12 October 2020

Manager
Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

Email: MCDInsolvency@Treasury.gov.au

Dear Sir/Madam,

Corporations Amendment (Corporate Insolvency Reforms) Bill 2020
TMA Australia Submissions on the Exposure Draft

Turnaround and restructuring naturally lie at the heart of the Turnaround Management Association ("TMA") Australia. That is why, with Australia facing a pandemic induced recession through no fault of its own, the TMA supports SME law reform which promotes restructuring of businesses facing insolvency through no fault of their own.

Consistent with our engagement with Treasury since the onset of COVID-19, the TMA has put in a huge amount of work and thought into our response. The submission is considered, detailed and solution focussed. The critical themes are:

- A restructuring practitioner should personify and be true to the chosen description. Submission 36 sets out our rationale and the appendixes provide an analytical framework to assist in the definition of suitably qualified restructuring professionals.
- To survive during a debtor-led restructuring process, the debtor will need the support of its trade and finance creditors. The priority of debts incurred during this period need to be certain and clear. Submissions 17, 19 and 40 address the central issues of priority of debts incurred.

There is a lot left to regulation – including how best to balance between protection of employee entitlements and keeping alive the prospect of ongoing employment. The TMA commits to working with you and other bodies such as the Australian Institute of Company Directors and the Business Council of Australia to make the reform work as intended.

The work will not end with legislative drafting. Clear, easy to use online guides and precedents will be essential to the bring the reform to life. This is particularly important given the focus on helping financially distressed small business to help themselves. The TMA and its members will help to develop the material required to make the reform work in practice.

As we move to a new generation of restructuring and insolvency law reform, it was particularly encouraging to see young members working into the early hours of the morning together with established board members to craft the submission. They are named below as part of our team which has worked on the submission and will keep on working on these and other reforms to make our turnaround, restructuring and insolvency frameworks as best as they can be to meet the economic challenges posed by COVID-19.

- Paul Apathy, TMA Australia Director (Partner, Herbert Smith Freehills)
- Jacob Lancaster (Herbert Smith Freehills)
- Hongbei Li (Herbert Smith Freehills)
- Angus Dick (Herbert Smith Freehills)

- Jennifer Ball, TMA Australia Director (Partner, Clayton Utz)
- Alexandra McCulloch (Clayton Utz)
- Michael Sloan, TMA Australia Director (Partner, Ashurst Australia)
- Gayle Dickerson, TMA Australia Director (Partner, KPMG)
- Sam Marsden, TMA Australia Director (Partner, Deloitte)
- Jane Starkins, TMA Australia Director (State General Manager VIC, Scottish Pacific)

Sincerely,

Carl Gunther
TMA Australia President
Tel: +61 408 477 407
TMAAustraliaPresident@turnaround.org.au
Turnaround Management Association Australia
www.turnaround.org.au

1 General Comments

The TMA welcomes the opportunity to comment on the Exposure Draft of the *Corporations Amendment (Corporate Insolvency Reforms) Bill 2020* (**Exposure Draft**).

1.1 Focus of TMA submissions

The TMA has in large part confined the scope of these submissions to the proposals pertaining to the restructuring of small businesses contained in Schedules 1 and 2 of the Exposure Draft. These aspects are most central to the role and expertise of the TMA as an organisation focussed on restructuring and turnaround.

We have given some limited consideration to Schedule 3 (Simplified liquidations) of the Exposure Draft. This is mainly in the context of considering the means by which the restructuring procedures can transition to simplified liquidation. In the limited time available we have not reviewed or commented on Schedule 4 (Virtual meetings and electronic communications).

The TMA welcomes the Government's moves to introduce simplified restructuring processes for small businesses. The TMA is therefore generally supportive of these reforms. The TMA's comments in these submissions are therefore focussed on suggestions which we believe may help these reforms work successfully. Our commentary is based on the TMA's preference for finding a way to revive ailing businesses and avoiding their demise given the terrible and lasting impact that has.

1.2 Comments on consultation period and materials

We do note that a significant part of the substance of the reforms (rather than simply administrative detail) appears to be dealt with in forthcoming regulations (the **Regulations**). We understand that this approach is driven by the Government's desire to bring these reforms into effect by 1 January 2021 and the limited Parliamentary sitting time before then.

However, given the Regulations are yet to be released, there are some challenges in understanding the operation of these proposed laws as a whole. The consultation period for this legislation is very short for legislation making changes of this magnitude to Australia's restructuring and insolvency landscape.

It is therefore likely that the Exposure Draft gives rise to a number of effects, consequences and interactions that the TMA has not been able to ascertain or fully consider at this stage. We therefore recommend that this legislation is formally reviewed after a period in operation so that it can be further considered, and where appropriate amended, with the benefit of this further experience in practice.

1.3 Key submissions

The TMA has made a significant number of submissions in section 2 of this document. However, we wish to draw your attention to, and emphasise the following submissions in particular:

- Submission 7: Consequences of termination of restructuring period
- Submission 17: Ability to incur debts during restructuring period
- Submission 19: Payment of pre-restructuring debts during restructuring period
- Submission 33: Proposing a restructuring plan – payment of employee entitlements
- Submission 36: Registered liquidator / who can be a restructuring practitioner?
- Submission 40: Treatment of debts incurred in restructuring in a subsequent liquidation

These submissions are shaded in red in the below table.

2 Submissions on the Exposure Draft

	Topic	Proposed new or amended Corporations Act section	Submission
1	**General comments - complexity**	N/A	**Recommendation 1** • Simplify Part 5.3B by removing or simplifying certain provisions to reflect the unique context of a small business under restructuring. • Address key issues in the Corporations Act rather than in the Regulations. The TMA notes that the Exposure Draft incorporates many of the provisions in the *Corporations Act 2001* (Cth) (**Corporations Act**) which apply to voluntary administrations. Many of the key provisions relating to the operation of the restructuring process are to be contained in the Regulations. The result is a statutory regime that appears relatively complex. We are conscious that this complexity may make the regime less accessible for small businesses hoping to utilise this regime. We recommend consideration be given to whether all of the provisions in the Exposure Draft that have been incorporated from the Corporations Act are necessary in the context of the small business restructuring plan, or whether some of these can be removed. It would also be helpful if more of the key provisions that are currently to be dealt with in the Regulations are contained in the statute. We also recommend that the Government devote resources to ensure that there are user-friendly guides and explanations of the process made available on Government websites once these reforms are enacted to assist small businesses navigate these provisions and the regime generally.

	Topic	Proposed new or amended Corporations Act section	Submission
2	**General comments – UNCITRAL draft text on simplified insolvency regime**	N/A	**Recommendation 2** • Have regard to the UNCITRAL Text generally when formulating this legislation. The TMA has reviewed the latest draft text on a simplified insolvency regime prepared by the United Nations General Assembly (available at https://undocs.org/en/A/CN.9/WG.V/WP.170) (**UNCITRAL Text**). Though the UNCITRAL Text is yet to be finalised, the draft provides a useful set of legislative recommendations as to matters that should be covered when enacting laws for a simplified restructuring or liquidation regime for small businesses. These recommendations have been carefully developed by an international group of experts, and reflect some of the leading thinking in this area. We therefore recommend that the Government has regard to the recommendations contained in the UNCITRAL Text when formulating this legislation and designing the restructuring regime and simplified insolvency regime contemplated therein.
3	**Use of the term "restructuring" to describe a specific procedure**	N/A	**Recommendation 3** Replace the following terms in the Exposure Draft: • "restructuring" with "small company moratorium"; and • "restructuring plan" with "small company arrangement". The Exposure Draft uses the term "restructuring" to describe the formal process introduced in Division 2 of the new Part 5.3B. The term "restructuring" has a well-established, more general meaning in normal business usage. Generally the term is used to refer to a process to adjust both the components of the balance sheet and the operations of the business through a series of steps mostly outside of a formal insolvency

	Topic	Proposed new or amended Corporations Act section	Submission
			process. It can also be used more generally to refer to a general reorganising of a corporate group or its business activities. We are concerned that use of the label "restructuring" to refer to a specific formal procedure, as currently envisaged under the Exposure Draft, may lead to a degree of confusion of terminology within the business community (and potentially for small businesses trying to understand the process, and conducting searches using this phrase). We therefore recommend replacing the label "restructuring" with something that will more clearly describe this process. In the United Kingdom a newly enacted debtor-in-possession process with many similarities is called the "moratorium". Likewise Singapore has also introduced a debtor-in-possession "moratorium" procedure. We suggest that a similar label would be more appropriate than "restructuring". We recommend use of the term "small company moratorium" rather than "restructuring". Our proposed label is descriptive of the process, less likely to cause confusion, consistent with internationally similar processes and also reflects that it is a procedure specifically targeted at small companies. Similarly, we recommend using the term "small company arrangement" instead of "restructuring plan". This term would be more consistent with existing terminology both under the Corporations Act, and also with terminology in other jurisdictions such as the United Kingdom.
4	**"Small business restructuring practitioner" terminology**	N/A	**Recommendation 4** • Define or replace references to "small business restructuring practitioner" with "restructuring practitioner" for consistency. The Exposure Draft refers to "small business restructuring practitioner" and "restructuring practitioner" in different places. It is not apparent how these terms interrelate. The definition of "restructuring practitioner" to be inserted at s 9 includes a small business restructuring practitioner, but there does not appear to be a definition for small business restructuring practitioner.

