforts to save the company.

Instead, administration would have removed control of the company from its directors and have placed it in the hands of an independent administrator at a time when the Banks were comfortable with the company's new management, including the CRO, and there were positive signs that the reorganisation was beginning to have a positive effect on financial performance with a slight result improvement. An administrator would have also conducted an investigation into the company's affairs and likely causes of its financial distress and may have questioned the timing and circumstances in which the Banks took steps to correct any flaws in their security.

Ultimately, administration could have resulted in the liquidation of the company if a restructuring proposal was not accepted by the majority of creditors and further detriment to the value of the business was likely to have been caused, leading to a lower return to the Banks and almost inevitably no return to unsecured creditors and the shareholders. The Banks had previously formed the view that, "*bankruptcy (i.e. liquidation) of the company (in Dutch: ‘Faillissement’) will negatively affect the proceeds of the assets*" and this was consistent with the impression gained by management during later discussions regarding a trade sale that, "*the takeover candidates prefer to buy the company following liquidation*". If, however, the business was not placed into administration and survived through a recapitalisation, sale or debt restructure, then ordinary unsecured creditors and employees stood to receive the full amount of their debt and entitlements ('100 cents in the dollar').

Further, the appointment of an administrator to any one of the operational subsidiaries could have created a risk of contagion whereby creditors, counterparties and employees might have become concerned about the financial standing of the overall enterprise and reacted by increasing prices and restricting supplier terms and quantities to reflect the perceived increase in commercial risk of default at a time when the business was already experiencing difficulties in generating profits. Even worse still, creditors may have commenced legal action against the other operating subsidiaries for any late payments and it may have become necessary to seek, if possible, the protection of moratoria in the other jurisdictions in which those subsidiaries were located. Such proceedings would have been distracting, costly and value destructive.

In summary, it is my view that formal administration and a moratorium was not the preferred option for Flow Management in the circumstances for removing the business from financial distress and improving its chances of survival while maximising value and the return to the Banks.

1. Hahn, R. and Metcalfe, R. (2017). The Ridesharing Revolution: Economic Survey and Synthesis. Paper prepared for *Oxford University Press* Volume IV: More Equal by Design: Economic design responses to inequality. [↑](#footnote-ref-1)
2. Anthony, S.D. (2016). Kodak's Downfall Wasn't About Technology. *Harvard Business Review*. https://hbr.org/2016/07/kodaks-downfall-wasnt-about-technology [↑](#footnote-ref-2)
3. Douglas Baird, ‘Bankruptcy’s uncontested axioms’ (1998) 108(3) *Yale Law Journal* 573, 580-583 [↑](#footnote-ref-3)
4. Smith, A., 1759. The Theory of Moral Sentiment. [↑](#footnote-ref-4)
5. The terms "voluntary administration" and "administration" are generally used to describe the laws and procedures prescribed by Part 5.3A of the *Corporations Act 2001* (Cth) (**Act**). [↑](#footnote-ref-5)
6. See, for example, sections 440A, 440B, 440D and 440F of the Act regarding the various stays on court proceedings, suspension of enforcement processes and restrictions on the exercise of rights. [↑](#footnote-ref-6)
7. Section 436A, 436B and 436C of the Act. [↑](#footnote-ref-7)
8. Section 437A(1) of the Act. [↑](#footnote-ref-8)
9. Section 437D of the Act. [↑](#footnote-ref-9)
10. Section 588G of the Act. [↑](#footnote-ref-10)
11. Section 588GA of the Act. [↑](#footnote-ref-11)
12. INSOL International. (2017), *Statement of Principles for a Global Approach to Multi-Creditor Workouts II* (at 7). [↑](#footnote-ref-12)
13. Australian Securities and Investments Commission (**ASIC**) is established under the *Australian Securities and Investments Commission Act 2001* (Cth) and regulates corporations, markets, financial services and consumer credit. [↑](#footnote-ref-13)
14. Australian Competition and Consumer Commission (**ACCC**) is a Commonwealth statutory body which enforces the *Competition and Consumer Act 2010* (Cth) and other legislation to promote competition and fair trading. [↑](#footnote-ref-14)
15. *Debt collection guideline: for collectors and creditors*, April 2021 at 27:

https://download.asic.gov.au/media/hw4nf11g/rg96-published-13-april-2021.pdf [↑](#footnote-ref-15)
16. https://www.ato.gov.au/general/paying-the-ato/if-you-don-t-pay/ [↑](#footnote-ref-16)
17. https://www.ag.gov.au/sites/default/files/2021-05/information-for-insolvency-practitioners-fact-sheet.PDF [↑](#footnote-ref-17)
18. https://www.ausbanking.org.au/banking-code/ [↑](#footnote-ref-18)
19. For the purposes of the BCoP, a “small business” has an annual turnover of less than $10 million, fewer than 100 employees and less than $3 million total debt to all credit providers. [↑](#footnote-ref-19)
20. Asia Pacific Loan Market Association. [↑](#footnote-ref-20)
21. https://www.smallbusiness.nsw.gov.au/get-help/covid-19/national-code-conduct-commercial-tenancies [↑](#footnote-ref-21)
22. UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of

enterprise groups in insolvency, United Nations, July 2012 at 5. [↑](#footnote-ref-22)
23. Bruner, Robert F., 2005, Where m&a pays and where it strays, in *Deals from hell: M&A lessons that rise above the ashes* (John Wiley & Sons, New York). [↑](#footnote-ref-23)
24. Sayed, M., 2019, Cultural Differences Impact on Cross-Border Mergers and Acquisitions Outcomes,https://www.researchgate.net/publication/336994906\_Cultural\_Differences\_Impact\_on\_Cross-Border\_Mergers\_and\_Acquisitions\_Outcomes. [↑](#footnote-ref-24)
25. van den Sigtenhorst, R., 2021. Finding COMI in Group Insolvencies: Taking a Page from the Chapter 15 Playbook. *INSOL International*, Technical Paper Series No 49. [↑](#footnote-ref-25)
26. Section 435A of the Act. [↑](#footnote-ref-26)