William Buck Business Recovery Services

Submission in response to the National Innovation and Science Agenda: Improving bankruptcy and insolvency laws Proposals Paper

27 May 2016

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1. Introduction

William Buck Business Recovery Services is a specialised insolvency, restructuring and forensic division of William Buck.

We assist companies and individuals in financial distress as early as possible, in order to reach a financially and strategically beneficial solution.

Our team is comprised of 5 registered liquidators and 3 trustees in bankruptcy who work closely with dedicated teams of insolvency and reconstruction experts. With access to William Buck's national network our practice delivers the highest quality service Australia wide with technical resources second to none.

Acutely aware of the changing landscape of accounting and advisory services in Australia, William Buck is at the forefront of delivering innovative and collaborative solutions to all financial dilemmas faced in business and by individuals. By ensuring that our clients are soundly positioned to maximise their future potential before our formal engagements conclude we are providing responsible and sustainable expert advice.

2. Executive Summary

The Government's Innovation and Science Agenda is seeking to drive future prosperity of the Australian economy through innovation and science. Under the culture and capital focus of the Agenda, the following measures to improve existing bankruptcy and insolvency laws have been proposed:

1. Reducing the current default bankruptcy period from three years to one year;

2. Introducing a 'safe harbour' for directors from personal liability for insolvent trading if they appoint a restructuring adviser to develop a turnaround plan for the company; and

3. Making ‘ipso facto clauses, which have the purpose of allowing contracts to be terminated solely due to an insolvency event unenforceable if a company is undertaking a restructure.

There is some uncertainty as to whether the primary goal for reducing the default bankruptcy period will be achieved. That is, the reduced bankruptcy period might not encourage entrepreneurial endeavour. However, the changes, if implemented, will allow individual debtors to regain control of their finances earlier than under the current regime and possibly return to a normal healthy financial position sooner.

The safe harbour and ipso facto clauses have been given a great deal of consideration in recent years. The Financial System Inquiry Report, released in late 2014, reignited the conversation by acknowledging various submissions which called for the introduction of a safe harbour for prudent directors and for the protection against prohibitive ipso facto clauses in external administrations. The 2015 Productivity Commission Report into Business Set-up, Transfer and Closure also proposed changes in line with this proposal paper. Both of these proposed measures will present greater opportunities for the successful restructure and turnaround of struggling businesses that would otherwise have no alternative but to succumb to a formal external administration under Chapter 5 of the Corporations Act 2001 (Corporations Act).

Following are views and responses to some of the Proposal Paper’s queries.

3. Reducing the default bankruptcy period

The Government proposes to reduce the statutory bankruptcy period under Section 149 of the Bankruptcy Act 1966 (Bankruptcy Act) from three years to one year after the bankrupt files their statement of affairs. The proposal suggests that if the statutory bankruptcy period is reduced a number of obligations relating to the current three-year statutory bankruptcy period are retained such as those relating to contributions from income earned and providing assistance to trustees realising assets. The proposal suggests a number of restrictions may be lifted after discharge from the reduced statutory bankruptcy period including the restrictions placed on overseas travel and the requirement to disclose bankruptcy status when obtaining credit.

The claim that, “Reducing the default period and related restrictions to one year will encourage entrepreneurial endeavour and reduce associated stigma”, is not supported by any empirical evidence. A publicly released study or survey of entrepreneurs and those studying entrepreneurship would be beneficial to confirm whether the proposed changes will have the desired effect on the target group. A similar study on discharged bankrupts to determine if they believe they would have benefited from reduced restrictions would also be useful.

In 1992 provisions were introduced to the Bankruptcy Act to allow for the early discharge of low income earning bankrupts after 6 months from the date of bankruptcy. As a result of increased opposition to the relaxed statutory bankruptcy period, in 2003 the early discharge provisions were abolished and the three-year statutory bankruptcy period was reinstated. It is now 13 years on and it is possible that public perception and sentiment has matured although consideration should be given to past experience in reducing the statutory period.

The actual entrepreneurial benefit of the proposed changes possibly results from the earlier freedom to invest in capital improvements and debtors might only become aware of those benefits after the debtor enters bankruptcy or has been discharged from bankruptcy. The relaxation of legislation itself may not motivate individuals to engage in more entrepreneurial behaviour but if those individuals ever experience personal bankruptcy they would be released to continue their inherent entrepreneurial activities earlier under the proposed legislation. As long as debtors do not systemically abuse the bankruptcy regime an earlier release would likely encourage economic advancement and not detract from it.

