TMA Turnaround Management Association® Australia

TURNAROUND MANAGEMENT ASSOCIATION AUSTRALIA (TMA) SUBMISSION TO THE NATIONAL INNOVATION AND SCIENCE AGENDA

IMPROVING BANKRUPTCY AND INSOLVENCY LAWS

1. INTRODUCTION TO TMA RESPONSE

1.1 Frame of reference

The Turnaround Management Association (**TMA**) welcomes the opportunity to comment on the National Innovation and Science Agenda (**NISA**) proposals in relation to improving bankruptcy and insolvency laws.

1.2 What is the TMA?

The TMA is the Australian chapter of a 9,300 worldwide member association formed in 1988, focusing on corporate renewal and turnaround management.

The TMA's membership includes trading and investment bankers, investment funds, financial advisers, lawyers, accountants, insolvency professionals, company directors and managers with expertise in undertaking structural and organisational turnarounds of reference entities undergoing some form of financial distress.

Our education program recognizes professional excellence and provides an objective measure of expertise related to workouts, restructurings and corporate renewal.

1.3 Scope of submissions

The TMA has confined these submissions to the discussion of the Safe Harbour proposals, and will not address the proposals made in relation to default bankruptcy periods and *ipso facto* clauses.

The TMA's key submissions are:

(a) the TMA supports Safe Harbour;

(b) the TMA supports Model A over Model B, although the TMA can see merit in Model B; and

(c) the TMA recommends that Model A be amended in two key respects:

  (i) to operate in the "twilight zone" of insolvency, as opposed to when a company is demonstrably insolvent (when voluntary administration or insolvency remains the best option); and

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(ii) to afford directors a "safe harbour defence" in relation to civil liability actions brought against them for breaches of directors' duties in relation to director conduct during the Safe Harbour period, in addition to the proposed defence for insolvent trading during Safe Harbour.[1]

The TMA also suggests that there is utility in NISA considering a limitation on the ability of a subsequently appointed liquidator to bring an action against a director for breach of s 588G or ss 180- 183 of the *Corporations Act* in circumstances where there is evidence that the requirements of Safe Harbour were properly implemented. However, the TMA recognises that a subsequently appointed liquidator should still be able to take action against directors in circumstances where the liquidator determines that the requisite Safe Harbour steps were not followed or there were serious matters arising from the directors' conduct prior to Safe Harbour. This is discussed further at 2.5 below.

Our responses to each of the queries raised by NISA are set out in sections 2 and 3 below.

1.4 The TMA supports Safe Harbour

The TMA considers that a distressed business has the best prospects of survival through:

(a) early engagement with stakeholders;

(b) expert advice from restructuring advisers in the "twilight zone" of insolvency; and

(c) the development and implementation of a restructuring plan and/or informal workout strategies.

Well-known attendant benefits of restructuring, turnaround and business renewal (as opposed to administration or liquidation) include job preservation, protected tax revenue, maintaining enterprise value of the company and preserving the social compact between businesses and the local community.

The TMA considers that informal workouts often have a significant practical advantage over formal procedures in saving businesses, due to their flexibility and efficiency.

In this regard, the TMA is in favour of legislative change that promotes the use of these informal mechanisms and provides appropriate protection for directors who actively explore the possibility of revival of a distressed company at an early stage.

The overarching intent of the TMA (and business renewal itself) is that early identification and increased optionality promote better outcomes, this is complimentary to the prospective reforms and regulations.

1.5 The "twilight zone" and timing of turnaround efforts

The TMA considers that the ideal time for turnaround and restructuring of distressed businesses is in the "twilight zone" of insolvency. The concept of the twilight zone is well-known in the restructuring industry, and essentially means the period of time during which there is doubt as to the company's solvency or an imminent risk of insolvency based on cash flow projections or other indicators of financial distress. This may be during a temporary illiquidity period or a crisis event (by way of illustration, an unexpected rather than sustained revenue fall or costs

[1] The TMA notes that where Safe Harbour is properly invoked, as it suggests, in the "twilight zone" of insolvency, a defence to insolvent trading claims will not strictly be required. This is because the company will not be "insolvent" at the time of the alleged conduct and therefore an insolvent trading claim will not be able to be established. However, the TMA recognises the practical incentive and conceptual utility in providing directors with an insolvent trading defence for proper use of Safe Harbour.

increase because of a key person or executive departure, international trade restriction, unexpected change in commodities or currency values or some other occurrence which is capable of being addressed within the short term by operational, balance sheet or business measures).

During the twilight zone the company is not yet strictly insolvent according to its balance sheet or in respect of debts which are currently due and payable; but the circumstances dictate a watchfulness is appropriate given the potential for the situation to force a company to become insolvent. In these circumstances, a properly functioning board should seek to discharge its duties through the preservation of value by developing a turnaround plan instead of taking the safer option appointment of an external administrator (in order to avoid insolvent trading risks and personal liability).

