

Business Rescue Status report as at 30 March 2015

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1908 - 2008



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Companies and Intellectual
Property Commission
a member of the dti group

Key data fact

- The data of this report was for the first 3.25 yrs since inception of BR

What we know

- Rescue (Chapter 6) is nearing four years at end of April 2015 but report is for:
- Thus 3 years 3 months at end of July 2014
- Many opinions on:
 - Effectiveness and efficiency of BR regime
 - Problems in practice and within act
 - Conflict, rumour about abuse
 - Complaints
 - BRP competencies, fees, absence of liability, CIPC, licencing

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What we don't know

- What are the status and issues related to the effectiveness and efficiency of Chapter 6 implementation?
- What issues are to be addressed.

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Why is it important to know?

- There is a need to determine and evaluate the status quo of the rescue industry by all parties (Regulator, BRPs, Creditors, **Government**, employees, other).
- The status should guide future actions addressing the problems.
- Potentially guide amendments to the Act.

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What this research has done

- This research set out to describe the status quo by answering **specific questions** as set out in the brief by CIPC (SCCA committee)
- This included research on data from:
 - CIPC statistics – basis
 - An online survey of 120 rescues
 - A Survey of “public opinion”, n = 68
 - A survey of BR knowledgeable people, n = 78
 - Interviews with CIPC, BRPs, Banks, Creditors, Directors who filed for rescue, Lawyers involved, others = n = 5 each
 - Extension of conflict research - separate
 - Delphi data collection – phase 1

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Potential Outcomes of Business rescue?

1. Reorganise the business entity – going concern principle (not legal entity)
2. Better Return than in liquidation (for Creditors) **BRiL**
3. Other – S 155 arrangement, Business sale, mergers, asset sales, takeover – happens outside BR)
4. Other combinations
5. Liquidation
 1. Immediately before 1st creditors meeting if no reasonable prospect can be determined
 2. After investigation when BRP determines no reasonable prospect
 3. Not obtaining the vote for the plan at 2nd creditors

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Key findings 1

1. Success in BR is regularly misunderstood with limited creditor knowledge (except for banks)
2. The BRP is central (**disproportionate influencer**) to the process and therefore draws most attention, criticism and blame for process related concerns.
3. Affordability of business rescue is a limiting factor and especially so when legal proceedings are part of the process.
4. Reasonable prospect, its definition, understanding, measurement and determination is central to BR. Much future research required.

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Key findings 2

- 5 Conflict exists in the industry especially between banks (as main creditors) and BRPs. Post business rescue investigations also report conflict between filing directors and BRPs.
- 6 Post Commencement funding/finance (PCF), which is a key determinant in BR success for reorganisation is not readily available. Various reasons for it is explained.
- 7 The Regulator is a “real bone of contention” for BRPs and affected persons alike. This is especially so for timeous response, accuracy, capacity and **authority to act**.

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Recommendations 1

1. Establishment of an expert advisory panel to support the regulator. This should be done in association with a professional body such as TMA.
2. Accreditation of BRPs through revisiting an accreditation body to assist with **education**, post mortem evaluation, peer review and licensing. This is the most pressing issue.
3. BRP competency development – could be part of point 1.

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Recommendations 2

4. Enhancement of the legal procedures that hamper BR execution, especially time limitations by investigating **specialized courts**, ombudsman, tribunal, enhanced complaints procedures, alternative dispute resolution and more as alternative processes – link to point 1 – **expert panel**.

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Recommendations 3

5. Initiating a process for revisiting Chapter 6 issues that were identified as inconsistencies, practical problems or short comings. These may include clarifications for:
 1. Factual measure for reasonable prospect
 2. PCF priorities in liquidation
 3. This may include amendments but also practice notes applied within the current execution structures of the Regulator.

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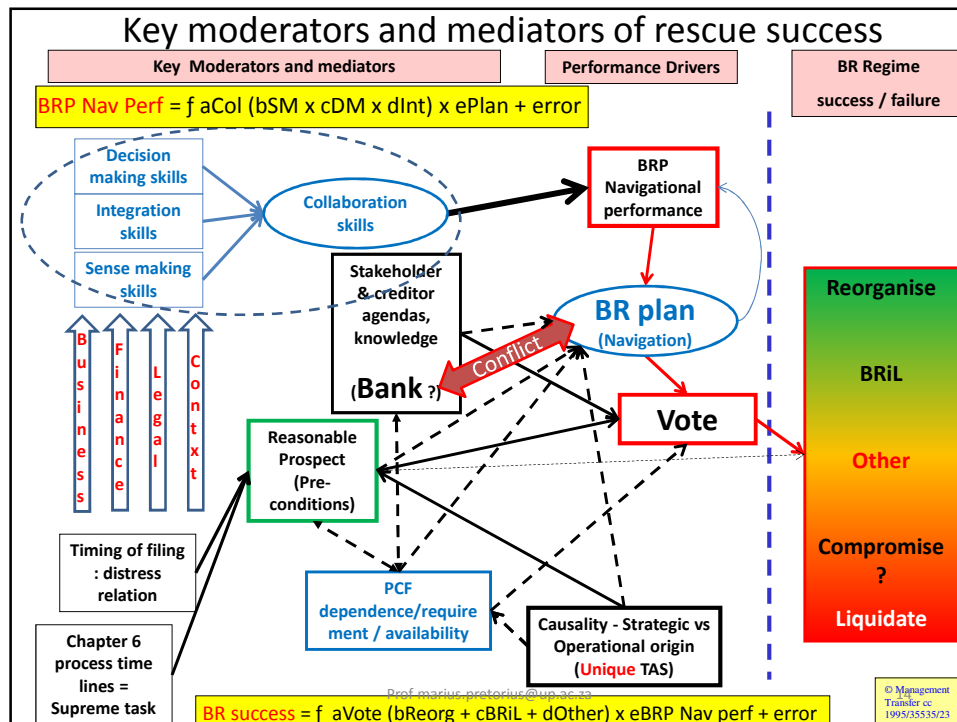
Recommendations 4

6. General education of directors, employees and affected parties

7. Licensing to be kept on ad hoc basic

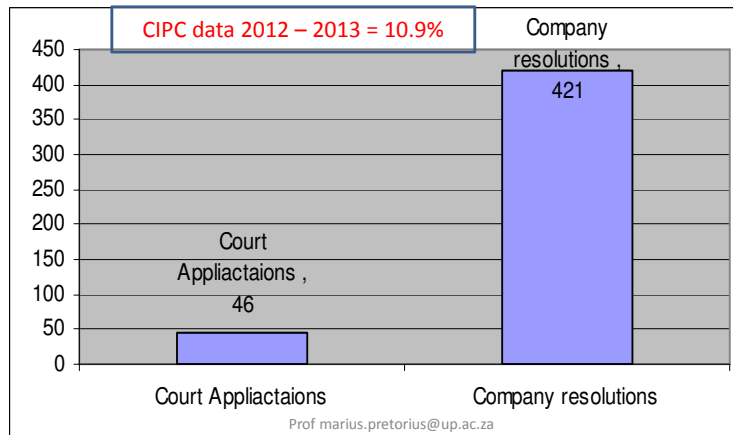
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How many companies have gone into BR by board resolution vs court order? x2

- $135 / 1398 = 9.7\%$ CIPC data 2014 Survey = 10%



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How many companies have come out of BR successfully?