However, as entrepreneurs tend to be highly motivated people it is possible that they would have little regard for any changes to bankruptcy laws. At a luncheon held at NSW Parliament House on 25 May 2016 themed "Forging An Accountable Future", a panel of highly successful entrepreneurs and their advisors was assembled to discuss the relationship between entrepreneurs and accountants. The writer of this submission publicly asked the panel their views on the specific issue of this proposed reduction to the default bankruptcy period and whether it would encourage increased entrepreneurial activity. The response from the panel was that entrepreneurs' actions would not be influenced by any such change in the legislation.

Quarterly bankruptcy statistics released in March 2016 by the Australian Financial Security Authority show that only 22.7% of new bankrupts attributed their bankruptcy to business related matters. For the 2015 year this statistic was 17%. This statistic suggests that the number of bankrupts that might be encouraged to re-engage in entrepreneurial activity as a result of the introduction of these legislative changes less than a quarter of total persons declaring bankruptcy.

Notwithstanding the uncertainty surrounding the actual outcome of these proposed changes, the following comments are provided in relation to the proposed changes and queries.

> *Proposal 1.1*
> *The Government proposes to retain the trustee's ability to object to discharge and to extend the period of bankruptcy to up to eight years.*
>
> *Query 1.1*
> *The Government seeks views from the public on whether the criteria for lodging an objection and the standard of evidence to support an objection should be changed to facilitate a trustee's ability to object to discharge.*

The current objection process, as set out in Section 149A of the Bankruptcy Act, operates as an effective tool trustees use to incentivise bankrupt's to comply with their obligations during their statutory period of bankruptcy. The primary purpose of the objection provisions is not to penalise bankrupts for non-compliance (that role is performed in Section 263), it is to act as a deterrent and an incentive for continual compliance. Most trustees would withdraw their objections to discharge against a bankrupt once the grounds for the objection have been satisfied by the desired performance of the bankrupt.

If the statutory bankruptcy period was reduced from three years to one year, the effectiveness of the objection provisions to encourage ongoing compliance after early discharge, in their current form, would be negated.

To encourage ongoing compliance after a one year discharge, the objection provisions would need to be readily available to trustee's as a tool to reinstate the bankrupts' undischarged status either from the date of the objection or retrospectively to the date of bankruptcy. A new criteria of objection could be introduced to Section 149A(2) setting out grounds of objection for the trustee to take immediate action to extend the bankruptcy back to three years. The evidence required from the trustee should be minimal for these minor grounds so as not to add to the administrative burden, particularly in un-funded administrations.

> *Proposal 1.2.1*
> *The Government proposes to change the Bankruptcy Act to ensure the obligations on a bankrupt to assist in the administration of their bankruptcy remain even after they have been discharged to allow for the proper administration of bankruptcy.*

> *Query 1.2.1a*
> *The Government seeks views from the public on which particular obligations on a bankrupt should continue even after a bankrupt is discharged.*

The obligation to remit income contributions under Section 139P of the Bankruptcy Act is a significant source of realisation for many bankruptcies, for the benefit of creditors. In the negative, the regime discourages bankrupts from furthering their income earning potential. The obligations to remit income for the benefit of creditors should not be materially affected by the early discharge of the bankrupt.

In the spirit of the Government's intention to encourage the furtherance of individual potential for the benefit of the economy as a whole, the income contributions regime could be amended to reward bankrupts being released early by applying a reduced rate of contribution for years 2-3 of the bankruptcy (the "twilight period" as referred to 1.2.1b below). Applying a rate of contribution of only 25% (as opposed to the current 50%) to income over the relevant income threshold would be less of a disincentive for maximising the earnings during bankruptcy. (*This view also addresses Proposal 1.2.2)*

Investigations into a bankrupt's affairs can take considerable time, particularly when they are complex and involve protracted legal proceedings. Often the process to establish a potential avenue of recovery can take greater than 6 months after a statement of affairs is received. It is imperative that trustees' powers to conduct investigations and examinations are not prejudiced by an early discharge from bankruptcy.

It is acknowledged that the statutory bankruptcy period only starts when a statement of affairs is lodged with the Official Receiver so, at the time the statement of affairs is lodged, the bankrupt is being somewhat compliant and it should be presumed they will continue to remain compliant.