The twilight zone is precisely the time during which there is the best prospect of restructure or turnaround through informal workout measures (rather than early entry into voluntary administration). This is because the company has not yet defaulted on obligations to major investors, bankers or trade counterparties and is not yet associated with the stigma of insolvency. The potential for insolvency if nothing is done, often acts as a form of pressure or catalyst for various parties to work together or form realistic positions to reach an agreement. As such there is a good chance of working with these key stakeholders to find an solution to the company's liquidity issues and avoid interruption to performance of the company's obligations to its stakeholders, employees and the community.

Importantly, the motivations and economic interest of the restructuring adviser(s) should not be to encourage insolvency where value preservation may be derived through other options.

1.6 TMA member survey: views of our members on Safe Harbour

In 2014 the TMA conducted a survey of its members on the topic of insolvency law reform in Australia. The following comments are intended to provide NISA with the views and experience of those professionals whose day-to-day practice and business over many years deal with successful turnarounds and resolve business failures. The survey responses from TMA members provide an empirical basis to draw the following preliminary conclusions:

(a) TMA members are supportive of the introduction of Safe Harbour protections to assist directors in developing and executing against a restructuring plan to save the business, either before or as a critical part of triggering the statutory moratorium allowed by voluntary administration;

(b) the present voluntary administration process does not generally cause business failure, in our experience, business failures are mostly caused by bad or untrained management; and

(c) there is no great appetite to completely replace the Australian system with the American Chapter 11 "reorganisation" model, although there are aspects of the American model which merit consideration, such as:

    (i) limits being placed on triggering the end of executory contracts by trade and IT suppliers;

    (ii) faster sales of business lines; and

    (iii) preferred financing packaging.

The TMA submits the quantitative analysis associated with its survey as **Annexure A** to this report.

2. **SAFE HARBOUR MODEL A**

2.1 **The TMA Supports Model A**

The TMA supports Safe Harbour Model A in principle, subject to two key amendments:

(a) that Safe Harbour should operate in the "twilight zone" of insolvency rather than when the company is already insolvent; and

(b) that the Safe Harbour directors' defence be extended civil liability claims against directors for breach of their duties under ss 180-183 of the *Corporations Act* arising from acts or omissions of the directors during the Safe Harbour period.

These amendments are discussed further below.

The TMA considers that Model A is desirable in principle because it requires directors to take active steps toward turning the affairs of a company around in order to have the benefit of legal limitations on their liability. The TMA agrees that the involvement of a restructuring adviser will assist distressed companies to consider informal workout solutions in a flexible manner. Further, Model A directs the minds of directors towards the interests of creditors, which the TMA considers is crucial to facilitating a corporate environment that encourages innovative solutions for companies in the twilight of insolvency.

The TMA also agrees with the emphasis Model A has placed on the maintenance of adequate financial records. By requiring the restructuring adviser to have a properly informed opinion, the NISA proposal reflects the purposes of the *Corporations Act* and facilitates effective and successful turnarounds, with active involvement from companies in distress.

2.2 **Proposal 2.2.1 – The Restructuring Adviser**

The TMA agrees that restructuring advisers can, and should, play a crucial gatekeeping role in a Safe Harbour scheme. The onus of selecting appropriate restructuring advisers has been correctly placed on directors in the NISA proposal, further recognising that safe harbour facilitates the continued control of directors, while issues with the affairs of the company are resolved.

You will note our use of the plural "restructuring advisers". This is deliberate. Most restructuring situations will need more than one qualified party to advise to reach an optimal outcome. The larger the size and complexity of the situation, the more likely this is to be true.

2.3 **Suitability of TMA Certified Turnaround Professionals for restructuring adviser appointments**

Every restructure has a different feature or driver. The most common public restructures involve balance sheet repair or improvements in operational performance (renegotiation of contracts with suppliers, change in customer base, changes in banking arrangements, changes in process to build in productivity, changes in workforce allocation, changes in revenue accounting etc). Often these forms of restructure will involve professionals such as lawyers to advise on solvency issues, accountants to advise on financial and valuation modelling, investment bankers to seek out sale or refinancing mandates, chief restructuring officers to better communicate with key stakeholders such as distressed side bankers. Each of these professional advisers are likely to be members of industry bodies such as the TMA on the basis that likeminded professionals will gather to share ideas, experiences, techniques and thereby improve the quality of restructuring advice in the market.

Many restructures, though, are of a different kind. Often small and medium enterprises (**SME**) will face issues around brand, culture, generation change in family businesses, strategic vision

and even governance that, once addressed allow a moribund or ailing enterprise to reinvigorate its offering in the market, particularly in the start-up market, being the policy driver of the proposed reform. The advisers to those enterprises may or may not be TMA members, probably will not be insolvency practitioners represented by ARITA and may or may not operate within industry bodies.