- 132 successes CIPC data
- Figure is success definition dependent
 - Reorganisation
 - Better return than in Liquidation
 - (No distinction between reorganisation and/or Better return than in Liquidation or other)
- **Substantial implementation filed** COR 125.3
- Translates into: **9.4%** Compare US approximate of 5%

Opinionnaire states 42% respondents supported the statement that the success is between zero and 25% (Deloitte 2014:20)

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If court order – who initiated it?

- Mainly disgruntled creditors
- 3 cases of employees
 - Solar spectrum - labour
 - Cases of unhappy employee

Interview
data

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What are the time dimensions of the entire process?

- 5.6 - 6.3 months
- Varying between 6 -24 months but influenced by various factors
- Target = 6 months
 - Court delays influence this significantly

CIPC data

Interview
data

Interview
data

62% of respondents expect no change in the time dimensions
(Deloitte report, 2014:11)

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How many companies have gone into BR?

- 1398 legal filings over 3.25 years
- **1529 on 5 March 2015**
- Translates into:
 - 430.1 / year average
 - 35.8 / month average

CIPC data

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How many court applications have been refused?

- Unknown
- Unsuccessful applications are not reported.

CIPC data

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What are the cost implications, particularly cost incurred to the BRPs?

- Extensive
- Legal fees : BRP fees ratio reported as 60:40
- Opinions suggest that BR is **not** for micro and small firms due to costs

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For those companies that were not reorganised, were the creditors better off than if they had not gone into BR (BRIL)?

- Yes

Interview
data

“this is the most valuable provision of the act” – Leading BRP quote

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Where BR failed, why did it fail?

- Main **generic** reasons, Top 5 include:
 1. Reasonable prospect interpretation
 2. Firms wait too long before acting
 3. Shareholder disagreement and “infighting”
 4. Absence of “Data integrity”
 5. Wilful withholding of information by shareholders when trying to abuse the process
6. Absence of PCF – as a result of the first 5

Interview data

Conflict data

Case data

Caveat: Context specific circumstances – Each case is different

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Was there a reluctance to give finance after company went into BR?

- Yes – definitely
 - Banks currently the main source for PCF
 - Very few distress funds available
 - **Data integrity problem** flagged again

Interview data

Opinionnaire confirms by stating: there is a lack of appetite for distressed funding in SA (Deloitte 2014:21).

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PCF Restraining and driving forces



1. Liability of data integrity
2. Value at risk - relationship
3. Potential funders need clarity asap after appointment - Crucial urgency window
4. Preferences (S 135)
5. BRP limitations (reputation and skills)
6. Previous management relationship
7. PCF claw back options limited



1. Newness
2. Potential if used correctly to use time value of money
3. Risk –reward opportunity for funders
4. BRP network – still needs work.
5. Job saving employment spirit

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Is there evidence that the failure of BR was attributable to a lack of support by the banks, major suppliers, major customers?

- Definite yes for banks
- Very case dependent
- Influenced by industry, business size and customer
 - Retail sector – more likely
 - Government as client – more likely
 - Smaller business – more likely as alternative suppliers can be found easily

Interview
data

Suppliers are mostly willing to supply on cash before delivery basis

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Has failure been due to poor performance of the BRPs?

- No factual data available CIPC data
- Proved to be the main reason reported by creditors – especially banks Interview data
- But also directors who filed, legal advisors, academics
- **There is a significant demand for “Take over requests” reported by “top” BRPs**
- **New trend developing: Brokering for profit**

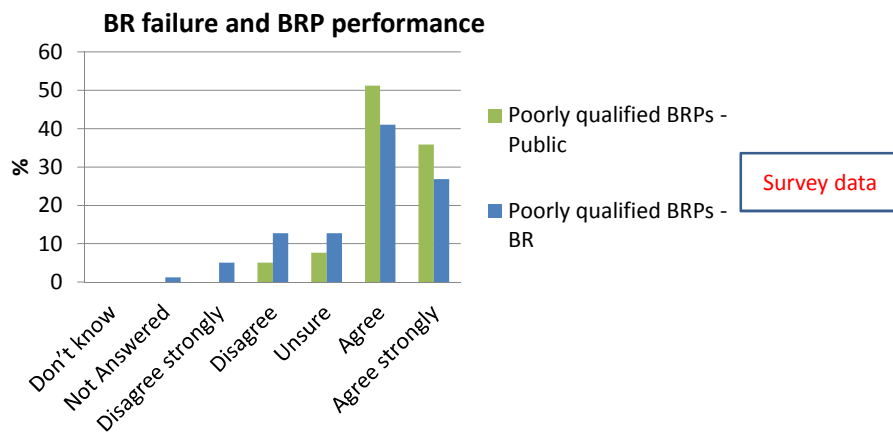
Opinionnaire states only 21% respondents believe that there are some of the BRPs who are adequately skilled and qualified (Deloitte 2014:20)

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Did experience/qualification of BRPs have any effect on the success or failure of BR process?

- Yes Interview data



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Rescues:BRP ratio

- 184 practitioners until 31 July 2014
- $1398/184 = 7.6$ rescues per practitioner
- Highest for one BRP = **127 rescues**
- Highest for one firm = **188 rescues**
- Highest 5 BRPs = **318 rescues (22.7%)**

Apparent growth in recent past of junior practitioners
Figures need interpretation

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CIPC data 29

Has failure been due to any defects in the companies act?

- No evidence
- Apparent discrepancies – several sections
 - Some sub-sections indicated – next slide
- **Not the act itself - rather**
 - Depends on attitude and intent of legal advisors of the filing firm or creditors
- CIPC must regulate – not only administrate

Survey data

Interview data

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Is the problem that there was a mistake in having put the company into BR in the first place, ie. There was no realistic possibility that it could succeed?

- Yes
- Reasonable prospect issue
 - Basis of most conflicts reported
 - Reason advanced for no PCF coming forth
 - Waiting too long

Document
research,
interview
data, conflict
data, court
judgements

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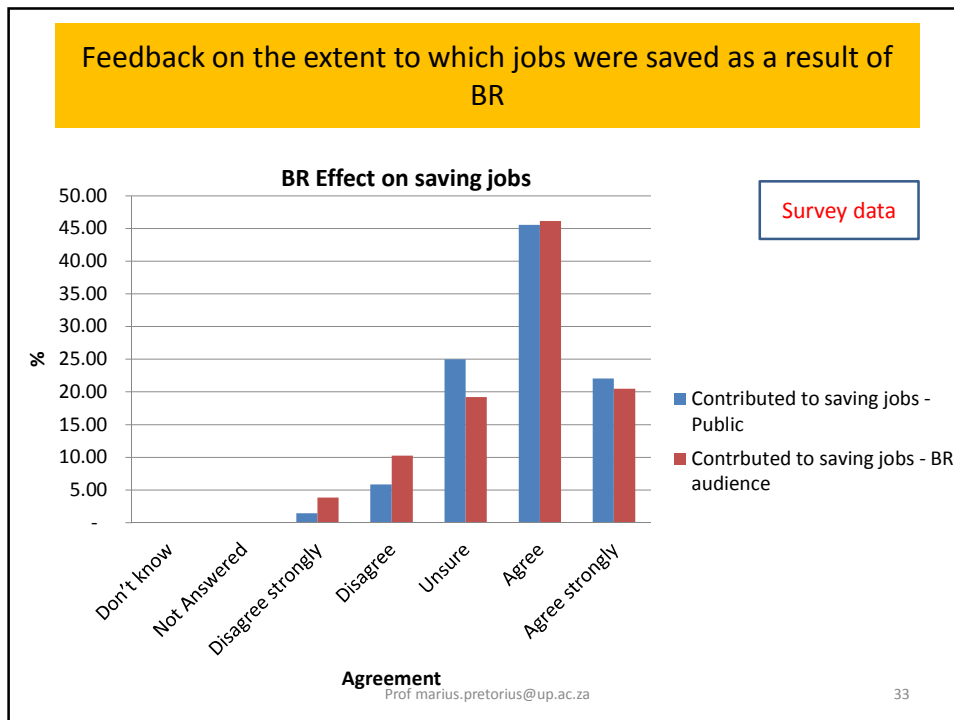
Feedback on the performance/non performance of BRPs

