

Ep.72 Indigenous business restructurings in Australia and India

Intro music: INSOL international, in conjunction with the Early Researcher Academics Committee, presents: Insol talks.

Ishana Tripathi (IT) (00:23): Hello and welcome to another episode of INSOL Talks on the topic of understanding indigenous business restructurings in Australia and India. I am Ishana Tripathi, a member of INSOL ERA and I will be your host for this episode. In this episode, the ERA Committee is very pleased to welcome back Dr Jason Harris, who is a Professor of Law at the University of Sydney, and invite for the first time Preeti Nalavadi, who's a PhD candidate at the University of Adelaide and also teaches and curates courses at the University of Adelaide.

In today's podcast, we will try to cover the history, central conversation and present day of the indigenous business restructuring framework in Australia and India, particularly focused towards the SME market. And we'd also look towards hoping that this podcast contributes to the awareness and information on the workings of the issues that some of these indigenous businesses face, both in Australia and India. With this background, I would like to extend a very warm welcome to Jason and Preeti to INSOL Talks and move to our very first question. My first question is to you, Preeti. To set the context, what are indigenous businesses and how are they different from small businesses?

Preeti Nalavadi (PN) (01.54): Yeah, thank you very much Ishana for this opportunity. It's indeed my pleasure. With regards to indigenous businesses, there are different sorts of understanding that we have to explore here when it comes to Australia and India. With regards to Australia. I would pass that question to Professor Jason Harris to explain what indigenous businesses mean in the Australian context. But with regards to India, it's mainly the traditional businesses that I'm concentrating in this part of research and these could be a part of the MSME economy, or they could also be part of the informal economy. And those are the sorts of businesses that I'm focusing on. Yeah. There is no particular definition in terms of what indigenous businesses are in the Indian context. And like I said, they can be part of either MSME economy or they can be non MSME and they might be part of the informal economy as well. Basically, the small indigenous businesses who are or who could also be tribal businesses or adivasi's, as we call. And they are those businesses that are carrying on activities since generations as well. It could be relating to some art or some historical practices that they might be engaged in. And those are the businesses that are that the research is based on those sort of businesses for India on my side.

IT (03.22): So to just get the Australian perspective, Jason, why select Australia and India as a comparison? This is of course, in addition to your response to what are indigenous businesses in Australia?

Jason Harris (JH) (03.37): Sure. So indigenous businesses in Australia can take different forms. So an indigenous person or indigenous people who want to start up their own business are able to use a company under the Corporations Act. If they're operating it for a charitable or not for profit purposes, then they can use an incorporated association. So that's another option. But Australia is in a unique position where we have our own bespoke indigenous corporation legislation. And so, an indigenous group of people who want to start up a business, whether it's for profit or not, for profit, can register under that specific set of laws. It's generally a free to register, so the compliance costs are very low. The operation of those laws is referenced to our standard company laws, but often there are slightly fewer compliance obligations. And obviously the approach of the regulator is going to be sensitive to the particular circumstances and the needs and goals of indigenous peoples across the country. And of course, we must recognise that there's not one indigenous population in Australia. There are, of course, hundreds of Aboriginal nations across Australia through various tribal groups and areas.

So an indigenous business basically can be registered under that specific law. And then then it's clear that it's operating on that basis. Or it could just be registered under a standard law. But then you have the disadvantage that all of the company law requirements are going to apply to that, as well as the standard kind of compliance costs and fees, you know, annual registration fees, annual fees, auditing requirements and those types of things. So the indigenous statute has some variations on that and in many cases has a more streamlined and certainly cheaper version. Australia has had a bespoke Indigenous Corporations Act since the nineteen seventies. It came about initially through our system of land rights. So we have initially state legislation and now national legislation to cover indigenous rights to property, including indigenous, you know, fishing rights, for example, and, uh, rights in relation to the use of land. And then about, I think it was about ten or fifteen years ago that law was updated and modernized and referenced pretty heavily to our standard company law, albeit in a slimmed down form, although it's still hundreds of sections.