The TMA accordingly supports the concept of having both identified harbour masters to act as restructuring advisers and in having the definitional aspect of the restructuring advisery type wide enough to incorporate other disciplines or levels of experience available to the board of an ailing enterprise. Ultimately, the board should make the decision on what experience is needed. Ultimately, the board bears the risk of using a non-designated restructuring adviser as harbour master if it turns out a different skillset was needed. Ultimately, though, the restructuring adviser should be chosen by the board to meet the circumstances of turnaround identified by the board.

The TMA agrees that one of the designated harbour masters, indeed the most effective harbour master, will be one accredited or experienced to act as restructuring adviser. This person may occasionally be an insolvency practitioner, though will probably most times be someone with broader business saving skills outside formal insolvency or near insolvency (voluntary administration) controllerships. . The TMA's Certified Turnaround Professional accredited members (**CTPs**) have the necessary qualifications and experience to act as restructuring advisers. CTP designation is the highest accreditation a turnaround professional can achieve in Australia. Moreover, it is an accreditation with international standing in the turnaround industry, an Australian CTP accreditation being one that comes from licensing and recognition arrangements with the Turnaround Management Association in the USA.

CTP accreditation can only be achieved through completion of post-graduate study designated by the TMA, compliance with the TMA's strict ethical standards, demonstration of adequate restructuring experience, provision of references and participation in continuing professional development. Further details are provided in **Annexure B**.

CTP accreditation status of a proposed restructuring adviser candidate will provide directors with comfort that the candidate meets the Minimum Standards (set out and defined in the table below) for appointment as a restructuring adviser.

The TMA notes that qualification as a lawyer, chartered/CPA accountant or registered liquidator, without more, will *not* make a person suitable for appointment as a restructuring adviser. Demonstration of compliance with the Minimum Standards (set out in the table below) will be necessary to qualify a non-CTP for appointment as a restructuring adviser.

2.4 TMA responses to specific queries on the role and qualifications of the restructuring adviser

The TMA's responses to the specific queries under 2.2.1 are set out in the table below.

TMA RESPONSES TO SPECIFIC QUERIES ON THE ROLE AND QUALIFICATIONS OF THE RESTRUCTURING ADVISER

The TMA's responses to the specific queries under 2.2.1 of the NISA enquiry are set out below.

Ref	Query	Response
2.2.1a	What qualifications and experience directors should take into account when appointing a restructuring adviser? Should the above factors be set out in ASIC guidance or regulations?	The TMA agrees that a restructuring adviser must be an accredited member of an organisation, approved by the Minister, with its own disciplinary framework, ethical standards and educational framework (**Approved Organisation**). In addition to belonging to an Approved Organisation, the TMA considers that restructuring advisers must have: (a) expertise in and an understanding of the management, financial/accounting and legal aspects of a restructuring; (b) postgraduate qualifications (or their equivalent) in turnaround, restructuring and/or corporate renewal; and (c) a demonstrable amount (at least 8-10 years) of actual turnaround/ restructuring experience; (d) compliance with the code of ethics of the person's relevant accrediting Approved Organisation; and (e) compliance with the relevant ongoing professional development requirements of the relevant accrediting Approved Organisation. (together, the **Minimum Standards**). The Safe Harbour scheme will rely on distressed companies accessing the skills and experience of properly qualified restructuring advisers. The TMA therefore considers that the above Minimum Standards are essential, and should be prescribed in legislation. We emphasise that all Certified Turnaround Professional accredited members of the TMA (**CTPs**) meet these Minimum Standards.

Ref	Query	Response
		Further details of requirements for CTP accreditation by the TMA are set out in **Annexure B**.
2.2.1b	Which organisations should be approved to provide accreditation to restructuring advisers?	The TMA considers that a restructuring adviser must be a lawyer, insolvency practitioner or accountant duly accredited by an Approved Organisation. The TMA, for the reasons set out above and at Annexure B, agrees that it should be an Approved Organisation. In addition to the TMA, we also support the inclusion of the following organisations in the list of Approved Organisations: (a) a state, territory law or Commonwealth law society; (b) Charted Accountants Australia and New Zealand; (c) CPA Australia; (d) the Australian Banking Association; (e) the Australian Institute of Company Directors; and (f) Australian Restructuring, Insolvency and Turnaround Association. However, mere accounting, or legal qualifications will not make a person suitable for appointment as a restructuring adviser. Further, many registered liquidators will lack skills in the area of restructuring and turnaround. These skills are very specific and are developed by experience, comparable situations and post graduate study. The TMA therefore re-iterates the importance of the Minimum Standards being prescribed in legislation, in order to ensure the integrity and success of Safe Harbour. It emphasises that its CTP accredited members are ideally suited to appointments as restructuring advisers.