- Yes
- Formal complaints

Complaints
data

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Employment survey February 2013

CIPC Survey data

- Requested the conditionally licensed BRPs to complete
- Interim report:
 - 31/126 responses = 25% = Biased responses
- The number of jobs at the start of the projects were reported to have been 5680 and at the end of the rescues 4256.
- **Only 25% of the jobs were lost.** THUS The rescue effectively saved 75% of the jobs, where in the case of a liquidation all jobs most probably would have been lost.
- If we look at the number of dependents to a full time job which is commonly calculated to be at least six (6) the effect is more than 30 000 lives, that have been effected positively.
- Many of the rescues reported on have not reached substantial implementation of the business rescue plan

NB Caveat: Response bias as it is suspected that only the successful BRPs reported

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This report - guestimate

1. Assuming mathematical averages and projection, together with the assumption that the alternative to rescue is liquidation, the following can be deducted and projected for the industry:
2. Projecting over the total of 1398 rescues in the first 3.25 years, translates into a **projected** total of 10 865 jobs saved in total.
3. Considering that each person holding a job, on average supports four to six people, BR did affect at least 40 000 citizens.

The above data suffer bias as there is a tendency to report success more extensively and downplay failure. These projections must therefore be applied with extreme care – speculative projections.

The number of companies that are shell companies or property companies that filed for BR is concerning.

Some feedback on the overall implementation of BR by CIPC

- Standard response is: complain
 - Administrator and not regulator
- Later slide

Interview
data

Some feedback from creditors in terms of their roles and experiences

- Banks normally key creditor
- With security
- Conflict rive between banks and BRPs

Conflict
research data

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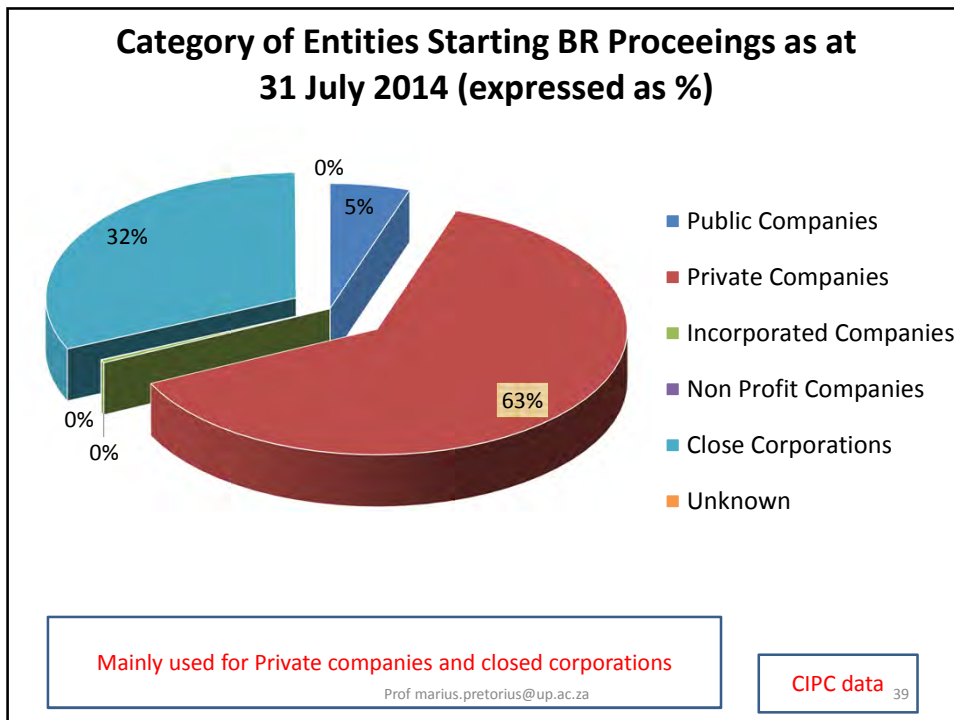
Is BR useful for small firms?

- Next slide
- 32% by closed corporations
- 63% typical medium firms

CIPC data

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Opinionnaire from Deloitte 2014