So that's indigenous businesses. The second question that you ask, why did Preeti and I choose to compare Australia and India? We did the comparison because we have quite different approaches to this issue. So both jurisdictions have reasonable numbers of indigenous businesses. Uh, I would say that working with Preeti, it seems to me that India probably has a much larger population of unregulated, informal businesses than what we have in Australia in terms of indigenous businesses. So the numbers of registered indigenous corporations in Australia is probably under ten thousand, whereas it's a much larger number in India in terms of informal businesses. And it came about because Preeti and I were talking about how the Australian law operates from an insolvency perspective. So, our work is not specifically about how do indigenous businesses incorporate. And of course, there's varying systems in India. As we discuss in the paper in Australia, we've got the two kind of three main choices in corporations association, corporations act or the specific bespoke statute.

But it seemed to us that the treatment on insolvency for indigenous businesses was a really interesting issue. So even if we recognised that indigenous businesses perhaps do have special characteristics, do have special goals and special needs, and maybe shouldn't be treated like all the other standard commercial companies that are out there. There's then an interesting question as to how we deal with them on an insolvency basis. And I was aware that in Australia we basically just apply the standard insolvency law. And so, talking with Preeti about the lacuna, or the apparent lacuna in Indian insolvency law, where these informal businesses, it seems, just are not covered by the IBC. That then got me thinking about, well, how well really does the Australian regime work. And so, what we thought in this system of research that we're doing on this issue, was that perhaps India could learn from the Australian experience, not in the sense of, well, Australia has a law and you should too, but really learning from the Australian experience. And it seemed to us that the application of standard commercial corporate insolvency law to indigenous businesses doesn't always work particularly well. In large part because indigenous businesses are not always the same as standard commercial companies. And even if we think about the standard norms that underpin corporate insolvency law in terms of, if you like, creditor primacy, that it's on insolvency, it's all about creditors.

When we're dealing with indigenous businesses in Australia. You know, often there's a very small number of creditors, you know, the business might only have one creditor, which is the government. So a lot of these businesses are heavily dependent on government, government funding, particularly from the health department, social services department, education department. Many of these indigenous businesses really are providing quasi-government services. And so the application of standard insolvency rules with a company liquidator being appointed, possibly, who has really no background or expertise in indigenous businesses, most likely will be coming from a major city, whereas a lot of the indigenous businesses are in incredibly remote locations in Australia, thousands of kilometres from major cities. And so it just seemed to us that there may well be a tension applying standard corporate insolvency law to indigenous businesses when they're not exactly the same as

standard corporate businesses. So India can learn from that experience. But then on the Australian side, I think we can also learn from the Indian experience in terms of the various support regimes that the central government in India and also the state governments in India have set up to assist and support the development and the growth of indigenous businesses as part of their kind of microeconomic SME support system. So that's something that we can learn from an Australian perspective.

IT (10.31): Thank you so much for that detailed and informative answer, Jason, and I want to sort of echo that the novelty of this research is probably not lost on the insolvency community as at large and as a whole. But I do want to sort of take one beat back and move to Preeti, to also elaborate, perhaps on why choose this topic from an India perspective, especially because, as Jason has also highlighted in his response, and you, Preeti, have started this session with the conversation that it's actually undefined as a concept. I just wanted to give you a first sort of run as to why this topic from an India perspective, and then comparing it to Australia from the India comparative research angle.

PN (11.23): Thank you very much for that question. Basically, this all started when me and Professor Jason Harris undertook this research on MSME comparison with India and Australia, and why India and Australia? Well, that's a very organic choice for me because my PhD is revolved around comparison of three different countries United States, Australia and India. And it's a corporate rescue topic.

