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## ABSTRACT

South Africa is experiencing constrained economic growth with a domestic growth rate for 2017, of less than one percent. This has dictated a harsh environment for South African businesses which are the back bone of the economy, providing much needed jobs. Based on international best practice, South African legislation allows an opportunity for recovery in the form of business rescue as an alternative to liquidation of the business.

Using qualitative, semi-structured interviews with an inductive approach a comparison was made between business rescue in South Africa and the parallel practice of voluntary administration in Australia. Since the inception of business rescue in South Africa, a relatively low success rate of 9.3 per cent has been achieved more especially compared to the 22 per cent success rate of voluntary administration in Australia.

Upon interrogation of the subject matter it has been established that the practices are procedurally alike however, the fundamental differences relate to the quality of business rescue practitioners and the regulatory body associated with such practitioners. This study proposes that adjustments to the standards that endorse practitioners which will lead to an improvement in the success rate of business rescue in South Africa.

## **KEYWORDS**

Business Rescue

Voluntary Administration

Companies and Intellectual Property Commission (CIPC)

Australian Securities and Investments Commission (ASIC)

Business Rescue Practitioner

## DECLARATION

I declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Business Administration at the Gordon Institute of Business Science, University of Pretoria. It has not been submitted before for any degree or examination in any other University. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

Muhammud Moolla

6 November 2017

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## **CHAPTER 1: DEFINITION OF PROBLEM AND PURPOSE**

### **1.1 Introduction**

Statistics South Africa reported that 1 934 businesses were liquidated in 2016 (Statistics South Africa, 2017b) which equates to nearly 162 businesses being liquidated every month. Businesses provide employment and an increasing number of failed businesses will lead to an increasing number of employees losing their jobs and a decreased demand for labour (Miles, Scott, & Breedon, 2012) thereby adding to South Africa's already high unemployment rate of 27.7 per cent, observed in 2017 (Statistics South Africa, 2017a).

### **1.2 International Rescue Regimes**

Governments around the world are currently implementing rescue regimes to salvage financially distressed businesses as opposed to the immediate termination of the business (Rosslyn-Smith, 2014, p. 2). In 2004, The United Nations Commission on International Trade Law released a Legislative Guide on Insolvency Law that promoted the rehabilitation and not the immediate liquidation of financially distressed companies (Levenstein, 2015, p. 80). Developed nations such as the United States of America, the United Kingdom, Canada and Australia have implemented rescue regimes and South Africa has responded by implementing its own rescue regime called Business Rescue (Rosslyn-Smith, 2014).

### **1.3 Business Rescue**

Business Rescue is an alternative to liquidation for companies in distress and was inserted into the Companies Act No 71 of 2008 and launched in 2011. A financially distressed company is a company that is unable to meet its financial obligations as they become due within the next six months. A company experiencing financial distress is then legible to apply for business rescue (Pretorius, 2014). All stakeholders of a company (i.e. creditors, employees, management and shareholders) may make an application via the court for the company to be placed into business rescue (Companies Act No. 71, 2008).

The objective of business rescue is to restructure the affairs of the company to maximise the likelihood of the company continuing to conduct business on a solvent

basis. This aim might be difficult for businesses to achieve and if the company cannot be effectively rescued (i.e. conduct business on a solvent basis) then the company's affairs should be administered so as to provide a better return for the company's stakeholders when compared to immediate liquidation (Rosslyn-Smith, 2014).

Upon entering business rescue, a business rescue practitioner is appointed and a temporary moratorium is placed on the rights of all the company's creditors to proceed against the company during the business rescue period. The business rescue practitioner, once appointed, must supervise the current and future affairs of the company during the business rescue. The appointed business rescue practitioner must be registered and licensed with the Companies and Intellectual Property Commission (CIPC) (Anderson, 2008).

Once the business rescue practitioner is appointed they are responsible for the affairs of the company. The practitioner must develop a plan for the restructuring of the company within a certain period (Jordaan, 2015). This plan is referred to as the business rescue plan and needs to involve the affected parties of the business (i.e. creditors, employees, shareholders, unions and debtors). The plan is presented to the creditors and they may approve or reject the plan (Companies Act No. 71, 2008, ch. 6). Once the plan is approved by the creditors, control of the company is returned to the directors provided that the business rescue practitioner feels that they are able to implement the plan. The practitioner may become involved in the execution of the plan and conclude business rescue if it is considered of benefit to the company and the eventual outcome. The practitioner feels the company needs their help the practitioner may continue his or her role until the plan is implemented and the business rescue conclude. If the plan is not approved by the creditors the company is placed into liquidation. A company being placed into liquidation may also conclude business rescue (Loubser, 2010).

Levenstein (2015), Loubser (2010), Anderson (2008), Naidoo, Patel and Padia (2017) and others conducted studies comparing South Africa's business rescue regime to other international regimes. These studies only compared the laws and literature or the views of practitioners in a single country and did not conduct a comparison on the views of the practitioners in different countries (Naidoo, Patel, & Padia, 2017). This study aims to focus on the laws, practices, procedures and the views of the professionals in South African and Australian rescue regimes.

## 1.4 Voluntary Administration

The Australian rescue regime was guided by the American and English approach and has many similarities to the South African approach (Naidoo, Patel, & Padia, 2017). The Australian regime is called voluntary administration and was launched in 1993 (Corporations Act No. 50, 2001). Laws and procedures regarding voluntary administration are included in the Australian Corporations Act of 2001.

The objective of voluntary administration in Australia, as stated in the Corporations Act, is to maximise the chances of the business continuing its existence. If the company cannot be rescued and has no chance of survival, the company's affairs should be administered in a manner that would return a better return for the stakeholders when compared to immediate winding up of the company (i.e. liquidation) (Corporations Act No. 50, 2001).

Upon entering voluntary administration, a voluntary administrator is appointed and a temporary moratorium is imposed on the rights of creditors. After their appointment, the voluntary administrator supervises and controls the company. The appointed voluntary administrator must be registered with the Australian Securities and Investments Commission (ASIC) (Anderson & Morrison, 2007).

Much like in South African business rescue, the voluntary administrator needs to develop and present a plan to the company's creditors. This plan is called a Deed of Company Arrangement and contains the current financial state of the company and a plan to restructure the company. The company's creditors accept or reject the deed. If the creditors accept the deed, the company and its administrator need to implement the changes proposed in the deed. Upon the approval of the deed by the company's creditors, the company ceases to be under voluntary administration and control of the company is returned to the company's directors. The voluntary administrator can remain as an administrator if their skills are needed to implement the changes in the deed (Anderson, 2008). If the deed is rejected by the creditors, the company is then placed into liquidation (Anderson & Morrison, 2007).

There are many similarities between the laws, objectives and procedures regarding the rescue of financially distressed companies in Australia and South Africa (Naidoo, Patel, & Padia, 2017).

## 1.5 Research Motivation

The reported success rate of businesses entering the business rescue process was only 9.4 per cent (Companies and Intellectual Properties Commission, 2016). Australia, a country with similar procedures and rules also seems to have problems regarding their voluntary administration process (Australian Government Productivity Commission, 2015). While the system is generally regarded as sound, there have been recent calls for a review of Australia's insolvency laws in order to "encourage and facilitate corporate turnarounds" (Australian Government Productivity Commission, 2015, p. 362). The Australian statistic regarding voluntary administration are as follows.

- 37 per cent of businesses are deregistered within two years of the commencement of business rescue,
- 57 per cent are deregistered within three years,
- 70 per cent are deregistered within four years, and
- 78 per cent are deregistered within five years.

Australian Government Productivity Commission, 2015

Examining the Australian statistics, it is evident that the success rate is higher than the South African business rescue procedure; the success rate of the Australian procedure is 22 per cent. With South Africa's business rescue procedures being similar to other Commonwealth countries, and especially the Australian business rescue approach (Levenstein, 2015), a question must be asked about what changes South Africa can implement to make its business rescue process more successful.

## 1.6 Research Objective

The objective of this study is to identify the similarities and differences between the two countries' (i.e. South Africa and Australia) laws and procedures regarding the rescue of financially distressed companies. The study will focus on the laws and practices as well as professionals who are currently working in the industry. Business rescue is a relatively new phenomenon in South Africa and was only implemented in 2011, voluntary

administration was implemented in Australia 24 years ago (Anderson, 2008). The objective of the study was to examine the changes that South Africa can apply to its business rescue regime to increase the success rate by examining a similar procedure which has a relatively high success rate and has been in place for many years.

### **1.7 Scope of the Research**

The scope of this research will focus on the similarities and differences between South African and Australian business rescue regimes. A comparison between the countries' laws and procedures was conducted. The countries laws, contained in the respective acts, were explored for similarities and differences. Primary data was collected from professionals in the industry to further explain the similarities and differences between the two procedures. Finally, a recommendation is made on what South Africa can learn from the differences so as to increase its success rate.

### **1.8 Conclusion**

This study seeks to benefit business and academia in South Africa by contributing to the existing knowledge of business rescue in South Africa. A comprehensive direct comparison between South Africa and Australia, including the data collected from professionals about the practice in their respective countries, may assist the South Africa business rescue industry improve its success rate. The secondary data examined and the results of the primary data collected will be presented in the following chapters.

## **CHAPTER 2: LITERATURE REVIEW**

### **2.1 Introduction**

The topic and the rationale of this research were introduced in Chapter 1. This Chapter will review the current literature available, giving rise to the research questions in Chapter 3.

For any academic research project, a review of prior and relevant literature relating to the topic is essential. An effective literature review creates the foundation for the research. The literature review facilitates the development of theory, identifies areas where extensive research exists and uncovers areas where further research is needed (Webster & Watson, 2002). The sources for the literature review include academic databases, the Acts governing the practice and current articles surrounding the topic.

The literature review for this study was conducted with multiple intentions. Randolph (2009) advises that the first intention of the literature review should be to establish a foundation for the research and demonstrate the researcher's knowledge on the research topic. This included understanding the laws and procedures as set out by the relevant authorities in the two jurisdictions regarding business rescue and voluntary administration. The next intention of the literature review was to explore the origins of the laws of the two countries, explore the procedures of business rescue and voluntary administration, examine the difference between a business rescue practitioner and a voluntary administrator and finally explore other literature pertaining to business rescue and voluntary administration which could give rise to the research questions.

### **2.2 Origins of Legislation**

The origin of legislation in the different jurisdictions is important because it forms the basis of the laws. Many scholars focus on what happens after the legislation is introduced but ignore how the laws came into existence in the first place (Sitaraman, 2015). An understanding of the origins of the laws can assist in drawing parallels between legislation in other countries and facilitate a better appreciation of new developments and their efficacy.

#### **2.2.1 South Africa**

The Cape, Natal, The Orange Free State and the Transvaal were unified in 1910 and the Union of South Africa was established. The four independent regions previously

recognised Roman Dutch Law and English Mercantile Law. These laws were practiced in the four different British ruled colonies (The Cape, Natal, The Orange Free State and the Transvaal). Roman and English statutes were used to develop the South African Law and these statutes are still used today in modern South Africa (Davenport & Saunders, 2000).

The foundations of South Africa's insolvency law can be traced back to the insolvency ordinance of Amsterdam in 1777 (Cronje, 2006). At the time, this was considered the best insolvency law. The law recognised *compulsory sequestration*, or the administration of estates by a trustee, and the rehabilitation of a creditor (Palmer, 2012).

The Cape Joint Stock Companies Limited Liability Act was enacted in 1861 and was a copy of the English Joint Stock Companies Act of 1844 and the Limited Liability Act of 1855. South Africa's first post-unification Act regarding companies was the Companies Act 46 of 1926. The Companies Act of 1926 was replaced by the Companies Act 61 of 1973 (Palmer, 2012). Business rescue as a procedure to rescue financially distressed firms first featured in the Companies Act No 71 of 2008 which replaced the Companies Act of 1973 (Companies Act No. 71, 2008).

### **2.2.2 Australia**

Australia was officially formed in 1901 and is a relatively young nation. The British first colonised Australia in 1770 and in 1778 Governor Phillip established the first colony in Port Jackson, Sydney (Lindsay, 2009). Prior to its independence, Australia was made up of several British Colonies. The law making power was held by the British Crown in Westminster, England. Due to the vast distance between Australia and England, the law making was left to the various governors appointed by the British. The Governors' decisions could only be overruled by the British Courts in London. In 1800 the residents of these colonies had shown an interest in self-governance and in 1823 the first Court and Legislative Council was formed in New South Wales (Lawgovpol, 2014). This is commonly known as Australia's first constitutional document. Parliaments were later formed in each of the six colonies: Victoria, Tasmania, South Australia, Queensland and Western Australia. The six colonies operated with autonomy and self-governance before the formation of the Federation in 1901 (Australian Government Solicitor, 2010).

In Australia, the first scheme of arrangement for companies in financial distress was developed in 1870 and was drafted from the British Joint Stock Companies Arrangement Act of 1870. In 1937, after the formation of the Federation, Australia adopted identical commercial laws from the United Kingdom. Official Management, which was called Judicial Management in South Africa, was later adopted by Australia and the system



made provisions for companies who were in financial distress to be rescued instead of being liquidated (Anderson, 2008).

On 20 November 1983, the Attorney General commissioned an enquiry into the laws regarding companies in distress. This report was specifically to examine the Bankruptcy Act of 1966 and its applications with regard to business and non-business debtors as well as the Companies Act of 1981 with regards to insolvency procedures (The Law Reform Commission, 1988). The report was published in 1988 and called the Harmer Report. The Harmer report stated that the official management procedure was rarely attempted and in 1990 recommendations from the Harmer Report were introduced as law. The insertion of part 5.3A into the Australian Corporations Act established voluntary administration which replaced official management in Australia (Anderson, 2008).

South Africa and Australia share many laws due to their common Anglo heritage. The company law regimes in both countries also have much in common. Legislation does not operate in the same manner in different social conditions however there is value in making comparisons of the legislative regime in different jurisdictions (Anderson, 2008).

### **2.3. Liquidation**

Liquidation often means the winding up or closing down of financially distressed companies. Business rescue in South Africa and voluntary administration in Australia was formed to be a viable alternative to liquidation (Anderson, 2008).

#### **2.3.1 South Africa**

Liquidation means that the business is no longer able to pay its debts. In South Africa, a liquidation order may come about as an order from the court, a request from creditors or from the financially distressed company itself (Insolvency Act 24 of 1936). The company will have to establish a final day of trading after which all trading is expected to cease. All income received after the final day of trading will be for the benefit of the insolvent estate. Creditors will also not be paid after the final day of trading. During the liquidation process it is illegal to pay creditors as a payment to a single creditor will be to the detriment of the other creditors. An affidavit is drafted and an application for liquidation is made to the High Court of South Africa. The court issues the company with a case number and appoints a liquidator to handle the company's affairs (Levenstein, 2015).

Directors of a company are expected by law to attend meetings with the company's liquidators, completely disclosing the company's affairs to the liquidators. The company's directors are also expected to attend the meetings of creditors where they could be interrogated on the affairs of the company. The meetings can be held at the High Court or the local magistrate's court. The directors are placed under oath during these meetings and may have legal representation (Levenstein, 2015).

Directors of the company in liquidation relinquish control of the company, handing over to the liquidator. The assets of the company fall under the control of the master of the court until the appointment of the liquidator. The liquidator proceeds to dispose of these assets. The proceeds from these assets are used to pay the creditors. Secured creditors are paid before unsecured creditors (Wood, 2007).

Liquidators in South Africa are compensated from the proceeds of the revenue received from the assets. It is standard procedure that the liquidators are compensated prior to payment of the creditors. The insolvency act states that liquidators are remunerated at a rate of three per cent for immovable property, ten per cent from the sale of movable assets and one per cent of cash in the estate (Chief Masters Directive 6 of 2009 South Africa). Liquidation proceedings are expected to take between six to 18 months, but can take many years depending on circumstances (Levenstein, 2015).

### **2.3.2 Australia**

A company in Australia is deemed insolvent when it cannot pay all its debts once they are due for payment. Companies cannot trade once they are insolvent and penalties apply for companies who trade during insolvency. It is the director's duty to comply with the laws regarding insolvent companies. A director is expected to inform all parties if he/she believes there is a risk of insolvency. Directors' duties during insolvency are set out in section 588g of the Corporations Act. It is also a director's duty to keep complete and up-to-date financial records. If the records are not complete the company is deemed insolvent from the date of the incomplete records. Directors have been prosecuted for allowing companies to incur debts while the companies were deemed insolvent and directors have been personally liable for these debts (Australian Securities and Exchange Commission, 2017).

When a director deems a company to be insolvent it is their duty to appoint an insolvency practitioner to assess the financial situation of the company. Before a company is placed in liquidation, a voluntary administrator can be appointed to administer the affairs of the company. The aim of the voluntary administrator is to administer the affairs of the company in a way that results in a better return to creditors than they would have received if the company had been placed in liquidation. If the company cannot be restructured it is then placed into liquidation (Australian Securities and Exchange Commission, 2017).

Directors of the company lose control of the company during liquidation. The liquidator is appointed and all the assets are under their control. The directors do however still have responsibilities and duties during the liquidation process. The directors must inform the liquidators of the company's assets and liabilities. It is also compulsory for the directors to attend creditors meetings, during these meetings the directors are questioned under oath (Australian Securities and Exchange Commission, 2017). Directors of a liquidated company can remain as a director of another company, however if two of a director's companies go into liquidation within seven years and the creditors receive less than half the money that they are owed, the director may be disqualified from being a director of any company for a period of five years (Australian Securities and Exchange Commission, 2017).

Unlike South Africa, the liquidators and external administrator's fees are not prescribed by the courts as stated in section 2.3.1. The fees may be calculated using one of many different methods. The fees may be calculated on the basis of time spent by the external administrator and their staff, a quoted fixed fee, based on an upfront estimate, or a percentage of asset realisations. These fees are approved by a resolution of the creditors (Australian Securities and Exchange Commission, 2017).

## **2.4 Alternatives to Liquidation Before Business Rescue and Voluntary Administration**

Prior to voluntary administration, which was only introduced to Australia in 1993, and business rescue, which was introduced in 2008 (Anderson, 2008), there were formal and informal measures to restructure a financially distressed company (Levenstein, 2015).

### **2.4.1 Judicial Management in South Africa and Official Management in Australia**

Prior to business rescue being incorporated in the Companies Act of South Africa and voluntary administration in Australia, judicial management and official management was used in the respective countries in an attempt to salvage companies. The aim was to restructure companies in distress and these laws offered a mechanism to do so (Anderson, 2008).

Judicial management was seen as a breakthrough and considered a progressive law when it was introduced in South Africa in 1926. In 1961 Australia formulated a law based on the South African judicial management system, calling it official management (Anderson, 2008)

Judicial management and official management placed the company in the hands of an independent judicial manager who would manage the company affairs under the supervision of the courts. The court would only grant a company permission to be placed under judicial management if there was a great possibility that the company would eventually become a successful going concern. The application for judicial management would be brought forward by a creditor of the company as an alternative to liquidation (Loubser, 2010).

The official management process was replaced with voluntary administration in the Australian Corporations Act in 1993 (Levenstein, 2015). It remained in the South African Companies Act until it was replaced by business rescue in 2008 (Loubser, 2010).

#### **2.4.2 Corporate Informal Workouts**

Prior to business rescue being introduced in South Africa and voluntary administration in Australia, judicial and official management were the only official mechanisms available to financially distressed companies. Unfortunately, with the limited success of judicial management many companies were still liquidated (Levenstein, 2015). Liquidation of companies is a relatively time consuming and complicated procedure with the eventuation of the company being sold off or closed (Wood, 2007). The failure of judicial management in South Africa and official management in Australia led to companies or individuals instituting informal restructuring agreements with their debtors. Financial institutions or major creditors would form a consortium of creditors and agree to certain conditions to fund the financially distressed company. This was done as an alternative to liquidation or judicial and official management. This agreement was known as an 'Informal Creditor Work Out' model. It turned out to be a feasible option regarding the

rescue of a company in financial distress and became popular in South Africa even though it was not legislated in the Companies Act of 1973 (Levenstein, 2015).