The after-acquired asset provisions should remain in place for as long as the bankrupt remains undischarged. The proposed reduction in the statutory bankruptcy period presents an opportunity to encourage entrepreneurship if the bankrupt is allowed to retain assets acquired after their one-year discharge is effective. This would encourage some bankrupts to invest their assessed income in working capital and increase their earning capacity and contribution to the economy earlier than what the current regime allows for. This may have a detrimental effect on the quantum of after-acquired assets realised by trustees but in practice However, some bankrupts likely delay these types of investment decisions until after discharge so as to avoid the after-acquired asset provisions. Any reduction in realisations in bankrupt estates resulting from shortening after-acquired asset provisions might be offset by gains in income contributions (although no evidence is presented here to support this claim).

Where a trustee is dealing with ongoing investigations or realisations of divisible assets, the bankrupt's obligations to assist those activities should remain until the statutory limitations no longer apply. The duties of a bankrupt and the powers of the Official Receiver to issue notices to the bankrupt, such as those contained in Section 139ZL and 139ZQ of the Bankruptcy Act, apply equally to undischarged and discharged bankrupts and that application should remain.

> *Query 1.2.1b*
> *The Government seeks views from the public on what incentives and mechanisms should be in place to ensure compliance with obligations after discharge.*

Incentives mentioned above in relation to the trustee's ability to easily object to discharge and to go so far as to reinstate a bankrupt's discharged status in the three year period after commencement of their bankruptcy, would incentivise bankrupts to remain compliant.

The Government's proposal to reduce the statutory bankruptcy period from three years to one year could potentially encourage innovation and entrepreneurship whilst also ensuring bankrupts remain compliant with their obligations if the reduction from three to one year was considered a privilege, not an entitlement. The two years after the early discharge could be treated as a "twilight period". During the "twilight period" the bankrupt's status as an undischarged bankrupt could easily be reinstated if they were to breach their duties and obligations. Under this model the bankrupt would enjoy the benefits and freedom of a discharged bankrupt whilst being acutely aware of their ongoing obligations to comply with the provisions of the Bankruptcy Act.

The "twilight period" would be innovative from the Government's perspective as it would satisfy its Agenda to encourage entrepreneurship whilst also protecting creditors' rights.

> *Proposal 1.3.1a*
> *The Government proposes to reduce credit restrictions under the Bankruptcy Act to one year, subject to any extension for misconduct.*

The reduction of credit restrictions under the Bankruptcy Act to apply only for the period that a debtor is classified as an undischarged bankrupt would be appropriate to encourage entrepreneurship. Such a reduction may not have any significant effect on the bankrupt's ability to borrow funds though as most prudent credit providers would conduct their own searches of either the National Personal Insolvency Index ("NPII") or the commercially available Veda file.

> *Proposal 1.3.1b*
> *The Government proposes to retain the permanent record of bankruptcy in the National Personal Insolvency Index.*

The NPII should be maintained as it represents the only permanent record of an individual's historical encounters with the Bankruptcy Act and provides a valuable source of information to credit providers, statutory authorities and the public. The NPII allows an individual's defaulting debtor history to be tracked to ensure they are not abusing the provisions available to deal with unmanageable debt. However, the public release of this information, in circumstances where the Veda credit file information is limited to a defined period of time, still presents the same roadblocks to an individual seeking to move on from bankruptcy and obtaining credit.

Consideration should be given to maintaining the NPII as a primary source of debtor information to be held by the Government confidentially and disseminated only under the compulsion of law.

Query 1.3.1
The Government seeks views from the public on whether it is appropriate to reduce the retention period for personal insolvency information in credit reports.

The retention and divulgement of personal insolvency information on credit reports, as well as information relating to an individual's direct involvement with a company that entered external administration, is a common roadblock to re-engaging in entrepreneurial activities. Often directors of failed companies, or discharged bankrupt's, contact insolvency practitioners years after finalisation or discharge to request a letter confirming there are no remaining claims against them personally by the external administrator or trustee. These requests are to satisfy credit providers who have made enquiries of their personal credit file as part of their pre-lending due diligence. In the majority of instances the individual's ability to obtain credit is not affected. It is an important source of information for credit providers conducting due diligence and upon receipt of the relevant information credit providers make their own decisions on whether to progress the application on the balance of the risks. There are no concerns with the current retention period of 5 years.

Proposal 1.3.2
The Government proposes to reduce the overseas travel restriction to one year, subject to any extension for misconduct.

Aside from the requirement for the bankrupt to inform the trustee of travel, the restrictions on travel that can be placed on a bankrupt during the statutory bankruptcy period are discretionarily applied by the trustee. For a complying, model bankrupt, there may be no greater restriction than having to simply inform the trustee of their travel plans and obtaining permission to leave Australia prior to the date of travel.