- 79% of BRPs not adequately skilled or educated

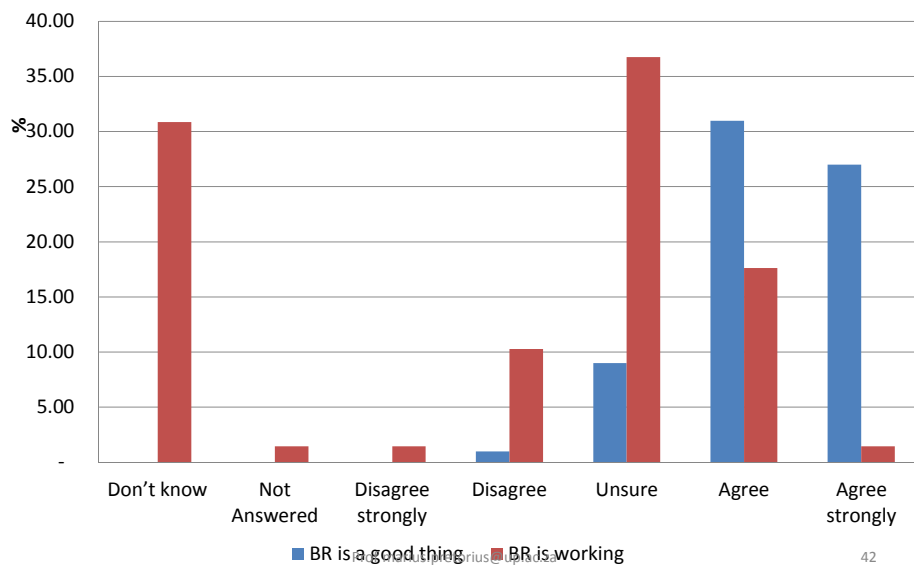
Questionnaires' data

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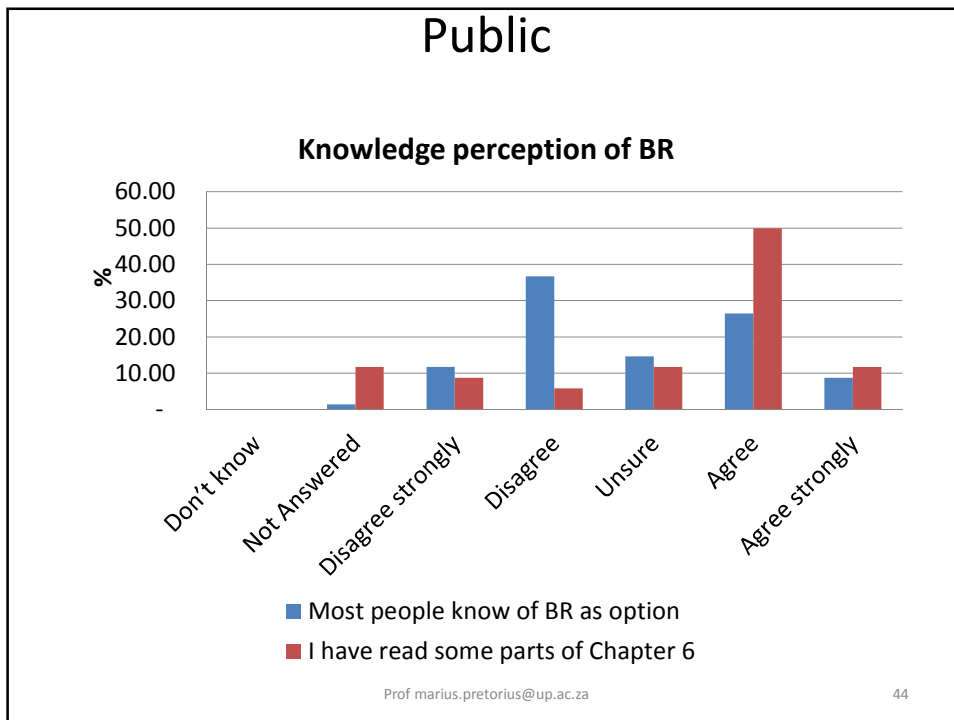
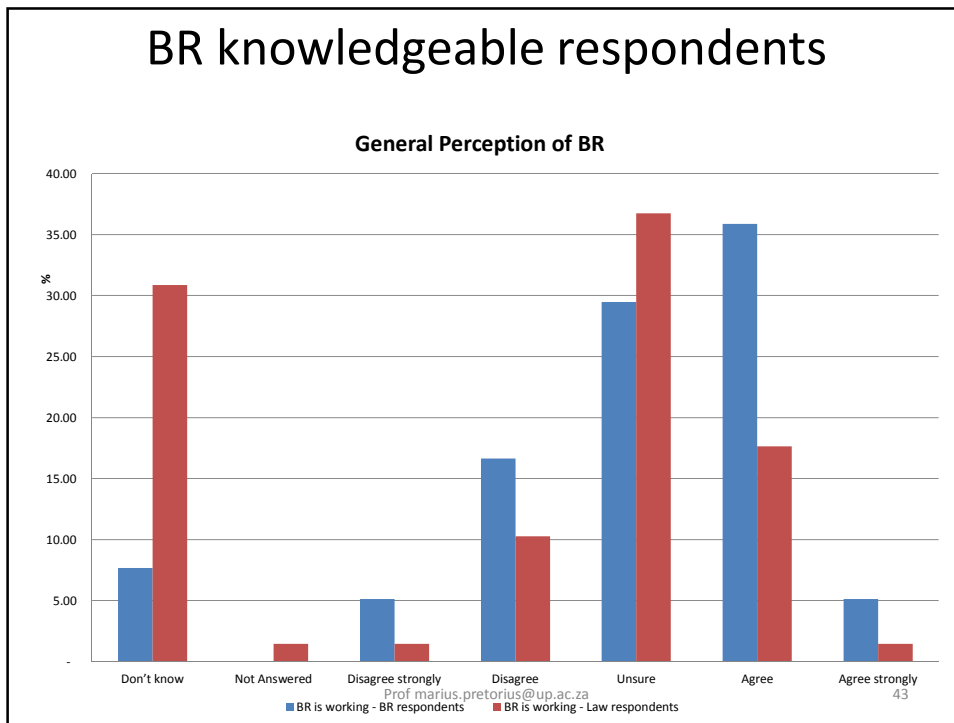
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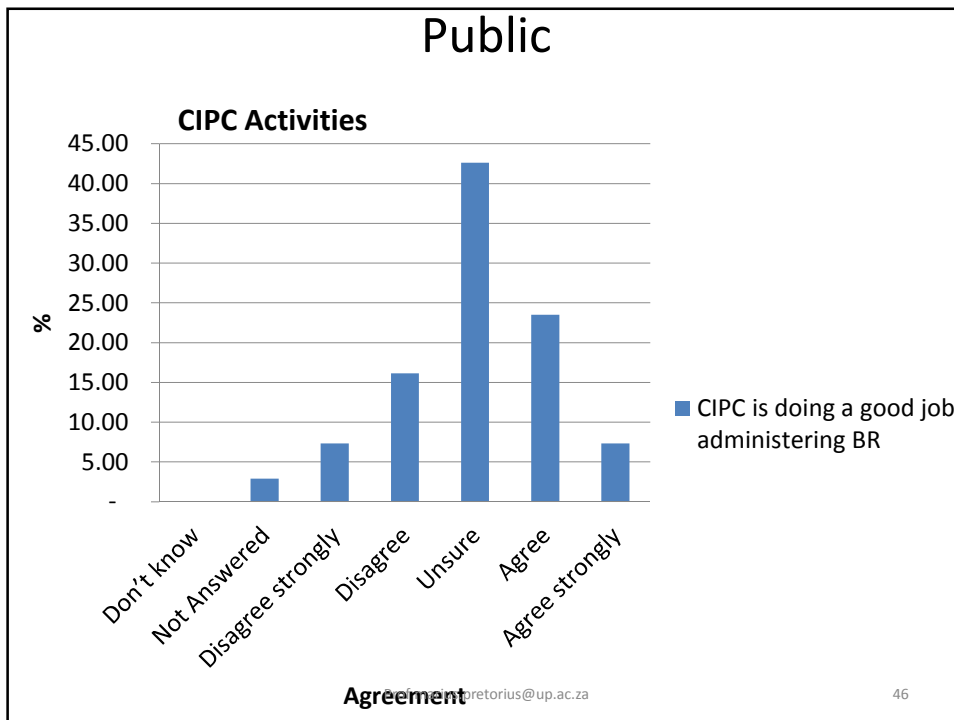
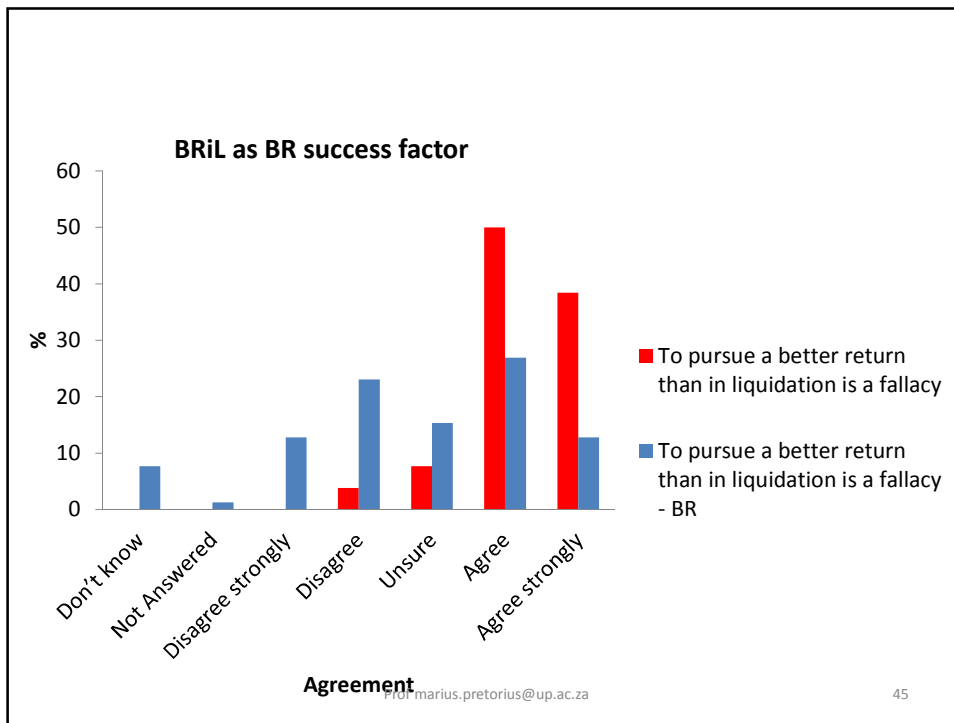
Public