The practice of informal creditor workouts was not regulated, resulting in a number of points of concern. A moratorium or stay on the creditors' claims could not be instituted and it was difficult to establish an agreement between all the creditors as the creditors, once notified of the distressed position of the company, could apply for the business to be formally liquidated. Once the company was in distress and the creditors had been informed, the liquidation laws allowed for any creditor of a company to bring upon liquidation proceedings, this meant that 100 per cent of the creditors had to agree to the informal workout (Levenstein, 2015).

The smaller creditors and other suppliers of the financially distressed company were often not notified of the informal credit workout and this could place this uninformed group of creditors at a disadvantage. The employees were also often not informed of the credit workout and if the company needed to decrease the number of employees, careful consideration would be required to avoid a contravention of the stringent South African labour laws (Levenstein, 2015). Despite being faced with similar challenges all around the world, informal workouts are still in practice today in both South Africa (Levenstein, 2015) and Australia (Commonwealth of Australia, 2014).

## **2.5 International Corporate Rescue and Insolvency**

Corporate rescue regimes are not exclusive to South Africa and Australia and many other countries such as Canada, the United States of America and England also have corporate rescue regimes. The rescue of corporations in distress involves a variety of aspects and stakeholders. This is further complicated by a number of companies having operations in many different jurisdictions with different laws. Corporate rescue mechanisms worldwide have been drafted, taking into account the laws of a number of different countries, in order to establish the best practice for business rescue (Levenstein, 2015).

### **2.5.1 International Best Practice**

The United Nations Commission of International Trade (UNCITRAL), a branch of the United Nations (UN), was established to remove and reduce the obstacles to international trade by harmonising the laws of different countries. A Legislative Guide on

Insolvency Law was created by UNCITRAL in 2004 with the goal of encouraging the adoption of effective national corporate insolvency regimes (Levenstein, 2015).

UNCITRAL identified eight key themes with regard to a successful insolvency regime.

The eight themes are

- The provision of certainty in the market to promote economic stability and growth,
- The maximisation of value of assets,
- Striking a balance between liquidation and restructuring,
- Ensuring equitable treatment of similarly situated creditors,
- Provision for timely, efficient and impartial resolution of insolvency and rescue procedures,
- The preservation of the insolvent estate to allow equitable distribution to creditors,
- Ensuring a transparent and predictable insolvency law that contains incentives for the gathering and dispensing of pertinent information, and
- The recognition of existing creditor rights and establishment of clear rules for the ranking of priority claims.

(United Nations Commission on International Trade Law, 2010)

## **2.6 Business Rescue and Voluntary Administration**

Anderson (2008) concludes that the objectives and processes of Australia's voluntary administration are almost identical to those of South African business rescue procedures. This section aims to cover the stakeholders, the rescue plans, the entry into administration, the terminations of proceedings and the practitioners of the business rescue regimes of South Africa and Australia.

### **2.6.1 Business Rescue Introduction**

The application of Business Rescue in South Africa has brought it in line with modern jurisdictions with the aim of striking a balance between creditors and debtors. The laws were also adopted in line with the eight themes described by UNCITRAL. Chapter Six of the Companies Act aims to meet the needs of a modern South African economy, while providing a mechanism of rescue for financially distressed companies that balances the rights of all the relevant stakeholders (Stein & Everingham, 2016).

The Companies Act, in line with international best practice as set out by UNCITRAL, also makes it easier for companies in financial distress to be rescued and avoid liquidation,

continuing as a commercially viable company and thereby preserving employment and contributing to economic growth. Ultimately, a company that is wound-down or liquidated in South Africa has a negative effect on GDP (Levenstein, 2015).

The implementation of Chapter Six in the Companies Act means that South Africa now has an effective approach to company restructuring and turnarounds. The new laws enable companies in distress to be restructured in an effective manner and continue trading. Business rescue also allows for a company to be wound down or sold if the process can achieve a better return for the company's creditors when compared to liquidation (Conradie & Lamprecht, 2015).

The Companies Act of 2008 defines business rescue as a procedure to facilitate the rehabilitation of a financially distressed company. Business rescue facilitates the rehabilitation of a company by facilitating the installation of a temporary supervisor, who administers the affairs and manages the assets of the distressed company (Companies Act No. 71, 2008).

During business rescue there is a temporary moratorium on the claims against the company. This allows the supervisor time to implement a plan of restructure, related to the affairs of the company including the property, movable assets and liabilities associated with it, in a manner that will maximise the likelihood of the company continuing to exist on a solvent basis. If the company cannot be salvaged and cannot recover and operate as a going concern, business rescue makes provision for the assets of the company to be dispersed in a manner that would yield a better return for the company's shareholders and creditors (Companies Act No. 71, 2008).

### **2.6.2 Voluntary Administration Australia Introduction**

Voluntary administration in Australia is a mechanism to provide a financially distressed company a chance to recover and trade out of difficulties when a company is insolvent. A qualified independent supervisor is appointed and takes full control of the company in an attempt to save it (Blazic, 2014).

During Voluntary Administration there is a moratorium on claims against the company. This enables the independent supervisor to develop and implement a plan to save the distressed company. If it not possible to save the distressed company, voluntary

Administration provides a mechanism to administer the affairs of the company in a way that results in a better return to creditors and shareholders than they would have received if the company had been placed into liquidation (Australian Securities and Exchange Commission, 2017).

### **2.6.3 Entities that can enter Business Rescue and Voluntary Administration**

#### **2.6.3.1 South Africa: Entities that can enter Business Rescue**

Business Rescue proceedings are contained by the South African Companies Act of 2008. This act applies only to registered companies (Close Corporations, Private and Public Companies) and does not make provision for natural persons or other entities such as trusts (Companies Act No. 71, 2008).

#### **2.6.3.2 Australia: Entities that can enter Voluntary Administration**

Legislation related to voluntary administration is included in part 5.3A of the Australian Corporations Act of 2001 and only makes provision for registered companies to be placed in administration. Legislation pertaining to personal insolvency is included in the Insolvency Act (Australian Government Productivity Commission, 2015).

### **2.6.4 Stakeholders and Affected Persons**

The key stakeholders in Voluntary Administration and Business Rescue are the

- Company Directors,
- Creditors (secured and unsecured),
- Employees and trade unions, and
- Shareholders.

#### **2.6.4.1 Company Directors South Africa and Australia**

A director can be defined as a person who manages the company's business activities. Each small company must have at least one director and larger companies may have a number of directors who collectively manage the affairs of the company. The director of a company manages the affairs of the company but is not to treat the assets of the company as his own (Australian Securities and exchange Commission, 2017). The Companies Act in South Africa and Corporations Act in Australia both define the duties and responsibilities of directors.



## **2.6.4.2 Creditors**

### **2.6.4.2.1 South Africa**

A creditor is defined as a person who is owed money by the company under an arrangement. This person or company needs to have been owed money prior to the commencement of business rescue proceedings (Marcow, 2014). Creditors can form a creditors committee and this committee can collaborate with the business rescue practitioner on matters relating to the business rescue. The creditors however cannot dictate to the practitioner (Le Roux & Duncan, 2013, p. 59). The ranking order of creditor pay-outs is divided into pre-commencement and post-commencement debt. Payment to employees during business rescue is prioritised over post commencement finance. Post commencement finance claims are then paid followed by the pre-commencement secured creditors and unsecured creditors (Le Roux & Duncan, 2013, p. 61). An employee who has not been paid by the company when his salary or wage is due is considered a creditor of the company (Marcow, 2014, p. 26).

### **2.6.4.2.2 Australia**

A creditor is defined by the Corporations Act as a person who is owed by a company. The creditors provide goods and services or financial loans to the company. An employee owed money for unpaid wages, salaries and other entitlements is a creditor. A creditor may be a secured or unsecured creditor. A secured creditor has “security” over the company’s assets (e.g. a bond on the company’s assets) whilst an unsecured creditor is a creditor who does not have ‘security’ over the company’s assets. Employees are considered unsecured creditors in Australia however, they are paid as a priority as opposed to the claims of the other unsecured creditors in the event of liquidated (Australian Securities and Investments Commission, 2017)

## **2.6.4.3 Employees and Trade Unions**

### **2.6.4.3.1 Employees and Trade Unions South Africa**

The Companies Act of 2008 allows Trade Unions and employees who are not creditors of the financially distressed company to become affected parties in the business rescue process. This is due to the fact that one of the aims of business rescue is to work in the interest of the workers (Loubser, 2010).

#### **2.6.4.3.2 Employees and Trade Unions Australia**

The Corporations Act in Australia provides for employees of a company to become stakeholders in voluntary administration proceedings only if they are owed money by the company. Employees who are creditors are represented by their trade union. Other than that situation, trade unions play no part in the voluntary admissions process. The employees then become stakeholders by way of their creditor status (Corporations Act No. 50, 2001).

#### **2.6.4.4 Shareholders South Africa and Australia**

A shareholder is member of a company which owns an interest in a company. A shareholder could be a natural person or a company. Shareholders in South Africa have the right to bring upon business rescue proceedings. Similarly, they have the right to bring upon voluntary administration in Australia (Levenstein, 2015).

### **2.6.5 Commencement of Business Rescue and Voluntary Administration**

#### **2.6.5.1 Criteria for Entering into Business Rescue South Africa**

The Companies Act defines a financially distressed company as one that at any particular point in time appears unlikely to repay all the due debt within the following six months or if it appears that the company will be insolvent within the next six months. The director or board of directors can pass a resolution to commence business rescue proceedings if they have reasonable evidence that the company is in financial distress and there is a plausible prospect of rescuing the company (Companies Act No. 71, 2008). Employees, trade unions, shareholders and creditors can also bring about business rescue proceedings by applying to the court (Marcow, 2014).

#### **2.6.5.2 Criteria for Entering into Voluntary Administration Australia**

Voluntary administration in Australia commences once a voluntary administrator has been appointed. The voluntary administrator is usually appointed by the directors of the company; however, in some cases a liquidator could also appoint a voluntary administrator. The company may only appoint a voluntary administrator if it is believed that the company is financially distressed or will become distressed in the near future. A secured creditor which owns a majority of the company's assets could also initiate the voluntary administration process (Australian Government Productivity Commission, 2015).

### **2.6.6.1 Appointment of Business Rescue Practitioner**

A company could enter into business rescue via a resolution of the board or a court order. The business rescue practitioner is nominated by the person making the application to the court or by the directors if the proceedings were initiated by a board resolution. Such a nomination would have to be confirmed by a majority of the creditors during the first creditors meetings. If the directors institute business rescue proceedings (via a board resolution) they have five working days to nominate a business rescue practitioner; it is acceptable for more than one practitioner to be appointed (Zwane, 2015).

### **2.6.6.2 Appointment of Voluntary Administrator**

Directors of a company may appoint a voluntary administrator if they believe that the company is in financial distress or it is likely to become distressed in the near future. By appointing a voluntary administrator directors may avoid potential liability for trading in insolvent conditions. The appointment of a voluntary administrator does not involve the courts and is a relatively quick and simple procedure. In addition to a director, a secured creditor, who submits an application for the company to be placed in voluntary administration, or a liquidator may also appoint a voluntary administrator (Blazic, 2014).

## **2.6.7 Commencement of Business Rescue and Voluntary Administration proceedings**

There are slight differences in the commencement of proceedings in South Africa and Australia. International corporate rescue regimes usually have three distinct steps. The first step is the commencement of proceedings. The second is the investigation into the affairs of the company and the third step is the development of the rescue plan and the decisions associated with implementation of the plans (Anderson, 2008).

### **2.6.7.1 Business Rescue Commencement**

In South Africa, business rescue begins once the company files a resolution with the CIPC to place itself under business rescue. The creditors and the court could also file for a company to be placed under business rescue and the business rescue will begin when the decision is made by the court for the company to begin proceedings (Anderson, 2008).

Section 129 of the Companies Act (2008) states that once a form is filed with the CIPC, the commission will issue a notice of commencement of business rescue proceedings. This notice will have to be communicated to all the company stakeholders and displayed conspicuously at the company's main operating premises and on the website. If the company is listed on an exchange, it will have to be communicated to the exchanges communication services.

Individual creditors are given the rights to form a committee of creditors. The committee of creditors can be formed at the first creditors' meeting which must be held within ten days of the appointment of the business rescue practitioner (Zwane, 2015).

#### **2.6.7.2 Voluntary Administration commencement**

Voluntary administration offers the company a chance to assess its prospects in a relatively fast manner. As soon as the voluntary administrator is appointed by the board or the court, the procedure begins. Immediately upon his/her appointment, the voluntary administrator takes full control of the company assets and affairs. The directors of the company no longer have control of the company and lose all their rights (Offermans Partners, 2017).

It is the voluntary administrator's responsibility to notify the relevant stakeholders of their appointed as the administrator. The first creditors' meeting needs to be held within eight days of the voluntary administrator's appointment. To allow adequate notice in preparation for the meeting it is best that the creditors are informed on the first day of the appointment. In addition, it is required that the notice be published in a newspaper within three days of the administrator's appointment. After the notice has been published and the creditors are informed all communication between the company, the creditors and other stakeholders is handled by the administrator (Offermans Partners, 2017).

#### **2.6.8 Moratorium on Proceedings**

The purpose of business rescue and voluntary administration is to allow the company some breathing space to allow the affairs of the distressed organisation to be restructured. Upon entering voluntary administration in Australia and business rescue in South Africa, there is a moratorium on the obligations of the distressed company towards its debtors. For the duration of rescue, no legal proceedings, including court orders or judgements, may be enforced. In addition, property or other possessions of

the company may not be confiscated by creditors during this time. The company may only dispose of property or assets if it is in the ordinary course of business, with the consent of the practitioner or a court order (Anderson, 2008).

## **2.6.9 First Creditors Meetings**

### **2.6.9.1 South Africa**

The first meeting of creditors is required to be convened by the Business Rescue Practitioner within ten days of their appointment. This meeting is to inform the creditors if there is a reasonable prospect of successfully rescuing the company. The creditors in attendance are requested to put forward verified claims in order to meet other company creditors, forming a creditors committee. The first creditor meeting allows discussion regarding the status of the company and its trajectory. The individual creditors can choose to form a creditors committee at the first creditors meeting. The creditor committee will consult with the practitioner on matters regarding the company and the rescue process, however such a committee is not expected to issue instruction and the practitioner maintains autonomy (Levenstein, 2015).

Employees are only considered to be creditors if they are owed money by the company (Zwane, 2015). Section 189 of the Labour Relations Act makes provisions for the employees who are not creditors to be present at the creditors meeting and be informed of the business rescue proceedings as the proceedings may lead to retrenchment of employees (Labour Relations Act No. 66, 1995). The employees have a right to make representations at the first creditors meetings and can also purchase creditors voting rights (Joubert & Loubser, 2016).

### **2.6.9.2 First Creditors Meeting Australia**

With regard to voluntary administration, The Corporation Act of Australia has made provision for two creditors' meetings to be held while the company is in administration. The first meeting must be held within eight days of commencement with the creditors being given at least five days' notice of the meeting. The purpose of the first meeting is to inform the creditors of the status of the company and to facilitate the formation of a creditor committee. In addition, this meeting provides an opportunity for the creditors to approve or reject the appointment of a particular administrator if they have concerns regarding the administrator's abilities.

## **2.6.10 Business Rescue Plan and Deed of Company Arrangement**

### **2.6.10.1 Business Rescue Plan**

The Companies Act of 2008 requires that business rescue plans be devised to demonstrate the intended course of action. Judicial management in South Africa did not require a proposed plan but international commentators argue that a business rescue plan is crucial to the success of a turnaround. It is the responsibility of the business rescue practitioner, in consultation with the stakeholders, to devise such a plan (Loubser, 2010).

The business rescue plan comprises of three main components. Part A contains a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began. Part A also contains a complete list of creditors and the dividends the creditors would receive if the company is immediately placed into liquidation. An agreement concerning the remuneration of the business rescue practitioner is also contained in part A (Companies Act No. 71, 2008).

Part B of the Business Rescue Plan focuses on the proposal put forward to the stakeholders to rescue the company. It details with the nature and the length of the proceedings and the assets available to repay creditors. Part B also highlights the order in which the creditors will be repaid if the business rescue plan is adopted (Companies Act No. 71, 2008).

Part C of the business plan should highlight the main conditions for the plan to be implemented. The effect on the employees should also be highlighted and the projected financials for the ensuing three years should be presented. The end of the business rescue process should also be included in part C of the plan (Companies Act No. 71, 2008) .

### **2.6.10.2 Deed of Company Arrangement – Voluntary Administration**

A Deed of Company Arrangement is between the company currently under voluntary administration and the creditors, and aims to govern the affairs of the company. The

creditors vote on the proposals contained in the Deed of Company Arrangement and the company must sign the deed within 15 days of the creditors' approval.

Approved creditors are included in the Deed of Company Agreement. The order of employee entitlement and creditor payments is also contained in the agreement. A Deed Administrator monitors the agreements as set out in the deed and creditors have the right to monitor the deed. Creditors have an opportunity to negotiate the terms of the agreement before approval of the Deed of Company Arrangement is presented at the second creditors meeting. If there is a majority vote, all creditors are bound by the Deed of Company Arrangement, regardless of an individual having repudiated the arrangement (Offermans Partners, 2017).

## **2.6.11 Adoption, Amendments and Refusal of the Business Rescue Plan and Deed of Company Arrangement**

### **2.6.11.1 Business Rescue Plan**

The business rescue practitioner has a duty to convene and preside over a meeting within ten business days of the publication of the business rescue plan. At this meeting, the practitioner will propose the plan to the creditors. Employees and union representatives are also present at the meeting and may make representations (Companies Act No. 71, 2008). The business rescue practitioner needs to publish a business rescue plan within 25 days of their appointment. The majority of creditors, via a vote or the court, could extend the period for the publication of the business rescue plan (Zwane, 2015).

The creditors vote to approve, amend or reject the plan at this meeting. The plan will be approved if more than 75 per cent of the creditors with voting interest vote for the plan and at least 50 per cent of the independent creditors vote for the plan. The plan may be partially approved, allowing the practitioner to amend it and hold another creditor meeting to approve the amended plan. If the rescue plan is rejected by the creditors and the practitioner does not seek a revision to the plan, the company will then be placed into liquidation (Companies Act No. 71, 2008).

All affected parties of the company, including creditors who were not present at the adoption of the plan or those who voted against it, are bound by the business rescue plan once approved by the creditors. Upon the adoption of the plan, the business

rescue practitioner must take the necessary steps to satisfy all the conditions upon which the business rescue is dependant and implement the business rescue plan (Strime, 2012).

#### **2.6.11.2 Voluntary Administration – Deed of Company Arrangement**

The second creditors' meeting is to be held within 25 days (15 working days) of the administrators' appointment. At this meeting the administrator needs to advise the creditors on the financial affairs of the company and on the prospect of a successful administration. Such a meeting should be held after the administrator has thoroughly investigated the affairs of the company and provides an opportunity to report upon any trade that may have occurred during insolvency. The directors are held responsible for debts incurred during the time the company was insolvent (Offermans Partners, 2017).

During the second meeting, the administrator is expected to express an opinion regarding whether or not it is in the best interest of the creditors to institute the Deed of Company Agreement. The creditors, once informed of the options, may choose to accept or reject the Deed of Company Arrangement and end the administration and return the control of the company to the directors (Offermans Partners, 2017).

If the creditors accept the Deed of Company Arrangement, the agreement will then have to be accepted by the company and signed within 21 days of the creditors' acceptance. All creditors are bound by the agreement, even if they voted against it. The moratorium on the enforcement of rights is lifted once the Deed of Company Agreement is executed (Offermans Partners, 2017).

#### **2.6.12 Termination of Voluntary Administration and Business Rescue**

##### **2.6.12.1 Business Rescue Termination**

The Companies Act provides three ways for the termination of business rescue: a court order, termination by the business rescue practitioner and the implementation or the rejection of the business rescue plan.

