Vantage Performance, who are we?

Vantage Performance is a domestic firm forcused on Turnaround Capital and Growth. We have been operating for 16 years and in that time, have been awarded 14 turnaround awards by our peers. Amongst our senior leadership team, we bring more than 80 years experience in building stronger more resilient businesses, by restructuring and turning around financially struggling companies.

Please see our website for more information: www.vantageperformance.com.au

The experience of our Executive Directors is summarised in the Appendix to this document.

Submission - public

This document comprises Vantage Performance's response to request for feedback and comments on: Helping companies restructure by improving schemes of arrangement

Closing date for submissions: 10 September 2021

Date of this Submission: 9 September 2021

Email	MCDInsolvency@Treasury.gov.au
Mail	Manager Market Conduct Division The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Enquiries can be initially directed to Matthew Bowd

Helping companies restructure by improving schemes of arrangement – questions proposed by Treasury

Question	Response	Comment
Question 1a: Should an automatic moratorium apply from the time that a Company proposes a scheme of arrangement? **Question 1b:** Should the automatic moratorium apply to debt incurred by the Company in the automatic moratorium period?	S411(16) already provides the platform for a moratorium as may be required, by application to the Court. See comments.	**Vantage Performance is supportive of reforms which promote restructuring and turnaround efforts in Australia. A key element of a successful restructure or turnaround, is stakeholder management with a view to stabilising the business, and the ability to continue to work with creditors on trading terms aligned with the business' available working capital during the turnaround phase.** **Absent an automatic moratorium, companies currently have the following available:** • **Negotiate a mutually acceptable arrangement by consent with any relevant party,** • **Benefit from the existing Ipso Facto relief (preventing termination of contracts, etc),** • **Apply to the court for relief under s411(16) of the Corporations Act 2001 (Cth) for the court to stay actions by creditors.** **Q1a:** In a scheme context, we are unaware of evidence that the above regimes are not already sufficient. Our experience and understanding of schemes, is that the noisiest issues tend to relate to class definition and scheme terms, not creditor enforcement actions - which if an issue, can be resolved through s411(16). Our experience and understanding of schemes is that the access issue is one of cost not the lack of an automatic moratorium, it being a court approved process, and therefore principally accessible to only very large corporates. We are conscious that comments around the need for a moratorium (made by the Productivity Commission and in a draft submission paper that we have seen, prepared by a key industry body as a part of this consulation and promoting the need for a moratorium) – do not address the existence of s411(16), which appears to have been overlooked.

		That said, if there is a significant desire to broaden the use of schemes and one element of that is evidenced to be a need to implement a scheme moratorium, **s411(16) could be varied to provide an automatic moratorium rather than requiring a court application, and allowing any aggrieved party to apply for a variation to the automatic moratorium, thereby reversing the onus.** **However, the ramification cannot be to inhibit the company's ability to access future trade on normal trading terms, without the need for 'guarantees' or prepayment. That would have the opposite impact and make schemes less accessible and more unwieldy.** **If a moratorium is considered necessary – the practical working out of that must be to stabilise the platform, reduce noise, enhance the company's ability to restructure, and not overly complicate and thereby increase the cost or burden associated with the scheme process (when compared to not making the change)**. The balance of this paper assumes it is determined that a moratorium is considered necessary.
Question 2: Would the moratorium applied during voluntary administration be a suitable model on which to base an automatic moratorium applied during a scheme of arrangement? Are any adjustments to this regime required to account for the scheme context? Should the Court be granted the power to modify or vary the automatic stay?	See comment	S411(16) already exists within the scheme context. As such, s411(16) could be reviewed, together with any construction issues raised in court cases (eg see commentary on *In the matter of Boart Longyear Limited* [2017] NSWSC 537), and varied to provide for an automatic moratorium and resolving such issues with express text. Yes, the court should be granted the power to modify or vary the automatic stay. A voluntary administration is a creditor led process involving the board's loss of control to a voluntary administrator (and the moratorium and creditor payment protections are expansive and crafted accordingly). It is not suitable for schemes, which are principally company in possession debtor led - and desirable to companies and their boards in that respect – with the additional oversight required in a voluntary administration not required in a scheme in light of the court's oversight. **Greater regulatory or third party oversight (separate to the court) which reduces the company's and its board's control over the scheme process, is likely to operate to dissuade not encourage greater use of schemes. It will also increase complexity and cost.**