So, when we wrote a paper and we presented on multiple occasions on MSME insolvency on from a comparative perspective, we realized that part of the MSME structure when it comes to India is completely unexplored. I mean, even if you look at IBC, it's mainly when you, when prepack was introduced, it was mainly to cater to the corporate MSMEs. I mean, how many MSMEs are in corporate nature? You know, that sort of research has not taken place, unfortunately. So when you look at the data of the MSME ministry over a period of time, when you look at their reports, we can find that a number of businesses, more than 95%, or it could also be around 97-98% percent, are the businesses that are falling under the category of MSMEs. And when you look at the spectrum of MSMEs, you will find a majority of those businesses again, 95 and above percentage of those businesses fall under micro-enterprises and small enterprises. So it's all about, so when we have this MSME conversation for India, it's all about micro and small enterprises. And I'm really surprised and disappointed that no research has been done in that area at all. I mean, even when you talk about different committees, the approaches that different committees have taken in terms of the studies that they have conducted over a period of time, I hardly believe that there is a single committee out of all of those who have focused on this aspect of for MSMEs.

So, in my opinion, because there is no exploration in terms of research and study for the MSMEs, where majority of MSMEs in India are small and micro enterprises, it means that they are completely left out in terms of providing a specialised resolution process for them and they are completely out of IBC because personal insolvency has, I mean, there can be an argument by people or experts saying that they could fall under the personal insolvency space, but personal insolvency space is yet to be tested and we still don't know how it's going to come out in terms of IBC. So, to call IBC as sort of a legislation that's going to solve problems with regards to distress, sort of businesses, either small or big, might be a bit of an exaggeration in my opinion. And also one fundamental approach, as in the main argument that, you know, insolvency law should provide a one size fits all approach. I think that's that's the element that we're trying to dismantle with this work, because it clearly doesn't work in terms of MSMEs, and especially if those MSMEs are, I mean, the informal economy.

So, this is one part of the problem, right? So the other part of the problem is in India where the MSMEs are not they are not registered under the MSME portal. So they are strictly not MSMEs, but they are forming a part of informal economy. So again, there are multiple reports on how much, how

much of informal economy is, what percentage is covered in India and how many businesses are falling under that category. So it means that they are completely left out under the MSME act, even to get certain benefits that the government is providing. So that's the other part of the story. So just to sum up my answer, you can see for India, there are multiple layered problems that are arising in terms of having a particular resolution mechanism when these sort of businesses go bust. And if these sort of businesses are not doing well, there's hardly anything to revive them. They would liquidate, obviously, and they would be out of market, totally. And these are the businesses which are vulnerable and they cannot be, and if they are not revived, there is highly likelihood that if they are indigenous and tribal businesses, for example, if they are engaged in forest, sort of, uh, if they are products, product making, then then that particular art is also lost, which has been going on for several years, generations together. So so you can see those sort of problems are arising there for India. So I think that's why this particular topic was extremely important to explore.

IT (16.25): Thanks so much for that elaboration, and I am looking forward to the different papers that are going to come out of it, because I think this is very engaged and it is a very, very important area of research with a lot of unsaid things that need to be said. So thank you very much for for this idea for the insolvency research community at large. My next question, just to sort of get into the technicalities of what is involved here, is to you, Jason, do you think with the legal framework that perhaps exists more in Australia as opposed to India, is there adequate protection for the indigenous businesses with the regime that exists at the moment?

JH (17.13): It's a great question, and to a certain extent it depends on the type of insolvency regime that might be relevant. So one feature of our bespoke indigenous corporations legislation is we have something called a special administration. And the grounds for appointing a special administrator are very broad. They're not limited to insolvency, but they do include insolvency. There can be a number of problems in the indigenous corporation, you know, membership disputes or inability to make decisions or poor books and records. There might be a lot of reasons for different problems, but including potential insolvency or actual insolvency. So if a special administrator is appointed, they don't have to be an insolvency practitioner. So the registrar will appoint someone who they think is appropriately qualified to deal with the problems of that particular indigenous corporation.

And in fact, they make it quite clear in their regulatory guidance that the goal of special administration is in fact not creditor protection. It's not to ensure that creditors get paid. It's to actually fix the problems inside the indigenous corporation and then return it to the control of the members. So that's the overarching goal.

And again, if we think about the differences between an indigenous corporation and a standard company, commercial company, if the indigenous corporation has a few local creditors, and then maybe the Department of Health or something like that as their major creditor, maybe that is okay to then say, okay, well, you know, the government doesn't need to have its debt repaid. But that's that's quite different. If we say looking at a standard SME that might have a variety of suppliers and if they don't pay the suppliers, then the suppliers themselves could get into financial distress, so you can have this domino effect. So, it can be different in indigenous corporations.