Business rescue is expected to be completed within three months but there is no time limit on the proceedings. If the rescue is not concluded within the three-month period,

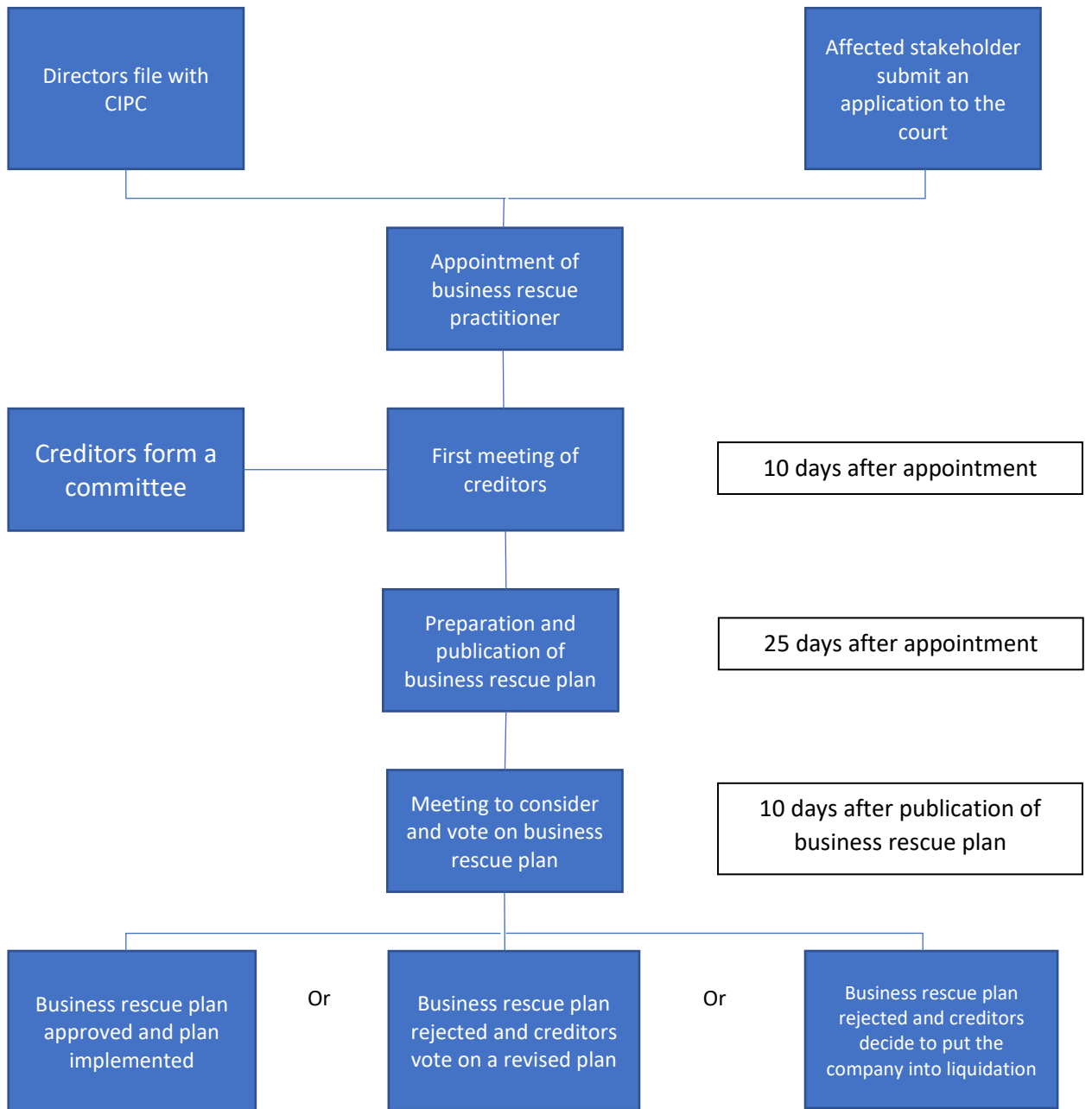


the practitioner has to provide monthly reports and communicate these reports to all affected stakeholders (Levenstein, 2015 p. 374).

#### **2.6.12.2 Voluntary Administration Termination**

Voluntary administration can be terminated in three ways: A Deed of Company Arrangement is executed, the creditors resolve that the administration should end or the creditors resolve to liquidate the company (Corporations Act No. 50, 2001).

**Figure 1: Business Rescue Process**



**Figure 2: Voluntary Administration Process**



## **2.7 The Business Rescue Practitioner and Voluntary Administrator**

The business rescue practitioner or voluntary administrator is a crucial part of a business rescue as these individuals play a key role in the drafting and implementation of the plan. From the moment they are appointed they effectively manage all aspects of the business (Pretorius, 2015). The appointment of an independent administrator to preside over the affairs of the distressed business is prescribed by international best practice (Levenstein, 2015).

### **2.7.1 Qualification and Registration Criteria of a Business Rescue Practitioner in South Africa**

The CIPC approves and regulates business rescue practitioners. Section 138 of the Companies Act states that a member of a professional body accredited by the CIPC can be appointed as a rescue practitioner. Practitioners are not permitted to have any other relationship with the director or with the company undergoing business rescue (Levenstein, 2015).

As of 2014, 42 per cent of business rescue practitioners registered with the CIPC are chartered accountants and a further 42 per cent are liquidators; only 11 per cent are business consultants (Levenstein, 2015, p. 402). A person not a member of these organisations and not operating in these industries could still launch an application with the CIPC to become a business rescue practitioner; these appointments are made on an ad hoc basis (Levenstein, 2015). Any person who is an admitted attorney or has a law degree can be considered to become a liquidator (Department of Justice and Constitutional Development, 2017). It is not essential for a liquidator to have a commerce degree to become a liquidator and a liquidator also does not need any turnaround experience or commercial experience before being admitted as a liquidator (Papaya, 2014).

### **2.7.2 Qualification and Registration Criteria of a Voluntary Administrator in Australia**

The Corporations Act of 2001 in Australia only provides for registered liquidators to become voluntary administrators. In order to become a liquidator in Australia one needs to obtain a tertiary qualification in commercial law and accounting and also pass two courses dealing with insolvencies. In addition to the qualification, a liquidator also needs 4000 hours of employment at a senior level dealing with the administration and receivership of companies (Australian Securities & Investments Corporation, 2017). A liquidator also needs to be a member of the Institute of Chartered Accountants or CPA

Australia (CRS Insolvency Services, 2017). A CPA is a finance, accounting, and business professional with a commercial qualification and CPAs have in depth accounting knowledge (CPA Australia, 2017). The voluntary administrator cannot have a previous relationship with the company or its directors and must not have been declared insolvent.

### **2.7.3 Remuneration of the Business Rescue Practitioner and the Voluntary Administrator**

#### **2.7.3.1 Remuneration of Business Rescue Practitioners South Africa**

The tariffs or fees paid to the business rescue practitioner are prescribed by law and are dependent on the size of the company. Companies undergoing business rescue proceedings in South Africa can be classified as large, medium or small companies. The ranking of these companies is achieved by assigning points to them, to ultimately obtain a public interest score. The public interest score is calculated by using the following.

- (a) A number of points equal to the average number of employees of the company during the financial year,
- (b) One point for every R 1 million (or portion thereof) in third party liability of the company, at the financial year end,
- (c) One point for every R 1 million (or portion thereof) in turnover during the financial year, and
- (d) One point for every individual who, at the end of the financial year, is known by the company.

(Wixley & Everingham, 2015)

A company is classified as 'large' if it exceeds 500 points, 'medium' if it has less than 500 points but more than 100 points, and 'small' if it has less than 100 points (Levenstein & Barnett, Basics of Business Rescue).

Registered Business Rescue Practitioners are also classified into three diverse groups.

- A senior practitioner is a person who has actively been engaged in turnaround practice for a period of at least ten years,

- An experienced practitioner who has been involved in turnaround practice for a period of at least five years, and
- A junior practitioner who is qualified but who has not been involved in the turnaround practice for five years.

(Levenstein & Barnett, Basics of Business Rescue)

A junior practitioner may only be appointed as a business rescue practitioner for a small company, an experienced practitioner may be appointed small and medium companies and a senior practitioner may be appointed for small, medium and large companies (Levenstein & Barnett, Basics of Business Rescue).

The tariffs or fees paid to the Business Rescue Practitioner are prescribed by law and are dependent on the size of the company, as defined by the Public Interest Score. The maximum rates that can be charged, irrespective of classification of the business rescue practitioner, are

- Small company: R1250 per hour VAT included,
- Medium company: R1500 per hour VAT included, and
- Large company: R2000 per hour VAT included.

In addition to this hourly rate, out of pocket expenses can also be charged by the practitioner. Business rescue practitioners are remunerated by the distressed company (Levenstein & Barnett, Basics of Business Rescue).

### **2.7.3.2 Remuneration of the Voluntary Administrator**

ASIC provides a guideline for the remuneration of voluntary administrators. A voluntary administrator is entitled to be paid reasonable fees, or remuneration, for the work they perform, once these fees have been approved by a creditors' committee, creditors or a court. Voluntary administrators are also reimbursed for out-of-pocket costs incurred in performing their role (Australian Securities and Exchange Commission, 2017)

The creditors or creditors' committee are expected to approve the fees charged by the voluntary administrator. 'Out of pocket fees' refer to legal fees, asset valuation fees, auctioneer fees, stationery and travel costs. The voluntary administrator will be paid from the company's assets before the creditors are paid. If there are insufficient funds for the

company to actuate payment of the voluntary administrator for services rendered, he or she may arrange with a third party for the payment of fees. The creditors' committee or the courts can approve the fees charged by the voluntary administrator and these fees are usually charged on the basis of time spent, by the voluntary administrator and their staff, on the assignment or a percentage of the assets realised by the voluntary administration. Negotiation related to a degree of remuneration in advance of the voluntary administration undertaking is considered acceptable (Australian Securities and Exchange Commission, 2017).

## **2.8 Definition of a Successful Business Rescue and Voluntary Administration**

### **2.8.1 Definition of a Successful Business Rescue**

The reported success rate in 2015 in business rescue was only 9.4% per cent (Companies and Intellectual Properties Commission, 2016). This was calculated by taking the number of companies still registered divided by the number of companies that enter business rescue. The definition of successful in business rescue has not been formalised. The definition of success could be derived from section 128 (1)(b) of the companies act which states the aim of business rescue is to develop and implement a plan to rescue the company and if it is not possible for the company to continue in existence the return to the company's creditors and shareholders should be greater than that of immediate liquidation.

### **2.8.2 Definition of a Successful Voluntary Administration**

The definition of success in Australia has not been officially defined but has been calculated by evaluating the number of companies still registered after rescue proceedings compared to the number of companies entering voluntary administration. The success rate after a company entered voluntary administration was 22 per cent (Australian Government Productivity Commission, 2015). Although no official definitions of success exist in either of the countries, the success rate is calculated in the same manner. Other definitions of a successful voluntary administration could be the acceptance of the Deed of Company Arrangement, the implementation of the Deed of Company Arrangement, or returning a better return to shareholders as opposed to an immediate liquidation of the company.

## **2.9 Post Commencement Finance**

Post commencement finance is funding made available to the business after rescue proceedings have commenced. Financing is critical to a business rescue as most businesses enter the rescue due to a lack of funds. It might be very challenging for a company to obtain capital once it is in business rescue as creditors will be concerned about non-payment. The Companies Act makes provisions for super-priority financing (du Preez, 2012).

The Companies Act states that all fees owed to the business rescue practitioner are to be paid as the priority. The order of payment is such that claims of post-commencement employees, including any other claims that relate to employment during the course of business, are settled before post-commencement financiers who then paid preferentially over other creditors (du Preez, 2012).

## **2.10 Issues in the Literature Regarding Business Rescue in South Africa**

There are still many obstacles to be encountered regarding business rescue in South Africa. The act is relatively new, having been introduced in 2008 and implemented in 2011, and the court is still relied upon to provide guidance in the form of case law (Levenstein, 2015).

### **2.10.1 Formal education and experience of Business Rescue Practitioner**

The Companies Act of 2008 (section 138) states that a person may only be appointed as a business rescue practitioner of a company if such a person is a member in good standing of a legal, accounting or business management profession accredited by the CIPC. As a criterion, these professions appear to be inadequate as they do not preclude a wholly unsuitable candidate being appointed as a business rescue practitioner. For example, a number of attorneys are in good standing in the legal profession but have no experience in operating a business. The business rescue procedure requires a thorough understanding of the management of a business as well as the confidence to execute a plan that has wide-reaching consequences. The accountancy and legal professions do not necessitate business management experience. However, these professionals are still considered legitimate business rescue practitioners, as per the CIPC (Winer & Crook, 2016).



### **2.10.2 Skill Set of Business Rescue Practitioner**

The selection of the business rescue practitioner is extremely important because of the potential consequences the choice may have for the affected parties of the company. There are no tools and systems to predict the success of business rescue practitioners. In South Africa, the banks often base their post commencement financing decisions on who is appointed as the business rescue practitioner (Pretorius, 2014).

Currently, the CIPC is responsible for the issuing of licences to business rescue practitioners and these licenses are issued on an ad hoc basis. Chapter 6 of the companies act has made provision for a completely new profession of business rescue practitioners; however, this has not lead to a new profession in practice. In general, a professional body requires that members sit an examination prior to accreditation but this is not the case in the business rescue profession. Many business rescue practitioners do not possess skills integral to successfully conduct a business rescue and this necessitates the appointment of consultants with specific skill sets, leading to additional expenditure for the financially distressed company. An appropriate and standardised examination will ensure that a business rescue practitioner possesses both the legal and business acumen to successfully rescue a company (Papaya, 2014).

### **2.10.3 Companies using Business Rescue to avoid Liquidation**

During business rescue the directors of the company are not under oath nor are they directly questioned by the creditors or the creditors' committee as would be the case during liquidation proceedings. Companies generally apply for business rescue as a last resort to avoid being liquidated and thus prevent the prying eyes of the liquidators and the potential of personal liability for the debts of the company if the directors have been trading in a reckless manner (Kleitman, 2014).

## **2.11 Recent Amendments to Australian Law regarding Voluntary Administration**

### **2.11.1 Safe Harbour**

In September 2017, new laws regarding the rights, responsibilities, and the role of financial institutions regarding firms in voluntary administration were enacted. Details relating to these laws, called 'Safe Harbour', are contained in Section 588G of the Insolvency Act. The new provisions aim to change the culture of voluntary administration

and prevent directors of distressed firms, seeking legal protection, from being personally liable for the debt of their companies.

Safe Harbour laws encourage a director who suspects his company is financially distressed to seek help earlier. The new laws compel directors of a financially distressed firm to avoid a passive approach, rather urging them to seek the help of an independent turnaround professional to establish a course of action that will be most likely to lead to a better outcome for the company and its shareholders (Schlosser & Ball, 2017).

By taking appropriate steps (e.g. appointing an expert or consulting turnaround professionals) and preparing and implementing a restructuring process that will yield better results than a formal voluntary administration, the directors will be protected from personal liability for insolvent trading (Stragalinus & Heard, 2017).

It is recommended that directors continuously assess the long-term viability of the company, making adjustment to their course of action to ensure that the outcome will be beneficial to the company and its shareholders. Each time a new debt is incurred by the company the directors are expected to monitor that reasonable steps are being taken to restructure the business, allowing it to trade out of its difficulties. These laws will compel directors to seek help earlier for their financially distressed firms.

### **2.11.2 Ipsa Facto Clauses**

*Ipsa Facto* Clauses refer to contractual clauses that allow a party to terminate a contract upon the occurrence of a particular event. This event could be the entry into Safe Harbour or voluntary administration (Lacey, 2017). The banks providing loans to a company could withdraw the loan facility if a company enters into voluntary administration. The new *Ipsa Facto* Clauses prevent a bank from withdrawing the facility when the company enters into Safe Harbour and voluntary administration. The new *Ipsa Facto* Clauses will only come into effect in 2018.

### **2.12 Conclusion**

The literature review followed the origins of the laws of Australia and South Africa. It highlighted the alternatives to liquidation and the other options available to financial distressed companies. The laws and procedures of business rescue and voluntary administration was also explored in the literature review. As business rescue

practitioners and voluntary administrators play an important role in the rescue of financially distressed companies (Pretorius, 2015) the education, roles and remuneration of these professionals was also explored in the literature review.

The criteria for entering business rescue and voluntary administration, the business rescue and voluntary administration process and the information required in the business rescue plan and the Deed of Company Arrangement was also explored. Post commencement finance, the current issues regarding business rescue, and the new Australian legislation regarding voluntary administration was discussed.

The literature review provided a baseline for understanding business rescue and voluntary administration and gave rise to the research questions in chapter 3.

## CHAPTER 3: RESEARCH QUESTIONS

### 3.1 Introduction

The literature regarding business rescue and voluntary administration was reviewed in chapter 2. The purpose of his study is to investigate the low success rate of business rescue in South Africa when compared to voluntary administration in Australia.

### 3.2 Research Questions

#### **3.2.1 Research Question 1: What are the similarities between the South African and Australian business rescue process?**

Research question 1 intended to find the similarities between business rescue and voluntary administration. Research question 1 would form the basis of understanding business rescue and voluntary administration and make it possible to explore the differences between the two rescue regimes.

#### **3.2.2 Research Question 2: What are the differences between the South African and Australian business rescue process?**

Research question 2 intended to find the differences between the business rescue and voluntary administration.

#### **3.2.3 Research Question 3: What differences exist that may give rise to what appears to be a better success rate in Australia?**

Research questioned 3 was designed to investigate the differences between business rescue and voluntary administration. These differences would then be investigated to provide insight into the difference in the perceived success rate between South Africa and Australia.

## **CHAPTER 4: RESEARCH METHODOLOGY**

### **4.1 Research Methodology and Design**

Chapter 4 contains the research methodology employed in this study. It explains the rationale for the chosen design and methodology. An explanation of the unit of analysis, the population, pilot interviews, data collection and samples used is included in the chapter. The literature regarding business rescue and voluntary administration was analysed before the collection of the primary data. With both countries having different names for the same procedures the literature was examined and the links between the different themes in the two countries was established.

#### **4.1.1 Exploratory Research**

Saunders and Lewis (2012) describe exploratory research as being about discovering information on a topic that is not fully understood by the researcher. Exploratory research helps the researcher gain insights that form their research design and also provides the researcher with answers to the initial questions. These initial answers will need to be followed up with more detailed research. The research was conducted by examining the current literature available on the topic and conducting interviews.

An exploratory study was conducted to gain insight into the practices and procedures of business rescue and voluntary administration. Business rescue and voluntary administration have been legislated and the two concepts or practices are regularly used in practice. The laws governing these two practices are contained in the legislation of the two countries (Companies Act in South Africa and the Corporations Act in Australia). The secondary legislative data, well as other non-legislation data, was analysed to assess the differences and similarities of the two procedures as, this data was analysed before forming the research questions. Primary data was collected in the form of interviews as the secondary data was already available, this led to a mono method being used.

#### **4.1.2 Inductive Research**

Thomas (2016) describes the induction approach as a systematic set of procedures that can be easily used for analysing qualitative data and provides valid and reliable findings. The purpose of an induction approach is to condense the raw data into a summary and establish links between the research objective and the findings from the data (Thomas, 2016). This study followed an inductive process.

### **4.1.3 Unit of Analysis**

The unit of analysis is the main entity that is being analysed in a certain study. In other words, the unit of analysis is the 'what' and 'who' that are being studied. The unit of analysis can involve groups, individuals, and/or geographic units (Web Centre for Social Research Methods, 2017). The unit of analysis in this study was the processes and procedures performed by turnaround firms and professionals in South Africa and Australia.