Ref	Query	Response
2.2.1c	The proposed test of viability is whether the company can: (a) avoid insolvent liquidation, and (b) be returned to solvency within a reasonable period of time Is this an appropriate method of determining viability?	The TMA considers that Safe Harbour is most effective if invoked in the twilight zone of insolvency, rather than when a company is already insolvent. In this regard, the TMA proposes that the test of viability should be whether, in the opinion of the restructuring adviser: (a) the company can avoid insolvent liquidation, and (b) the turnaround plan enables the board of the company to determine that the company will be solvent within a reasonable period after completion of Safe Harbour; and (c) the turnaround plan contains periodic check points over the term of the plan for the board and the restructuring adviser to assess the continuing solvency of the company and to consider the interests of all creditors at each check point.
2.2.1d	What factors should the restructuring adviser take into account in determining viability? Should these be set out in regulation, or left to the discretion of the adviser?	The TMA suggests that the factors to be taken into account be broad and involve quantitative and qualitative assessments of both specific and general issues influencing the company, including levels of debt, internal capacity for change at the labourforce, executive and board levels, creditor attitudes and market conditions. The TMA consider that the factors should be left to the discretion of the adviser and not prescribed in the legislation or regulations.
2.2.1e	The restructuring adviser would be: (a) appointed by the company, not the directors, and thus owe any duties to the company; (b) required to exercise their powers and discharge their duties in good faith in the best interests of the company and to inform ASIC of any misconduct they identify;	The TMA considers that the proposed obligations and protections are appropriate and reasonable, subject to the following qualifications: (a) that the protection from civil liability afforded to restructuring advisers be rigorous, so as to avoid the safe harbour reforms becoming a mechanism by which liability, or fear thereof, is simply shifted from directors onto advisers; and (b) the protection be extended to include a person appointed by the company under the designation "chief restructuring officer" or "chief transformation officer" (or similar) and predominantly performing the functions of a restructuring adviser as defined in the Corporations Act.

Ref	Query	Response
	(c) not be civilly liable to third parties for an erroneous opinion provided that it was honestly and reasonably held; (d) unable to be appointed in any subsequent insolvency without the leave of the Court; and (e) specifically carved out of the expanded definition of director contained in the Act (i.e. would not be a shadow or de facto director). Are these appropriate protections and obligations?	

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2.5 **Proposal 2.2.2 – Directors' Defence under Safe Harbour**

(a) Scope of the Defence

The TMA agrees that Safe Harbour should operate as a defence to the insolvent trading provisions contained in s 588G of the *Corporations Act*. However, the TMA notes that, as a technical point, where Safe Harbour is invoked early and as proposed by the TMA, in the "twilight zone" of insolvency (ie. when a company is not actually insolvent), no defence to the insolvent trading provisions will be necessary. This is because the elements of an insolvent trading claim (ie that the company was insolvent at the relevant date) will inherently not be able to be established.

That said, the TMA recognises the conceptual importance of establishing a Safe Harbour defence for directors, in order to promote the use of Safe Harbour and incentivise directors to engage a restructuring adviser as and when required. It is important that directors who appropriately pursue restructuring opportunities under Safe Harbour receive a degree of comfort as to their legal liability for decisions made during the Safe Harbour period. This will encourage the use of informal workout mechanisms, which in the opinion of the TMA, often have a practical advantage over formal procedures in saving businesses – due to the flexibility and efficiency of these approaches.

Having regard to the importance of providing directors with comfort as to their legal liabilities in utilising Safe Harbour, the TMA also considers that proper compliance with the requirements of Safe Harbour should also operate as a defence to civil claims against directors for alleged breaches of directors' duties under ss 180-183 of the *Corporations Act* during the Safe Harbour period (together, **Directors' Duties Claims**), so long as directors follow the plan developed by the restructuring adviser, with any amendments agreed by the restructuring adviser to fit evolving circumstances. The risk of Directors' Duties Claims is also a motivating factor for directors to invoke the safety of voluntary administration at an early stage, and hand over responsibility for the affairs of the company to an external administrator without attempting a restructure. This is a mindset that, in the view of the TMA, requires legislative intervention to shift.

To go one step further, the TMA also suggests that consideration should be given to the imposition of a limitation on the ability of a subsequently appointed liquidator to bring any proceeding against directors for breach of duty under ss 180-183 or s 588G, where there is evidence that those directors have fully complied with the regulations in relation to the navigation of the Safe Harbour. While a defence is a useful tool to promote the use of Safe Harbour, it may be cold comfort to directors (particularly directors of SMEs and start-ups) who are not properly insured or otherwise cannot afford to take the risk of being sued and being required to legally defend their conduct. A limitation on the availability of an action against directors who invoke Safe Harbour, would provide directors with a greater degree of comfort in invoking Safe Harbour, and greatly increase the incentive for directors to appropriately use Safe Harbour. However, the TMA recognises that a subsequently appointed liquidator should still be able to take action against directors in circumstances where the liquidator determines that the requisite Safe Harbour steps were not followed or there were serious matters arising from the directors' conduct prior to Safe Harbour.