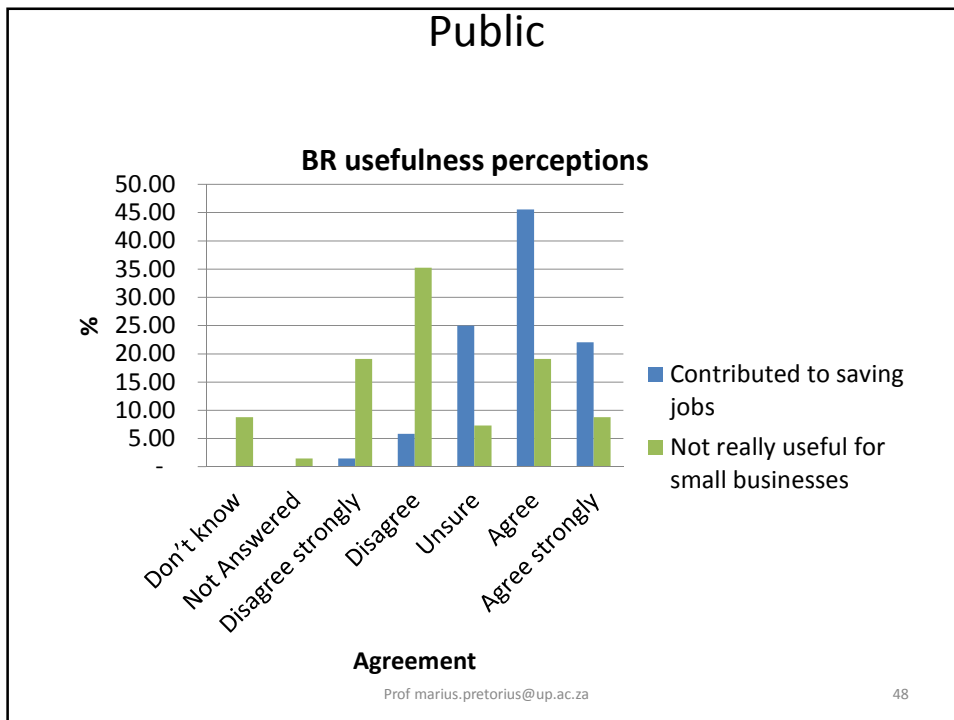
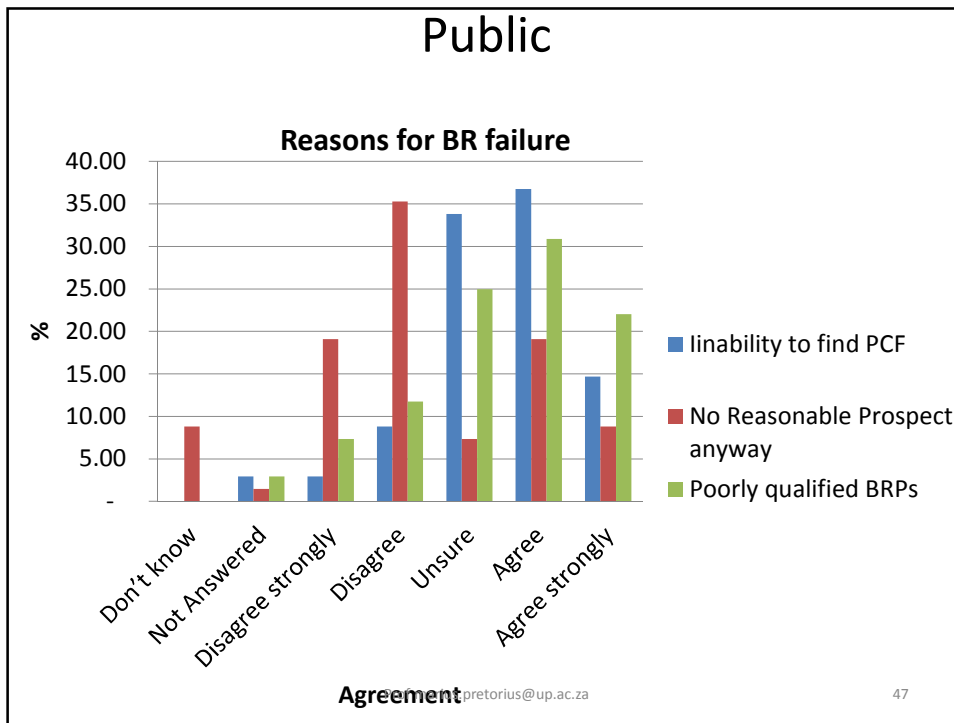
General Perception of BR