### **4.1.4 Population**

Prior to making sampling choices, one should have a good understanding of the target population, including its content, size, heterogeneity/homogeneity, accessibility, spatial distribution, and destructibility (Daniel, 2012). As this was a comparative study between two countries' principles and procedures, the population was carefully chosen to represent the two groups. The population included accountants, lawyers, advisors and professionals registered with turnaround bodies in the respective countries.

### **4.1.5 Sampling**

Purposive sampling is the most frequently used form of non-probability sampling. It is used particularly to select a small sample when collecting qualitative data. When a researcher selects a purposive sample, she or he is using their judgement to actively choose those who will best be able to help answer the research questions and meet the objectives. Some of the population will have a chance of being selected by the researcher while others will not (Saunders & Lewis, 2012). When using purposive sampling the researcher decides what needs to be known and sets out to find the people who are willing and able to provide this information to the researcher by virtue of experience or knowledge (Tongco, 2007).

The supervisor of the research was a business rescue practitioner in South Africa and a member of the Turnaround Management Association. He was asked to nominate participants to interview in South Africa and those participants were then asked to nominate or recommend other participants (Snowball sampling). As this was a comparison between the two countries different participants were chosen with regard to their profession to achieve a holistic view of the practice. Accountants, lawyers and the heads of turnaround associations were chosen in each country.

The researcher had attended a Turnaround Management Association conference in Melbourne, Australia. Contact was made with turnaround professionals at the conference and possible interview participants' details were recorded. These respondents were then contacted and an interview was requested. The respondents were then asked to nominate other professionals (Snowball sampling) in the industry. Table 4.1 contains an overview of the participants interviewed. The table contains the current role of the participant in business rescue and voluntary administration, their formal qualifications as well as their profession.

**Table 4.1 Overview of participants Interviewed in South Africa and Australia**

<b>Respondent</b>	<b>Current Role Business Rescue</b>	<b>Profession</b>	<b>Formal Qualifications</b>
SA 1	Business Rescue Practitioner	Business Rescue Practitioner	Chartered Accountant
SA2	Advisor	Commercial Lawyer	Lawyer
SA3	Business Rescue Practitioner	Business Rescue Practitioner	Chartered Accountant
SA4	Advisor	Commercial Lawyer	Lawyer/MBA
SA5	Business Rescue Practitioner	Commercial Lawyer	Lawyer
SA6	Business Rescue Practitioner	Business Rescue Practitioner	BCom Law / MBA
SA7	Advisor	Commercial Lawyer	Lawyer
SA8	Advisor	Banker	BCom
<b>Respondent</b>	<b>Current Role Voluntary Administration</b>	<b>Profession</b>	<b>Formal Qualifications</b>
AUS1	Voluntary Administrator	Voluntary Administrator	Chartered Accountant
AUS2	CEO of Company	Facilitating sale of Companies in Voluntary Admin	BCom
AUS3	Turnaround Professional	Turnaround Professional	Engineer / MBA
AUS4	Voluntary Administrator	Voluntary Administrator	Chartered Accountant
AUS5	Advisor	Commercial Lawyer	Lawyer
AUS6	Voluntary Administrator	Voluntary Administrator	Chartered Accountant
AUS7	Advisor	Turnaround Advisor	Certified Turnaround Practitioner
AUS8	Turnaround Professional	Turnaround Professional	BCom/MBA

#### **4.1.6 Data Collection**

The legislation and literature relating to the two countries was studied and documented. The secondary data also included peer reviewed journals, dissertations and other material. This analysis provided a basis for the semi-structured interviews.

Given (2008) describes semi-structured interviews as a qualitative data collection strategy in which the interviewer asks a series of pre-determined but opened ended questions. The research questions were developed from the literature review in advance, however during the interview process the researcher did not strictly follow the interview structure and went back and forth through the interview questions. Verbal and nonverbal responses from the interviewees were interpreted to gain a better understanding of the responses (Given, 2008).

#### **4.1.7 Pilot Interviews**

A pilot interview was conducted with the supervisor of this research; the supervisor is a registered business rescue practitioner. The pilot interview was undertaken to test whether the interview questions were sufficient to gain a full understanding of the process and procedures and to familiarise the researcher with the interview process.

#### **4.1.8 Interviews**

The topic and nature of the interviews were communicated to the interviewees via e-mail before the interview. Participants were encouraged to give their views and the questions were presented in an open-ended fashion. The aim of the interviews was to encourage the participants to voice their opinions on the practice and procedures of turnarounds in their respective countries.

The researcher envisaged each interview to last approximately 45 minutes. The interviews did last this long on average, but some exceeded an hour. Respondents were not interrupted and the interviewer set no time limit on the interviews. If an interviewee raised a new theme this theme was later expanded on and added to later interviews. Interviewees were also asked if the interviewer should ask other questions to the next participant to obtain a better understanding of the practice and process.



Telephonic interviews were conducted with some of the participants in Australia. Telephonic interviews do have the advantage of being more cost effective and they are logistically simpler, especially if the participant resides in a geographically distant location. The information received by the interviewer via a telephonic interview is similar to face-to-face interviews (Lewinson, Seeley, & Rohde, 2006). Telephonic interviews were conducted with three participants and the average time of these interviews was shorter than the average time of the face-to face interviews.

The researcher aimed to interview seven participants from each country from various professions dealing with company turnarounds. Over the period of two months the interviewer managed to interview eight professionals from South Africa and eight professionals from Australia. The South African interviews were conducted first. The researcher then travelled to Australia to conduct interviews with the Australian participants.

#### **4.1.9 Data Saturation**

Guest, Bruce and Johnson (2006) describe Data Saturation as the stage where additional data collection provides few, if any, new insights or themes into the research question and objectives (Guest, Bunce, & Johnson, 2006). Upon completing seven interviews in South Africa data saturation was reached. The point of data saturation was reached in Australia after interviewing six participants. Despite data saturation eight interviews were conducted in both countries.

## **4.2 Data Analysis**

### **4.2.1 Interview Transcription**

After the interviewees signed the consent form, the interviews were recorded on two devices. Two of the interview recordings were transcribed by the researcher and the other recordings were sent to a transcription service due to the time constraints of the research. Upon receiving the transcripts from the transcription service, the transcripts were then compared to the sound files to validate the transcripts. The transcripts were also modified to ensure the participants' confidentiality. The names of the participants were replaced with a number and no information of the participant was recorded.

#### **4.2.2 Coding of the Text**

The fundamentals of data analysis are the collection of the data, coding of the data, cleansing and revising the coded data, moving from codes to patterns and finally to jotting. This process helps to strengthen the understanding of the data by highlighting underlying issues (Miles, Huberman, & Saldana, 2014).

The data collected and the transcribed data was analysed using Atlas.ti. Atlas.ti is a programme designed specifically for the thematic analysis of qualitative data. Bassett (2010) explains that computer aided software such as Atlas.ti can facilitate the speedy, rigorous and sophisticated analysis of large volumes of qualitative data. The interviews were coded using Atlas.ti and significant themes were discovered (Bassett, 2010).

#### **4.3 Reliability and Validity**

Semi-structured interviews were conducted to gather primary data. Semi-structured interviews provide the researcher an opportunity to clarify the questions asked and the answers received. This structure also allows the researcher to spend more time on significant themes that matter to the respondent. The interviewer can also explore themes and responses from a variety of angles during the semi-structured interview (Saunders & Lewis, 2012). The exploration of themes and confirmation of certain facts during the interviews increased the reliability and the validity of the information received during the interview.

The aim of this study was to compare the experiences of the professionals in the two countries. Purposive sampling was used in both countries. The questions in the interviews remained similar with the only change being the definitions to ensure that similar reliable data was recorded.

There are many different professionals involved in the business rescue and voluntary administration industry (lawyers, accountants, practitioners and advisors). These professionals could have different views depending on their profession. Interviews were conducted with all the different relevant roles (lawyers, accountants, practitioners and advisors). The similar number of professionals (two lawyers and 2 accountants were interviewed in South Africa and Australia as can be seen in Table 4.1) were interviewed in each country to get a balanced view of the practice.

The results of the interviews were transcribed by a third party and the data then validated by the researcher. This data was then analysed using computer software to further ensure its validity and reliability.

#### **4.4 Limitations**

A cross sectional study of the practice in both countries was conducted. As mentioned in section 2.11.1, the laws are currently changing in Australia and a longitudinal study would have enhanced the reliability of the study.

Face-to-face interviews can increase the validity of the study by giving the researcher an opportunity to verify the answers given. However, interviews can lead to response bias from the respondents who do not want to share their negative experiences and offer answers that they assume to be acceptable to the researcher (Saunders & Lewis, 2012).

The study focuses on South Africa and Australia only. This same study could be replicated in Canada, the United Kingdom and The United States of America to give a better understanding of the practice and procedures.

The purposive sampling chosen in this study can lead to selection bias. Interviewees were chosen on the basis of the information the researcher thought they would provide and each participant did not have an equal chance of being chosen.

Qualitative research was used in the study to collect data and a thematic analysis was used to analyse the data. The themes were based on the researcher's insight into the practice and not on a specific formula. This study might be hard to replicate using the same themes in different jurisdictions. The process of coding could also compromise the coding and the contextuality of the data, which could affect the results of the study (Lapadat, 2010).

## **CHAPTER 5: RESULTS**

### **5.1 Introduction**

This chapter presents the results of the research conducted in South Africa and Australia using the research methodology set out in chapter 4. It addresses the research questions posed in chapter 3 using only primary data. The chapter begins with an overview of primary data collection and analysis and ends with a summary of the results.

### **5.2 Data Collection and Analysis**

#### **5.2.1 Grounded Theory**

An inductive approach was used in this research report. The inductive approach, unlike the deductive approach which tests existing theory, is concerned with the generation of new theory from the data. The purpose of using an inductive approach for this study was to condense the data into a summary and then establish links between data and the research question and finally to present the data in an understandable manner (Thomas, 2006).

Utilising the concept of Grounded Theory, the first level of analysis began with the literature review. Grounded Theory is a research tool or methodology that helps the researcher construct theory by analysing data. The analysis begins as soon as the first set of data is collected (Corbin & Strauss, 1990). Levenstein (2015) and Loubser (2010) conducted studies which included comparisons to other international rescue regimes. Lamprecht & Conradie (2015) and Anderson (2008) directly compared business rescue and voluntary administration. Naidoo, Patel and Padia (2017) also conducted research which included interviewing business rescue professionals in South Africa. However, no study aimed to develop new theory by comparing the experiences of the turnaround professionals in different countries. In this study, literature available regarding business rescue and voluntary administration was analysed and summarised. Questions were formulated from the literature review to conduct interviews with professionals from the two countries.

Each interview consisted of 17 questions. The participants were selected from two separate groups depending on their geographic location (i.e. South Africa and Australia). Although the questions between the different groups were similar, the

terminology was adjusted to be more relevant to the particular group. As presented in chapter 2, the official term used for companies in distress and formally applying for external management is called business rescue in South Africa and voluntary administration in Australia and the turnaround professionals are business rescue practitioners and voluntary administrators in respectively. Interviews in both the countries were carried out and the data recorded and transcribed. A second level of analysis was completed by studying the transcripts in order to establish a comparison between the two countries.

### 5.2.2 Thematic Analysis

Thematic analysis is often used in qualitative research to analyse the data collected. Thematic analysis focuses on identifiable patterns that exist within the data collected. The first step is to collect data followed by recognising patterns which can be associated to the research questions (Aronson, 1995). This study complies with the tenets of thematic analysis in that pattern identification and thematic development were preceded by data collection.

Thematic development was facilitated by the analytical process known as coding. The researcher did not pre-select themes before the interviews and the themes were only developed after the coding of the data. The significant themes identified from the interviews are as follows.

- Formal qualifications and experience of practitioners,
- Time spent on turnarounds,
- Definition of success,
- Business rescue and voluntary administration culture,
- Post commencement finance,
- Practitioners,
- Companies and Intellectuals Properties Commission and the Australian Securities and Investments Commission (CIPC and ASIC),
- Classification of practitioner,
- Safe Harbour and
- *Ipsa Facto* Clauses.

This chapter focuses on the primary data collected. The themes identified in the data will be discussed in this chapter and a further analysis of the themes will be completed in the next chapter by incorporating the information collected in the literature review.

### 5.2.3 Overview of the Sample

A total of 16 participants were interviewed for the study. Eight participants were interviewed in South Africa and eight participants in Australia. Snowball and purposive sampling was used in both countries. The participants held various qualifications and each provided a different role in the voluntary administration and business rescue processes. Lawyers, accountants, turnaround professionals, turnaround advisors as well as the respective heads of the Turnaround Management Association of each country were interviewed.

In order to more effectively make comparisons between the two countries, a similar number of each type of professional was interviewed as described in Table 5.1. Open ended questions were presented to each participant with only a minor change in the terminology to correctly define the roles in the respective countries.

**Table 5.1 Overview of participants Interviewed in South Africa and Australia**

<b>Respondent</b>	<b>Current Role Business Rescue</b>	<b>Profession</b>	<b>Formal Qualifications</b>
SA 1	Business Rescue Practitioner	Business Rescue Practitioner	Chartered Accountant
SA2	Advisor	Commercial Lawyer	Lawyer
SA3	Business Rescue Practitioner	Business Rescue Practitioner	Chartered Accountant
SA4	Advisor	Commercial Lawyer	Lawyer/MBA
SA5	Business Rescue Practitioner	Commercial Lawyer	Lawyer
SA6	Business Rescue Practitioner	Business Rescue Practitioner	BCom Law / MBA
SA7	Advisor	Commercial Lawyer	Lawyer
SA8	Advisor	Banker	BCom
<b>Respondent</b>	<b>Current Role Voluntary Administration</b>	<b>Profession</b>	<b>Formal Qualifications</b>
AUS1	Voluntary Administrator	Voluntary Administrator	Chartered Accountant
AUS2	CEO of Company	Facilitating sale of Companies in Voluntary Admin	BCom
AUS3	Turnaround Professional	Turnaround Professional	Engineer / MBA
AUS4	Voluntary Administrator	Voluntary Administrator	Chartered Accountant
AUS5	Advisor	Commercial Lawyer	Lawyer
AUS6	Voluntary Administrator	Voluntary Administrator	Chartered Accountant
AUS7	Advisor	Turnaround Advisor	Certified Turnaround Practitioner
AUS8	Turnaround Professional	Turnaround Professional	BCom/MBA

## 5.3 Findings

The three research questions give rise to the themes that will be discussed in this chapter as well as in chapter 6. The first three research questions are as follows.

- Research Question 1: What are the similarities between the South African and Australian business rescue processes?
- Research Question 2: What are the differences between the South African and Australian business rescue processes?
- Research Question 3: What differences exist that may give rise to what appears to be a significantly higher success rate in Australia as compared to South Africa?

### 5.3.1 Theme: Formal Qualifications and Experience of Practitioners

The business rescue practitioner plays a key role in the business rescue process. Although the formal education of the practitioner is of importance, external advice is often required when implementing a turnaround and the advisors to the practitioner may be as vital to the process. This theme was developed based on the coded interview transcripts from the codes 'Experience' and 'Formal Qualifications'.

#### 5.3.1.1 Formal Qualifications of Practitioners

Comments regarding the formal qualifications of the turnaround professionals in Australia and South Africa are included in Table 5.2. These comments were self-reported.

Table 5.2: Respondent's Comments on their own Formal Qualifications

Comments from Respondents in Australia	
Respondent	Comments

AUS1	<i>Chartered accountant, member of ARITA, registered liquidator, official liquidator</i>
AUS2	<i>...have a Bachelor of Business and political science background so I studied Bachelor of Business at university and also economics.</i>
AUS3	<i>MBA</i>
AUS4	<i>I'm a qualified chartered certified accountant from the UK, I'm currently studying an MBA.</i>
AUS5	<i>I've got a bachelor of laws and a graduate diploma of applied financing and investments.</i>
AUS6	<i>I'm a chartered accountant, a fellow member of chartered accountant, I'm a registered liquidator and official liquidator.</i>
AUS7	<i>I have a bachelor of economics and I'm a certified turnaround practitioner and I have a CPB.</i>
AUS8	<i>I have an MBA, I have engineering qualifications.</i>
Comments from Respondents in South Africa	
Respondent	Comments
SA1	<i>So, I see you are a CA...</i>
SA2	<i>I'm an attorney who advises a number of clients in regard to business rescue.</i>
SA3	<i>CA.</i>
SA5	<i>I did BCom Law and LLB.</i>
SA4	<i>BCom, LLB, LLM, MBA.</i>
SA6	<i>I've got an MBA, MBL in South Africa Unisa, I've got a PhD, I've got a postgraduate certificate in advanced tax.</i>
SA8	<i>I'm an attorney.</i>



The formal education of the practitioners and the advisors to the turnaround industry seem to be very similar, as can be seen from the comments in Table 5.2 and also highlighted in Table 5.1. Many of the participants in both countries were either lawyers and/or Chartered Accountants. All of the voluntary administrators in Australia were Chartered Accountants and only one business rescue practitioner in South Africa was not a Chartered Accountant.

The advisors to the turnaround industry are not involved in the actual turnaround of the company but rather provide consulting services to the voluntary administrators, business rescue practitioners and other stakeholders involved in turnarounds. The professionals providing advice to the stakeholders on turnarounds in South Africa were all lawyers and only one advisor in Australia was not a lawyer.

### 5.3.1.2 Experience of the Practitioners

Business rescue in South Africa was only implemented in 2011 (Rosslyn-Smith, 2014). As the practice is only six years old, one would expect the South African practitioners to have little experience when compared to the Australian voluntary administrators because their process was established 23 years ago (Corporations Act No. 50, 2001). Comments about the experience in the field of the practitioners in Australia and South Africa are presented in Table 5.3 and are self-reported by the participants.

Table 5.3: Turnaround Experience of the Practitioners

Comments from Respondents in Australia	
Respondent	Comments
AUS1	<i>Yeah so only since 1993.</i>
AUS2	<i>16 months.</i>
AUS3	<i>So, I've been in Australia for 13 years, so for 13 years.</i>
AUS6	<i>So, you know from 1989 through to now which is almost 30 years other than a stint of 10 years running a manufacturing business I've been involved in business optimisation and Restructuring.</i>

AUS7	<i>2000, 2001 and I was in Europe at that time so I got into the restructuring world in Europe and I returned to Australia actually in 2008.</i>
AUS8	<i>About 16 years, so my first turnaround was done back in 2002.</i>
AUS3	<i>I sold my business, through KPMG, they sold it for me. I was bored at home and they said why don't you come and help us in consultancy ... the partners had invested a lot of money in a business in the Middle East which they shouldn't have done but they did, got themselves into shit and they couldn't sort it out. So, I went over to the Middle East and sported that out ... that went on for about a year, fixing different businesses.</i>
<b>Comments from Respondents in South Africa</b>	
Respondent	Comments
SA1	<i>15 years later and I've got a lot more ...</i>
SA2	<i>I've been involved right from when business rescue sort of started I've been involved in the industry involving advising.</i>
SA3	<i>I was a chartered accountant number one and because I've been in the turnaround area for like twenty years plus I've done it in Australia, liquidations and administration.</i>
SA4	<i>I've been involved in business rescue say three and a half years.</i>
SA6	<i>Full-time I started June 2011.</i>
SA6	<i>I joined TMA International, Turnaround Management Association International in 2000 I think can't remember before they were in South Africa I joined them at Chicago University and when the South Africa chapter opened up they phoned me and asked me if I want to join them in South Africa so then I joined I would think it was 2005 I think the TMA South Africa, so I joined them</i>

	<i>and I also was a member of AIPSA those days, the Association for Insolvency Practitioners of South Africa.</i>
SA7	<i>I've been since the mid-90s I've been dealing with distressed clients or I've got 20 years plus experience in this space.</i>
SA8	<i>I've been involved in insolvency since the early 90s so before 2011 we didn't have business rescue here, liquidations and insolvency and informal compromises and then in 2011 we got our new piece of legislation.</i>

Although business rescue is relatively new in South Africa, the professionals practicing in the industry have been involved in business rescue or turnarounds for many years in an official or an advisory manner. Some of the practitioners in Australia and South Africa have had experience in turnarounds in other countries and one South African professional has had many years of experience in Australia and the United States of America (SA3 in Table 5.3)

Respondent SA6 in Table 5.3 also has experience working with turnarounds in the United States. The Australian practitioners and advisors also had turnaround experience in other countries, as can be seen from the comments from AUS7 and AUS3 in Table 5.3.