As the current restrictions are not overly prohibitive they should continue to apply to the bankrupt for the three year "twilight period" if the statutory bankruptcy period was reduced to one year. This would allow the trustee to maintain some oversight whilst their "twilight period" obligations were ongoing.

Proposal 1.3.3
The Government proposes to consult with relevant industry and licensing associations with a view to aligning restrictions with the reduced period of bankruptcy, where appropriate.

The restrictions placed on bankrupts by industry and licensing organisations can be the biggest inhibitor to re-engaging in entrepreneurial activities post-bankruptcy. Some restrictions may appear overly prohibitive and some may be more relaxed but ultimately it is up to those individual organisations to agree the appropriate restrictions with their members. Any consideration to reduce such restrictions would no doubt be welcomed by individuals exiting bankruptcy. If the Government could successfully engage with various industries to encourage greater acceptance of individuals who have been through the bankruptcy regime the economy would likely benefit from the increased contribution to capital growth over time.

Additional comments in relation to Reducing the default bankruptcy period

Consideration should be given to the effect that the reduction in the statutory bankruptcy period will have on and the balance between debtors entering bankruptcy versus Part IX debt agreements. A debtor can only propose a debt agreement if their circumstances fall under the maximum threshold tests for assets, liabilities and income. The latest AFSA personal insolvency statistics show that in 2014-15 the number of bankruptcies in Australia were at their lowest level since 1994-95 and the number of debt agreements were the highest on record.

With a possibility of being released from the heavier bankruptcy restrictions earlier, astute debtors may to take the bankruptcy path as an alternative to entering a debt agreement. Should this effect be realised after the introduction of the proposed measures, the balance of debtors entering the Part IX debt agreement regime and the bankruptcy regime will shift to the latter. This may not necessarily result in a negative impact on the economy but it will change the makeup of the Australian personal insolvency landscape.

4. Insolvent trading safe harbour

The Government proposed to introduce a safe harbour for directors to the insolvency provisions of the Corporations Act to facilitate the restructure of businesses in an environment that protects creditors' interests but encourages entrepreneurship.

Without a safe harbour model in place, directors of companies who are taking positive action to rectify their company's insolvent circumstances run the risk of being held personally liable for further debts incurred during the time the company is trading whilst insolvent. Further, external advisors to the company at that point also tread a fine line of liability. In this situation, the insolvent trading penalties in the Corporations Act operate as a deterrent to the company director and their advisors when considering whether to attempt to rescue the company. The alternative to rescuing the company is appointing an external administrator which, in some circumstances can be a very costly approach to restructuring and in other circumstances results in the terminal liquidation of the company's business.

Safe Harbour Model A

> *Proposal 2.2*
> *It would be a defence to s588G if, at the time when the debt was incurred, a reasonable director would have an expectation, based on advice provided by an appropriately experienced, qualified and informed restructuring adviser, that the company can be returned to solvency within a reasonable period of time, and the director is taking reasonable steps to ensure it does so.*
>
> *The defence would apply where the company appoints a restructuring adviser who:*
> *(a) is provided 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*
> *(b) is and remains of the opinion that the company can avoid insolvent liquidation and is likely to be able to be returned to solvency within a reasonable period of time. The restructuring adviser would be 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.*

Query 2.2
Subject to the further information on the proposal set out in the sections below, the Government seeks views from the public on whether this proposal provides an appropriate safe harbour for directors.

An appropriately monitored and regulated safe harbour for directors would provide great opportunity for business in Australia to repair and redeploy working capital in circumstances where, for whatever legitimate reason, that capital has not been employed in the most profitable or responsible manner.

Safe Harbour Model A provides an appropriate safe harbour for directors, subject to further comments below on specific elements.

Query 2.2.1a
The Government seeks views from the public on what qualifications and experience directors should take into account when appointing a restructuring adviser and whether those factors should be set out in regulatory guidance by the Australian Securities and Investments Commission, or in the regulations.

The role of the restructuring advisor is central to the operation of safe harbour provisions and should be treated with the same level of scrutiny and regulation that a registered liquidator is subject to.

The period shortly before a company enters into formal external administration is always the most critical to an administrators investigations because it is the time when most of the damage is done to the available resources that will be divided amongst creditors. The antecedent transaction claw-back provisions of the Corporations Act focus mostly on the few years before a company fails and on the 6 months prior to the appointment of the external administrator. It is this environment that the restructuring advisor will be operating in and for this reason they must be appropriately qualified to navigate the minefield of legislation and claw-backs that could easily apply if the restructure is not successful.