So with special administration I think that can work so as to protect the interests of the members of the indigenous corporation. And it just operates on a different model to this kind of standard, accredited primacy that we see in standard insolvency law. But part of what we're doing in this paper is then looking at how standard insolvency laws can be applied to indigenous corporations, and I think that's potentially where the problem lies, because, as we all know, people listening to this podcast that, you know, standard insolvency laws come within the framework of the insolvency law norm. So, you know, the idea of *pari passu* distribution and, you know, having a stay on enforcement actions and in some cases having priority creditors. And really, you know, it's all about creditors. And in many systems the

creditors can, you know, remove an insolvency practitioner, appoint their own appointee and these types of things. So where you've got an indigenous corporation that perhaps doesn't have a lot of creditors, it's mostly the government that they're dealing with in their local communities. The application of those standard insolvency laws can actually leave the indigenous persons who are part of that corporation, and probably part of that broader social and in many cases, family grouping, that is the key stakeholder group in that particular indigenous corporation in that specific location. Applying standard insolvency rules can cause more problems than they fix.

So, if we take one example, the idea in most of our insolvency systems is external administration. So we withdraw the control over the insolvent company from the incumbent directors, and we appoint an external person who's supposed to be completely independent. That could have pretty significant implications for the local community, and it may well pose some cultural risks for that local community, because what these, some of these indigenous corporations are doing is not just providing a standard arm's length commercial service. They might actually be supporting and facilitating, you know, traditional customs and practices. And so to have an external person who almost certainly is not an indigenous person come in and basically take over the running of that business and say, oh, you know, your books and records are out of date, so let's just stop supplying because, you know, there's a risk of depleting the assets. That might be an absolute catastrophe for that local community.

So part of what we're doing in this research project is trying to highlight the important values in protecting and facilitating the continued cultural work that a lot of these indigenous organizations are providing, and just appointing a liquidator from a big city to come in and take over and, you know, stop paying because there's a problem and, you know, that could have a disastrous consequence for the local community.

On the flip side, we've also got really different social factors at play here. So the idea that we can just kind of ring fence the assets of this financially distressed company because of the risk to external creditors in circumstances where, you know, they might be providing the only health services in that township, or the only education services or the only childcare services or source of employment. So there's also familial and in some cases, tribal lines here that are also important for the people on the ground. So imposing a standard insolvency law process of ring fencing assets, removing the incumbent directors, focusing on creditor financial returns. It's really quite unrealistic in a remote community that is largely based around a broader familial group, where if the, the tribal elder approaches that person who's working for that indigenous corporation and says, you know, you need to give us our supplies for the week. The fact that that indigenous corporation has gone into external administration, like liquidation, to a certain extent, it's not going to matter. Like that person who's part of that family tribe they've got, I'm sure many of them would say they've got a far greater tribal and familial obligation than they do complying with the terms of the Corporations Act.

So that's one of the tensions that we highlight in the paper is, you know, we've called our paper by reference to the need for greater cultural sensitivity in insolvency that, you know, it's not just about returns to creditors that in these types of businesses there are other really important social factors at play, and they should be recognized in the insolvency. Now they can be in special administration, but they're not all special administration. So just to give you an example, by way of statistics, if there's about 9,000 or so registered indigenous corporations in Australia each year, there's not more than about 15 or 20 special administrations. So the majority of these insolvent companies are going through a standard insolvency process. And, you know, that's not to say that the insolvency practitioners who are doing indigenous corporation insolvency are culturally insensitive. It's not to say that none of them have any experience with these types of matters. And, you know, just go, go in and ignore all of those cultural and social sensitivities. But the fact that we don't have any indigenous insolvency practitioners in Australia, the fact that we're basically importing insolvency practitioners,

often from other states, because these are very remote locations. You know, we're just urging for some caution and urging for greater cultural sensitivity training for the insolvency profession so that they don't assume that this is just a standard insolvency, because it isn't.