The length of experience in the turnaround industry in both Australia and South Africa varied from about 16 months to over 30 years. Although it varied from person to person, the experience of the practitioners and the advisors did not differ greatly between the two countries, more particularly due to South African participants having had international experience.

Business rescue and voluntary administration professionals have diverse backgrounds, as illustrated in Table 5.1, Table 5.2 and Table 5.3, however there is little that separates the experience and education of the professionals from the two countries. The theme of Formal Qualifications and Experience of Practitioners answers part of Research Question 1: What are the similarities between the South African and Australian business rescue process?

### 5.3.2 Theme: Time Spent on Turnarounds

Voluntary administration and business rescue undertakings may vary in terms of the amount of time required by the turnaround professional and the number of rescues or turnarounds a practitioner is involved in could affect the possibility of an effective outcome. The advisors and lawyers to the turnaround industry work on an ad hoc basis while also attending to other commercial matters.

The voluntary administrators and business rescue practitioners in both countries had devoted all of their time to restructuring the companies under their direct management. The time spent on the companies depended on the complexity and other factors surrounding the administration.

The codes “average time spent on a rescue” and “factors determining time spent on a rescue” were grouped to form the theme, Time Spent on Turnarounds. The comments about the average time spent on business rescue and voluntary administration are found in Table 5.4.

#### 5.3.2.1 Average time spent on Voluntary Administration and Business Rescue

Table 5.4: Average time spent on Voluntary administration and Business Rescue

Comments from Respondents in Australia	
Respondent	Comments
AUS3	<i>Maybe a year, maybe even longer. And that's part time. You've got to train your staff, retrain I should say. So, you can't fly-in, fly-out.</i>
AUS7	<i>That is a difficult question to answer.... that administration took from the beginning of April 2016 and it's still going today in late 2017... so unfortunately the answer to your question is an administration takes as long as it needs to take and I know that's not very helpful, but it is [company] specific.</i>
AUS8	<i>Depending upon the size of the turnaround some have lasted just months ongoing, some have lasted one year and one has lasted five years.</i>
Comments from Respondents in South Africa	

Respondent	Comments
SA1	<i>I would say about a year.</i>
SA1	<i>So, I think the average business rescue in the industry is about nine months, lasts about nine months on average but ya I'd say about 12 months.</i>
SA4	<i>Ya start to finish, the advice is something else but ya I'd say it takes you start to finish realistically a year.</i>

The average time spent on a business rescue and voluntary administration, as seen from the comments in Table 5.4, seems to vary but no significant difference seems to exist between the average time spent on voluntary administration when compared to business rescue.

### 5.3.2.2 The factors Determining the Time Spent on Voluntary Administration and Business Rescue

The factors determining the time spent on voluntary administration and business rescue are included in Table 5.5.

Table 5.5: Factors Determining Time Spent on Voluntary Administration and Business Rescue

Comments from Respondents in Australia	
Respondent	Comments
AUS1	<i>There's other factors that require the devotion of time, it's certainly influenced by the size of the assets because with the size comes complexity and volume of issues et cetera so it correlates quite well.</i>
AUS3	<i>...it's how much they, how hard it is to fix it and how much money they've got to pay us.</i>

AUS4	<i>There are a number of different factors that need to be considered in the voluntary administration process not always reflected by the size of it.</i>
AUS5	<i>It depends, a lot of the time you have smaller teams for smaller administrations but it does again depend on the complexity of structuring of the business and what needs to be done or options that are available for it.</i>
<i>Comments from Respondents in South Africa</i>	
Respondent	Comments
SA4	<i>Let's say it's gonna differ from sector to sector.</i>
SA4	<i>And it's very much the function of the number of agreements that the company has in place but I won't say it's related to the size of the company at all...</i>
SA4	<i>...your contractual arrangements are limited to the store and its operational side of it you don't have a lot of other contractual arrangements, you don't have a lot of leases or rentals. So, I would say as a rescue it's much simpler than one where you've got "oh we've got a debtor's book to collect and contractual arrangements et cetera et cetera. So, although it might have significant liabilities to the landlords where you cancel that agreement you cancel all the agreements associated with that.</i>
SA7	<i>If there's multiple creditors that and that's often your commercial type businesses... he doesn't have multiple creditors whereas your commercial businesses in the cities or more urban areas.</i>

The practitioners restructuring companies spent, on average, more than the prescribed period as set out in both the Companies Act and Corporations Act, in South Africa and Australia respectively. The average time spent by the practitioners ranged from a few months to many years depending on the complexity of the company.

Issues relating to the shareholders, assets as well as money to spend on the administration process all influence the time taken for restructuring to occur, and no significant difference between the two countries could be established. It can be said that the factors determining the time spent on turnarounds are similar in both South Africa and Australia, thereby addressing Research Question 1.

### 5.3.3 Theme: Definition of a Successful Voluntary Administration and Business Rescue

Definitions of success can be found in section 2.8 and although they differ slightly, the participants' definitions point to similar outcomes. The official definitions are very broad; the participants were questioned about their definition of a successful administration. Answers to these questions can be found in Table 5.6.

Table 5.6: Definitions of Successful Voluntary Administration and Business Rescue

Comments from Respondents in Australia	
Respondent	Comments
AUS2	<i>Because unsecured creditors have a very low return money, seven per cent of unsecured creditors receive less than eleven cents back in the dollar, ninety-two per cent of those receive zero, DOCA [Deed of Company Arrangement} traditionally the percentage of debt administration, the proportion of voluntary administrations that successfully progressed into a deed administration or a docker.</i>
AUS5	<i>A business that continues in existence and substantially doing the same thing but has either removed or addressed the issues that were causing it difficulty prior to the turnaround.</i>
AUS6	<i>The business is still trading and employing people and it doesn't matter if it's, the volumes have decreased substantially and the number of employees have decreased substantially, that I think is still staying alive and trading because that keeps businesses alive as well as suppliers keep trading and customers to keep trading.</i>

AUS7	<p><i>Well a successful turnaround in an administration I guess is a narrower definition which is what is the responsibility of an administrator? The administrator's responsibility is to drive to an outcome which creates the highest possible return for the stakeholders and particularly with regard to the creditors and that's all creditors not just the secured creditors, not just the employees, not just government, its trade creditors it's everybody.</i></p> <p><i>So, a very narrow definition is one that takes a situation which is difficult by definition you're in administration so it must be difficult for whatever reason and maximises the outcome in the circumstances.</i></p>
AUS7	<p><i>A broader definition which I think is why administration has been the subject of, you know, the safe harbour legislation which is part of the Australian governments innovation agenda is one which has regard to the economic benefit of preserving and encouraging the revival of companies that get into trouble.</i></p>
Comments from Respondents in South Africa	
Respondent	Comments
SA1	<i>It's very broad it's very loose.</i>
SA2	<i>Ya, but I mean what is that based on, is that ten per cent of companies don't go into liquidation or ten per cent of the companies have a better return in liquidation.</i>
SA3	<i>Our definition is the business rescue plan gets published, it gets agreed by the creditors and it gets implemented. If that happens that's success and in the case, we doing now that will be a wind down so you know the definition is that it needs to be, have a result better than what they show.</i>
SA4	<i>Yes, a plan that gets substantially implemented is successful.</i>
SA5	<i>I think the success rate is good if you take, managed wind down of a business as a success.</i>
SA6	<i>Now you opening a can of worms I mean there's so many people. If you look at every university and every student basically</i>



	<p><i>is talking about successful business rescue, I think successful business rescue is a combination of two things one is to get a plan approved that's your first benchmark is to get a plan approved, if you've got the plan approved you only 50% there right then you've got to look at the following, can a plan be implemented with or without the practitioner, if it can be without the practitioner then that becomes 100% the moment its approved then you successful.</i></p>
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The definition of success varied from one practitioner to the next; however, the participants from both countries shared similar definitions of success. These varied from the acceptance of a Deed of a Company Arrangement (equivalent to a business rescue plan) to some practitioners defining success as a business that was still operating, even at a diminished level. Practitioners in both countries also considered closing down the business and returning a higher return to creditors, instead of immediate liquidation, a success.

Perhaps the most fitting definition of success in this context, was from respondent SA1 of South Africa who said that “it’s very broad it’s very loose”. The theme regarding the Definition of a Successful Voluntary Administration or Business Rescue highlights, once again, another area of similarity between the practices in the two countries, as addressed by Research Question 1.

#### **5.3.4 Theme: Business Rescue and Voluntary Administration Culture**

Although respondents were not directly questioned about the culture surrounding business rescue and voluntary administration, comments on the culture and stigma surrounding voluntary administration and business rescue were forthcoming in the interviews. Comments regarding culture and stigma were coded to form the theme Business Rescue and Voluntary Administration Culture. Some examples of these answers can be seen in Table 5.7.

Table 5.7: Voluntary Administration and Business Rescue Culture

Comments from Respondents in Australia	
Respondent	Comments

AUS3	<i>Yeah, Australia is very risk averse, I've seen the culture of business, as in it's not as, it's always by the book.</i>
AUS3	<i>Because the risks are so high if you fail compared to other countries, and the cultural bit which is pushed by the administrators and the receivers because they get paid so much and they don't want to lose their cosy relationship. That's the problem in Australia.</i>
AUS3	<i>You don't want the courts to decide on anything- the courts decide and you're screwed. You've got lawyers in there. Nothing gets decided. They're all after the fees. You got to change the culture and that's the trouble.</i>
AUS3	<i>Yeah, it has to change the culture, you've hit the nail on the head. Until that happens lawyers can get around it or consultancy guys can get around it they'll see I'm not safe. I think there's a learning curve, a consequence curve.</i>
AUS3	<i>I know what you're saying because they are protected and all the rest of it but I'm just not sure even with the protection whether their egos will let them.</i>
AUS4	<i>I think at the end of the day it comes down to corporate culture and the innovation reforms safe harbour all intended to help improve a culture of being safe to fail more like the US approach of encouraging entrepreneurs instead of punishing them when they fail.</i>
AUS4	<i>No, I think the cultural change for me is more important than some of the legislation at the moment.</i>
AUS5	<i>No there's a degree of ego in the sense of not wanting people to know that you are in difficulty or not wanting to admit that you're in trouble, there is also an element of its temporary we will trade through it we've just got to keep hanging in there and the longer that happens without anything being done of course the harder it is to fix the situation.</i>

AUS5	<i>It will certainly change the culture it's hard to change the stigma to a certain extent but it may become less of an issue the longer this legislation stays in effect and the more successful turnarounds are become evident through the market.</i>
AUS7	<i>Yeah in unlike the United States where failure is just part of the learning journey to become a great entrepreneur and some people fail more than others along with the way and some people never recover and some people become the president of the United States.</i>
Comments from Respondents in South Africa	
Respondent	Comments
SA1	<i>I think it often does happen like that although very often the director is sitting there and he's hoping against hope that his company, that he will get to save it you know what I mean.</i>
SA1	<i>Ya, I mean it depends on the kind of relationship you've got them so that's why you know business rescues have a big stigma attached to it, the people are scared to file for business rescue but I think the advantages of filing it earlier are better than the disadvantages.</i>
SA2	<i>It's the be all and end all factor, if you come even six months is probably you know that takes a very diligent Board of Directors with a lot of foresight and no one likes, no one likes to admit that their company is doing badly and that they can't run their own companies cause that's what it comes down to.</i>
SA2	<i>When a director, board of directors are sitting in front of you and saying "we need to consider business rescue" what they saying is we've got ourselves into trouble and we don't know how to get ourselves out or they too far in, they thought they could get themselves out and then can't. So, it's I think ego plays a big role in it, they don't do it until we can't pay employees at the end of the month.</i>

SA2	<i>Most of them their experience of business rescue is their debt is going into business rescue, people that they were owed money that owed them money are going into rescue because they are hopelessly insolvent and then they get ten cents on the rand and the company is closed down anyway. So, when everyone sees business rescue they just say ah you know it's a useless thing it doesn't work, you end up getting screwed anyway.</i>
SA2	<i>...that's why it's abused so often and that's why it doesn't have a good name in the market because it's been abused and it's being used as a last ditch attempt.</i>
SA2	<i>It's the number one thing to rescuing a company is educating those in charge of the company. The problem is that people are a) embarrassed that their company is in this position or they in denial that it's in that position...</i>
SA2	<i>And they feel like if they come in it's an admission of failure on their part but sometimes it's not sometimes it's just that the market is bad and that you know you can't do anything about it.</i>
SA1	<i>Business rescues have a big stigma attached to it, the people are scared to file for business rescue but I think the advantages of filing it earlier are better than the disadvantages.</i>
SA3	<i>The company directors leave it too late without a doubt that's the biggest single problem and they in denial.</i>
SA3	<i>Obviously entering into business rescue earlier would also be beneficial to the company and they not doing it and I don't think I mean there isn't really a valid reason for them not to, except the stigma and the culture around business rescue.</i>

The culture regarding administration in South Africa and Australia was similar in that it is often the “egos” of management that prevents a firm from seeking help at an earlier stage. The use of the word “ego” was used by different participants in both South Africa and Australia. Management viewed administration as a failure of their abilities and this view may delay their decision to enter into business rescue. The respondents in Australia seemed to think that the new Safe Harbour laws (discussed in section 2.11.1)

would help change the culture in Australia by encouraging directors to enter into administration and removing the stigma attached to entering administration.

As mentioned above, business rescue and voluntary administration have negative connotations in the business world. The stigma attached to, and the culture of, business rescue and voluntary administration is another example of the similarity between the practices in the two countries. This partly answers Research Question 1: What are the similarities between the South African and Australian business rescue process?

### 5.3.5 Theme: Post Commencement Finance

Post commencement finance is an important factor when determining the chances of a successful rescue. “In any rescue regime, a degree of financial support is required from the commercial environment through the provision of additional funding and requesting existing creditors to postpone or compromise their claims” (Vriesendorp & Gramatikov, 2010).

Questions related to Post Commencement Finance were not included in the original set of questions. The repeated mention of this subject, as are included in Table 5.8, gave rise to a theme.

Table 5.8: Comments on Post Commencement Finance

Comments from Respondents in Australia	
Respondent	Comments
AUS1	<i>Look I haven't had an involvement where it's actually been effective but I can understand, I understand theory I just haven't seen it happen.</i>
AUS4	<i>Yes, it's called debt funding in the US. Yes, not used very often. I just used it on a recent voluntary administration for 60 million but it's not something to be taken lightly. I had to go to court to ensure that I don't have a personal liability in relation to the debt. Yes, so it's quite a process.</i>
AUS6	<i>So, if you say "look without finance we are unable to open the doors and continue trading and if we can't open the doors and</i>

	<p><i>continue trading the chances selling this business for restructuring is zero". So we need finance to be able to do that but there's a risk it may not work but the only way we going to do it is to get this finance and that financier needs to stand it needs to get paid before anyone else does and then I think that makes sense, there's no real risk factor for anyone else I mean other secured creditors might tell well they getting a priority but we say well hang on a minute if they didn't do this or if we didn't get this funding then you wouldn't have got anything in any case. So, I think that's okay.</i></p>
<p>Comments from Respondents in South Africa</p>	
<p>Respondent</p>	<p>Comments</p>
<p>SA1</p>	<p><i>What's hindering them as well, once the business is rescued, the availability of post commencement finance, the banks don't even look at post commencement finance, there are some players in the market who are starting to look at it, they starting to provide post-commencement finance but they obviously very picky as to which ones they finance at this stage because they've got a lot of choice you know.</i></p>
<p>SA2</p>	<p><i>You can't rescue a company without funding, very rarely will you find outside funding for that initial, and it also depends when you come into rescue you know if you come in within six months and you because in six months' time you might not be able to pay your debt that becomes due.</i></p>
<p>SA2</p>	<p><i>The banks aren't going to put it in because they will just shut down the moment somebody says business rescue they shut down, secure their positions and wait to see if it's worth reopening the facility or I mean if you in business rescue it means your overdraft is fully...</i></p>
<p>SA2</p>	<p><i>Two things simple, number one it's the customer, the client, the company directors leave it too late without a doubt that's the biggest single problem and they in denial, and secondly there is no post-commencement finance available so there's no</i></p>

	<i>distressed funds available, they starting to come out, we tried to get one going five years ago, nobody was...</i>
SA7	<i>Okay so not totally averse to it but it's got to be justified so for me in a number of matters we have given substantial post-commencement finance, we've given substantial post-commencement finance I'm talking millions, one matter 5 million post-commencement finance but if its properly documented, justified, the practitioner was good you know there's a good motivation for doing it... In a particular instance I think there were two, there was effectively three businesses one was delinquent, one was in business rescue and the others below that below the structure were good businesses so it was key to retain those businesses as going concerns. So that's what we funded through the post-commencement finance because obviously this was a holding company and it was placed in business rescue and I think eventually it was liquidated as part of the plan but we managed to sell off those good businesses why? Because we kept them going as going concerns and hence retained going concern value in those businesses.</i>
SA8	<i>...called PCF. Now who puts in PCF? It could be your existing bank they already down the tube for whatever the amount is on the overdraft, do they want to put in more money? Probably not so we ask you as the practitioner go to the third-party buyer who wants to pop the asset up, put some money in, keep it alive while I do my deal and buy it. Get the money back anyway from buying it so that's another source and then ya there's a lot of talk and movement about distressed funds, funds that are set up in South Africa just to put in PCF so they can get a foot in the door and then do an acquisition. There are those companies around but we have not seen the levels of transactions involved in those companies to the extent that I would like to see it.</i>

Based on the above comments, Post Commencement Finance seems to be a common area of concern and it can be said that both countries experience poor availability and

willingness of the lenders to fund a distressed company. This theme answers, in part, Research Question 1.

### 5.3.6 Theme: Practitioners

This study employed purposive and snowball sampling. Whilst the initial participants were chosen from the Turnaround Management Associations in both South Africa and Australia, not all participants were members of such organisations. No specific questions regarding the practitioners themselves were included in the formal interview questions, however respondents in both countries commented on the quality of practitioners in general. The comments on the practitioners were then coded and transformed into the Theme “Practitioners”. Comments on the theme are contained in the Table 5.9.