It should be further noted that there are frequently more instances of “pre-insolvency advisors” engaging with companies facing external administration to help those companies position themselves to best avoid the antecedent transaction claw-backs and in some cases to facilitate phoenix arrangements. Anecdotal evidence suggests that pre-insolvency advisors that engage in these avoidance-advisory roles are likely to be pseudo insolvency practitioners that are not registered liquidators, do not have formal qualifications or are not members of an accredited insolvency industry body. If the introduction of safe harbour provisions do not exclude these operators the door will likely be opened for this type of unqualified advice to flourish.

Query 2.2.1b
The Government seeks views from the public on which organisations, if any, should be approved to provide accreditation to restructuring advisers if such approval is incorporated in the measure.

Given the specific knowledge of insolvent trading and antecedent transaction claw-back legislation that should be carried by a restructuring advisor it would not be appropriate to allow a practitioner without specific insolvency related experience to convey the protection of safe harbour laws to a director of an insolvent company. Further, a very practical and very technical accounting approach is required to be taken when embarking on an insolvent company’s restructure and such an approach may not be within the breadth of experience of a typical accountant or business advisor.

For the above reasons it is suggested that, to be afforded the insolvent trading safe harbour protections, a company should only be able to rely on a restructuring advisor that is accredited with specific insolvency and restructuring qualifications or is a registered liquidator. Industry recognised specific insolvency and restructuring qualifications are currently obtained through the Australian Restructuring Insolvency & Turnaround Association and the Turnaround Management Association. Other accounting or legal organisations may be in a position to offer suitable insolvency and restructuring courses to their members to accredit them with the necessary skills to undertake a safe harbour restructure.

The role of the restructuring adviser would be to form an opinion as to whether the company is "viable". The Government considers that the test of viability is whether the company can:

- *avoid insolvent liquidation, and*
- *be returned to solvency within a reasonable period of time.*

Query 2.2.1c
Is this an appropriate method of determining viability?

This is an appropriate test of viability and should be in line with the business judgement rule in the Corporations Act. However, consideration should be given to the definition of "reasonable" as this is open to subjective interpretation.

A potential model of viability opinions similar to those issued by registered auditors could be considered. A "viability opinion" could be formed by the restructuring advisor and that opinion could take one of a number of defined forms. For example, if a successful restructure was highly likely to result, the restructuring advisor could issue an opinion saying as such, thus providing a degree of confidence to the stakeholders. Such a model would also allow a consistently understandable opinion to be presented across inconsistent industry types and business sizes. A lower confidence opinion could be used by stakeholders to inform their strategic decisions on how to manage the higher risk associated with the business.

Query 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 factors for determining viability will vary greatly between each company. A benchmark should be established at the point of engagement of the restructuring adviser to provide an indication of the measure of progress in the improvement of viability resulting from the restructuring plan and to act as a reference point when considering the success of the implementation of the plan.

A going concern Report as to Affairs could be prepared by the company with the assistance of the restructuring advisor to incorporate the effect of the restructuring plan into the company's current insolvent trading positon. This report would take into account the effect that future cash flows resulting from the implementation of the plan will have on the company and the creditors.

Query 2.2.1e
The Government seeks views from the public on whether these are appropriate protections and obligations for the restructuring adviser, and what other protections and obligations the law should provide for.

The proposed protections are appropriate.

Query 2.2.2a
Do you agree with this approach?

The approach of:

- causing directors to remain subject to all other obligations that the law provides;
- on subsequent liquidation of the company allowing civil claims in relation to employee entitlements; and
- disregarding any protection for claw back provisions for unreasonable director related transactions during the safe harbour period;

is appropriate.

While the Government thus does not propose to require that companies disclose whether they are operating in safe harbour, no relaxation of a company's continuous disclosure obligations is proposed.

Query 2.2.2b
Do you agree with our approach to disclosure?

There will be heightened risk of subsequent insolvency and the appointment of an external administrator in circumstances where a company enters insolvent trading safe harbour. On one hand, if the company did enter external administration and creditors were not aware of the impending risk, the rights of creditors will be severely prejudiced. On the other hand, consideration should be given to the impact on the company resulting from adverse supplier or market reaction to information that a restructuring advisor was assisting the business.