	Topic	Proposed new or amended Corporations Act section	Submission
			Consideration should be given to consistency of drafting and whether any additional definitions are required.
5	**When restructuring procedure ends**	453A(b)	**Recommendation 5** • Specify when a "restructuring" process ends by inserting a provision in the Corporations Act similar to existing s 435C of the Corporations Act in respect of administration (rather than dealing with this in the Regulations). Section 453A(b) of the Exposure Draft provides that a restructuring of a company ends in the circumstances prescribed by the Regulations. We recommend that the circumstances where a restructuring ends should be set out in statute, in a similar way to the existing s 435C of the Corporations Act which specifies the circumstances in which an administration can end. This is important for understanding the restructuring process as a whole, and ensuring it works as intended. Most of the other key matters relating to the restructuring period (as opposed to the period of the restructuring plan) are set out in statute. We are therefore of the view that this should also be contained in the primary legislation rather than in the Regulations. We assume that the restructuring process will end upon the earlier of: • when the prescribed maximum period of time for a restructuring expires; • when terminated by the restructuring practitioner; • when the creditors vote to terminate the restructuring; • when terminated by the court; or • when a restructuring plan that is approved by creditors takes effect (this might, by analogy with a deed of company arrangement (**DOCA**), require a document setting out the terms of the restructuring plan to be executed by the company and the restructuring practitioner).

	Topic	Proposed new or amended Corporations Act section	Submission
6	**When period under a restructuring plan starts and finishes**	453A(b) 453J 455B(2)	**Recommendation 6** • The Regulations should set out when the period that a company is under a restructuring plan starts and ends. • It should be clear that the period of "restructuring" ends when the "restructuring plan" period commences. The Exposure Draft does not set out when the period that a company is "under a restructuring plan" commences or when it ends. We assume it is intended that the Regulations will provide for this. We assume that the period that a company is "under a restructuring plan" will commence on the date that the restructuring plan is approved by creditors. Alternatively, by analogy with DOCAs, it might be the date that a document setting out the terms of the restructuring plan (so approved) is executed by the company and the restructuring practitioner. We assume that there will be a provision (similar to existing s 445C of the Corporations Act) specifying when the restructuring plan terminates, which would be on the earlier of: • when the restructuring plan terminates in accordance with its terms (either because it has been fully effectuated, or for some other reason); • the court orders the termination of the restructuring plan; or • the creditors pass a resolution terminating the restructuring plan. We assume it is intended that the company will not be under a "restructuring" and subject to a "restructuring plan" at the same time. In other words, we assume that the "restructuring" period is analogous to the period where a company is in administration, and the "restructuring plan" period is analogous to the period when a company is subject to a DOCA.

	Topic	Proposed new or amended Corporations Act section	Submission
7	**Consequences of termination of restructuring period**	N/A	**Recommendation 7** • There should be a provision clearly setting out the consequences of a "restructuring" terminating. • This provision should provide where creditors have approved a restructuring plan within the statutory timeframe, the company should become subject to that restructuring plan. • The provision should by default provide that where creditors have not approved a restructuring plan the company should enter liquidation. • The company should enter liquidation directly from the restructuring process (rather than returning to the control of its directors) in a manner similar to the direct entry into liquidation from administration provided for in existing s 446A of the Corporations Act. In most cases this would be the simplified liquidation process. • The company should only return to ordinary operation under the control of its directors if the company is solvent and with the consent of the restructuring practitioner or the approval of creditors. The Exposure Draft does not set out what happens upon the termination of a restructuring. It is critical that this is made clear. We believe this should be done in the Corporations Act rather than in the Regulations. In our view there should be a route by which a company can directly enter liquidation where a restructuring terminates. This should be the default consequence of the restructuring period terminating, except in circumstances where a restructuring plan has been approved and commences within the relevant prescribed timeframe. This direct route would be analogous to the ability of a company to enter liquidation directly from administration under Part 5.3A of the Corporations Act (see existing s 446A). We believe it would be appropriate for the company to enter liquidation (most likely under the simplified liquidation procedure) as the default option in such circumstances unless either:

Topic	Proposed new or amended Corporations Act section	Submission
		• the restructuring practitioner determines; or • the creditors vote, that the company should return to normal operation in the control of the directors. This should only be permissible in circumstances where the company is solvent. In some circumstances it might also be appropriate for a restructuring practitioner or the creditors to determine that the company enter administration, but we expect in practice it would be relatively rare that an administration would be useful to a small business that has already undergone a failed restructuring process. We take the view that it is appropriate that the company enter liquidation in these circumstances because a company is only likely to access the restructuring process in the first place if it is financially distressed (and the directors must form the view it is insolvent or likely to become so). In circumstances where the restructuring process has failed, it is likely that liquidation will be the most appropriate option in the majority of cases. Returning the company to normal operations in those circumstances would add an additional (and unnecessary) step involving the company or its creditors placing the company into liquidation. This would entail additional delay and cost. In addition, there would be uncertainty as to the operation of the company during any 'gap' period between the end of restructuring and commencement of liquidation (or any other another insolvency process).

	Topic	Proposed new or amended Corporations Act section	Submission
8	**Resolution by directors as to insolvency**	453B(1)(b)	**Recommendation 8** • Replace “reasonable grounds for suspecting” under new s 453B with “in the opinion of the directors voting for the resolution” (for consistency with existing s 436A of the Corporations Act). The Exposure Draft provides that a restructuring practitioner may be appointed under new s 453B by a resolution of directors if the directors voting for the resolution “**have reasonable grounds for suspecting**” that the company is insolvent, or is likely to become insolvent at some future time. This can be contrasted with the power of the board to appoint an administrator under existing s 436A, which instead applies if the board has resolved to the effect that “**in the opinion of the directors voting for the resolution**” the company is insolvent, or is likely to become insolvent at some future time. It is unclear whether this difference in language is intentional, and if so the reason for this. We note there is significant case law on the existing language used in s 436A. Therefore unless there are policy reasons for a change in approach (which should be addressed in the explanatory memorandum) we would recommend retaining the same language (used in s 436A) in the new s 453B.
9	**Notification of commencement of restructuring**	N/A	**Recommendation 9** • Introduce a provision requiring companies to file a public notice and notify creditors immediately upon the commencement of a restructuring process. The Exposure Draft does not currently make any provision for the notification of creditors or the broader public of the commencement of restructuring apart from the company under restructuring setting out in every public document and every negotiable instrument, the expression "restructuring practitioner appointed" as required by s 457B.

	Topic	Proposed new or amended Corporations Act section	Submission
			Given the significant impact of this process both on the company's creditors and other third parties dealing with the company it is important that there is some form of public notice (presumably with ASIC) immediately upon commencement of the restructuring, and also that the company is obliged to immediately notify its existing creditors of its entry into the restructuring process in addition to the giving of a declaration made by the restructuring practitioner upon being appointed, which is only required to be given to "as many of the company's creditors as reasonably practicable" under new s 453D of the Exposure Draft. This should be provided for in the Exposure Draft. We note in this regard paragraph [86] of the UNCITRAL Text which states: *"Giving notice of the commencement of insolvency proceedings is central to several key objectives of an insolvency regime. It ensures transparency of the proceedings and that all parties in interest are equally well informed and can timely challenge the commencement of the proceeding. For those reasons this [text] requires the notice of commencement of insolvency proceedings to be individually notified to all known parties of interest."*
10	**Eligibility criteria for restructuring process – liabilities of the company**	453C(1)(a)	**Recommendation 9** • Specify how liabilities will be calculated under new s 453C(1)(a). • Consider the appropriateness of any proposed liability cap having regard to the method of its calculation, the size of business that will be included or excluded by that cap and the liability

caps adopted for similar small business restructuring regimes in other comparable jurisdictions.

- Ensure the criteria and their calculation are simple and clear at the outset, so as to avoid any risk of proceedings subsequently being held to be invalid due to uncertainty or miscalculation of the company's liabilities.
- Review the liability cap once the legislation is in operation to consider whether it should be adjusted.