Table 5.9: Comments Regarding Practitioners

Comments from Respondents in Australia	
Respondent	Comments
AUS3	<i>...they were losing a lot of money because, no disrespect to accountants but accountants can't fix businesses and that's a fact of life.</i>
AUS3	<i>Yeah, they just slash and burn, make a lot of money on the way through...</i>
AUS4	<i>The quality of the practitioners, overall most are very good but there are some that are more incentivised toward insolvency.</i>
AUS5	<i>You've got some good ones you've got some not so good ones that's always the waiver so it's a case of needing to encourage information and best practice within the sector and ensuring that people are aware of what is a better standard of operation than what is not.</i>
Comments from Respondents in South Africa	
Respondent	Comments



SA1	<i>I think the industry is, I think the general quality of practitioners is very poor, there's this part that says you can be an accountant, lawyer or a business management consultant to be a business rescue practitioner.</i>
SA1	<i>You push the creditors aside and any free cash flow that the company generates for the next 6 to 12 months, as a business rescue practitioner you can just basically help yourself with it, I mean the difference is obviously some people do it ethically and are worried about their reputation but some are just not worried about their reputation.</i>
SA1	<i>I think the industry has got a long way to go before it's matured in terms of quality of practitioners specifically because I mean so much of the success of the business rescue revolve around the practitioner or are entirely dependent on the practitioner.</i>
SA1	<i>At the end of the day a lot of business rescue practitioners would let it run out for six months, charge fees and the creditors would get absolutely nothing.</i>
SA1	<i>I would say the qualification of practitioners, they should be either a I think they have to have formal either financial qualification such as a CA or a legal qualification as well, I think they'd have to be a lawyer or an accountant by qualification, that's the one thing, I would potentially not allow liquidators to be business rescue practitioners although there are very skilled liquidators who could be but I think thought should be given to not allowing liquidators to be business rescue practitioners.</i>
SA2	<i>There is a lot of practitioners out there who I would not term competent and so ya we just if given the option when we do advise our clients to for instance to a voluntary business rescue, we would advise them on names of practitioners and we will facilitate meetings between the client and those practitioners before the resolution is passed.</i>
SA2	<i>In principle there's nothing wrong with it, it's just the mind-set that needs to change you know practitioners look at everything, are backward looking not forward looking, liquidators sorry,</i>

	<i>liquidators are backward looking not forward looking, that's the mindset that they've always had. I don't think it's necessary to have, you know to bar them I don't think you have to be either or but I think you know liquidators also don't have to have minimum qualifications and so anyone can be appointed as liquidator if you have applied to the master.</i>
SA3	<i>You know some of them have got factories you know one guy in particular he's got a hundred on the go simultaneously one hundred, impossible to do it properly so he's got a factory so he runs it for two months then puts them in liquidation so his success rate would be ten.</i>
SA3	<i>...what's happening here is I'm coming back to the business rescue, the business rescue practitioner takes his fee, sells assets to his mate, doesn't keep the creditors informed, doesn't issue status update, doesn't issue a business rescue plan and the business just fails, now that would never happen in Australia because their checks and balances are much more.</i>
SA4	<i>You definitely need to enhance the quality of the service that the practitioners are rendering yes and ensure that the practitioner actually has a proper understanding of the act definitely, that's critical.</i>
SA6	<i>Look, I don't even want to start with the people...</i>
SA7	<i>Okay so that's the first point I want to make so it's not, it's business as usual but with a difference obviously now we have to follow a legal process, there's a practitioner and I need to say the practitioners is the biggest issue for me.</i>
SA7	<i>Respondent: No, they cherry pick, there's no doubt, Interviewer: But they saying the good guys are cherry picking, Respondent: Yes, Interviewer: The bad ones are, they'll take anything and they'll do anything,</i>

	<i>Respondent: No no sorry I am aware of this...</i>
SA7	<i>I'm talking about legal action and business rescue you know because take practitioners, the CIPC says to us if you don't want a practitioner go to court, we cannot go to court in every matter where we object to a practitioner, we want a combination of the relevant bodies i.e. TMA, SAICA whoever it may be as well as them to discipline the delinquent, rogue call them what you want practitioners and that's the biggest issue, there's no consequence.</i>
SA8	<i>...there's those couple of guys in the TMA you know good guys, guys who know what they doing, they understand rescue and if you appoint the right guy, [name removed] is another one you know there's a lot of them, when I see lots it's not lots maybe 10 or 15 that I would put in...</i>
SA8	<i>I think certain people talk against rescue as a practice because either they have been burnt in a failed rescue or they've had an experience with a rescue practitioner who doesn't know what he's doing and he's only in it for the fees or and he's had some bad experience within the business rescue context.</i>
SA8	<i>So, most of it is dealt with to a large degree and then it comes back always the conversation always comes back to the business rescue practitioner. I mean some guys just don't even file a plan, that's like this matter I've got with the bank and now that's why we asking for his licence to be revoked. Whether you would see that in Australia probably not, that's the difference.</i>

The respondents in both countries made comments on their fellow professionals in the turnaround industry. There were only three comments made by the Australian respondents. The comments were mixed but mostly complimentary. For example, this comment by AUS4 who stated that “the quality of the practitioners, overall most are very good but there are some that are more incentivised toward insolvency” and AUS 5 who stated that “you’ve got some good ones you’ve got some not so good.” There was only one respondent who had entirely negative comments on the voluntary

administrators and they centred around liquidators being voluntary administrators, “[y]eah they just slash and burn, make a lot of money on the way through” as said by AUS 3.

The South African respondents all made comments regarding the business rescue practitioners in South Africa. The comments were generally about the abilities or the quality of the practitioner, the ethics and practices of business rescue practitioners, and the education of the practitioners. There was also a substantial increase in the number of comments from the South African respondents when compared to their Australian counterparts.

The quality of the practitioners in South Africa seemed to be a problem as evidenced by SA1 saying “I think the general quality of practitioners is very poor” and SA2 believing that “there is [sic] a lot of practitioners out there who I would not term competent.” The quality of the practitioner and the service they were providing did not seem to be of an acceptable standard. This could be contributing to the low success rate of business rescue in South Africa as the business rescue practitioner plays an important role in the business rescue process. This conclusion is supported by SA1 who said

I think the industry has got a long way to go before it’s matured in terms of quality of practitioners specifically because I mean so much of the success of the business rescue revolve around the practitioner or are entirely dependent on the practitioner.

There were also many negative comments from the respondents about the ethics of the practitioners in South Africa, such as

any free cash flow that the company generates for the next 6 to 12 months, as a business rescue practitioner you can just basically help yourself with it, I mean the difference is obviously some people do it ethically and are worried about their reputation but some are just not worried about their reputation.

(SA1)

SA3 said that, in some cases “the business rescue practitioner takes his fee, sells assets to his mate, doesn’t keep the creditors informed, doesn’t issue status update,

doesn't issue a business rescue plan and the business just fails." SA7 believes that this is due to the fact that "...there's no consequence." There seems to be many unethical practitioners in South Africa who are not following the rules and regulations. These practitioners seem to give the industry a bad reputation and could also contribute to the low success rate of business rescue.

There were also complaints about liquidators in South Africa becoming business rescue practitioners. This is due to the fact that most liquidators in South Africa, as mentioned in chapter 2, are lawyers and not Chartered Accountants as is the case in Australia. SA1 felt strongly about this, stating that they "would potentially not allow liquidators to be business rescue practitioners although there are very skilled liquidators." SA3 believes that liquidators are not suitable because they "are backward looking not forward looking, that's the mindset that they've always had." With the only professional prerequisite being a law degree in order to be a liquidator in South Africa; some of the respondents seem to think that they do not possess the ability to turn around a business as they do not have experience in a business environment, unlike the liquidators in Australia.

There are many complaints regarding the quality of the practitioners, the ethics and practices of business rescue practitioners and the education of the practitioners. This seems to be a major difference between South Africa and Australia and this theme of Practitioners partly answers Research Question 2: What are the differences between the South African and Australian business rescue process?

### **5.3.7 Theme: Companies and Intellectual Property Commission and the Australian Securities and Investments Commission (CIPC and ASIC)**

The interview did not contain questions directly related to the CIPC and ASIC. The comments about the CIPC and ASIC were coded separately and the two codes from the different groups were used to form the theme CIPC and the ASIC. The CIPC in South Africa and the ASIC in Australia are departments who license rescue practitioners. They also govern the respective industries and can expel or discipline members, as mentioned in chapter 2. Although the theme is called CIPC and the ASIC, there were no comments about the ASIC however it was included in the theme as this is a comparative report. Almost all the respondents mentioned the CIPC without being prompted by a question. The comments regarding the CIPC are found in Table 5.10.

Table 5.10: Comments about the CIPC

Comments from Respondents in South Africa	
Respondent	Comments
SA2	<i>Attorneys are accountable to the Law Society you know and that's what you need is some sort of regulating body that says okay if you're a practitioner then you have to be a member of the Business Rescue Practitioners Association of South Africa, here's our sets of rules, here's our conduct and here's what you have to meet, failing which you will not be appointed and you have to have a signed off status certificate, it's sort of there at the moment with CIPC but it's just not...</i>
SA3	<i>CIPC is actually, it doesn't have the systems and controls in place up until about six months ago it was manual can you believe it on Excel spreadsheets so they are trying to catch up but they are light years behind ASIC and that's why they've palmed out the whole accreditation of practitioners to the chartered accountants to the lawyers.</i>
SA4	<i>At this stage you can run a business rescue for three years, not submit any report to CIPC and not be subject to sanction so why do you, there's no incentive I mean if there's as an attorney if I get reported to the Law Society I can get disbarred, I can use my licence to practice.</i>
SA6	<i>...don't know where they are now to sort of put some discipline in the system and if you don't deliver your monthly reports you going to be removed and if you don't do this that's going to happen.... And nobody enforces that in any case.</i>
SA7	<i>So, if you not already aware I represent ABSA at the CIPC in terms of representing us to drive a process with practitioners</i>

	<i>or regarding practitioners and we looking to try and improve that around the accreditation of practitioners, it's almost the topic on its own.</i>
SA7	<i>I don't believe the CIPC plays enough of an overseeing role if I can call it that. If you look at the master of the High Court he plays a much more significant role in terms of policing the activities of liquidators, they can't step out of line if they get out of line they just don't get appointments. You know so there's a definite you know kind of carrot and stick approach to the way they operate.</i>
SA8	<i>We can improve what goes on at the CIPC, I think we've got some rouge practitioners out there who should have their licences revoked...</i>
SA8	<i>I say ya there is no, there's nothing if you do something wrong, if you are a bad business practitioner there isn't really I mean like the Law Society will take action on you but the CIPC isn't.</i>

The South African respondents had many complaints about the CIPC. Complaints varied from their role as guardians of the business rescue industry to the technology the CIPC was using. Seven of the eight respondents had concerns regarding the CIPC as an authority. The CIPC seems incompetent when disciplining practitioners who do not stick to timelines and do not obey the rules set out in the Companies Act.

SA3 believes that one of the problems with CIPC is that "it doesn't have the systems and controls in place up until about six months ago it was manual can you believe it on Excel spreadsheets so they are trying to catch up but they are light years behind ASIC." This participant had previously worked as a turnaround professional in Australia for more than ten years and is currently working as a business rescue practitioner in South Africa. The CIPC is still developing its internal operations capabilities and this could also lead to inefficiencies when dealing with the practitioners.

The CIPC, although a regulatory body, does not seem to entertain complaints about the practitioners and relies on the court to punish practitioners. SA7 illustrated this by saying that

the CIPC says to us if you don't want a practitioner go to court, we cannot go to court in every matter where we object to a practitioner, we want a combination of the relevant bodies i.e. TMA, SAICA whoever it may be as well as them to discipline the delinquent, rogue call them what you want practitioners and that's the biggest issue, there's no consequence.

Going to court could be an expensive and lengthy process and not necessarily the best use of an individual practitioner's time.

There also seems to be little punishment for practitioners from the CIPC who lengthen the business rescue process and not produce reports on their progress. SA4 said that "you can run a business rescue for three years, not submit any report to CIPC and not be subject to sanction" and SA6 said they would like to see the CIPC "put some discipline in the system and if you don't deliver your monthly reports you going to be removed and if you don't do this that's going to happen."

The CIPC and its role - regarding the licensing, regulation, oversight and punishment - seem to be lacking when the comments in Table 5.10 are taken into consideration. This seems to be a significant difference between South Africa and Australia and partly answers Research Question 2: What are the differences between the South African and Australian business rescue process?

### **5.3.8: Classification of Practitioner**

Comments regarding the classification of practitioners were coded and a theme was formed. South African business rescue practitioners can be classified as a junior, senior and experienced. The size of the company determines the practitioner needed, as mentioned in section 2.7.3.1. Australia does not have levels of practitioner and all voluntary administrators are on the same 'level'. The South African business rescue practitioners were not happy about the way many of them are classified. The comments regarding the classification of the practitioner are in Table 5.11.



Table 5.11: Comments on Practitioner Classification

Comments from Respondents in South Africa	
Respondent	Comments
SA1	<i>Although I, I feel I should be at least classified as an experienced practitioner, I have been bumping heads with CIPC about it and hope to get reclassified as at least an experienced practitioner within the next year...But it's a fairly common problem that a lot of practitioners are sitting with.</i>
SA1	<i>He's an experienced practitioner he should be a senior. There's a lot of, if you look at the list of business rescue practitioners I mean these guys have been in the liquidations industry for 40 years and they classified as a junior practitioner so unfortunately CIPC is...</i>
SA3	<i>[Name removed] is a prime example he has only experience even though he's doing his PhD because CIPC say no you haven't done formal business rescue for more than 10 years therefore you're inexperienced.</i>
SA6	<i>Now I'm highly qualified that's all that I've done my whole life I can't register as a business rescue practitioner because I'm not a member of any professional body..... okay so I won't be allowed to get a licence here but a 24-year-old guy who's a CA and belongs to the Chartered Accountant Association he can become a senior rescue practitioner and you can do that sum yourself, do the calculation. You know so it's pathetic there's no other word to describe it, how they trying to regulate this environment. There's a lady I think she's 23 she passed her bar exam the other day, she can become a senior business rescue practitioner.</i>
SA6	<i>How can a liquidator for the life of me have turnaround experience and 10 years of it, the act came into operation 1 May 2011 now if my maths serves me right it's six years down the</i>

	<i>line, how the hell can you have 10 years of experience to become a senior practitioner?</i>
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As can be seen from the comments, complaints relate mainly to the levels assigned to practitioners. The respondents seemed to blame the CIPC for not giving them the higher status of an experienced or senior practitioner. The hierarchy of practitioners is set out in the Companies Act of 2008 and clearly explains the level of experience required by a turnaround practitioner in order to become a junior, senior or an experienced business rescue practitioner.

There is also further confusion regarding the classification of business rescue professionals. SA1 points to some examples “he’s an experienced practitioner he should be a senior. There’s a lot of, if you look at the list of business rescue practitioners I mean these guys have been in the liquidations industry for 40 years and they classified as a junior practitioner...”.

The law, as set out in the Companies Act of 2008 and summarised in chapter 2, clearly states the requirements for becoming a business rescue practitioner and the requirements regarding the different categories of practitioners. The comments from the participants seem to contradict each other with some liquidators being able to practice as senior practitioners without the required ten years of experience and others, who have also been liquidators for more than ten years, are defined as junior practitioners.

The practitioners also seem to blame the CIPC for not considering their previous experience as a Chartered Accountant in informal turnarounds as turnaround experience, as is voiced by SA1

I feel I should be at least classified as an experienced practitioner, I have been bumping heads with CIPC about it and hope to get reclassified as at least an experienced practitioner within the next year...But it’s a fairly common problem that a lot of practitioners are sitting with.

The same respondent had many years of informal turnaround experience but is not considered a senior or experienced practitioner. SA1 explained their informal turnaround experience,

I'm into business rescue, I am I've been involved in this sort of distressed environment for a very long time, 2002 and 2003 I worked for a company called [company name] group which was headed up by one of the sort of main turnaround guys in the country and he's one of the leading players in business rescue now. So that gave me an insight into turnaround work because the business rescue act obviously hasn't been promulgated then and that gave me an insight into debt recovery as well.

It seems that a liquidator may claim his liquidation experience as business rescue experience but an accountant may not.

The confusion regarding the licensing and classification of practitioners has resulted in many complaints voiced during the interviews with South African practitioners. The Australian system does not allow for such classifications. It would seem that the South African system of classification may prevent adequately qualified practitioners from taking on bigger appointments and allowing practitioners who do not have the necessary experience to be appointed as senior practitioners. This shortfall in South Africa, that is not experienced in Australia, may ultimately lead to a lower success rate of business rescue in South Africa and this theme partly answers Research Question 2: What are the differences between the South African and Australian business rescue process?

### **5.3.9 Theme: Safe Harbour**

Safe Harbour laws were introduced in Australia in September 2017 (Lacey, 2017). The laws, as mentioned in chapter 2, aim to prevent directors from trading during insolvency and compel directors to seek external advice before accumulating more debt. Directors who acquire external advice from voluntary administrators and turnaround professionals will not be held personally liable for the company's debts if the company is liquidated. If the directors accumulate debt in an irresponsible manner, without acquiring external advice, they may be held liable for trading irresponsibly.

The topic of Safe Harbour was not initially included in the interview, however all respondents in Australia expressed a view on the matter and questions regarding Safe Harbour were later included in the interview questionnaire. Comments regarding Safe Harbour were coded and a theme was formed. The major comments regarding Safe Harbour are included in Table 5.12.

Table 5.12: Comments on Safe Harbour

Comments from Respondents in Australia	
Respondent	Comments
AUS1	<i>Well I think the Safe Harbour initiatives are long overdue but I think that only time will tell when in terms of them actually effectively coming in. The fundamental problem and issues I see with safe harbour is that they good in principle but the devil is in the detail.</i>
AUS1	<i>...which is what it aims to achieve then people would be getting advice earlier so that would be good and then we would rather do Safe Harbour or we would get involved in the process a lot earlier before the assets have diminished in value.</i>
AUS2	<i>Well the protections for Safe Harbour provisions have been so specific and niche that it hasn't been widely accepted or understood so it's overly complex legislative landscape in Australia so there's a lot of laws it's too complex people don't understand it is one.</i>
AUS2	<i>I think it's good and necessary and the laws that they made that are going to be introduced should help but I don't think well the industry says that they perhaps not, aren't gonna make a huge amount of difference but I think it's a step in the right direction.</i>
AUS3	<i>Most people don't understand what it means.</i>
AUS3	<i>At the end of the day let's wait and see I think, I just don't understand how it's all going to be applied yet. I can see what the written word is. If the lawyers and others, if there's holes in</i>

	<i>there and it lets them in, lets them look around. I just don't know. Ask me the question in three or four months.</i>
AUS4	<i>We like to think at [company] we are going to be the best practice leaders for Safe Harbour. We've invested a lot of methodology and approach to Safe Harbour. So, I think it provides a good opportunity, certainly a move in the right direction to create a better system and a more safe to fail kind of environment so company directors will benefit from the changes.</i>
AUS4	<i>I think it's a tool that can be very useful. I think I've done the analysis and it doesn't always lead to restructure. It could also prolong the period before liquidation.</i>
AUS5	<i>Well I think it's a step in the right direction there could have been other reforms happen at the same time but the governments gone with a very limited approach so we'll take what we've got and continue to wait for more changes.</i>
AUS5	<i>I certainly welcome the Safe Harbour defence, that can be helpful.</i>
AUS5	<i>Well it means that we can encourage directors to take steps to turnaround businesses prior to it getting into voluntary administration or liquidation phase because they will be less concerned about personal risk to themselves if they think they can rely on the defence to insolvent trading which is the Safe Harbour defence.</i>
AUS6	<i>...think anyone that goes into the Safe Harbour regime in the interim is going to want to not have key contracts as part of their business because they going to fall away and or you going to assume they going to fall away unless you can negotiate with them to continue supplying or continue the contract in some shape or form.</i>
AUS6	<i>...for any business to go to the Safe Harbour is going to have to have their tax up-to-date and like I said any business that I have seen 95 per cent of businesses that I have seen that have gone</i>

	<i>into voluntary administration have all got an outstanding tax debt so you will maybe be disqualified from entering a Safe Harbour scheme if your tax is not up-to-date.</i>
AUS7	<i>...what Safe Harbour does do is it says to those directors you have a defence in fact you have a carve out from the law which says I brought on an appropriate set of advisers and those advisers advised me through the process and therefore I'm not personally liable I'm acting in the best interests of the stakeholders I'm acting in the best interests of the creditors and I got an ability to demonstrate that I've got proper advice in doing that.</i>
AUS8	<i>Well Safe Harbour is something that should have been put in place 10 years ago it currently has a different form in the US called Chapter 11 and I think they have chapter 8, various things in the UK also and Safe Harbour is something that is well overdue here in Australia.</i>
AUS8	<i>Safe Harbour is a wonderful change in the law and its actually moving away from the previous environment in Australia which was run by the insolvency practitioners whereby companies would just be shut down and value, jobs and livelihoods were lost as a result of the law.</i>

The new Safe Harbour regulations seem to be a major topic in the Australian turnaround industry. The respondents' attitudes towards the new regulations were mostly welcoming and seen as a step forward for the turnaround practice in Australia. AUS1 said "the Safe Harbour initiatives are long overdue" and AUS5 said "I certainly welcome the Safe Harbour defence, that can be helpful." The general attitudes towards the new regulations were positive and despite the scepticism on the part of some practitioners, most believe it is a step in the right direction.