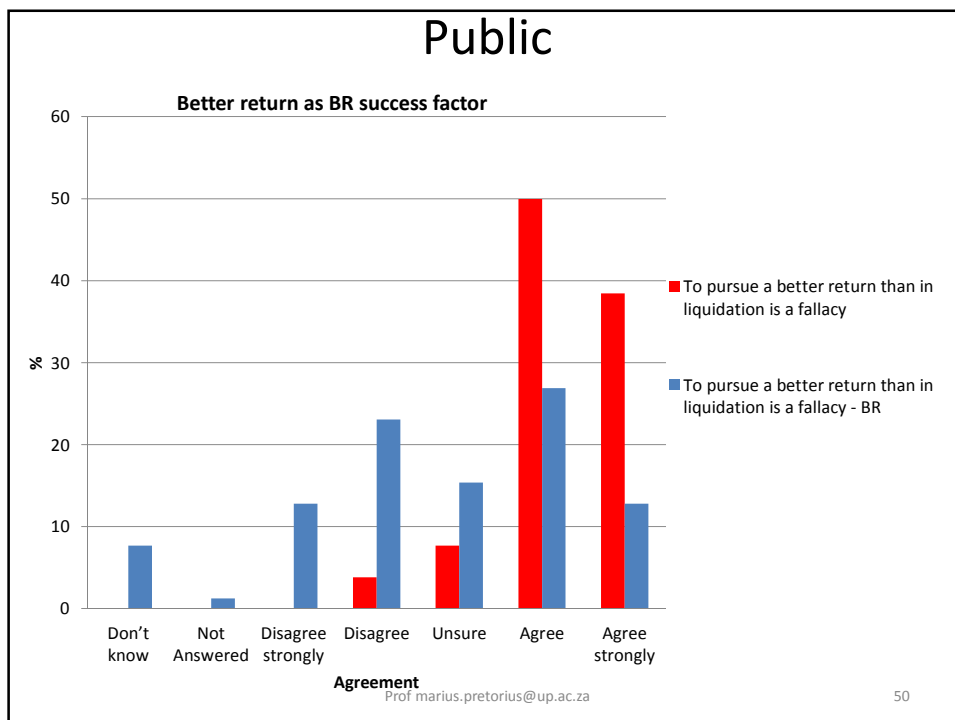
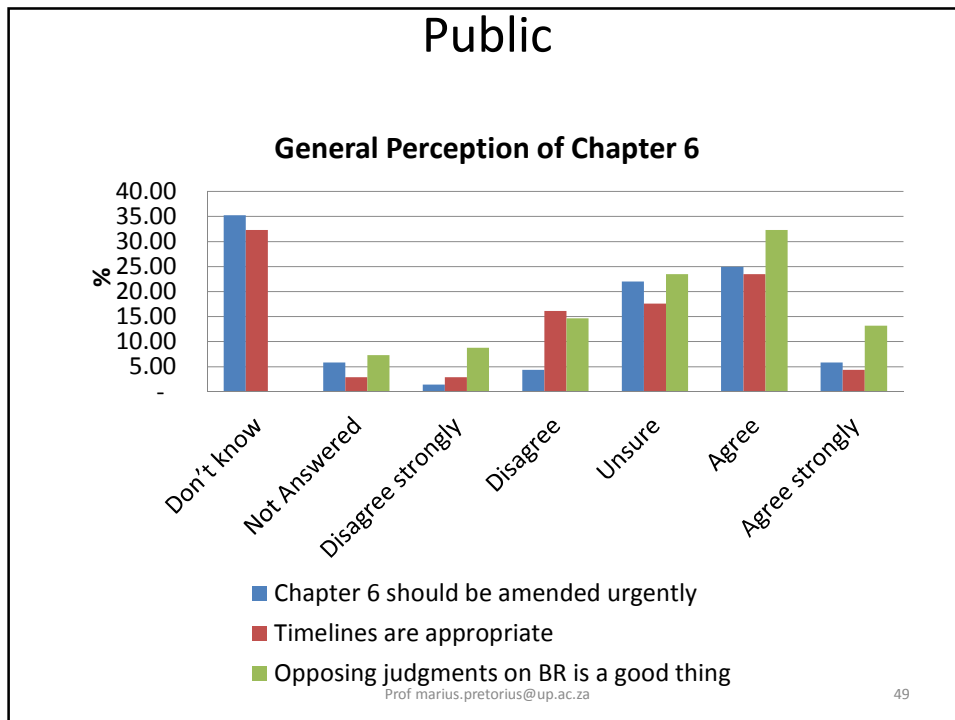


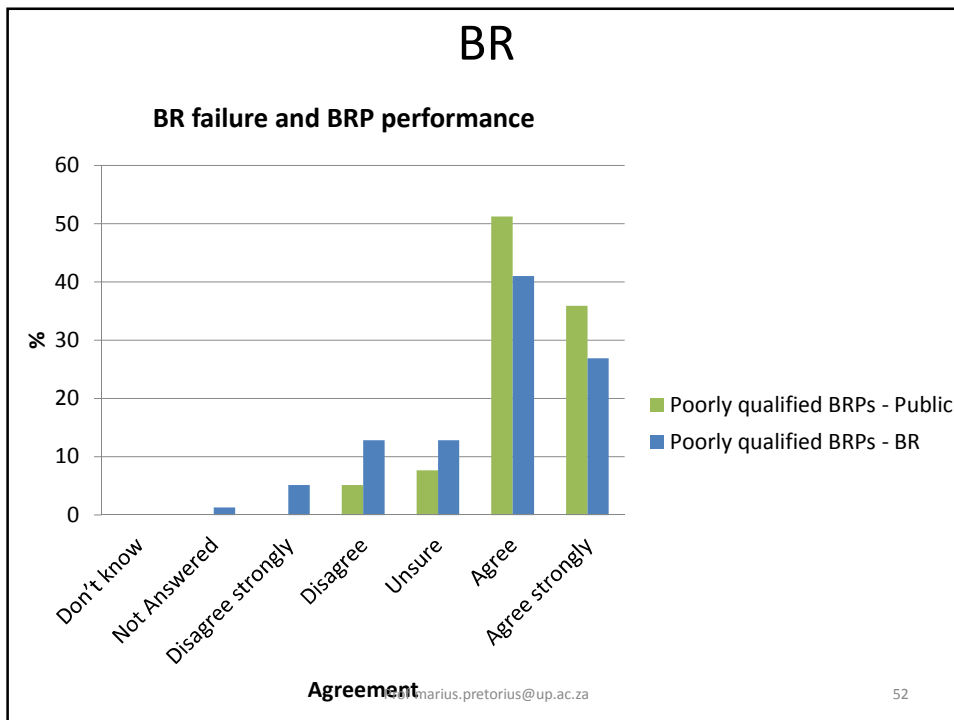
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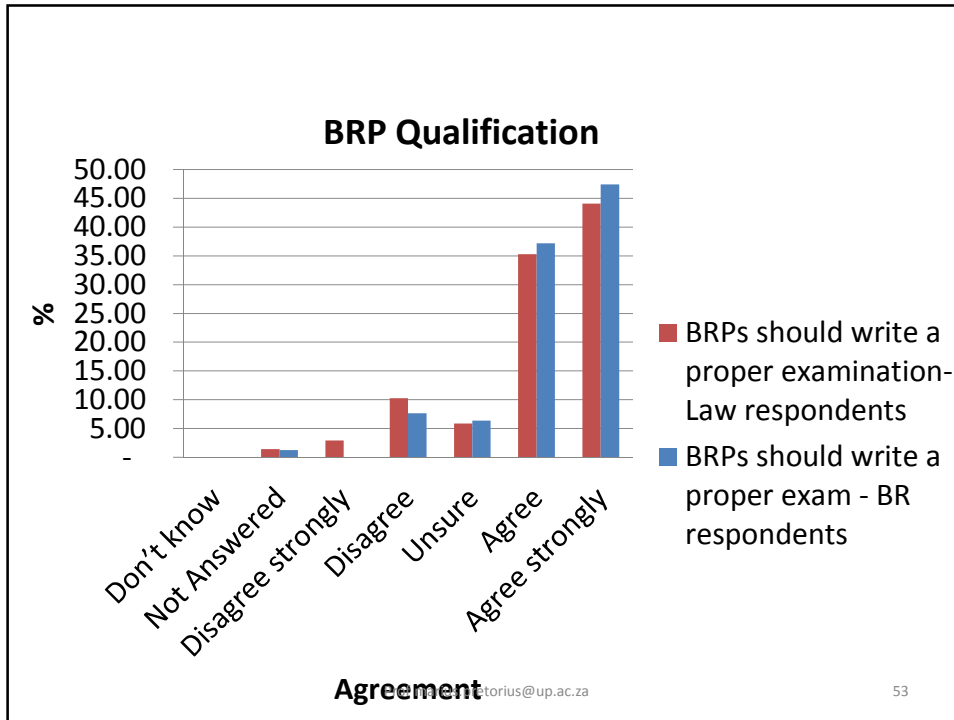