The new s 453C(1)(a) indicates that Regulations may establish a test for eligibility for the restructuring process based on the liabilities of the company.

Although the Regulations are yet to be released, we understand from the Joint Media Release issued by the Hon Josh Frydenburg MP and the Hon Michael Sukkar MP on 24 September 2020 that the Government is considering limiting the eligibility for the restructuring process to companies with liabilities not exceeding $1 million.

It is unclear how liabilities would be calculated for these purposes (eg whether they would include prospective, future, contingent or unliquidated amounts). This will need to be clarified in the Regulations. It is also important that such eligibility criteria are framed in a way that makes it clear from the outset of the process if the company does or does not qualify (to avoid the risk of invalid proceedings).

There are differing views as to the appropriate level of the liability cap for this regime. We understand that this liability cap has been selected on the basis that "[a]round 76 per cent of companies entering into external administration in 2018-19 had less than $1 million in liabilities" (according to the Government's fact sheet entitled "Insolvency reforms to support small business). Anecdotally, we believe that the percentage of companies entering into administration with less than $1 million in liabilities is likely to be far lower than 76%. We question whether this statistic is representative of actual business activity in Australia, although we are unable to confirm this without knowing how this statistic was calculated (for example, it may be influenced by the number of 'shell companies' which enter into administration). Importantly, we note that this statistic does not consider liabilities incurred by companies during and post the COVID-19 pandemic, and therefore the proportion of businesses that have incurred (or will incur) over $1 million in liabilities and have entered (or will enter) into external administration may be much higher.

If the Government chooses to retain the $1 million liability cap, consideration should be given to increasing it once the reforms have been implemented, there has been an opportunity to evaluate their performance and the business community has become broadly familiar with how they operate.

Topic	Proposed new or amended Corporations Act section	Submission

We note that a cap based on a maximum of $1 million in liabilities would appear to be lower than the caps applicable to small business restructuring processes or small business liquidation proceedings in other jurisdictions.

For example:

- **United States**: to access the new Part V of Chapter 11 (for small businesses) a company must have aggregate, non-contingent liquidated secured and unsecured debts of less than **US$7.5 million** until 27 March 2021 (and **US$2,725,625** thereafter) under the Small Business Reorganization Act of 2019 as temporarily amended by the Coronavirus Aid, Relief, and Economic Security Act.
- **United Kingdom**: prior to being replaced this year by a stand-alone moratorium available to a broader range of companies, the moratorium for small businesses pursuing a company voluntary administration was available to companies who could satisfy two or more of the following criteria:

  (1) turnover of no more than **£10.2 million** for the financial year;

  (2) balance sheet assets no greater than **£5.1 million**; and

  (3) not more than 50 employees.
- **Singapore**: to be eligible for the new streamlined process recently proposed in the Insolvency, Restructuring and Dissolution (Amendment) Bill 2020 a company must have:

  (1) annual sales turnover for the relevant business year must not exceed **S$10 million**;

  (2) the applicant must not have more than 30 employees;

  (3) the applicant must not have more than 50 creditors; and

  (4) the liabilities of the applicant company (including contingent and prospective liabilities) must not exceed **S$2 million**.

Consideration should therefore be given to whether a higher threshold would be appropriate either now or at some point in the future to ensure that the restructuring process has utility beyond very small companies.

	Topic	Proposed new or amended Corporations Act section	Submission
11	**Eligibility criteria for restructuring process – common directors**	453C(1)(b)	**Recommendation 11** • Delete the eligibility requirement under s 453C(1)(b). New s 453C(1)(b) of the Exposure Draft provides that the restructuring procedure under proposed Part 5.3B cannot be used by a company if a director of the company (or someone who has been a director of the company in the previous 12 months) has been a director of another company that has been under restructuring or been the subject of a simplified liquidation process within a period prescribed by the Regulations unless exempt under regulations made for the purposes of s 453C(2). Paragraph (2)(b) provides that the Regulations may prescribe the circumstances in which the directors of companies are exempt from the requirement in paragraph (1)(b). Consideration should be given to whether this eligibility criteria is arbitrary, and could lead to companies needlessly being excluded from the restructuring regime. In particular: • where companies are largely unrelated (for example, they may only have a single director in common, and only for a brief period in time) it is unclear why the first company accessing the restructuring process should preclude the second company from accessing the restructuring process; • where the companies are related (for example, part of the same corporate group) more than one entity may need to access the restructuring process, but it is unclear whether this is permitted (and if it is permitted whether it is necessary for the companies to enter into the process at exactly the same time). Again, it is unclear why this should preclude access. Consideration should be given as to the policy basis for this criteria, and whether it is necessary or can be addressed in another manner. Additional uncertainty is created by the fact that a restructuring practitioner or current director(s) may not always know if a previous or current director(s) fail the eligibility test. It is unclear if and how this information will be made available, such as through an ASIC company search. We therefore recommend that the eligibility requirement under s 453C(1)(b) is deleted.

	Topic	Proposed new or amended Corporations Act section	Submission
12	**Functions of restructuring practitioner**	s 453E(1)	**Recommendation 12** • Broaden the scope of s 453E(1) to recognise the deliberative aspects of the restructuring practitioner's role. The new s 453E(1) provides that the function of the restructuring practitioner will be to provide advice to the company on matters relating to restructuring, assist the company to prepare a restructuring plan, make a declaration in relation to the same in accordance with the Regulations, and any other functions provided under the Act. This suggests that the restructuring practitioner will have a mainly advisory role, and that decisions will largely be made by the company. However, we note that other provisions suggest that the restructuring practitioner will have a more deliberative role despite the company being a debtor in possession. For example: • the restructuring practitioner is taken to be acting as the company's agent (new s 453H); • the restructuring practitioner may decide to terminate the restructuring process (new s 453J); • the restructuring practitioner may consent to the company entering into transactions outside the ordinary course of business (new s 453L(2)); • the restructuring practitioner may consent to transfers of or adjustments to members' shares (new s 453N); • the restructuring practitioner may consent to security enforcement or exercise of third party property rights (new s 453Q); • the restructuring practitioner may consent to legal proceedings against the company (new s 453R); • the restructuring practitioner may consent to enforcement of ipso facto rights (new s 454P(7)). These powers appear to go beyond the advisory role described in s 453E. We expect that a court may have regard to s 453E as an interpretive aid when considering the powers and duties of the restructuring practitioner under the legislation more generally (similarly to

	Topic	Proposed new or amended Corporations Act section	Submission
			how a court may rely on new s 452A which explains the object of Part 5.3B). We therefore believe it is important that the functions set out in this section accurately reflect the nature of the role. We recommend broadening the language of s 453E to recognise the deliberative aspects of the restructuring practitioner's role during the restructuring.
13	**Duties of restructuring practitioner**	N/A	**Recommendation 13** • Insert a general provision indicating the duties of the restructuring practitioner. • For example this could require the restructuring practitioner to exercise its powers or discretions under the legislation having regard to the interests of creditors. The Exposure Draft does not contain any general provisions with regard to what (if any) duties are owed by the restructuring practitioner when carrying out its functions. The Exposure Draft does provide that the restructuring practitioner becomes an officer of the company under s 9 (as amended) and therefore, all statutory provisions concerning the duties of an officer under the Corporations Act will apply including the duty to act in the best interests of the company. We note that some, but not all, of the new sections require the restructuring practitioner to consider the interests of creditors when making particular decisions, such as new ss 453J(1)(a) and 453L(5). We recommend that consideration is given to including a general provision indicating the duties of the restructuring practitioner. For example, this might require the restructuring practitioner to exercise its powers or discretions under the legislation having regard to the interests of creditors.