AUS8 believes that it is a "wonderful change in the law and it's actually moving away from the previous environment in Australia which was run by the insolvency practitioners whereby companies would just be shut down and value, jobs and livelihoods were lost as a result of the law." South African business rescue legislation makes no provision for Safe Harbour or the benefits of such stipulations. This is a

significant difference between Australia and South Africa and partly answers Research Question 2: What are the differences between the South African and Australian business rescue process?

### 5.3.10. Theme: *Ipsa Facto* Clauses

The legislation process regarding the *Ipsa Facto* Clauses is currently underway in Australia, with enforcement of the law expected from 01 July 2018. The *Ipsa Facto* provisions are intended to restrict counterparties from exercising contractual rights solely as a consequence of the company entering into administration, a scheme of arrangement or receivership (Apathy, Spencer, & Cronk, 2017).

The new *Ipsa Facto* Clauses do not allow for banks and other creditors to recall assets from financially distressed companies who enter into Safe Harbour, voluntary administration and liquidation as this can be seen to destroy the goodwill of the company. Given the novelty of the legislation to the Australian turnaround industry, and that the Australian Federal Government released draft legislation for comment by 24 April 2017, it is expected that this would have been of interest to Australian respondents. The discussion surrounding *Ipsa Facto* Clauses and the proposed impact it is to have on the industry accounted for significant lengths of time in most interviews. The comments regarding the new *Ipsa Facto* Clauses are presented in Table 5.13.

Table: 5.13 Comments on the *Ipsa Facto* Clauses

Comments from Respondents in Australia	
Respondent	Comments
AUS1	<i>...in particular it brings it more in line with you know the US and what they can do through their chapter 10 and 11.</i>
AUS2	<i>...the insolvency law reform act, there's a lot of pieces to it, it's overly complex and burdensome but the key points that I am aware of and support are the Safe Harbour provisions and ipso facto reforms.</i>
AUS4	<i>Yes, definitely could have been executed better. There's been a lot of work we've had to do to prepare for the changes behind</i>

	<i>the scenes which aren't really overwhelming but there's been a lot of fiddling around the edges in terms of process.</i>
AUS4	<i>That's the encouraging factor, whether it works that well or not remains to be seen. Certainly, the support for the changes came from the Australian Institute of Company directors as well as ARITA and TMA so business thought this was a good idea, how much they adopt that and how willing they are to implement that because it is all new we just going to have to wait and see.</i>
AUS5	<i>...it may also impact then the cost of doing business with those entities because they going to be more at risk in terms of not being able to act on their own contractual arrangements with respect to the entity that is relying on you know the Safe Harbour provisions or the ipso facto style clauses not being able to be actually implemented.</i>
AUS5	<i>...companies can go and collect their trucks and things like that. So, I think that's the danger I think that it's just it's one of those things that are yet to be seen you would hope that this thing works and that companies are able to, well I think the purpose is so that companies can continue existing into the future and trading even if it's at a reduced level and employing that's the key because you know having businesses go broke the employees become unemployed is costing the government a lot so what they trying to do now is to say okay let's make it easier for company directors to put companies, get them restructured before it's too late.</i>
AUS5	<i>So voluntary administration was supposed to be a way of restructuring and so now they saying that hasn't worked either so can we now introduce something that happens before voluntary administration.</i>
AUS5	<i>I'm not too sure I thought that if the company well I read something the other day I can't remember what it was but it was some sort of issue about ipso facto law that if the company did not continue being restructured they went through some other</i>



	<i>course then the ipso facto clauses remain and can be acted upon.</i>
AUS5	<i>I certainly welcome the Safe Harbour defence that can be helpful I need to still have a look at the ipso facto regime and see how that flows through to businesses doing business with particularly financiers to businesses but at the end of the day the ipso facto part is just a policy shift from government as to who bears the risk in these types of situations so it's going to be one of those things we just have to live with I suspect.</i>
AUS6	<i>Well like I said the ipso facto doesn't come into play until 01 July next year so that's too far down the track to tell so I think anyone that goes into the Safe Harbour regime in the interim is going to want to not have key contracts as part of their business because they going to fall away and or you going to assume they going to fall away unless you can negotiate with them to continue supplying or continue the contract in some shape or form.</i>

Respondents did not have considerable objections regarding the *Ipsa Facto* Clauses and were unable to comment with too much conviction since submissions on the new legislation are still being considered. There are currently no *Ipsa Facto* Clause provisions in South Africa and this is a significant difference between the two countries. This theme partly answers Research Question 2: What are the differences between the South African and Australian business rescue process?

#### **5.4 Conclusion**

The data collected from the interview transcripts was discussed in this chapter. The data was coded and groups were formed for the two countries. The coded data was then funnelled into themes that could be used to answer the research questions. The themes presented in this chapter will be further discussed in chapter 6 by combining them with the literature from chapter 2.

## **CHAPTER 6: DISCUSSION OF RESULTS**

### **6.1 Introduction**

The purpose of this study was to investigate the similarities and differences between the South African and Australian rescue procedures. The success rate in Australia for voluntary administration was 22 per cent after five years (Australian Government Productivity Commission, 2015) and the South African success rate for business rescue was 9.3 per cent in 2015 (Companies and Intellectual Properties Commission, 2016). With many similarities between the two procedures this study aimed to investigate the differences between the two procedures and how these differences contribute to the lower success rate in South Africa. It was believed that insights into the two practices could be gained from reviewing the laws and the literature relating to business rescue and voluntary administration. This chapter presents the key findings from chapter 2 and chapter 5.

The results discussion follows the order of the research questions as set out in chapter 3. The research aimed to investigate the laws, practices, and procedures of the two countries. Themes were developed from the literature and the primary research conducted. The themes in chapter 5 will be discussed as well as other themes from the literature.

The research paper covers the practice of business rescue and voluntary administration and involved reviewing and reporting on a number of factors, namely the origins of the laws, the governing bodies, the practitioners and primary data collected. Due to the large amount of data it was grouped into themes to enable the researcher to analyse the data and present reliable findings.

### **6.2 Research Question 1: What are the similarities between the South African and Australian business rescue process?**

The themes that partly answered research question 1 will be discussed in this section.

#### **6.2.1 Theme - Origins of the laws**

To understand both the processes which are governed by the Companies Act and the Corporations Act, the basis of the laws were examined and a review of the two acts conducted.

South Africa and Australia are both members of the Commonwealth and have a history that includes British rule. As a result, the legislation in these countries have many similarities. South Africa and Australia still use case law and both have their origins in British case law, as mentioned in section 2.2. The identified theme 'origins of the laws' covers the history of the law-making procedures in South Africa and Australia. These procedures are similar and therefore this theme helps to answer the first research question.

### **6.2.2 Liquidation, Informal Workouts and Judicial Management**

Voluntary administration was introduced into Australia in 1993 and business rescue introduced to South Africa in 2011. Prior to these administration procedures being introduced, there were other options available to financially distressed companies. Liquidation, informal workouts, and judicial management were present in both countries, with liquidation and informal workouts still present in both these countries today (Anderson, 2008).

Corporate informal workouts are informal agreements between the relevant parties to write off or restructure debt. Financial institutions or major creditors would form a consortium of creditors and agree to certain conditions in order to fund the financially distressed company. This was done as an alternative to liquidation. The practice of informal workouts is not legislated and information regarding these workouts is often private as discussed in section 2.4.2.

Judicial management, as mentioned in section 2.4.1, was the only formal workout available to companies in financial distress in South Africa and Australia. Distressed companies could apply for judicial management as an alternative to being placed into liquidation. When judicial management was first launched in South Africa in 1926 it was seen as a breakthrough and was incorporated into the Australian Companies Act of 1961. Judicial management was unsuccessful in both countries, mainly due to the fact that the entire debt had to be repaid to the creditors. Voluntary administration in Australia and business rescue in South Africa replaced judicial management as a rescue mechanism (Anderson, 2008).

As can be seen in section 2.3, a company is deemed insolvent when it cannot pay their debts when they are due for payment. This definition holds true in both the South African and Australian contexts. An external administrator takes control of the company and administers the affairs of the company with the aim of disposing of the assets,

collecting the proceeds and dividing them between the different creditors depending on their status. The directors lose their rights in terms of administration of the company but they do still have certain responsibilities and duties during the liquidation process.

The major difference between the South African and the Australian liquidation process is the compensation of the liquidators, as mentioned in section 2.3.1 and 2.3.2. South African liquidators' remuneration is determined by legislation. The liquidators receive a percentage of the assets that they dispose of whereas the remuneration of liquidators in Australia is determined by the creditors. Taking into account the difference in remuneration structure there seems to be no other significant differences between liquidations in South Africa and Australia.

Judicial management in South Africa and official management in Australia are not significantly different as mentioned in section 2.4.1. Corporate informal workouts are not legislated and the basis of the workouts is similar. Being mindful of the difference regarding remuneration in the two countries, the theme 'liquidation, informal workouts and judicial management' contributes to the first research question.

### **6.2.3 Theme: Business Rescue and Voluntary Administration, Legislation Processes, Aims and Objectives**

An extensive review was completed on the legislation and processes of business rescue and voluntary administration. The laws were assessed in section 2.6, the process of entering into business rescue and voluntary administration was reviewed in section 2.6.3, the business rescue plan and Deed of Company Arrangements were assessed in section 2.6.10.2 and the termination of proceedings was reviewed section 2.6.12 "The DOCA [Deed of Company Arrangement] is similar to the business rescue plan of the South African business rescue legislation, which is equally important to the successful outcome of South African businesses using business rescue proceedings" (Conradie & Lamprecht, 2015). Conradie and Lamprecht concluded that the business rescue plan used in business rescue in South Africa was similar to the Deed of Company Arrangement used in voluntary administration in Australia. Anderson (2008) further concluded that the objectives of business rescue and voluntary administration are similar.

Remuneration of the business rescue practitioner and the voluntary administrator was also reviewed and differences identified. The business rescue practitioner has a pre-

determined rate (section 2.7.3.1) whereas creditors in Australia can determine the remuneration of the voluntary administrator as mentioned in section 2.7.3.2. Despite this being an obvious difference between the two procedures, it does not ultimately influence decision making or outcomes. There are also minor differences in the timelines regarding the creditors meeting, as stated in section 2.6.9 and section and 2.6.11, however this difference is only a matter of days and is therefore not significant in the larger scheme of events.

Anderson (2008) also concludes that the objectives of business rescue and voluntary administration “are almost identical”. The theme ‘Business Rescue and Voluntary Administration, Legislation Processes, Aims and Objectives’ contributes to research question 1.

#### **6.2.4 Theme: Time Spent on Voluntary Administration and Business Rescue**

If a rescue practitioner takes on too many appointments it will lead to a low success rate as they cannot contribute sufficient resources to the rescue. Peter van der Steen, a business rescue practitioner, as quoted in the book *Beyond Play*, “if you are very lucky, you can do two, maybe three rescues at any given time. In the first month of a business rescue you are involved full time ... you hardly have time to tie your shoe laces” (Pretorius, 2014). As can be seen from the quotation, business rescue is time consuming and a practitioner can only embark on a certain number of appointments. This is further supported by SA3 who said

You know some of them have got factories you know one guy in particular he's got a hundred on the go simultaneously one hundred, impossible to do it properly so he's got a factory so he runs it for two months then puts them in liquidation so his success rate would be ten.

SA3

The factors determining the time spent on administrations are various (e.g. complexity of company, shareholders and assets) and were discussed in section 5.3.2. The time spent on administration seems to differ from company to company but no significant difference could be found between the time spent on appointments between the two countries. The general feeling is that certain administrations are more demanding in

terms of time and, if not given the full attention of the administrator, may suffer a negative result thereby impacting the success rate. The time spent on voluntary admission and business rescue contributes to research question 1.

### **6.2.5 Theme: Definition of Success**

In 2015, the success rate of business rescue was reported as 9.4% (Companies and Intellectual Properties Commission, 2016). The definition of success in business rescue has not been formalised but can be derived from the Companies Act and as mentioned in section 2.8.1, there are many different ways to define success. The acceptance of the business rescue plan could be considered success as could the implementation of the plan.

The definition of success in Australia has also not been officially defined and has been calculated by taking the number of companies still registered compared to the number of companies entering voluntary administration. The success rate after a company entered voluntary administration was 22 per cent (Australian Government Productivity Commission, 2015). Although no official definitions of success exist in either of the countries, the success rate is calculated in the same manner.

The respondents also had different views regarding the definition of success (section 5.3.3). As can be seen in Table 5.6 the respondents' views on success differ from the acceptance of a plan (business rescue plan or Deed of Company Arrangement), returning a greater return to the creditors when compared to liquidation, to restructuring the business and keeping it operating even at a diminished level.

The respondents in Table 5.6, although from different countries, had similar views on the definition of success and this contributes to research question 1.

### **6.2.6 Theme: Business Rescue and Voluntary Administration Culture**

Culture can be defined as the social behaviours and norms found in human societies (Houser, 1996). The respondents were not directly questioned about the culture of business rescue and voluntary administration; however, many expressed an opinion.

Business rescue proceedings were often seen as a last resort and that there was a stigma attached to entering business rescue and voluntary administration. The respondents who had commented on the culture and stigma attached to business rescue

and voluntary administration stated that directors viewed entering into business rescue and voluntary administration as an admission of failure. This might have prevented the directors from entering into business rescue and voluntary administration earlier. There were similar views regarding the culture and stigma from the participants of both the countries as can be seen in Table 5.7 and section 5.3.4. This contributes to research question 1.

### **6.2.7 Theme: Post Commencement Finance**

Post commencement finance refers to funding made available to companies who are in business rescue and voluntary administration. Financing is extremely important to a company as part of the reason for the business being under administration is the lack of funds (see section 2.9).

Post commencement finance is available in both countries. Participant AUS4 stated that “we used it on a recent voluntary administration for 60 million” but also noted that, “it’s not something to be taken lightly.” A creditor providing post commencement finance in South Africa and Australia becomes a priority creditor as stated in section 2.9. Looking at Table 5.8, the respondents from South Africa raised concerns about the scarcity of post commencement finance whilst the associated processes in the Australian context may act as a hindrance; AUS4 stated that they “had to go to court to ensure that I don’t have a personal liability in relation to the debt” and that “it’s quite a process.”

In both Australia and South Africa, post commencement finance providers enjoy preferred creditor status. Such finance is available in both countries although it tends to be scarce and difficult to obtain. Such similarities contribute to research question 1.

### **6.2.8 Formal Qualifications and Experience of Practitioners**

This theme only applies to the professionals interviewed and does not relate to all of the professionals in the industry. The practitioners interviewed had varied experience. Lawyers, Chartered Accountants and turnaround professionals were interviewed, as shown in table 5.1. The experience of the individuals performing business rescue also varied. As business rescue was only launched in 2011 and voluntary administration was launched in 1993 (Conradie & Lamprecht, 2015), one would expect the participants in Australia to be considerably more experience.

However, some of the respondents in South Africa had been working overseas, such as SA3, “I’ve been in the turnaround area for like twenty years plus I’ve done it in Australia, liquidations and administration.” Advisors also had vast experience in dealing with distressed clients prior to the launch of business rescue. Even with the launch of business rescue 23 years after the launch of voluntary administration, the experience of the practitioners in the two countries was not significantly different.

The educational backgrounds of the practitioners interviewed was also similar. Three of the four business rescue practitioners interviewed were Chartered Accountants and all of the voluntary administrators in Australia were chartered accountants. The advisors to the industry were lawyers in both countries with the exception of one, who had a commerce degree, as is seen in table 5.1.

As seen in section 5.3.1, there is no significant difference in the formal qualifications and experience of the professionals in South Africa and Australia and this therefore contributes to research question 1.

### **6.3.1 Theme: Safe Harbour**

Safe Harbour is the new legislation in Australia that aims to encourage directors to seek help if suspect their company is in financial distress. The new laws compel directors to seek the help of a turnaround professional if they feel that the company will experience or is experiencing financial difficulty (see section 2.11.1). The new Safe Harbour legislation could change the culture of voluntary administration by making it compulsory for directors to seek help earlier. It also brings the Australian regime closer to the American and English regimes as pointed out by AUS8 “it [Safe Harbour] currently has a different form in the US called Chapter 11 and I think they have chapter 8, various things in the UK also and Safe Harbour is something that is well overdue here in Australia.” Safe Harbour was only launched in Australia in September 2017 (Lacey, 2017) . The respondents, as seen in Table 5.12, were mostly welcoming of the new legislation, however participants were hesitant to declare it a success as they “think that only time will tell” (AUS1).

South Africa does not have any Safe Harbour legislation and more research is needed to assess the effects it will have in Australia. Safe Harbour contributes to research question 2, however it is important to note that although it is a difference, Safe Harbour was only passed into law in September 2017 (Lacey, 2017) and did not have an effect on the success rate reported in this study.



### **6.3.2 Theme: *Ipsso Facto* Clauses**

*Ipsso Facto* allows one party to cancel or modify a contract upon the occurrence of an event. The new *Ipsso Facto* clauses are designed to prevent the enforcement of *Ipsso Facto* when a financially distressed company enters into Safe Harbour or voluntary administration (Lacey, 2017).

As can be seen from Table 5.13, there are mixed reactions to the new clauses and that they are not fully understood by the practitioners. The new clauses will only come into effect next year and the new *Ipsso Facto* Clauses contribute to the second research question. It should be noted that these clauses had no effect on the reported success rate in Australia as the clauses will only come into effect in 2018 (Lacey, 2017).

### **6.3.3 Theme: Background of Practitioners**

In Australia, voluntary administrators have to be registered with ASIC and be registered liquidators. To become a registered liquidator a candidate will also have to be a member of the Institute of Chartered Accountants or CPA Australia (CRS Insolvency Services, 2017). “A CPA is a finance, accounting and business professional with a specific qualification. Being a CPA is a mark of high professional competence. It indicates a soundness in depth, breadth and quality of accountancy knowledge” (CPA Australia, 2017). This implies that liquidators and voluntary administrators are accountants or have financial and accounting training.

There are currently no specific requirements for the qualifications a business rescue practitioner needs to possess (Pretorius M. , 2014) The business rescue practitioner has to be licensed by the CIPC and has to be in good standing of a legal, accounting or business management profession as mentioned in section 2.10.2. In 2014, business rescue practitioners have originated from business, legal and accounting backgrounds. 43 per cent of professionals only had legal background and no business experience (Pretorius, 2014).

Four business rescue practitioners were interviewed in South Africa with two of them being chartered accountants, all of the voluntary administrators interviewed in Australia were chartered accountants as can be seen in table 5.1. As mentioned, 43 per cent of business rescue practitioners only had a legal background. Papaya (2014) has also stated that many business rescue practitioners do not possess the integral skills needed to successfully conduct business rescue.

This seems to be a major difference between Australia and South Africa. All voluntary administrators had an accounting background and needed to be members of a financial regulatory body and not a legal regulatory body. The fact that 43 per cent of South African practitioners had only a legal background and not a business background contributes to the second research question.

#### **6.3.4 Theme: CIPC and ASIC**

The CIPC and ASIC are responsible for the licensing of the business rescue practitioners and the voluntary administrators, as mentioned in sections 2.7.1 and 2.7.2. There were many complaints from the respondents regarding the role of the CIPC. The CIPC does not seem to have any internal systems to facilitate the overseeing of practitioners as stated by SA3 “it [CIPC] doesn’t have the systems and controls in place up until about six months ago...they are trying to catch up but they are light years behind ASIC.” The respondents had many other complaints regarding the CIPC governing of the industry, for example “[a]t this stage you can run a business rescue for three years, not submit any report to CIPC” (SA4) and “I don’t believe the CIPC plays enough of an overseeing role if I can call it that” (SA7).

The Australian respondents had no complaints about ASIC with regard to the oversight role and this seems to be a significant different. This theme contributes to research question 2.