IT (24.56): I mean, that perspective is a very large one as well, Jason, because I think there's so much grey right now in these areas, because one of the things that I've consistently understood from the discussions that have been tabled around MSMEs is the human component. And how do you effectively evaluate the human component, and that you're able to draw it from a business perspective is to me, very interesting. So, congratulations to both Preeti and you to be able to do it.

Now in the context of India. I just wanted to sort of move to the perspective of the legal framework that does not exist in India. And because you already mentioned it a few times Preeti, I'm not going to pose the same question than post adjacent to you, but rather post the question of strengths and weaknesses. Now, can you give us a little bit of an insight on why there is an absence of protection of indigenous businesses in the current Indian framework? What is the existing framework that can potentially protect, or the absence thereof that does not protect indigenous and small businesses in India?

PN (26.06): Excellent question. Ishana. So, like I said, that majority of businesses of these businesses could be part of informal economy. So when they are operating in informal economy, they are structured really differently. So take for example those businesses that are producing some forest, forest related products. Let's take that as an example. So for this sort of community you know they are mainly dwelling in different sorts of areas around India, in several parts of India. And they are having protection under the PESA regulation of 1996, as well as the Forest Rights Act of 2006. So the governance model that works is mainly community centred and consensus-based governance model, where they use or utilize the governance of Gram Sabhas. So it's basically the local governance structure that's helping them to govern.

Now, in these sorts of businesses, even the financial aspects are or the credit, um, area is completely very bespoke and very different. So they may not be availing credit from a formal channel because they are informal, part of the informal economy. So it may be very bespoke and they might have got some funding from the government if they are registered under the MSME, but if they're not registered under the MSM, then they might be operating in a very different area. They could be availing microcredits, or it could be anything, or they could be raising funds from friends and families or community based sorts of little organisations.

So having said that, we see that when they have established these sorts of businesses like this, the Government of India is very keen on supporting these businesses, as I can see, through their various schemes that they have, including the minimum sorts of pricing, minimum sale price that they have on these sorts of products. Then there is this One Kendras that are promoting them to sell those products using technology and other things. So those sorts of activities are being carried out by the government, which is quite encouraging in that space. But my problem arises when these sorts of businesses do not do well. So what happens when they do not do well when their products are not sold at all. And in that case, probably they get some sort of relief from the government. But then it may not always be possible for them to revive or to really come out of that particular debt when they are operating under an informal economy, because they are availed loans in a bespoke manner.

So that is where, you know, these businesses will not flourish, and then they would simply close their doors. So it also means that, these sorts of businesses, which were carried out by generations together, you know, through their families and forefathers and their ancestry. They get erased very quickly because they do not have the appetite to run that business, and then they do not have that capability to bounce back. So there is no system for them to bounce back when they are into debt. There is no resolution mechanism for them to enable them to bounce back. So in this particular, uh,

research, what I'm trying to explore is that can there be a community based sort of a local structure, which can be a quasi-judicial sort of a model on the lines of the Gram Sabhas and the One Kendras that have already been established at a local level. So can there be similar sort of a system there which acts as a quasi, in a quasi-judicial manner and provides certain resolution mechanisms in a simplistic manner. Even for that argument, I mean, if we consider the argument that IBC will be overhauled and these particular businesses will be brought under the IBC in a, in, in some sort of an amendment or something. Still, that's not going to solve the problem. You know, these are not the businesses that are going to stand at the doors of the tribunals or the NCLT's.

So these are the businesses which are completely different and unique. And I think it's important for us to preserve these businesses. And like Professor Jason Harris has already said that, you know, there are socio cultural issues involved in these sorts of businesses, so they might need to be catered to in a very different manner. And I think that's the requirement there. And that's where this research is heading into.

IT (30.42): Thank you so much for that overview. I can understand the complexity, but you really simplified the answer for our audience. So thank you very much for that. And I do perhaps want to move to Jason. On a more positive note, Jason, you've identified some weaknesses, very quickly, ask what you think the biggest strength of the system is, and what could effectively be used to refine the system in the future.