The proposed Safe Harbour defences are essentially an extension of the "business judgment rule" under s 180(2) of the *Corporations Act*, and in the TMA's view is appropriate in circumstances where the legislature is seeking to enact meaningful change to the way companies approach the twilight zone of insolvency.

The TMA considers, however, that it is appropriate for directors to remain liable under s 596AB with respect to employee entitlements, and for unreasonable director related transactions under s 588FDA.

(b) Elements of the Defence

The TMA considers that the steps a director must take in order to receive the benefit of a defence to the insolvent trading provisions contained in s 588G of the *Corporations Act* and Directors' Duties Claims during the Safe Harbour period should be set out in the legislation.

In the TMA's view the director should have a defence under ss 558G and to the Directors' Duties Claims relating to conduct of the director during the Safe Harbour period, if the director:

(i) appoints a restructuring adviser or restructuring advisers (with the qualifications and experience mandated by the legislation and regulations);

(ii) provides the restructuring adviser with appropriate books and records within a reasonable period of their appointment to enable them to form a view as to the viability of the business; and

(iii) takes reasonable steps with respect to the affairs of the company:

(A) in the interests of the company's body of creditors as a whole;

(B) in the interests of its members;

(C) based on the advice provided by the restructuring adviser,

during the "Safe Harbour period".

(c) What is the "Safe Harbour period"?

The Safe Harbour period should commence when the director appoints a restructuring adviser, and ends when either:

(i) the restructuring adviser forms the view that the company is not viable;

(ii) the appointment of the restructuring adviser is terminated for any reason, including but not limited to the successful restructure, workout or turnaround of the company;

(iii) the company is placed into voluntary administration, liquidation or receivership; or

(iv) maintain records in relation to the entry into safe harbour and the conduct thereof.

(d) What are the "reasonable steps" a director must take?

The TMA considers that the "reasonable steps" which a director must take in order to avail himself/herself of the relevant defences should be broadly defined by regulations. Such "reasonable steps" should include:

(i) considering the appointment of joint and several restructuring advisers having regard to the nature and size of the company or corporate group in distress;

(ii) working with the restructuring adviser to develop and implement a restructuring plan;

(iii) maintaining records of the conduct of the Safe Harbour;

(iv) ongoing monitoring of the company's financial position and the viability of the restructuring plan; and

(v) participating in and facilitating discussions between the restructuring adviser and major creditors, financiers, shareholders and other stakeholders with respect to the restructuring plan and other informal work out options.

2.6 **Privacy vs Continuous Disclosure Obligations**

In response to query 2.2.2b, the TMA agrees that privacy is often an important factor in the success of informal workouts as involving the stigma of insolvency is key to maintaining the ongoing business relationships that will ultimately allow the company to trade-on.

However, the TMA recognises the importance of continuous disclosure obligations and also agrees that such obligations should not be relaxed on entry into Safe Harbour arrangements.

2.7 **Proposal 2.2.3 – Where Safe Harbour defence will not be available to directors**

The TMA considers that the circumstances in which the Model A Safe Harbour defence should not be available to directors have been defined appropriately in the NISA proposal.

3. **SAFE HARBOUR MODEL B**

The TMA prefers Model A to Model B because Model A encourages directors and companies to embrace turnaround procedures, by involving accredited restructuring advisers. Model A (if appropriately invoked by directors) will provide a defence to s 588G of the *Corporations Act* and (if modified in accordance with the TMA's submissions) and Directors' Duties Claims.

Model B, proposes a carve out to s 588G rather than a defence. This is less desirable than Model A because it fails to recognise the importance of proactive change in facilitating effective turnarounds, and may allow directors to rest on their haunches in safe harbour, without actively seeking solutions. Model A's requirement that a restructuring adviser be involved is preferable for this reason.

Moreover, by deferring assessments of "reasonableness" to Courts upon future contingencies, rather than by assigning responsibility to accredited restructuring advisers, Model B provides less comfort to directors than Model A. This would clearly curb the purpose of the Safe Harbour reform in the first place.

Nonetheless, the TMA sees some merit in Model B, but would suggest the Model A proposal is preferable for all stakeholders.