	Topic	Proposed new or amended Corporations Act section	Submission
14	**Requirement for restructuring practitioner to hold beliefs on "reasonable grounds"**	453J(1)(a) 453L(5)	**Recommendation 14** • Delete requirement that the restructuring practitioner must hold beliefs on "reasonable grounds" under new ss 453J(1)(a) and 453L(5). Certain provisions of the Exposure Draft require the restructuring practitioner to hold beliefs on "reasonable grounds". This requirement differs from the requirement in the corresponding administration procedures upon which those provisions were based. We recommend that the requirement that the restructuring practitioner hold beliefs on "reasonable grounds" be deleted to ensure consistency in approach and interpretation with the corresponding provisions applicable to administrators.
15	**Appointment of restructuring practitioner as liquidator – preventing conflicts of interest**	N/A	**Recommendation 15** • Restrict person(s) appointed as restructuring practitioner to a company from subsequently being appointed as liquidator of the same company in order to prevent conflicts of interest. • Restrict any other person who is a partner, director or employee of the same firm as the restructuring practitioner from subsequently being appointed as liquidator of the company. The Exposure Draft does not prevent a person who has been appointed as a restructuring practitioner to a company subsequently being appointed as its liquidator. We note that a conflict of interest (or the appearance of a conflict of interest) may arise on the basis that the restructuring practitioner may be influenced by the prospect of earning more fees as a liquidator if the company was to enter liquidation (than if the company was to implement a restructuring plan). We therefore recommend that such a restriction be introduced. Such a restriction should apply to restrict:

	Topic	Proposed new or amended Corporations Act section	Submission
			• the person actually appointed as restructuring practitioner of the company; and • any other person who is a partner, director or employee of the same firm as the restructuring practitioner, from undertaking any liquidation of the company that immediately follows the restructuring or restructuring plan. We note this may require a Government mandated default liquidator to take the appointment in circumstances where the creditors or the restructuring practitioner do not determine the liquidator to be appointed at the time that the restructuring is terminated.
16	**Right to inspect books held by other persons**	453G	**Recommendation 16** • Introduce consequences under new s 453G for persons who refuse a restructuring practitioner access to the books of a company, such as through the notice procedure prescribed by existing s 438C of the Corporations Act. We note that the new s 453G empowers a restructuring practitioner to inspect and make copies of the company's books at any reasonable time. Unlike the existing s 438C of the Corporations Act, there appears to be no consequences for refusing access to the books of a company. We recommend the use of a notice procedure similar to that provided under the existing s 438C in order to address this concern.

	Topic	Proposed new or amended Corporations Act section	Submission
17	**Ability to incur debts during restructuring period**	453L	**Recommendation 17** Restrict a company under restructuring from: • incurring debt unless it is in the ordinary course of business, with the consent of the restructuring practitioner or under an order of the court; and • obtaining or incurring further credit (in an amount exceeding an appropriate threshold) without notifying the relevant creditor that the company is under restructuring. The Exposure Draft does not expressly provide for the extent to which a company that is subject to a restructuring process may incur further debt. This needs to be made clear. The new s 453L provides that a company under restructuring is prevented from entering into a transaction or dealing affecting the property of the company during the restructuring unless it is in the ordinary course of business, with the consent of the restructuring practitioner or under an order of the court. However, this prohibition does not restrict the company from incurring debt during the restructuring period. We therefore recommend the inclusion of an additional provision that prevents the company from incurring debt during the restructuring period unless it is in the ordinary course of business, with the consent of the restructuring practitioner or under an order of the court. We also recommend a requirement that a company cannot obtain or incur further credit (in an amount exceeding an appropriate threshold) without notifying the relevant creditor that the company is under restructuring. It is important that any potential creditors are made aware of the restructuring and are able to determine whether to extend any further credit to the company on an informed basis given the increased risk involved. We note that such a requirement is included in s A25 of the *Insolvency Act 1986* (UK) in respect of the UK's new moratorium regime (which has many similarities to the proposed restructuring regime).

	Topic	Proposed new or amended Corporations Act section	Submission
18	**Offence relating to transactions and dealings affecting property during restructuring period**	453L	**Recommendation 18** • Confine criminal liability for directors under new s 453L to cases where the director acted dishonestly or intentionally caused a serious breach of s 453L. The Exposure Draft currently provides that a failure to comply with s 453L(1) is an offence. New Schedule 3 provides that a contravention of this section could lead to 6 months imprisonment. In our view, this would be inappropriate for a debtor in possession process as it may encourage an excessively cautious approach by directors who may delegate decision making to restructuring practitioners in order to avoid criminal liability. We believe this is not the intent of the reforms. We also note that "in the ordinary course of a company's business" is a concept that could admit a broad range of interpretations. In these circumstances, it may be more appropriate to confine criminal liability for directors to cases where the director acted dishonestly or intentionally caused a serious breach of s 453L. Other types of breaches could be dealt with by the voidability provisions and any other applicable civil remedies.
19	**Payment of pre-restructuring debts during restructuring period**	453L	**Recommendation 19** • Introduce a provision prohibiting companies from making payment on any debt (over a de-minimis amount) incurred prior to the commencement of restructuring without the consent of the restructuring practitioner or by order of the court. • An exception should be provided that permits a company under restructuring to pay any employee entitlements that are due and payable (regardless of when they were incurred). The Exposure Draft does not currently specify whether the company under restructuring is entitled to make any payments of debts incurred prior to the commencement of the restructuring (and if so in what circumstances). This is a very important matter that needs to be carefully considered. The normal principle would be that once a formal restructuring or insolvency process has been commenced, all (non-priority) debts

Topic	Proposed new or amended Corporations Act section	Submission
		incurred prior to the process should only be paid as part of a plan or insolvency distribution on a pari-passu basis. Any payment of 'pre-petition' debts would disrupt this basic principle and would generally be considered an unfair advantage by other creditors. This principle is not specifically addressed in connection with voluntary administration as the process is run by an administrator that understands that generally pre-administration debts should not be paid unless it is necessary to do so for the continuing operation of the business. A similar principle should apply in a restructuring. The Exposure Draft should specifically provide that the company cannot make payment on any debts incurred prior to the commencement of the restructuring (perhaps over a de-minimis amount) without the consent of the restructuring practitioner or by order of the court. The restructuring practitioner can then make an independent assessment as to whether payment of the pre-restructuring creditor is necessary for the ongoing operation or viability of the business. We note that introduction of such a provision would also be consistent with the approach adopted in s A28 of the *Insolvency Act 1986* (UK) in connection with payment of debts under the new moratorium regime in the United Kingdom (which shares some similarities with the proposed restructuring regime). There should be an exception to this restriction to allow a company under restructuring to pay any employee entitlements that are due and payable (regardless of when they were incurred) given these liabilities are given priority over unsecured debts in a liquidation (and given we understand the Government may requirement payment of such debts to be a pre-requisite to proposing a restructuring plan to the creditors).

	Topic	Proposed new or amended Corporations Act section	Submission
20	**Grant of security during restructuring period**	453L	**Recommendation 20** • Introduce a provision prohibiting companies under restructuring from granting security without the consent of the restructuring practitioner or by order of the court. • An exception should be provided that applies to the granting of ROT/PMSI type security in respect of new goods supplied and new credit incurred post restructuring, in the ordinary course of business. The Exposure Draft does not currently specify whether a company may grant any security over its assets during the restructuring period (although it might be implied that this would normally not be permitted as, for most businesses, granting security would not be done in the ordinary course of business). It would be prudent and appropriate for the Exposure Draft to introduce a specific provision prohibiting a company from granting security without the consent of the restructuring practitioner or by order of the court. We note that introduction of such a provision would also be consistent with the approach adopted in s A26 of the *Insolvency Act 1986* (UK) in connection with grant of security under the new moratorium regime in the United Kingdom. However, there should be an exception to permit ROT/PMSI type security in respect of new goods supplied and new credit incurred post restructuring, in the ordinary course of business.

	Topic	Proposed new or amended Corporations Act section	Submission
21	**Dealing with secured assets during restructuring period**	N/A	**Recommendation 21** • Introduce provisions addressing the extent to which a company is entitled to deal with assets that are subject to security during a restructuring, and what protections a secured party will have if such dealings occur, similar to existing ss 442B and 442C of the Corporations Act. The Exposure Draft does not specifically address the extent to which a company is entitled to deal with assets that are subject to security during a restructuring, or what protections a secured party has if such dealings occur. These issues are addressed in respect of administration under existing ss 442B (Dealing with property subject to circulating security interests) and 442C (When administrator may dispose of encumbered property). However, the Exposure Draft does not contain comparable provisions applicable to the restructuring process. Provisions that specifically provide for the treatment of secured assets in a restructuring should be included in a manner broadly consistent with existing ss 442B and 442C. These existing provisions provide a reasonable balance between protecting the interests of secured creditors and debtors, and is a regime that creditors in the Australian market are familiar with. It would therefore provide an appropriate basis for similar provisions to be introduced in respect of the restructuring process.
22	**Effect of restructuring on company's members**	453N	**Recommendation 22** • Replace requirement in new s 453N(2) that a transfer must be "in the best interest of the company's creditors as a whole" with a requirement that "there is no prejudice to any creditor". The requirement in new s 453N(2) that the "transfer is in the best interest of the company's creditors as a whole" is too restrictive. This requirement would make it difficult in practice for consent to be given to a transfer since, in most cases, it would have no effect (either good or bad) on creditors. We consider that this should be replaced with that "there is no material prejudice to any creditor".