JH (31.11): Well, I would put the special administration regime under the Registrar of Aboriginal Corporations as being a strength in the system, but it's a strength that could still be improved. And the biggest area it could be improved is with more funding. So, you know, 10, 20 years ago the registrar was running more than 30 of these special administrations a year, and since that time the numbers have halved, even though the overall numbers of indigenous corporations have increased. And so there is a concern that there's not enough funding in the system.

So one point of the special administration is the registrar pays for it. So it's not as if the cost of that administration is coming out of the assets of the company. It's actually the government that's paying for it. So if we had an increased funding to the registrar, then I think we could see the registrar providing more proactive support earlier in the decline curve for these businesses, so that maybe they didn't get to the tipping point of insolvency in the first place. So if we had more help early on, more help with, you know, training people with business skills, record keeping, accounts, improving information flows inside the businesses, then maybe we wouldn't have as many businesses getting into financial trouble. And if they did, maybe we'd end up with better outcomes.

So more special administrations, but also really changing the narrative around special administrations and around the sort of assistance you get with an insolvency practitioner. It's a regrettable fact that the narrative in the popular media in Australia around indigenous businesses is often framed in very negative tones. And it's framed in terms of, oh, well, you know, these are businesses that have poor corporate governance practices. Often, you know, there's a perception that there are high levels of misuse of public funds, for example, and there's concerns about the transparency and the quality of the auditing information that comes out of these businesses.

And yet, studies by the registrar show that actual, actually incidents of fraud in these businesses are very low, much lower as a proportion of total numbers than what we see with standard commercial companies. And the reasons for failure for most of these businesses are actually not because there's been misappropriation or misuse of funds or property. It's often because they lacked the management skills in the first place. So maybe providing a bit more government support when these businesses are being started, so that they can start on a sounder foundation and have better sources of information on an ongoing basis, that it could then try and keep them out of trouble. But it's also very clear that special administration, it's incredibly flexible. It can basically be moulded to try and

address whatever problems the indigenous corporation has. So changing the narrative around the problems that indigenous corporations have, so that it's not automatically perceived as a failure, that if you need to appoint a special administrator or you need the assistance of someone who's got insolvency skills, it's not necessarily because the people running the business have failed or because you know they're hopeless or they're ripping off the company or something. There can be lots of reasons why these businesses get into financial trouble.

So there have been recommendations, for example, to change the name of special administration because administration does have an insolvency connotation, given that one of our insolvency procedures in standard corporate insolvency is voluntary administration. So there has been a suggestion that maybe a name change would be appropriate so that it's not perceived as being, oh, well, the company must be insolvent then, because of course that can erode the stakeholder confidence and the creditor confidence in continuing to deal with the business.

So I think if we could see that change in the narrative, if we could, if we could see more action by the regulators earlier through more funding, more support mechanisms and more special administrations, albeit under a different name, and that could help a lot more of these businesses achieve their overarching purpose, which is supporting and providing value to indigenous peoples.

IT (35.16): Thank you so much, Jason. In the true seasoned academic fashion, you've given us strengths and arguments both for and against the strength. So thank you very much for that. Which segues very nicely into our next question, and the vagueness of this question is something that I need to apologize for, because it is a question that perhaps even seasoned academics still struggle to evaluate in completeness, which is the cultural, social, communal aspects of businesses and these businesses in bankruptcy. So my question to both of you and for the new debutant interviewee, Preeti, as a first question, is what are the cultural, social and communal aspects that are so disconnected from existing legal restructuring regimes and that the existing legal regimes do not cater to or support? What have you found as key areas which perhaps don't have answers, and that you think that still require a lot of introspection of lawmakers, policy makers, to understand these indigenous businesses better. Perhaps you can weigh in from the Indian perspective. Before I move to Jason on the Australia perspective, or if you think that it needs a comparative response, feel free to provide the insight from both India and Australia.