ANNEXURE A

TMA SURVEY – ANALYSIS

Voluntary Administration is a successful model but could be better

As a matter of policy, the TMA suggests that the legislative framework should, wherever possible, encourage businesses to consider whether a restructuring plan can be developed as one response to distressed trading conditions. Balancing policy objectives ensure there is no dilution of the requirement that companies cease trading when it becomes obvious the company is insolvent and the subsidiary policy objective encouraging directors to access the statutory moratorium of voluntary administration when there is some doubt about whether the company is or will become insolvent.

It is apparent that these policy objectives are substantially met - a significant majority of survey respondents (83.57%) do not believe that the existing voluntary administration system *causes* business failures, though some respondents suggest that fears of insolvent trading laws meant directors placed *Allco, Timbercorp, Henry Walker Eltin* in administration without properly investigating whether a restructuring plan was capable of execution outside of administration (we discuss below the remedy to this concern in the context of introducing express safe harbour protection for directors engaging in a restructuring plan). While some respondents (29.41%) question whether the American model would have saved a business placed into administration, the more significant outcome from the survey is the overwhelming support (76.34%) for improving the safe harbour protection for directors following a properly formed restructuring plan. That is, protecting directors from insolvent trading risk if a plan properly formed, disclosed and followed fails and the company still proceeds to administration.

The reflective of these survey results shows some turnaround specialists (16.43%) still believe companies are being placed into administration too early, with even more (29.41%) claiming that an American model would have saved companies, notwithstanding that most survey respondents (71.36%) accept the American model adds cost in the form of court and ad hoc committee requirements than the Australian model. Examples given include those mentioned above as well as *Ansett, Babcock & Brown* and other large and complex conglomerates. Given both models have the same objectives, namely business survival or asset maximisation, the latter results show a number of turnaround specialists believe key settings within the American model could better deliver the revival outcomes intended by the voluntary administration model.

If cost is not the relevant differentiator, there must be other settings that drive respondents to examine the American model.

When we look into the specifics of what changes turnaround specialists believe should be made, we see overwhelming majorities (76.34%%) favouring providing directors with safe harbour protections when developing restructuring plans for the benefit of creditors. This involves two policy changes in Australian law:

(a) to recognise that the 'interests of a company' approaching the 'zone of insolvency' shifts from a primary focus on equity to a primary or at least key focus on what is best for company creditors (including, preferentially, employees)

(b) to recognise that a well advised director forming a restructuring plan to save a viable business is making a decision that potentially benefits creditors, and other stakeholders including counterparties and that if the plan is well formed and properly executed against, the directors should have the statutory protection of 'safe harbour' defences against later insolvent trading claims should the business still fail or the company still be placed into administration or wound up.

The above points do not represent the present state of Australian law. The source of director duties in the USA is found within company legislation, principally State based. In the majority of States in which companies are formed, for example, Delaware, the courts have found directors owe actionable duties to look out for the interests of creditors once a company finds itself in the twilight zone of insolvency. This focus on creditor interests means that as the enterprise value slips below the value of creditor liabilities (negative shareholder value if the business is not realised as a going concern), boards must make decisions that best protect creditors when a company approaches insolvency situations.

Australian law does differ in this respect as our insolvent trading law, in practical effect, requires the directors to place a trading company that is, or might in the future be, insolvent into administration (or liquidation), even though this may immeasurably harm the company and its business, and even if the directors are in receipt of professional advice that a restructuring was feasible. In such a situation, the directors ought to be permitted to take proper steps to pursue a restructuring, as is the case in all other major Western economies. A safe harbour is needed to provide the necessary degree of flexibility for directors to make that choice to save viable businesses.

The TMA survey also shows respondents believe the existing voluntary administration model can be improved by active encouragement of a restructuring mentality amongst directors. The TMA considers that part of this change is legislative, in terms of expressing a view that directors should focus on creditor positions when a company is close to insolvency.

However, and more importantly, the TMA submits that whatever model we use, change is educative, accepting that not all directors have the skillsets to respond to the value transfer of interest between shareholders and creditors as an enterprise progresses through the twilights of solvency. In cases of inexperience, it is appropriate for the board to retain a skilled person to help develop that plan, preferably someone with experience in business revivals. It is here that the AICD, ABA, ARITA, TMA and other member organisations dealing with companies and directors or financiers have an educative offering to improve a restructuring mentality amongst company managers and boards that should be encouraged.

We offer some further commentary on the idea of developing safe harbour protections for directors executing against restructuring plans in the following observations in this submission. Solvency is often a complex issue.

Particularly in large and disaggregated enterprises, assessing the "solvency" or more accurately the liquidity of the business is rarely a simple exercise.

Mere temporary illiquidity in the business may not establish a company is unable to pay its debts as these fall due but it should trigger a properly functioning board to consider its forward cashflows and take appropriate action to protect stakeholder positions.