The impact of the failure of a safe harbour restructure attempt will bring significant scrutiny to the actions of the directors and the restructuring advisors. Utmost importance should be placed on maintaining the transparency of insolvency practitioners in Australia so as to ensure there is no question as to the conduct or influence the practitioner has on a particular outcome to stakeholders. The advice and actions of a restructuring advisor will be associated with the insolvency profession generally so it is paramount to ensure there are no opportunities for aggrieved parties of a failed restructure to claim they were not provided the opportunity to make a commercial decision in relation to their relationship with the insolvent.

In line with the earlier proposed "viability opinion" model, it would be an appropriate condition, in order for the company to access the safe harbour protections, to require the restructuring advisor to circularise all the company's stakeholders to advise of their engagement and their role in providing realistic solutions to the company's immediate concerns. The definition of stakeholders would need to be defined and the timing of such notice would need to be considered further. But without full disclosure to the affected parties there are myriad opportunities for aggrieved stakeholders to seek recourse against the company and the restructuring advisor.

Query 2.2.3
The Government seeks views from the public on in what other circumstances should the safe harbour defence not be available.

The circumstances outlined seem appropriate.

Safe Harbour Model B

> *Proposal 2.3*
> *Section 588 does not apply:*
> *(a) if the debt was incurred as part of reasonable steps to maintain or return the company to solvency within a reasonable period of time; and*
> *(b) the person held the honest and reasonable belief that incurring the debt was in the best interests of the company and its creditors as a whole; and*
> *(c) incurring the debt does not materially increase the risk of serious loss to creditors.*

> *Query 2.3*
> *The Government seeks your feedback on the merits and drawbacks of this model of safe harbour.*

This approach may be open to abuse because the terms are highly subjective. It would be difficult to maintain a consistent interpretation of the second element – honest and reasonable. Over time, such an approach may work if supported by relevant case law and detailed interpretations but the approach in Safe Harbour Model A seems to be a more robust for insolvent trading safe harbour in Australia.

Additional comments in relation to Insolvent Trading Safe Harbour:

An introduction of safe harbour laws should be supported by an education program for directors of companies. The general lack of business acumen amongst directors of companies in general in Australia is concerning. As there is no minimum standard of education in order to be registered as a company director it is not certain that all directors know how to manage the financial side of a business. The forming of an honest and reasonable view as to the company's position is skewed across the range of directors' abilities and experience. Not all directors of companies can present a properly informed view under the current Corporations Act system.

The Government should look to support the introduction of safe harbour laws with a basic mandatory education program (subject to prior experience exemptions) for directors at the time of first being appointed a director of a body corporate.

5. Ipso facto clauses

Ipso facto 'by the fact itself' clauses in contracts and agreements provide for immediate termination upon an insolvency event. These clauses can severely limit a company's ability to continue to trade through insolvency because essential commercial arrangements can be terminated with no prior notice to the external administrator. The value of the business and its assets can be prejudiced and the restructuring options available to external administrators can be limited. If the Government's proposal to constrain the operation of ipso facto clauses is implemented the ability to restructure and preserve the value of insolvent companies will be enhanced.

> *Query 3.2b*
> *Should any legislation introduced which makes ipso facto clauses void have retrospective operation?*

From the perspective of an external administrator, legislation constraining the operation of ipso facto clauses should apply retrospectively to contracts already in existence so as to ensure all failing businesses and their creditors are given equal opportunity to restructure and preserve value.

However, it would be anticipated that such retrospective application would be met with opposition by businesses, industry groups and advisers. The argument, that contracts and agreements containing ipso facto clauses are commercial agreements between two consenting parties who subscribed to the terms upon execution, has merit.

> *Query 3.2.b*
> *Are there any other circumstances to which a moratorium on the operation of ipso facto clauses should also be extended?*

The moratorium should also extend to provisional liquidations.

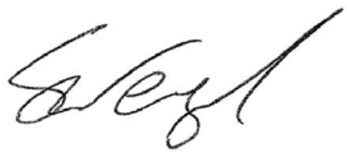
6. Conclusion

Generally, the proposed changes are supported but the Government should be cautioned that the primary aim of increasing entrepreneurial activity may not be realised by these measures alone. The measures will support and not detract from the future prosperity of the Australian Economy.

This submission has been prepared on behalf of and with the support of the William Buck Business Recovery Services division. The views, statements and opinions are for discussion purposes only.

Any queries in relation to this submission should be directed to Sean Wengel at William Buck, Level 29, 66 Goulburn Street, Sydney NSW 2000 or by telephone on (02) 8263 4000.

William Buck Business Recovery Services



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