PN (36.46): Yes. So basically I would draw upon my answer using my previous answers to your questions regarding the uniqueness of these businesses. So how these businesses are structured and how these businesses function. That itself is a game changer when you talk about and providing them with a resolution mechanism or an insolvency regime. So does the traditional model or a sort of IBC sort of a system. Does it even work well for these businesses? That itself is a big question, first of all. And secondly, there is complete absence of a data that we require. So I think there is a dearth of empirical research in this space to start with, to understand how many of these businesses are MSMEs. And then out of MSMEs, how many of them are indigenous? And if they are out of operating out of MSMEs, if they are operating into the informal economy space, you know, those sort of data is are extremely important to start the conversation even.

And, uh, having said that, I think we might be going on a dangerous path as far as India is concerned when we do the legal transplantations from other jurisdictions. So I think that's something which is missing out here, because indigenous businesses are extremely different in terms of their structure and their workings and their governance model as well, as I have explained. So I think those put them in a very unique spot and the cultural and social and communal aspects of these businesses are something to be taken into consideration when a framework is being designed. So IBC clearly does not, you know, as of now, technically it's not applicable, but assuming the fact that there could be some amendments to cater these areas. Still, it's not clearly taking into consideration the social,

cultural and communal aspects of these indigenous businesses. So there is a disconnect, as we can see, because IBC operates in a completely different style and in a different space.

So legal transplantation I don't think, is a great thing to do for India because they have to look at the local circumstances, which also includes the circumstances of these indigenous businesses. And also the one size fits all approach, again, I'm going back to the same narrative because that itself is fundamental here. I'm echoing the same thing there where, you know, one size fits all will not work well, and there needs to be a different regime altogether for the MSMEs as well as these indigenous businesses as well, which might form part of MSMEs or which might be outside the MSMEs.

So I think a tailored approach is important here where, you know, customized legislation or can be provided, a framework can be provided, which is, uh, looking at the local circumstances of these businesses, looking at the socio-cultural aspects of these businesses. And, uh, yeah. And the even the governance models that I have explained, you know, so making it more, um, friendly and, uh, without them exhausting their resources and they are able to have a quick and faster resolution and bounce back to business, you know, that sort of mechanism is missing. And to start that particular, I mean, to even suggest some sort of a model for that legislation, there is a dearth of research. So it all starts with an empirical research. I think that's my humble opinion.

IT (40.23): Thanks so much. It's not really a humble opinion. It's actually a very well researched opinion. But I do want to, uh, augment one particular point that you said from an India perspective, because it might just be easier for our international listeners to understand.

So the Insolvency and Bankruptcy Code, which is the Indian legislation, sort of separates corporates and non-corporates and MSMEs and SMEs are very unique because you have incorporated bodies and you have unincorporated small businesses. So unincorporated small businesses do not have insolvency regime at the moment because the law is not in force for their resolution. And that's very interesting because for corporate MSMEs, which are actually very large value, because of the sectors that they operate in, you do have corporate restructuring processes in the format of a pre-pack that is available in India and also out of court models. Because the company law in India allows for schemes, and the Reserve Bank of India, which is the banking regulator, also proposes restructurings for such MSMEs. Because there are actually a large value market.

Your sort of conversation especially is important because there is an entire segment of businesses that actually does not have restructuring framework right now, which is done through a formalized insolvency process. And you're absolutely right. The law is not structured enough to be able to support these businesses because they cannot possibly knock at the door of a tribunal, as you said. So quite fantastic in terms of drawing this distinction from an India perspective. And I just wanted to add that here.

But moving to Jason now for the same answer I know even you, like Preeti, have touched upon these aspects in your responses to my earlier questions. But it is a deeper divide and a deeper conversation from an Australian perspective, because of the nature of the persons who run these businesses. Which is why the controversial word communal in my question. So how would you sort of respond to these issues from an Australian perspective?

JH (42.44): Well, I would actually echo some of the things Preeti was saying. The challenge I think we have in Australia is that we've developed a bespoke indigenous corporation regime, largely in response to land rights legislation that's grown over time, and the question of what do we do on insolvency or what do we do with financial distress, has been answered largely by assuming that we should copy as much as possible of the standard corporate insolvency legislation, ostensibly on the assumption that creditors and stakeholders will basically understand what that means. So if we only had a specific bespoke regime for indigenous corporations, would standard creditors understand

how that worked. Whereas they might understand what a liquidation is or what a receivership is, for example.