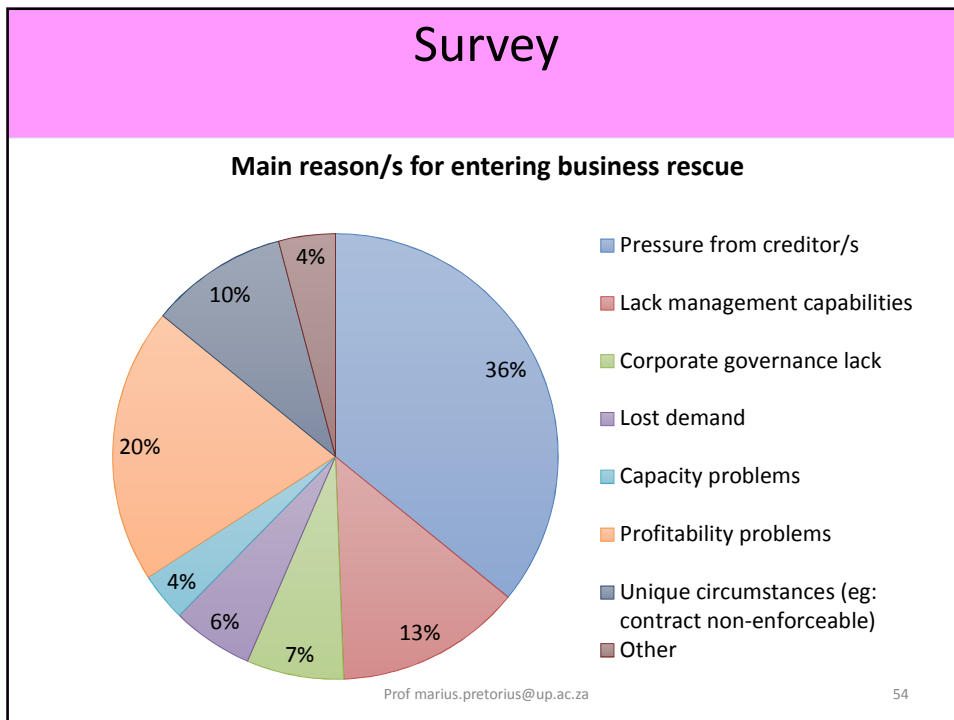




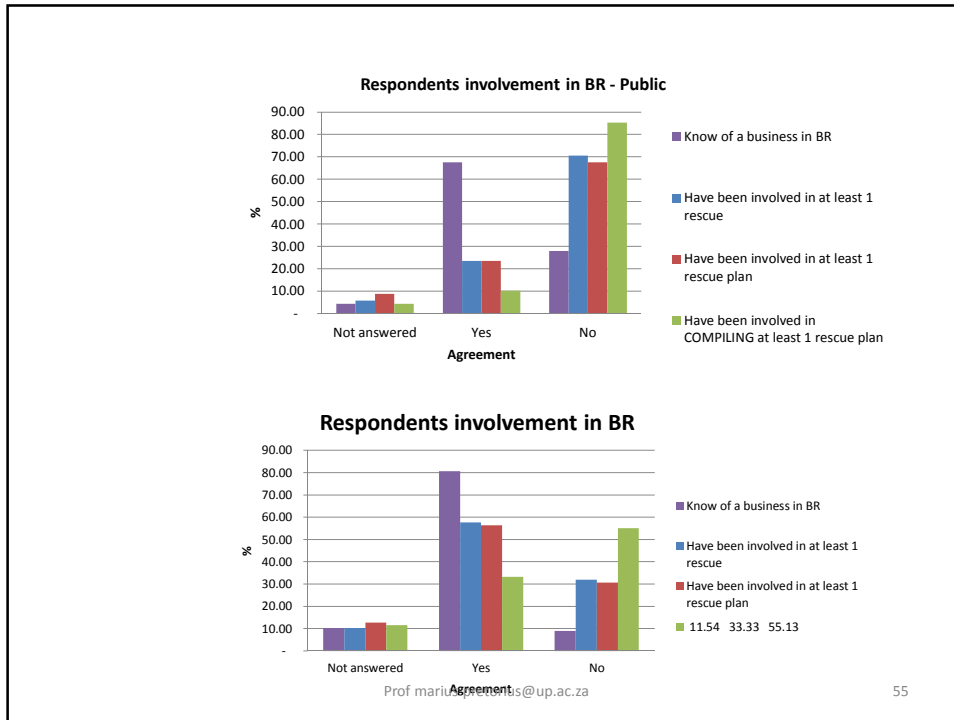




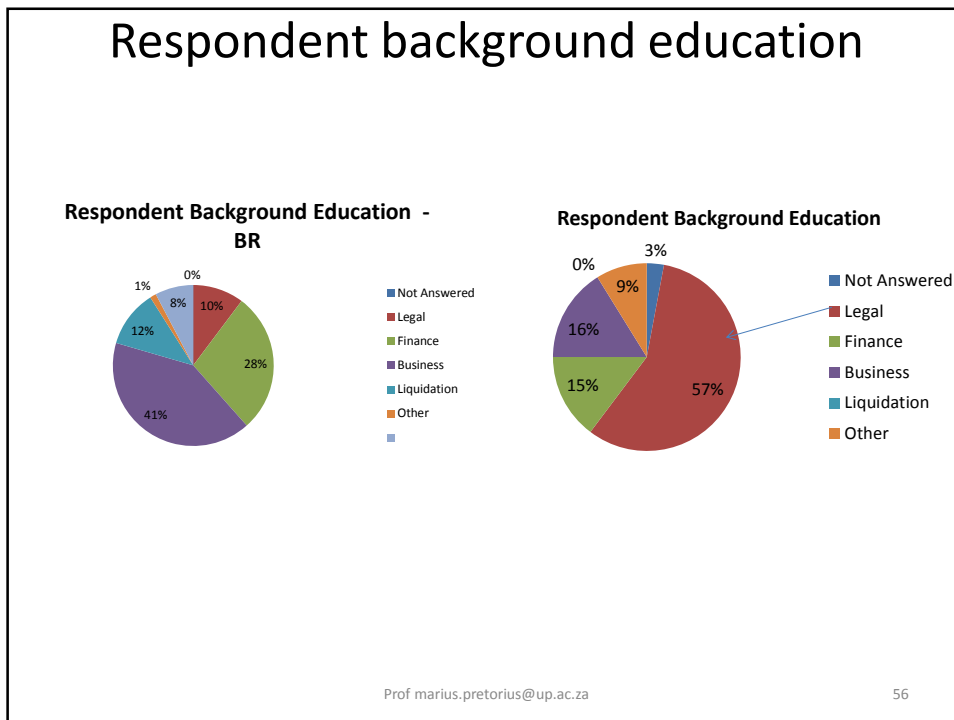
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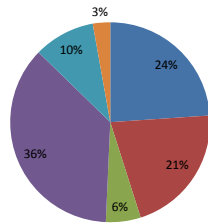
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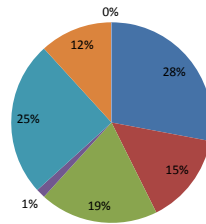
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Origin of non support for plans