	Topic	Proposed new or amended Corporations Act section	Submission
23	**Moratorium – stay on voluntary winding up**	453P	**Recommendation 23** • Prohibit shareholders from being able to initiate a voluntary liquidation of the company without the consent of the directors and the restructuring practitioner while the company is under restructuring by amending new s 453P. • Also consider prohibiting shareholders from changing the directors of a company under restructuring except with the consent of the restructuring practitioner. The Exposure Draft appears to introduce new moratorium provisions for a restructuring that largely replicate the existing moratorium provisions applicable in an administration. However the new s 453P does not include a restriction on the commencement of a voluntary winding up while the company is under restructuring (in contrast to the existing s 440A(1) applicable in an administration). There should be a restriction on the company (i.e. shareholders who commence a voluntary liquidation through a shareholders' resolution) commencing a voluntary liquidation while a company is under restructuring. Such a liquidation process could be initiated by shareholders in circumstances that disrupt a viable restructuring being undertaken by the company (i.e. its directors) with the assistance of a restructuring practitioner. This could be detrimental to creditors of the company, and might possibly be done as a means of exerting leverage on creditors. Therefore any voluntary liquidation process should only be commenced during the restructuring period with the consent of the directors and the restructuring practitioner. We note that a similar restriction on shareholders initiating voluntary liquidations applies under the new moratorium procedure in the UK (see s A20 of the *Insolvency Act 1986* (UK)). Similarly, consideration should be given to whether there should be a prohibition on shareholders changing directors of a company while it is subject to a restructuring without the consent of the restructuring practitioner.

	Topic	Proposed new or amended Corporations Act section	Submission
24	**Ipso facto stay**	454P – 454T	**Recommendation 24** • See Recommendations 25 to 27. The Exposure Draft introduces ipso facto stay provisions for a restructuring (new ss 454P – 454T) which are largely the same as the existing ipso facto stay provisions applicable to an administration (under ss 451E – 451H). This consistency is appropriate, although certain specific issues needs to be addressed, as set out in the following sections.
25	**Ipso facto stay – exceptions**	454P(5)(b) and (6)	**Recommendation 25** • Apply existing exceptions to the ipso facto stay in respect of schemes of arrangement, receivership and administration to the ipso facto stay under new s 454P. New ss 454P(5)(b) and 454P(6) provide that certain rights and contracts can be excluded from the operation of the ipso facto stay by regulations or declarations. The *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (Cth) and regulations 5.1.01, 5.2.50 and 5.3A.50 of the *Corporations Regulations 2001* (Cth) provide for exceptions to the ipso facto stay in respect of schemes of arrangement, receivership and administration. As a matter of consistency the same exceptions should apply to the ipso facto stay under s 454P. These existing regulations and declarations should be amended so that the exceptions under those regulations and declarations also apply to the ipso facto stay under the new s 454P.

	Topic	Proposed new or amended Corporations Act section	Submission
26	**Ipso facto stay – restructuring plan**	454P	**Recommendation 26** • Amend new s 454P so that it also applies to a company proposing, coming under or being subject to a restructuring plan. • Consistently, amend existing s 451E so that it also applies to a company proposing, coming under or being subject to a DOCA. The ipso facto provisions in the new s 454P appear to apply to a right that arises by reason that the company "has come or is under restructuring" (sub-s (1)). However, the new s 454P does not appear to stay any right arising by reason of the company proposing, coming under or being subject to a restructuring plan. This appears to be a lacuna, and we would recommend that this is addressed so that such matters are also subject to an ipso facto stay. Corresponding adjustments would also need to be made to the stay period. We note that a similar lacuna currently applies to the proposal of or entry into DOCAs under existing s 451E, and this gap should also be addressed.
27	**Ipso facto stay – grandfathering of contracts pre-1 July 2018**	454P	**Recommendation 27** • Introduce grandfathering exceptions for the ipso facto stay provisions relating to restructuring consistent with those applying to the existing ipso facto regime for schemes, receivership and administration. • This should be achieved by including a section in the Exposure Draft which states that the ipso facto stay related provisions introduced under the Exposure Draft apply in relation to

Topic	Proposed new or amended Corporations Act section	Submission

rights arising under, or self-executing provisions of, contracts, agreements or arrangements entered into on or after 1 July 2018

- Consistently with the other grandfathering exceptions is addressed in our Submission 25 above.

We note the existing ipso facto stay regime applicable to schemes of arrangement, receiverships and administrations is subject to a "grandfathering" exception under s 17 of the *Treasury Laws Amendment (2017 Enterprise Incentives No.2) Act 2017* (Cth) (**TLA Act**) and regulation 3 of the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* (Cth) (**CA Regs**). The effect of the grandfathering provisions is that arrangements entered into prior to:

- the commencement of the ipso facto regime on 1 July 2018, and
- 1 July 2023 which novate or assign rights under an arrangement entered into before 1 July 2018,

are excluded from the ipso facto stay regime.

In particular, s 17 of the TLA Act provided that: *"The amendments made by this Part apply in relation to rights arising under, or self-executing provisions of, contracts, agreements or arrangements entered into at or after the commencement of this Part."*

It does not appear that the Exposure Draft contains any equivalent to s 17 of the TLA Act. For consistency, we recommend that a section is included in the Exposure Draft providing that the ipso facto stay related provisions apply in relation to rights arising under, or self-executing provisions of, contracts, agreements or arrangements entered into on or after 1 July 2018.

We also recommend that the grandfathering provisions in the CA Regs are extended to the ipso facto provisions applicable to the restructuring regime, which could be achieved by adopting the recommendations made in Submission 25 above.

	Topic	Proposed new or amended Corporations Act section	Submission
28	**Consequences of termination of restructuring plan**	455B	**Recommendation 28** • The comments made in respect of restructurings in Submission 7 also apply in respect of restructuring plans. • Specify in the Regulations that a restructuring plan will remain effective even if eligibility issues in respect of entry into the restructuring process are later discovered. The comments made in respect of restructurings in Submission 7 also apply in respect of restructuring plans. In these circumstances it should also be possible for the company to directly enter liquidation, subject to any determination to the contrary of the restructuring practitioner or creditors. Separately, the Regulations should make it clear that a restructuring plan will need to remain effective even if eligibility issues in respect of entry into the restructuring process were later discovered.
29	**The restructuring plan**	455B	**Recommendation 29** • The key principles regarding the restructuring plan should be set out in the Corporations Act rather than in the Regulations. • Generally have regard to the UNCITRAL Text when formulating the detailed requirements of the restructuring plan. We understand that all of the substantive provisions relating to the restructuring plan are to be provided for in Regulations that have not yet been released. We therefore cannot comment on the new restructuring plan at this stage. These provisions will be critical to the success of the reform.

	Topic	Proposed new or amended Corporations Act section	Submission
			The key principles of the operation of the restructuring plan should be set out in the Corporations Act rather than in the Regulations. We also recommend that Government has regard to the recommendations in the UNCITRAL Text when formulating the detailed requirements of the restructuring plan.
30	**The restructuring plan – giving priority to eligible employee creditors**	455B	**Recommendation 30** • The Regulations should include a requirement, similar to existing s 444DA of the Corporations Act, that requires a restructuring plan to give priority to eligible employee creditors at least equal to what they would receive in a liquidation under ss 556, 560 and 561. Existing s 444DA of the Corporations Act (Giving priority to eligible employee creditors) requires a DOCA to include a provision that any eligible employee creditors will be entitled to a priority at least equal to what they would have been entitled to in a winding up of the company under ss 556, 560 and 561 (subject to prescribed exceptions). However, the Exposure Draft does not contain comparable provisions applicable to a restructuring plan. We recommend the inclusion of an employee entitlements provision similar to existing s 444DA of the Corporations Act. Any other payments that would have priority in the liquidation (such as in our recommendation debts incurred during the restructuring in the circumstances outlined in Submission 40 below) should also be required to have priority under the restructuring plan.

	Topic	Proposed new or amended Corporations Act section	Submission
31	**Standardised restructuring plan documentation**	455B	**Recommendation 31** • Insert pro forma restructuring plans in a schedule to the Regulations. • Insert other standard forms and templates in connection with the restructuring process and restructuring plan (e.g. standard forms of notices to creditors, disclosure forms, checklists, etc.). We recommend the inclusion of one or more pro forma restructuring plans in a schedule to the Regulations. This will reduce costs and provide some consistency in the terms of the plans being proposed. It will also simplify the process and reduce costs for all stakeholders. The language and drafting of such standardised documents should be clear, relatively simple and user friendly, in order to facilitate use by the general public and small businesses. Where possible or appropriate, other standard forms and templates should be provided in connection with the restructuring process and restructuring plan to further simply and standardise the process. This could include standard forms of notices to creditors, disclosure forms, checklists and the like. In this regard we note recommendation 6 of the UNCITRAL Text, which states: *"The insolvency law providing for a simplified insolvency regime should specify measures to make assistance and support with the use of a simplified insolvency regime readily available and easily accessible. Such measures may include services of an independent professional; templates, schedules and standard forms; and an enabling framework for the use of electronic means where information and communication technology of the State so permits and in accordance with other applicable law of that State."* We also note the comments made at paragraph [49] of the UNCITRAL Text in this regard.