And I think what we, what could work better and provide more appropriate outcomes for indigenous businesses and their broader communities, is actually a bespoke regime that if we started from the ground up, what is the nature of these businesses? Don't assume that they're like commercial companies. Don't assume that making rules that are as similar as possible to commercial insolvency rules is necessarily the best way to go, and actually then work through, well, you know, what are their characteristics? What are their needs? What are the tensions? What are the stakeholder expectations in insolvency, and how do we address those different considerations around an insolvency regime and build it on a bespoke basis. I think that would lead to a better outcome.

But that's not the approach that we've taken over the last 40 odd years. It's largely been to try and copy as much of the corporations act as we can, and we see that in terms of the reporting obligations, which arguably are too much and too onerous for a lot of these very small businesses. And we also see that in the insolvency context. So, yeah, that that would be my suggestion is instead of trying to make the existing framework work a little bit better, we should be rethinking that framework from the ground up. But you know, I'll also disclose my bias. I think that's the question we should be asking from a whole of insolvency law perspective as well. Not just incremental improvements, but actually rethinking the very foundation of our insolvency law to meet the needs of modern businesses.

IT (45.19): Thank you for that, Jason. Just to sort of close down this conversation, because it is obviously the start of many conversations. What I want to do is sort of like a rapid point question with both of you. In terms of a proposal as to the most sort of significant next step to integrate a modern legal framework, to enable and allow for efficient restructurings of indigenous businesses to sort of deal with issues of capitalization or how expensive an insolvency process is, and the outcome of a potential process like in the format of a fresh start. What would you say is the one thing that needs to be done from an integration step, or just as a next step for supporting efficient restructurings of indigenous businesses. First to Preeti and then to Jason for a last word.

PN (46.19): Thank you very much. Very quickly, I think, uh, India should adopt a five-point based system that I have. I'm proposing here. First of all, an empirical research. Secondly, that empirical research or study or the committee that is constituted the focus point should be exclusively MSMEs and nothing else. When I say that, it means they would explore the entire gamut of MSMEs, what kinds of businesses are sitting under MSMEs and how many percentages geographically, what are the locations, and so on and so forth. Exclusive study on that.

Secondly, exclusive study on their business structures. You know, it could be a part of the same study on their business structures and how many of those businesses have been revived so far, or how many of them have been, I mean, they are under distress, You know that sorts of data. And then a real relook of the MSME Act. So what is the MSME Act doing in this space? Because there is a board that is constituted under the MSME Act. They have certain powers. How are they working in this space? That sort of work. And then probably a model law or a framework that can be designed, which is nothing, not an integration to the main legislation, but rather a tailored sort of framework which is exclusively working well towards the MSMEs, not only the MSMEs, but also the indigenous businesses as well. An extension can be made to the indigenous businesses as well. So I think that's the five stage approach that can be taken for India in my humble opinion.

IT (48.02): Thank you for the five points to the one I asked Preeti, but it then shows how big this conversation is. Now for the final word. over to you, Jason.

JH (48.13): Yeah. I mean, my one suggestion, if we only had one, would be to provide more funding to the Registrar of Aboriginal Corporations to undertake more special administrations. I think that that

is flexible enough that it really meets the needs of those specific bodies, and in some of those cases might avoid insolvency. Eventuating. So yeah, that would be my suggestion.

IT (48.38): Thank you. Jason, thank you for the one point. And thank you, Preeti. Just to sort of wrap this conversation, I wanted to let our listeners know that this is obviously a start of many conversations to be had in this, in the MSME and the small businesses space, and I'm very glad to have kick started this conversation with the two of you. We do have another episode that is coming up on MSME restructuring soon, so it is a good sort of tie in into the conversation of how MSME reorganisations comparatively should work. So thank you very much for your time. Thank you for your patience with the questions. And I also want to thank our listeners for staying with us. Till next time.

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