Lack of support for rescue plans as origin of failure - BR



Lack of support for rescue plans as origin of failure - Public

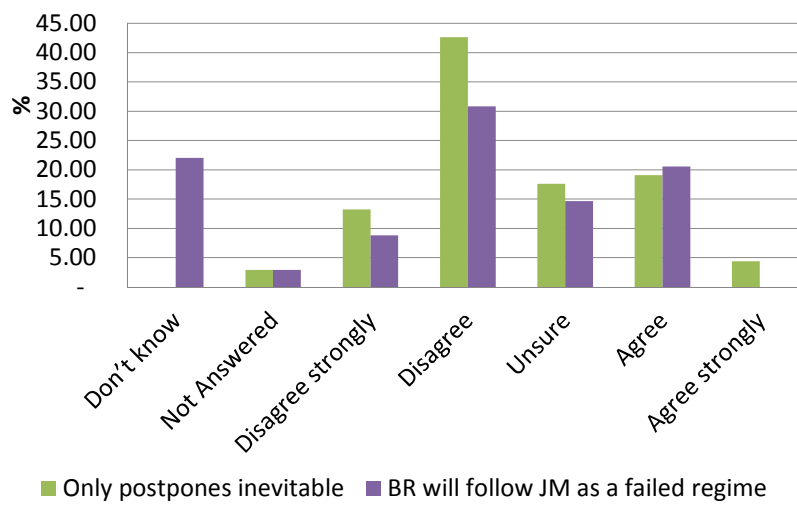


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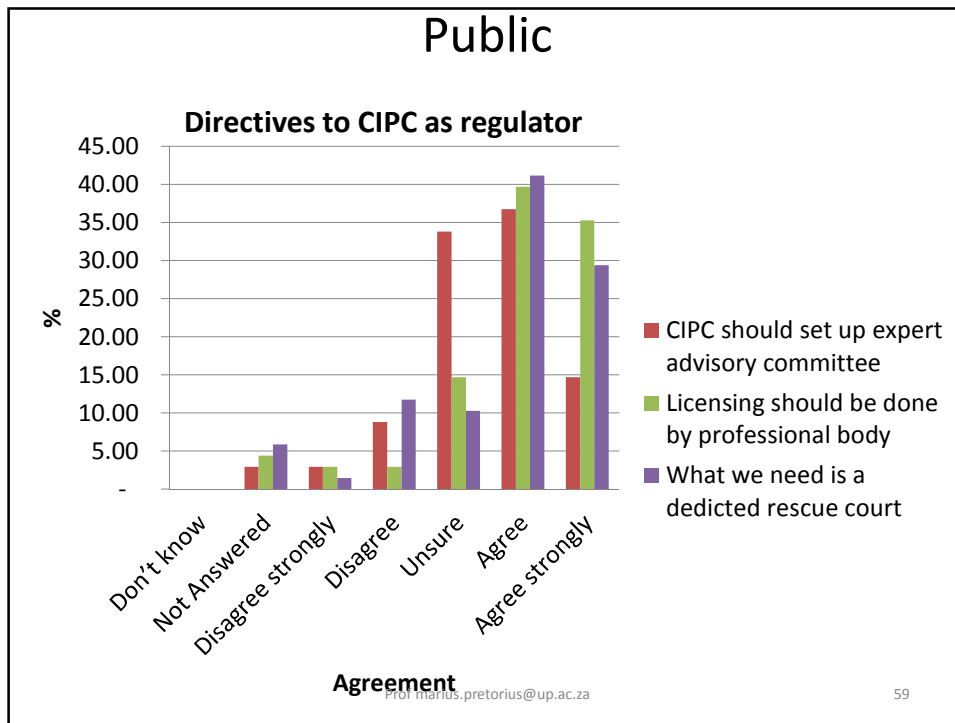
Public

Future expectation for BR

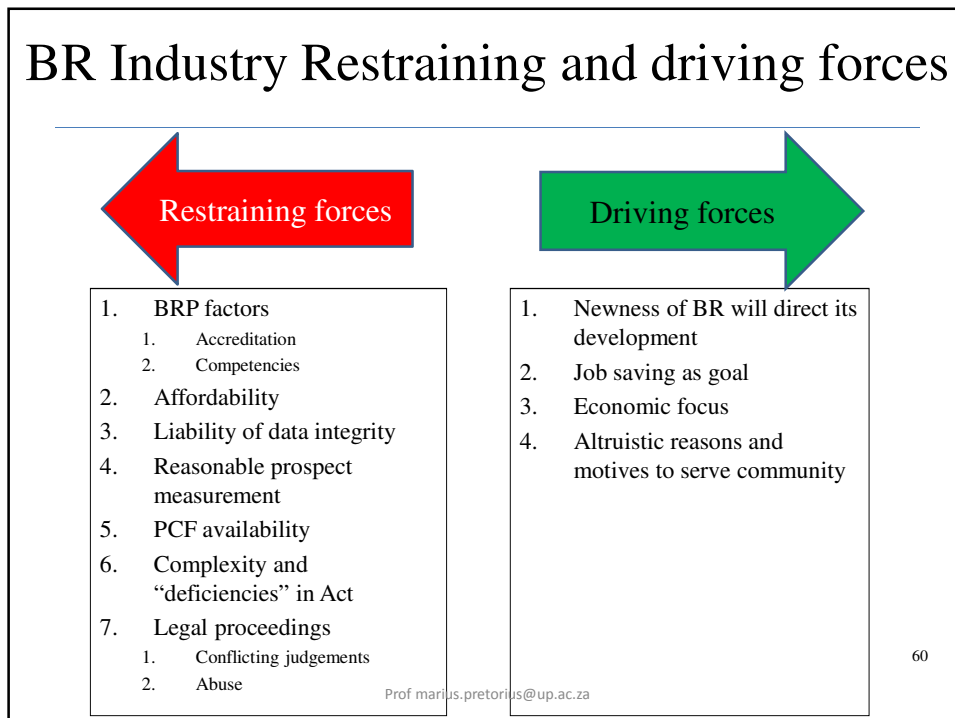


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How often has there been a failure to approve the BR plan?

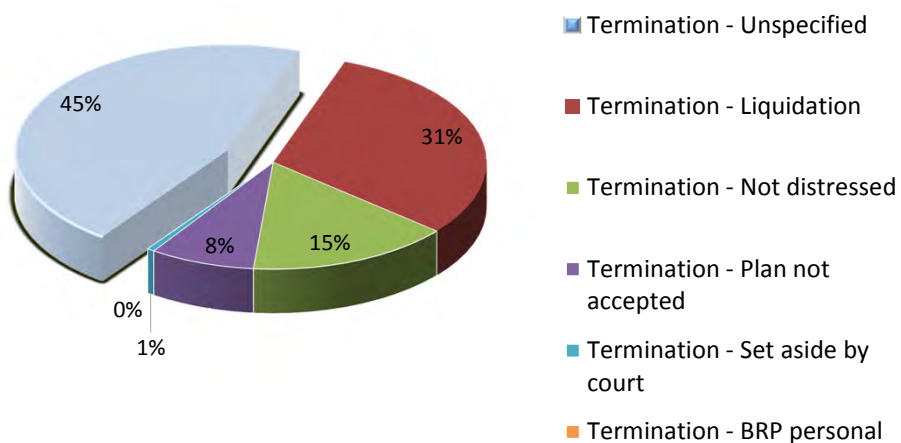
- 8% (see next slide)

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Breakdown of Terminations (CoR125.2) filed as at 31 July 2014 (expressed as %)



8% plans not accepted

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CIPC data

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Thank you

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Additional slides

- Not part of report

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