	Topic	Proposed new or amended Corporations Act section	Submission
32	**Effect of the restructuring plan on shareholders and third parties**	455B	**Recommendation 32** • Consideration should be given to how guarantees granted by directors, owners or family members in respect of debts of the company will be addressed under the restructuring plan, and whether the plan should be able to modify or discharge these liabilities. • Regard should be had to the UNCITRAL Text in this respect. • Consideration should be given to whether the statute needs to expressly contemplate that the Regulations can provide for third party releases under a restructuring plan. It is unclear from the draft legislation whether it is intended that a restructuring plan will be able to modify or discharge liabilities owing by third parties. Under existing Australian law, third party releases cannot be achieved under a DOCA, but can be achieved under a creditors' scheme of arrangement. This will be important to consider in respect of guarantees granted by directors or owners of a small business (which is a common occurrence and which are frequently secured by real property mortgages granted by directors or owners over their residential homes). In this regard we note recommendation 74 in the UNCITRAL Text: *"A simplified insolvency regime should address, including through procedural consolidation or coordination of linked proceedings, the treatment of personal guarantees provided for business needs of the MSE debtor by individual entrepreneurs, owners of limited liability MSE's or their family members."* We note also the further comments at paragraphs [156]–[160] of the UNCITRAL Text. It may be that the issue of third party releases is intended to be addressed in the Regulations. If so, consideration should be given as to whether the enabling language in the statute is broad enough to allow the plan to address the debts of third parties as well as debts of the company itself.

	Topic	Proposed new or amended Corporations Act section	Submission
33	**Proposing a restructuring plan – payment of employee entitlements**	455B	**Recommendation 33** • The Regulations should **not** require that all employee entitlements that are due and payable must be paid before a company can put a restructuring plan to its creditors. • Instead, the Regulations should require that where the company has not paid all employee entitlements that are due and payable at that time, such payments must be made under the restructuring plan ahead of any payments to normal unsecured creditors. The pre-requisites for proposing a restructuring plan are not set out in the Exposure Draft, but new s 455B instead contemplates that such requirements will be addressed in the Regulations. However, paragraphs [1.94]–[1.95] of the draft Explanatory Materials indicate that the Regulations could require the company to pay any employee entitlements which are due and payable before it can put a restructuring plan to its creditors. From discussion with our members we are concerned that in many cases a small business will not have met all its employee entitlements, and it may be difficult to do so prior to proposing a restructuring plan. Indeed, in some circumstances, some compromise of historic employee entitlements may be needed in order for a restructuring plan to be viable. Clearly it is preferable that employee entitlements be up to date, and paid in full. However in circumstances where the alternative is a liquidation of the company, where employees may be paid nothing or very little (and lose their jobs), it may be preferable for employees to compromise some of their entitlements to ensure some payments and ongoing employment. We recommend that further consideration be given to whether all employee entitlements must be paid in full before a restructuring plan is proposed. We suggest the removal of this requirement. Instead, where payment has not been made of all employee entitlements that are due and payable, these payments should be required to be made under the restructuring plan ahead of any payments to normal unsecured creditors. There should also be a requirement that the restructuring practitioner is satisfied that the outcome for each employee under the restructuring plan is at least as good as the outcome for that employee in a liquidation of the company – see Submission 30.

	Topic	Proposed new or amended Corporations Act section	Submission
34	**Voting on the plan**	455B	**Recommendation 34** • This is an important aspect that will need to be addressed. We repeat Recommendation 29.
35	**Challenging the plan**	455B	**Recommendation 35** • This is an important aspect that will need to be addressed. We repeat Recommendation 29.
36	**Registered liquidator / who can be a restructuring practitioner?**	456B	**Recommendation 36** • Extend the class of people qualified to undertake the restructuring practitioner role beyond registered liquidators. However, only registered liquidators should undertake the new simplified liquidation process if that is the outcome of the restructuring plan. • Introduce the eligibility criteria set out in this submission as a pre-requisite to becoming a restructuring practitioner. • Monitoring the admission and administering this new restructuring practitioner class should be overseen by either: (i) ASIC, (ii) selected appropriate professional associations, and/or (iii) the establishment of a supervisory board, as further described in this submission. New s 456B provides that a restructuring practitioner must be a registered liquidator. Treasury previously announced that a new classification of registered liquidator will be introduced whose practice will be limited to the new simplified restructuring process only. The Exposure Draft does not provide further detail on this new classification. For the avoidance of doubt (and perhaps somewhat confusingly), this new class of liquidators, being restructuring practitioners, should not be permitted to act as liquidators (either in a normal liquidation or simplified liquidation process) given the expertise required for liquidation. We understand that one of the reasons behind s 456B could

Topic	Proposed new or amended Corporations Act section	Submission
		be to subject a restructuring practitioner to the same professional obligations as a registered liquidator given concerns over phoenix activity. The risk with taking this approach is that it will likely lead to confusion. A restructuring practitioner is called a “practitioner” for good reason – they oversee a restructuring process with a view to saving a company. Liquidators, on the other hand, liquidate a company and bring an end to its life. While there has been commentary around an amorphous group called pre-insolvency advisors who promote phoenixing, no evidence has been put forward as to precisely who these people are. Tellingly, the only way to effect a phoenix transaction is via liquidation and the engagement of a registered liquidator. Due to Australia's economic success over generations there is a lack of an SME restructuring profession that is readily identifiable. It needs to be grown. In absence of that and for this reason we believe the best means of expanding the number of qualified persons who are able to perform all steps associated with the small business restructure other than an ordinary or simplified liquidation is to look to the criteria set out below. In short, the best people to help restructure a small business will be local senior accountants and possibly lawyers, particularly in suburban and regional Australia. For businesses in the agricultural sector (including farmers),involvement of rural debt counsellors may also be appropriate. Using the analysis contained on Appendix 1 the TMA is therefore supportive of extending the class of people qualified to undertake the restructuring practitioner role beyond current registered liquidators. We consider that facilitating a restructuring and assisting a company formulate a restructuring plan is something that could be carried out by a broader class of appropriately qualified professionals, however given the roles (i.e. acting as fiduciary and handling third party funds) and skills required, it is important that the requisite independence, experience and regulation remains. This should be administered by ASIC under the new classification. In addition, given the size of the businesses involved, and the potential for large numbers of small businesses to seek to avail themselves of this process, it will be important that small businesses are readily able to access professional assistance in this regard. The TMA notes the following criteria which broadly reflect the output from discussion within the restructuring community, accounting bodies and advocacy groups regarding a possible framework for appropriate qualifications to be a restructuring practitioner:

Topic	Proposed new or amended Corporations Act section	Submission
		• being a member of an appropriate professional association (for example, CAANZ, CPA, IPA, ABRT, TMA, ICB) with a code of ethics and suitable accreditation process to undertake the restructuring practitioner role; • having adequate professional indemnity insurance or a practice certificate; • being a 'fit and proper person' (ie the person has never been convicted of a financial crime, been an undisclosed bankrupt, etc.); • agreement to participate in a disciplinary process and/or alternate dispute resolution at their cost (eg through ASBFEO or the professional association referred to above); • at least 5 years in professional practice and have satisfied minimum training requirements; and • independence from the debtor company (which we recommend should be a legislative requirement). It is important that these criteria are satisfied. We consider three options for admitting and administering the new class of insolvency adviser as follows: • ASIC to administer licensing and ongoing compliance in respect of the new classification; • selected appropriate professional associations (for example, CAANZ, CPA, IPA, TMA, ICB) undertake the accreditation and oversight of members seeking to hold the restructuring practitioner role; and • the establishment of a supervisory board with representatives from the respective bodies (e.g. the Law Society of each state, CAANZ, TMA, ARITA and CPA) who will receive and adjudicate upon applications in a prescribed form on a regular basis. We consider that the definition of this new class of restructuring practitioner/registered liquidator should be included in Schedule 2 and the associated rules. The rules should 'release' this class of persons to undertake the restructuring practitioner role and should not require further vetting by any other body. However, we note that only registered liquidators (as that concept is currently formulated) should undertake the new simplified liquidation process if that is the outcome of the restructuring plan. We