#### **6.3.5 Theme: Required Experience to Become a Voluntary Administrator and Business Rescue Practitioner**

“During the five years immediately preceding the day on which the application is made—have engaged in at least 4,000 hours of relevant employment at a senior level in the external administration of companies, receivership and receivership and management” (Australian Securities & Investments Corporation, 2017). As can be seen from the quotation, Australian voluntary administrators need a minimum of five years’ experience before they are allowed to practice as a voluntary administrator.

The requirements to become a business rescue practitioner in South Africa are “an individual or individuals have to be a member in good standing of a legal, accounting or business management profession accredited by the Commission” (Papaya, 2014). There are no experience requirements needed to become a junior rescue practitioner.

There is a significant difference in the amount of experience required to practice as a business rescue practitioner and a voluntary administrator and this contributes to research question 2.

### **6.3.6 Theme: Classification of Practitioners**

Business rescue practitioners are classified as junior, senior and experienced practitioners. The classification of the practitioner determines the size of the company, as determined by the public interest score; they may be appointed to as described in section 2.7.3. There seems a lot of confusion with regard to the classification of practitioners, as seen from comments such as “although I, I feel I should be at least classified as an experienced practitioner, I have been bumping heads with CIPC about it and hope to get reclassified as at least an experienced practitioner within the next year” (SA1) and “[h]e’s an experienced practitioner he should be a senior” (SA1). Practitioners who have the relevant skills to become a senior practitioner are classified as a junior practitioner and this could lead to adequately trained professionals not entering or leaving the industry.

SA6 relayed a story about a young lady who at 23 “passed her bar exam...[and] she can become a senior business rescue practitioner.” Inexperienced practitioners can be classified as a senior practitioner and this could lead to an unsuccessful business rescue as they may not possess the necessary experience and education. The classification of practitioners and the problems associated with the classification is unique to South Africa and this contributes to research question 2.

### **6.4 Research Question 3: What differences exist that may give rise to what appears to be a better success rate in Australia?**

This section aims to build on the knowledge from the first two research questions. A focus on the differences between business rescue and voluntary administration and how these differences might affect the success rate in South Africa.

#### **6.4.1 Safe Harbour and *Ipsa Facto* Clauses**

The major differences between Australia and South Africa are the Safe Harbour provisions, the new *Ipsa Facto* Clauses and other issues regarding the business rescue practitioners.

The Safe Harbour provisions and the *Ipsa Facto* Clauses are new legislation and do not have an effect on reported success rate used in this study. In the future, these new laws and provisions could be monitored for how they affect the success rate of

voluntary administration in Australia and a study could be commissioned on their implementation in South Africa.

## **6.4.2 Practitioners**

### **6.4.2.1 Education of Practitioners**

There were many issues reported regarding the practitioners in South Africa. As stated in section 2.7.2, all voluntary administrators are liquidators and all liquidators in Australia have a business qualification. 43 per cent of business rescue practitioners in South Africa only have a legal background (Pretorius, 2014).

The business qualification that voluntary administrators possess gives them the ability to assess the business from a commercial and a financial point of view and their experience as a liquidator enables them to follow procedures as set out in the legislation. This enables voluntary administrators to possess the necessary skills to implement a successful turnaround. The business rescue practitioners who only have a legal background could be lacking the necessary business skills to implement the effective rescue of a financially distressed company.

### **6.4.2.2 Experience Needed to Become a Business Rescue Practitioner and a Voluntary Administrator**

Australian voluntary administrators need a minimum number of years' experience before they can be registered as liquidators and only liquidators in Australia can become voluntary administrators (Australian Securities & Investments Corporation, 2017). South African business rescue practitioners need only be a "member in good standing of a legal, accounting or business management profession accredited by the Commission" (Papaya, 2014). There were 377 business rescue practitioners registered with the CIPC at the end of July 2017, 224 of those business rescue practitioners were classified as junior practitioners (Companies and Intellectual Properties Commission, 2017). The lack of experience and no minimum turnaround experience requirements for business rescue practitioners could lead to a lower success rate in South Africa.

### **6.4.3 CIPC**

The CIPC does not seem to be competent in overseeing the business rescue practice in South Africa; there is no evidence to suggest that ASIC has issues with regard to oversight. Looking at Table 5.10, there were many complaints from the South African

participants about the CIPC and no complaints regarding the oversight role of ASIC. The CIPC depends on individuals and the courts to punish practitioners who break the rules.

I don't believe the CIPC plays enough of an overseeing role if I can call it that. If you look at the master of the High Court he plays a much more significant role in terms of policing the activities of liquidators, they can't step out of line if they get out of line they just don't get appointments.

(SA7)

"We can improve what goes on at the CIPC, I think we've got some rouge practitioners out there who should have their licences revoked" SA8. The CIPC seems to neglect its duties of oversight and often relies on other organisations to discipline the business rescue practitioners.

The CIPC can play a bigger role with regard to oversight and disqualify practitioners who constantly break the rules or who are dishonest. This will lead to many of the deviant practitioners leaving the industry and could enable companies to be rescued by honest and credible business rescue practitioners.

#### **6.4.4 Classification of Practitioners**

The classification of practitioners and the incorrect classification of practitioners (see section 5.8.8) could also play a role in the success rate in South Africa. Inexperienced and incorrectly classified practitioners might not possess the necessary skills to effectively rescue a financially distressed company.

#### **6.5 Conclusion**

It seems that South Africa and Australia's respective success rates are heavily influenced by the experience of the business rescue practitioners, the education of the practitioners, the licensing body of the practitioners (CIPC) and the classification of the practitioners.

## **CHAPTER 7: CONCLUSION**

The outcomes of the study are summarised in this chapter. The chapter begins by revisiting the research problem. The main findings are presented, followed by the limitations of the study and the recommendations. The chapter ends with a conclusion of the topic.

### **7.1 Recap of the Study**

The aim of this study was to examine the similarities and difference between the business rescue and voluntary administration processes. The research began with examining the different success rates between South Africa and Australia; with the success rate of Australia being 22 per cent and the South African success rate being only 9.3 per cent. Upon examining the literature and the procedures of the two countries it was found that the laws and the procedures of the two countries were similar. Apart from the age of the two procedures, business rescue only having been launched in South Africa in 2011 and voluntary administration in Australia launched in 1993, the other differences that exist between the two countries could explain the difference in success rates.

The review of the literature began by examining the formation of the two countries and the origins of the laws in the two jurisdictions. This was followed by reviewing the Acts pertaining specifically to business rescue and voluntary administration. Other literature surrounding the two rescue regimes in the respective countries was also reviewed.

Upon reviewing the literature three research questions were developed.

- The first research question aimed to establish the similarities between the two countries.
- The second research question aimed to establish the differences between the two countries.
- The third research question aimed to focus on the differences between the two countries and how these differences could affect the success rate in South Africa.

### **7.2 Main Findings**

The primary objective of the study was to examine the two similar rescue regimes and find the differences that contributed to the lower success rate in South Africa. The data

collected to address the research questions was from the literature surrounding the rescue regimes and one-on-one interviews in both countries. The main findings are discussed below.

The first research question aimed to explore the similarities between business rescue and voluntary administration. It was established from the literature that the origins of the laws and the aims and objectives of business rescue and voluntary administration were not significantly different. Similar definitions of success were also shared between the two countries. The processes relating to timelines were also similar. The business rescue plan and the Deed of Company Arrangement included similar information.

The interviews helped to establish that there was no significant difference between the culture of the regimes, the education of the professionals, and the experience of the professionals interviewed in the two countries.

The second research question aimed to explore the differences between the South African and Australian rescue regimes. A review of the literature identified the new Safe Harbour legislation and the new *Ipsa Facto* Clauses. Although these new laws were significantly different to South Africa, Safe Harbour was only introduced into Australia in September of 2017 and the new *Ipsa Facto* clauses only come into effect in 2018. These two pieces of legislation therefore had no effect on the success rates used in this report.

The interviews contained many complaints about the oversight role CIPC plays in regard to the business rescue practitioners, the CIPC classification of practitioners, the education of practitioners and the experience of the practitioners. The CIPC in South Africa was also lacking in many respects when compared to its Australian counterpart, the ASIC.

The third research question further explored the differences between South Africa and Australia. The literature was re-examined and differences in the education and experience of the practitioners began to emerge. Voluntary administrators in Australia have a business and a law background, whereas in South Africa the business rescue practitioner only needed one of the two to be registered. A voluntary administrator also needed a minimum of five years of experience in a turnaround role whereas the junior business rescue practitioners did not need any experience to be registered as a business rescue practitioner. The quality, ethics, and the standard of work of the

professionals seemed to be the difference between the two countries and this played a major role in the lower success rate in South Africa.

### **7.3 Value of the Research**

Levenstein (2015) and Loubser (2010) did a comprehensive study of the business rescue practice in South Africa with comparisons to international rescue regimes including Australia. Lamprecht and Conradie (2015) and Anderson (2008) directly compared business rescue and voluntary administration in terms of the procedures. Naidoo, Patel and Padia (2017) also conducted research to gain insights on the business rescue professionals in South Africa.

This study aimed to add value to the business rescue practice in South Africa by not only comparing the laws and procedures of the two countries but by also comparing the experiences of the professionals in both countries.

### **7.4 Recommendations of the Study**

#### **7.4.1 Recommendations relating to the business rescue practitioners in South Africa**

1. The CIPC needs to improve its role regarding the oversight of business rescue practitioners. Unethical and dishonest practitioners need to be penalised. The industry would benefit if such practitioners were effectively blacklisted as a means of preventing them from undertaking further business rescue appointments.
2. An analysis of the competency and the performance of business rescue practitioners needs to be undertaken by a committee. This committee could be a CIPC internal committee or an external committee.
3. An analysis of the performance of the business rescue practitioners needs to be undertaken, investigating the difference between business rescue practitioners with a law background and business rescue practitioners with a business background.



4. The pairing of practitioners by means of a programme of mentorship, especially where medium and large rescues are involved, would facilitate the transfer of skills between practitioners
5. A business rescue practitioner should only be able to handle a certain number of appointments at any given time. In this way they are able to devote sufficient resources to the complicated process that is business rescue.
6. Accredited courses need to be established for current practitioners to bridge the knowledge gaps between the individual business rescue practitioners in South Africa.
7. An external, independent body should be responsible for the licensing and the regulation of the practitioners like the South African Institute of Chartered Accountants and the Law Society, not the CIPC.
8. Prior to one being registered as a business rescue practitioner, a predetermined amount of business or turnaround experience should be obtained, as is the case in Australia.
9. Business rescue is an internationally accepted practice and is likely to remain a rescue mechanism available to companies in future. The business rescue industry would benefit if tertiary institutions were to design, and make available, specific courses that focus on business operation and teach the principles of business rescue.

#### **7.4.2 Recommendations Relating to the Success Rate**

10. Establishing a definition of success, regarding business rescue, would be of benefit in South Africa. This definition could include quantitative measures, such as the public interest score. For example, a reduction of the public interest score of less than 75 per cent could be regarded as a successful business rescue.
11. The number of jobs saved and the number of companies still operating after business rescue needs to be communicated to the public, this might encourage

directors to enter business rescue if the achievements of business rescue are communicated to them.

#### **7.4.3 Recommendations Relating to the Laws and Procedures of Business Rescue**

12. The timelines of business rescue need to be reassessed. Different timelines need to be implemented for the rescue of small, medium and large companies.
13. The implementation of the new Safe Harbour reforms in Australia needs to be assessed. As these reforms were mostly welcomed by the professionals in Australia, evaluation of the efficacy of Safe Harbour legislation internationally may point to its usefulness in the South African context.

#### **7.4.4 Recommendations Relating to Post Commencement Finance**

14. Post Commencement Finance should be made available to distressed companies. Ideally state facilitation of post commencement financing should take place, with the redirection of a proportion of the funds intended for creation of employment to protection of employment.

### **7.5 Limitations of the Research**

This study was a cross sectional study and a longitudinal study may have produced better results and provided better insight into the practice. A longitudinal study was not possible due to the deadline imposed on this study.

Purposive sampling and snowball sampling was used in this study and it is not a true reflection of the population. The respondents seemed to recommend only practitioners who they perceived to be of a better quality.

Qualitative research was conducted; the research and the findings have been exposed to the risk of subjectivity.

This study was only conducted with respondents from two countries. The introduction of a third country may have provided a deeper understanding of the issues.

## **7.6 Recommendations for further Research**

Based on the results and the limitations of this study, future research topics have been identified. The effects of Safe Harbour should be assessed with regard to possible implementation in South Africa. A quantitative study, to analyse the success rate of the different business rescue practitioners will provide insight on the training and the experience needed to become an efficient business rescue practitioner. The relevant authorities could then structure a course, based on the findings, for business rescue practitioners. South Africa and Australia were the only two countries assessed in this study. A third country, like Canada or England, could be included in the study to provide more reliable results. A qualitative study was conducted. A quantitative component could be added to the study to provide more reliable findings.

## **7.7 Conclusion**

South Africa is currently experiencing low growth and high unemployment and a relatively low success rate regarding business rescue (Naidoo, Patel, & Padia, 2017). This study provided key insights into the practice of voluntary administration in Australia and business rescue in South Africa. The views of practitioners also provided an understanding of the issues faced in Australia and South Africa.

This study has shown that business rescue is a major improvement on its predecessor, judicial management. There are still many issues affecting the successful turnaround of financially distressed companies. This study helped to understand the key elements behind the low success rate in South Africa when compared to Australia.

The laws and procedures in South Africa regarding business rescue are adequate. The business rescue practitioners play a significant role in the business rescue process (Pretorius, 2015). There are many issues regarding the education of the business rescue practitioners, the experience of the practitioners, the licensing of practitioners and the oversight of the practitioners. The success rate of business rescue will increase drastically if the issues surrounding the business rescue practitioners in South Africa are resolved.

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## APPENDIX

### Appendix 1: Interview Questions



**Muhammad Moolla**

**Business Rescue in Practice: A Comparative Study**

**Interview Questions**

South Africa

1. What is your current role with regards to business rescue?
2. What are your formal qualifications?
3. What type of business rescue practitioner are you, Small, Medium, Large?
4. How did you enter the business rescue industry?
5. How many years have you been a business rescue practitioner?
6. How many companies are you dealing with that are currently in Business Rescue?
7. Average Asset size of company?
8. On average how much of your time do you devote to these companies and how is that time split?
9. Do you devote more time if the company is larger, Is it directly proportional to company asset size?
10. Average number of companies that you deal with per year?
11. What do you think about the business rescue industry?
12. What is hindering the success of more companies
13. What are your thoughts about business rescue being used to prolong the liquidation process or the closing down of company process?
14. The main differences between the South African and the Australian procedures are
  - Relatively new to South Africa (5 years) and relatively old in Australia (20 Years)
  - Most business rescue practitioners in South Africa are lawyers and Australians have a mix of skills
  - In Australia, a liquidator could appoint a voluntary administrator if they feel the company can carry on as a going concernHow do you think these differences affect the business rescue procedure in both countries?
15. What are the issues you are currently facing with regards to the business rescue procedure?
16. What changes do you propose to the business rescue procedures? Or what do you recommend?
17. Do you recommend anyone else to speak to?

# Gordon Institute of Business Science

University of Pretoria

**Muhamud Moolla**

**Business Rescue in Practice: A Comparative Study**

**Interview Questions**

Australia

1. What is your current role with regards to voluntary administration?
2. What are your formal qualifications?
3. How did you enter the voluntary administration industry?
4. How many years have you been a voluntary administrator?
5. How many companies are you dealing with that are currently in Voluntary Administration?
6. Average Asset size of company?
7. On average how much of your time do you devote to these companies and how is that time split?
8. Do you devote more time if the company is larger, Is it directly proportional to company asset size?
9. Average number of companies that you deal with per year?
10. What do you think about the Voluntary Administration industry?
11. What is hindering the success of more companies
12. What are your thoughts about voluntary administration being used to prolong the liquidation process or the closing down of company process?
13. The main differences between the South African and the Australian procedures are
  - Relatively new to South Africa (5 years) and relatively old in Australia (20 Years)
  - Most business rescue practitioners in South Africa are lawyers and Australians have a mix of skills
  - In Australia, a liquidator could appoint a voluntary administrator if they feel the company can carry on as a going concernHow do you think these differences affect the business rescue procedure in both countries?
14. What are issues you are currently facing with regards to the voluntary administration procedure?
15. What changes do you propose to the business rescue procedures? Or what do you recommend?
16. Do you recommend anyone else to speak to?

## Appendix 2: Informed Consent



Informed Consent Letter  
2017  
Muhammud Moolla  
Gordon Institute of Business Science  
Topic: Business Rescue / Voluntary Administration

Dear Sir / Madam

I am conducting a study of the business rescue and voluntary administration procedures in South Africa and Australia. Our interview will help us understand the practices of the business rescue practitioners and voluntary administrators.

The information you will be asked to provide during the interview is your personal details, the name of your company, the business rescue practice and your feelings towards the practices and procedures.

I will also explain the differences in practices between South Africa and Australia and ask your opinion on how these differences contribute to the success rate of the business rescue practice in both countries.

The interview length is approximately 45 minutes.

Your participation is voluntary and you are welcome to end the interview at any time.

Your details will be stored and the interview will be recorded using a recording device. All data will then be aggregated and reported on anonymously. If you have any concerns please feel free to contact me or my supervisor. Our details are provided below.

Researcher Details  
Muhammud Moolla  
[Muhammud@hotmail.com](mailto:Muhammud@hotmail.com)  
+2786806549 / 0415472620

Research Supervisor  
Keith Fairhurst  
[keith@unleashconsult.com](mailto:keith@unleashconsult.com)  
+27834194058

Researcher Signature \_\_\_\_\_  
\_\_\_\_\_

Date:

Participant Signature

Date:

## Appendix 3: Ethical Clearance

# **Gordon Institute of Business Science**

University  
of Pretoria

06 July 2017

Muhammud Moolla

Dear Muhammad,

Please be advised that your application for Ethical Clearance has been approved.

You are therefore allowed to continue collecting your data.

We wish you everything of the best for the rest of the project.

Kind Regards

GIBS MBA Research Ethical Clearance Committee

#### Appendix 4: List of Codes: South Africa and Australia

South Africa	Australia
Average Asset Size of Company	ATO
Average time of Business Rescue	Auditors Advising Clients to go into rescue earlier
Bank	Average Asset Size
Business Rescue Advisor	Deed of Company arrangement
Business Rescue Culture	Definition of Success
Business Rescue Current role	Early Entry into Voluntary administration
Business Rescue Laws	Experience
Business Rescue Length	Factors that determine time spent on a company
Business Rescue Practitioner Body	Formal Qualifications
Business Rescue Practitioners	Hinderance of Success of more companies having a successful rescue
Business Rescue Proposed Changes	Ipso Facto Clauses
Business Rescue Stigma	Management of a company
Business Rescue used to prolong liquidation	Miscellaneous
Business Rescue Reasonable Prospect	No of Voluntary Administrations Currently involved in
CIPC	Pathway to Voluntary Administration
Classification of Practitioner	Personal Success Rate in a VA
Definition of Success	Post Commencement Finance
Early Entry into Business Rescue	Range of Company in VA
Educate Businesses on Business Rescue	Safe Harbour
Experience in Turnarounds	Successful Voluntary Administration
External Skills hired by Business Rescue Practitioner	Time Spent on VA
Factors determining time spent on rescue	TMA Australia
Hinderance to Success Rate	Turnaround Course
Industry Success Rate	Turnaround Industry
Miscellaneous South Africa	Voluntary Administration Culture
No of Companies currently dealing with in Business Rescue	Voluntary Administration Industry
Pathway into Business Rescue	Voluntary administration Laws
Personal Success Rate	Voluntary Administration Process
Post Commencement Finance	Voluntary administration Role
Qualifications	Voluntary administration Stigma
Range of Value of Company	Voluntary Administrator Practitioner
Role of Auditors in Business rescue	
SARS	
South Africa Culture	
TMA South Africa	
Views on the Industry	