The board needs to be involved to assess whether the cause of its liquidity crisis is bad management decisions, bad accounting or reporting situations, internal operational problems, or unexpected macro events. In short, whether the crisis is transient or likely to be persistent in nature.

Having identified a cause to address, the board needs to then assess the timetable of the solution. This timetable may be impacted by all manner of questions outside the immediate control of an Australian board:

(a) when a "mere temporary lack of liquidity" is weighed against the ability to sell assets in the short term, what assumptions may reasonably be made by the directors as to how quickly the assets can be sold (ie what is meant by "temporary"), whether there should be a "mark to market" based on fire sale value or, in a number of cases, whether there are real concerns whether the assets can be sold at all;

(b) where the company has a tetter of comfort or term sheet or standby "support" from its parent or JV partner or shareholder or overseas banker that is not legally binding but which has always been supported in the past, is it reasonable for directors to assume that they are solvent if they can only meet their debts by reason of their ability to call on that party? With multinational entities, how much weight can an Australian director place on the collectability of a debt from a related entity based offshore?

(c) where the parties to a JV are offshore parties requiring home country approvals to release funds into Australia, how do directors measure the timing delays and opacities associated with funding financial commitments from those offshore parties?

If the solvency of a financially distressed company is uncertain or incapable of precise determination, it follows that it may be difficult for the director to form the necessary positive expectation that the company actually is able to pay all its debts and its future incurred debts as and when they fall due.

Thus, not only will honest, diligent directors of companies that are actually insolvent place them into administration, but also there will be directors who feel compelled to do the same thing where the solvency is simply brought into question, because of the absence of their ability to form their positive expectation of solvency.

As submitted above, the focus here is wrong. As with every other major insolvency system, once the company enters the 'twilight zone of insolvency', there should be a focus on creditors, and the decisions of the directors should be measured against whether their decisions are in the best interests of creditors and the company as a whole.

Sometimes, this decision will lead to the appointment of administrators, other times, to further work being done on executing against a restructuring plan and engaging with counterparties in bilateral negotiations to reset contracts.

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ANNEXURE B

THE TMA CTP CERTIFICATION PROGRAM

1. INTRODUCTION TO THE TMA CTP PROGRAM

The Certified Turnaround Professional (**CTP**) designation was introduced by the TMA in the US in 1993 to create an objective measure of the experience, knowledge, and integrity that is necessary to conduct corporate renewal work.

In 2010, TMA Australia launched its two part CTP certification which is specifically tailored to the Australian market.

The first phase of qualification is Certified Turnaround Professional Associate (**CTPA**) qualification. CTPA designation is achieved through undertaking three individual courses equivalent to postgraduate level university subjects, that have been developed in conjunction with the University of Technology Sydney (**UTS**).

In order to be promoted from a CTPA to a CTP qualification, a CTPA will need to demonstrate a required amount of turnaround experience, provide references, and comply with the prescribed TMA Code of Ethics.

Once CTP accreditation is obtained, continued compliance with the Code of Ethics and compliance with ongoing education requirements will be required in order to maintain the CTP credential.

CTP designation is the highest accreditation a turnaround professional can achieve.

The TMA believes that its CTP qualified members are the best suited professionals in the restructuring industry for roles as restructuring advisers under Safe Harbour. The TMA considers that CTP accreditation will also be a useful benchmark for directors in considering the appointment of a restructuring adviser and satisfying themselves that the proposed candidate meets the required Minimum Standards for appointment.

2. EDUCATION FRAMEWORK

The CTPA program is the first of its kind in Australia and develops skills in leadership, legal and accounting aspects for turnaround situations. The CTPA certification programme requires the completion of 3 individual modules:

(a) Strategic Management for Turnaround

(b) Accounting for Turnaround; and

(c) Law for Turnaround.

Each course is approximately 40 hours in duration and is equivalent to a Postgraduate level University subject.

All courses are prepared and presented by leading academics from the UTS Faculties of Business and Law and also utilises industry experts as guest speakers and lecturers.

A minimum number of continuing professional development hours are required each year in order for CTPs to maintain their accreditation. The TMA runs workshops and seminars to provide the necessary continued education.

3. ETHICAL STANDARDS

Membership of the TMA requires dedication to the highest standards of professionalism, integrity and competence for those engaged in all matters involving turnaround and crisis management and corporate renewal. The TMA's Code of Conduct, with which all members of the TMA (including CTPs) must comply is set out below.

The Code is composed of Canons and Ethical Standards. The Canons are broad principles of conduct. The Ethical Standards (**E.S**.) are more specific goals toward which members should aspire in professional performance and behaviour.

TMA Code of Conduct

Canon I

General Obligations and Professional Boundaries

A member shall maintain and advance knowledge of the practice of turnaround and crisis management and corporate renewal, respect the practice and contribute to its growth.