	Topic	Proposed new or amended Corporations Act section	Submission
			consider that a liquidation process, whether or not simplified, requires specialist skills that only registered liquidators have. In making this submission our methodology was to assess the various elements of the Small Business Restructuring Professional role (see attached matrix style format at Appendix 1 to these submissions) and to compare and contrast the skill sets across the universe of advisers that could fulfil the role. We considered the competency of likely potential participants against each element of the role per the legislation. We believe this is a robust and unbiased approach to assessing the appropriate participants to fulfil the role that does not seek to favour any one professional group but seeks to focus on the intent of the proposed reform and the size of the potential problem it is seeking to solve.
37	**Appointment of 2 or more restructuring practitioners**	456J 456K	**Recommendation 37** • Remove the ability of a company to appoint two or more restructuring practitioners. We query why the Exposure Draft explicitly provides for the appointment of two or more restructuring practitioners to be appointed. We note that the restructuring process only applies to very small businesses, and the process is intended to be very brief. The role of the restructuring practitioner is also intended to be relatively limited, compared to an administrator, given this is a debtor in possession process. In such circumstances it is difficult to see why multiple restructuring practitioners would need to be appointed, and doing so would likely increase costs. We therefore recommend that all references to the ability to appoint two or more restructuring practitioners be removed from the legislation.

	Topic	Proposed new or amended Corporations Act section	Submission
38	**Eligibility criteria for simplified liquidation process – common directors**	500AA(1)(e)	**Recommendation 38** • Delete or amend new s 500AA(1)(e) in order to avoid unintended and arbitrary consequences. • Consider whether the policy basis for this criteria can be addressed in another manner. Similarly to the new s 453C(1)(b) (as discussed in Submission 9 above), the new s 500AA(1)(e) excludes a company if a director of the company (or someone who has been a director of the company in the previous 12 months) has been a director of another company that has been under restructuring or been the subject of a simplified liquidation process within the relevant period. The same comments made in Submission 9 above apply to this requirement.
39	**Eligibility criteria for simplified liquidation process – liabilities of the company**	500AA(1)(d)	**Recommendation 39** • We repeat the comments in made in Submission 10 in this context also. Similarly to the new s 453C(1)(a) (as discussed in Submission 10 above), the new s 500AA(1)(d) indicates that regulations may establish a test for eligibility for the simplified liquidation process based on the liabilities of the company. The same comments made in Submission 10 above apply to this requirement.

	Topic	Proposed new or amended Corporations Act section	Submission
40	**Treatment of debts incurred in restructuring in a subsequent liquidation**	513A 513B 513CA 553 556(1)(c)	**Recommendation 40** • Insert a new s 556(1)(ca) providing priority treatment in any subsequent liquidation to any debt that is incurred in the ordinary course of business, with the consent of the restructuring practitioner, or by the order of the court during the restructuring period. • Consistent with the current drafting of the Exposure Draft, debts incurred during the restructuring period should not be admissible to proof in the liquidation under s 553. The treatment of debt incurred during a restructuring (prior to the company becoming subject to a restructuring plan) is currently somewhat unclear. The treatment of debt incurred during a restructuring (prior to the company becoming subject to a restructuring plan) is currently somewhat unclear. It appears that such debts would **not** be admissible to proof against the company in a subsequent liquidation due to the various proposed amendments to ss 513A and 513B, and the introduction of new s 513CA. We note that the position appears to be different in respect of debts incurred by the company once it is subject to a restructuring plan by virtue of the amendments to s 553. Such debts incurred in the restructuring would also **not** appear to be priority claims in a liquidation either. This position differs from the position in an administration, where the administrator is personally liable for most debts incurred during the administration, and the administrator is entitled to be indemnified, and has a lien, for such liabilities under ss 443D, 443E and 443F. The right of indemnification is treated as a priority claim in the liquidation under s 556(1)(c). It appears to us that the restructuring practitioner is not personally liable for any of the debts incurred by the company during a restructuring. Accordingly, any indemnification right granted to the restructuring practitioner under the Regulations, and the priority given to that indemnification right in a liquidation under the amended s 556(1)(c) will not provide any benefit to creditors who incurred debts during the restructuring. It would therefore appear that debts incurred during a restructuring may not be eligible for payment at all during a subsequent liquidation. If this is the case, it is presumably unintended.

	Topic	Proposed new or amended Corporations Act section	Submission
			The TMA is of the view that any debt that is incurred in the ordinary course of business, with the consent of the restructuring practitioner, or by the order of the court during a restructuring should be afforded priority in any subsequent liquidation. This could be done by inserting a new s 556(1)(ca) providing for this priority treatment. Assuming this is done, we would also consider it appropriate that such debts continue **not** to be provable in the liquidation (consistently with debts incurred during administration). From a commercial perspective, we consider this priority treatment in a liquidation to be a bare minimum requirement for any creditor to be willing to extend any further credit to a company once it is subject to a restructuring process. (For many creditors this will still be insufficient protection and they will require payment on delivery or require other protection.) This would also be consistent with normal, well accepted insolvency principles which provide that any 'post-petition' credit should have priority over 'pre-petition' creditors.
41	**Insolvent trading liability**	455A(2) 588GAAB	**Recommendation 41** • Delete new s 455A(2). • Remove the evidential burden on directors prescribed by new s 588GAAB. A company that is subject to a restructuring or a restructuring plan is still under the control of its directors (see for example new s 453K(1)). Therefore the risk of insolvent trading liability under existing s 588G will continue to accrue to directors during these periods, subject to any specific exceptions or defences available to them. This risk is compounded by the fact that the directors will have resolved at the outset of the restructuring that the company is insolvent or likely to become so (under new s 453B) and the company will be taken to be insolvent when it proposes a restructuring plan (under new s 455A(2)). It is unclear why it is necessary for the company to be deemed insolvent in the circumstances where the company proposes a plan, and this could act as a deterrent to using this process. We therefore recommend deleting this new s 455A(2).

	Topic	Proposed new or amended Corporations Act section	Submission
			We note that new s 588GAAB appears intended to provide directors with some protection against liability for debts incurred during the restructuring of the company. The protection under the new s 588GAAB only extends to debts incurred in the ordinary course of the company's business, with the consent of the restructuring practitioner or by order of the court. The directors bear an evidential burden with respect to these matters. We query whether it is necessary or appropriate to impose an evidential burden on directors in these circumstances. There is no evidential burden for the current insolvent trading safe harbour applicable to debts incurred in the ordinary course of business. These matters should be matters of fact to be determined in the normal manner. It would also appear that including such an evidential burden would encourage significant documentation of trading decisions which may not be practical for a small business in the ordinary course of business.
42	**Voidable transactions**	588FE(2C) 588FE(2D)	**Recommendation 42** • We repeat the recommendations, made in Submission 7 and Submission 28 above, that a company be able to transition directly from being under restructuring, or under a restructuring plan, respectively, to liquidation. • This is to ensure there is no 'gap' such that new ss 588FE(2C) and 588FE(2D) can operate as intended. The Exposure Draft includes various amendments to the definition of relation back day (Corporations Act s 91) to include a "s 513CA day" for a company subject to restructuring or a restructuring plan immediately before winding up. It also makes various amendments to the voidable transactions provisions. We understand that the intent of these amendments is to have the voidable transactions regime applicable to a restructuring process operate in a similar way to the current regime applicable to an administration process, which we consider appropriate. However, we note a possible technical issue with respect to new ss 588FE(2C) and 588FE(2D). These voidable transactions provisions operate where the winding up "immediately" follows the restructuring or the restructuring plan. However, it currently appears that (unlike in an administration

	Topic	Proposed new or amended Corporations Act section	Submission
			or a DOCA) there is no direct route from a restructuring or restructuring plan to liquidation, and that the company may therefore need to first return to normal control of its directors. This would create a "gap" between the restructuring or restructuring plan and the subsequent liquidation, such that it does not "immediately" follow those processes. This would make these voidable transaction provisions largely non-applicable (and possibly subject to manipulation), which we assume is not the legislative intent. This issues would largely be addressed if there was a direct route from a restructuring or restructuring plan into liquidation (as there is in the case of administration), and as we recommend in Submissions 7 and 28 above, such that there would normally be no such gap. We recommend this is done.
43	**Vesting of unperfected security interests**	588FL PPSA s 267	**Recommendation 43** • Amend s 267 of the *Personal Property Securities Act 2009* (Cth) (**PPSA**) so that security interests which are unperfected at the commencement of a restructuring will vest in the company. We note that the Exposure Draft amends s 588FL so that PPSA security interests not registered within time will vest in the company if the company commences a restructuring within 6 months of the date of registration. This is consistent with the approach to vesting in respect of the administration process which we think is appropriate. However no amendment has been proposed to the vesting provisions contained in s 267 of the PPSA. Section 267 provides that a security interest that is unperfected at the date of administration or liquidation will vest in the company. We think it would be consistent for security interests that are unperfected at the commencement of a restructuring to also vest under s 267 of the PPSA.

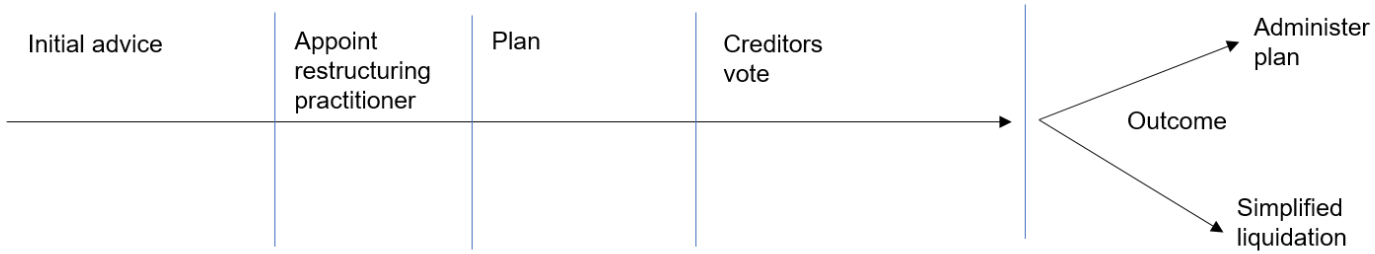
	Topic	Proposed new or amended Corporations Act section	Submission
44	**Automatic vesting of PPSA security interests granted under the date of administration or restructuring**	588FL	**Recommendation 44** • Amend s 588FL(4) to provide that the security interest shall not vest if it is granted by the company after the critical time with the consent of the administrator, deed administrator, restructuring practitioner or liquidator (as applicable). There is currently a technical issue that arises under s 588FL of the Corporations Act in respect of any security interested granted after the date of the administration, which causes that security interest to 'vest' (become invalid) even if the security interest was granted by an administrator as part of an administration funding package. These funding packages are frequently critical to the success of the administration. This has resulted in administrators needing to seek court orders to ensure such security will be valid whenever such new security is to be granted. A similar issue will arise in respect of security granted after the start of a restructuring under the Exposure Draft. Section 588FL of the Corporations Act, which deals with the automatic vesting of a PPSA security interest, has the effect that if a registration is not made within the time set out by s 588FL(2)(b), the security interest vests in the company. Under s 588FL(2)(b)(ii), the deadline for registration is the latest of the following times: • 6 months before the 'critical time'; • the time that is the end of 20 business days after the security agreement that gave rise to the security interest came into force, or the time that is the critical time, whichever time is earlier; • if the security agreement giving rise to the security interest came into force under the law of a foreign jurisdiction, but the security interest first became enforceable against third parties under the law of Australia after the time that is 6 months before the critical time – the time that is the end of 56 days after the security interest became so enforceable, or the time that is the critical time, whichever time is earlier; • a later time ordered by the court under s 588FM. If an administrator wishes to provide security as part of an administration funding, the effect of s 588FL is that the security will vest in the company, as the 'critical time' is the date which the

Topic	Proposed new or amended Corporations Act section	Submission
		administrator was appointed under s 513C, unless a later time is ordered by the court under s 588FM. As a result, an administrator who intends to provide security as part of an administration financing transaction must incur the cost and delay of seeking an order from the court under s 588FM of the Corporations Act to avoid the security vesting in the company (see, for example, *Korda, in the matter of Ten Network Holdings Ltd (admin apptd) (rec and mgr apptd)* [2017] FCA 1144 and *K.J. Renfrey Nominees Pty Ltd (Trustee), in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 325). Ultimately, whether an administrator considers that it is in the best interests of a company and its creditors to provide security during the course of an administration is a commercial decision that should fall within the wide role given to administrators under s 437A of the Corporations Act, and an administrator who is empowered to sell the entire business without seeking an order from the court should not be required to approach the court. Whilst this is an issue that has to date arisen in respect of administrations, the drafting of the current legislation and the Exposure Draft means that this issue will also apply to any security granted by the company during the restructuring. As noted in Submission 20 above, the grant of security during this period should be carefully prescribed and require the consent of the restructuring practitioner in most cases. However, there will be cases where it is appropriate and important for such funding to be provided on a secured basis. To avoid these vesting issues we recommend s 588FL is amended to address this issue in the case of both administration and restructurings. The amendment should provide that s 588FL(4) should not apply in respect of security that is granted by the company after the critical time with the consent of the administrator, deed administrator, restructuring practitioner or liquidator (as applicable).

	Topic	Proposed new or amended Corporations Act section	Submission
45	**Remuneration of restructuring practitioner**	Proposed Insolvency Practice Rule 60-18	**Recommendation 45** • Provide an appropriate, transparent framework for the remuneration of restructuring practitioners in respect of a restructuring or a restructuring plan. • Consider provision of Government funding to meet the costs of the restructuring process or simplified liquidation in appropriate cases where sufficient funding is not otherwise available. The Exposure Draft does not provide a framework for the remuneration of restructuring practitioners in respect of a restructuring or a restructuring plan. However, the Exposure Draft introduces a new s 60-18 into the Insolvency Practice Schedule which enables the Insolvency Practice Rules to provide for and in relation to the remuneration of a restructuring practitioner for a company and for a restructuring plan. We also note that the fact sheet previously released by the Government stated that the restructuring practitioner would propose a flat fee for their work in helping a business develop a restructuring plan, and that the fee for administering the restructuring plan would be provided for in the restructuring plan. We also understand that the Government prefers a competitive market based approach to price setting. Detailed consideration will need to be given to the remuneration of restructuring practitioners. For small businesses, if the fees payable to restructuring practitioners are too high, then restructuring may be unaffordable and this could jeopardise any return to creditors. Conversely, if the fees are too low, there may be little market interest in undertaking this new role. Market pricing may also be impacted by the complexity and amount of work involved and the degree of risk involved. Disclosure and transparency of fees will be important. However it should be noted that a purely market based approach may not deliver satisfactory results given that: • for small companies, the cost of the work may be disproportionate to (or even exceed) the assets of the company;

	Topic	Proposed new or amended Corporations Act section	Submission
			• directors may be less incentivised to pursue the lowest price as opposed to restructuring practitioners who can promise particular outcomes (such as avoiding personal liability or retaining ownership of the business) given that the costs of the process will effectively fall on creditors rather than shareholders where the company is insolvent. Consideration should be given to whether Government funding will be available to meet the costs of the restructuring process (or the simplified liquidation) in appropriate cases where sufficient funding is not otherwise available. In this regard we note recommendation 7 from the UNCITRAL Text which states: *"The insolvency law providing for a simplified insolvency regime should specify mechanisms for covering the costs of administering simplified insolvency proceedings where assets and sources of revenue of the debtor are insufficient to meet those costs."* We also note the further comments at paragraphs [50]–[51] of the UNCITRAL Text in this regard. Successful, fair and efficient restructuring and insolvency processes have significant external benefits to the broader business community, the economy and the public in general, and therefore public funding should be made available to achieve these broader beneficial outcomes.
46	**Temporary relief for companies seeking a restructuring practitioner**	Schedule 2	**Recommendation 46** • Provide further details in relation to temporary relief for companies seeking to appoint a restructuring practitioner. The Exposure Draft contains a new Schedule 2 (Temporary relief for companies seeking a restructuring practitioner) which is blank. We assume from the fact sheet previously released by the Government that the purpose of this Schedule will be to enable small businesses to apply for temporary relief from insolvent trading liability and around responding to statutory demands from creditors. We are unable to comment on this Schedule until further details are provided.

Appendix 1: Skills matrix and capability approach – restructuring practitioner



Designated adviser	Initial advice	Appoint	Plan	Vote	Outcome
Existing adviser (lawyer / accountant)	Yes	No	No	No	No
Independent generalist (lawyer / accountant)	Yes	No	No	Yes *	No
Independent specialist (e.g. accredited member professional association)	Yes	Yes*	Yes*	Yes*	Yes* (for plan) No for liquidation unless a registered liquidator
Registered liquidator	Yes	Yes*	Yes*	Yes*	Yes*

New class: restructuring practitioner

* Experienced accountant with insolvency / restructuring experience (who may or may not be a registered insolvency practitioner or meet the current requirements) could ensure compliance with regulations and reporting