E.S. 1.1 Professional Boundaries:

A member bound by this Code of Ethics is one who is engaged in the practice of providing managerial services and consultation services to businesses, debtors, creditors and other interested parties with respect to troubled businesses, organizations and associations. While such services include a wide range of issues and problems, a member must take care not to perform services that require a license, unless the member is so licensed to perform such services.

E.S. 1.2 Standards of Excellence:

A member shall strive to improve his or her professional knowledge and skill. Within his or her practice, a member shall demonstrate a consistent pattern of reasonable care and competence.

E.S. 1.3 Conduct:

A member shall uphold the law in the conduct of his or her professional activities.

E.S. 1.4 Human Rights:

A member shall uphold human rights in all of his or her professional endeavours.

E.S. 1.5 Continuing Education:

A member shall seek out and participate in educational programs to enhance his or her professional knowledge.

Canon II

Obligations to the Client

A member shall serve his or her client independently, competently and in a professional manner. A member should exercise unprejudiced and unbiased judgment on the client's behalf.

E.S. 2.1 Professional Responsibilities:

(A) A member shall undertake to perform the engagement to the best of his or her ability; (B) A member shall not proceed with an engagement unless the client has agreed with the objectives, scope and approach to be employed and has agreed to the fee structure; (C) A member shall not undertake an engagement which cannot be fulfilled in a timely manner because of his or her commitments.

E.S. 2.2 Independence:

A member's duty is solely to the client and he or she should strive to remain independent of other affiliations that could compromise his or her judgment or result in the appearance of compromise. Prior to accepting an engagement, a member shall disclose to his or her client all financial relationships which may cloud, or give the appearance of clouding, his or her judgment. If the client is the troubled business or organization, disclosure shall be made of any past referrals from, prior work for, or an ownership interest in, any owner, creditor or customer of the client and any party offering financing to, or seeking to purchase an interest in the client. A member shall avoid conflicts of interest and the appearance of conflicts of interest.

E.S. 2.3 Competence:

A member shall not undertake an engagement for which his or her firm does not have the technical capability.

E.S. 2.4 Candour and Truthfulness:

(A) A member shall not intentionally or recklessly mislead existing or prospective clients about the results which can be achieved through the use of a member's services; (B) A member shall not offer solutions nor make recommendations that are unrealistic or impractical. The nature of proposed actions, and the potential ramifications of those actions, should be communicated to the client.

E.S. 2.5 Integrity:

(A) A member shall not disclose confidential information about his or her clients or otherwise take advantage of such information; (B) A member shall not serve a client using proprietary information developed for a previous client without obtaining the previous client's consent.

E.S. 2.6 Contingency Fees:

A member may accept a performance bonus or other contingency fee.

E.S. 2.7 Ownership:

(A) TMA recognizes the difficulties involved with respect to equity ownership of a troubled company client;

(B) If a member owns or obtains a direct or indirect financial interest in a client, such interest must be disclosed to creditors and stockholders of the client on a

timely basis, must be negotiated prior to the assignment and additional equity ownership should not be negotiated during the course of an engagement;

(C) If an equity interest in a troubled business client results in the member gaining control of the client, the conditions and circumstances whereby the interest is obtained should be set forth in writing and agreed to prior to commencement of the engagement. Equity interests held by parties affiliated with the member shall be aggregated with the member's direct interest to determine whether or not the member would control the client. The member should insist that the client obtain legal counsel to represent the client with respect to negotiating and documenting the equity interest to be obtained by the member.

Canon III

Obligations to the Profession and to Colleagues

A member shall uphold the integrity and dignity of the profession.

E.S. 3.0: Responsibility to Colleagues:

E.S. 3.1: Each member has a responsibility to further the profession by acting with integrity and supporting the objectives and programs of the Association.

E.S. 3.2: A member shall not refer a client to a colleague in exchange for monetary consideration from that colleague or in any way share in any fee received by such colleague. For this purpose, "colleague" shall not include a member's partner, a shareholder or employee of such member's firm, or an independent contractor that has an exclusive, written contractual relationship with a member or such member's firm that predates the referral.

E.S. 3.3: A member referring a client to another member shall not make any commitments on behalf of the member receiving the referral or misrepresent the qualifications of the member receiving the referral.

E.S. 3.4: A member shall not misrepresent his or her credentials or capabilities in the pursuit of engagements.

E.S. 3.5: A member shall not disparage or make false statements about another member competing for an engagement.

E.S. 3.6: A member shall not give the impression that membership in the TMA bestows any credentials or in any way guarantees minimum qualifications.

E.S. 3.7: A member shall represent that he or she subscribes to this Code of Ethics

4. DISCIPLINARY FRAMEWORK

The TMA has a disciplinary framework and an oversight committee which ensures that all its members, including its CTPs, comply with the required ethical standards and continuing professional development.