Question 3: When should the automatic moratorium commence and terminate? Are complementary measures (for example, further requirements to notify creditors) necessary to support its commencement?	See comment	Commence – when the first public notice is given (notice to convene a meeting of members to the Australian Securities and Investments Commission ("ASIC") (not sooner in the pre-planning phase). Noting, schemes are rarely unlikely commenced as an abuse of process – they are expensive and ordinarily only commenced by large / instituational corporate groups, together with legal advice. That is, the risk of a scheme being commenced and continued, for the ulterior purpose of obtaining a moratorium with no intention to restructure, would appear to be very low. The position might be different if a pre-filing automatic moratorium was contemplated, which might result in abuse, which is not recommended.
Question 4: How long should the automatic moratorium last? Should its continued application be reviewed by the Court at each hearing?	See comment	Continue – so long as the scheme procedure and proceeding continues; With any affected creditor able to apply to court for a variation. A review process at every court hearing would necessitate evidence and increase cost and court time. It may require an issue that is not in dispute to be addressed by the court. As such, this is undesirable. Rather, every court hearing ought to be an opportunity for any agreieved party to apply for a variation to the automatic stay (in addition, an urgent injunctive basis should be available).
Question 5: Are additional protections against liability for insolvent trading required to support any automatic moratorium?	**No, Safe Harbour (s588GA) is available** although see comment	Directors currently have the following protection available during restructuring efforts: • **s588GA Safe Harbour – this section is already available and director feedback is that it is fit for purpose.** See separate review on safe harbour and our submissions; however our direct experience and feedback from directors is that the safe harbour is effective to support their restructuring efforts during financial difficulties. It is a useful tool to turn a company around and also in the pre-planning phases of any necessary formal restructure via a scheme or voluntary administration. Where a company is pursuing a scheme to restructure and improve the company's financial position, the elements of safe harbour ought readily be able to be satisfied, noting the following however:

		• It is possible that a scheme will seek to vary the rights of employees – if that is the case, it is possible that there might be a conflict between the employee compliance element of the safe harbour framework and what is being sought under the scheme. In this narrow case, for the safe harbour to be available, the scheme law might be varied as follows: • To provide for power to the court to waive the employee compliance element of s588GA(4)(a)(i) to the extent [only] of any conflict with the proposed scheme, by application to the court (and any ancillary orders necessary, eg the time that the waiver is on foot etc).
Question 6: What, if any, additional safeguards should be introduced to protect creditors who extend credit to the Company during the automatic moratorium period?	Remove preference risk	Ipso Facto relief was introduced to enhance the likelihood of a successful restructure. Creditors who are paid do not need protection. Creditors who are not paid can elect not to extend new credit. However, creditors who agree to trading terms with the company and in that sense, extend credit, should not be penalised by taking on preference risk. They should be able to receive payment for invoices issued without threat of preference if the restructure fails. Any preference carve out, should be limited however to payment of new debt incurred during the scheme period (not arrears).
Question 7: Should the insolvency practitioners assisting the Company with the scheme of arrangement be permitted to act as the Voluntary Administrators of the Company on scheme failure?	n/a	[Intentionally blank]

Other issues

Question	Response	Comment
Question 8: Is the current threshold for creditor approval of a scheme appropriate? If not, what would be an appropriate threshold?	Yes	[intentionally blank]

Question 9: Should rescue, or 'debtor-in-possession', finance be considered in the Australian creditors' scheme context?	Yes	This is desirable, to provide companies greater support for new money requirements. Matters such as senior secured first right of refusal and adequate protection will need to be considered.
Question 10: What other issues should be considered to improve creditors' schemes?	Cross-class crams downs	Yes to introduce.
Question 11: Are there any other potential impacts that should be considered, for example on particular parties or programs? If so, are additional safeguards required in response to those impacts?	n/a	[intentionally blank]
Other	n/a	[intentionally blank]

Appendix

Vantage Performance is led by founding CEO and Executive Director, Michael Fingland, supported by Macaire Bromley, Executive Director, NSW, Andrew Birch, Executive Director WA, and Kevin Higgins, Executive Director Qld.

Detailed profiles for each of our leaders can be located at https://www.vantageperformance.com.au/our-people/

Michael Fingland, founding CEO and Executive Director

Vantage Performance is led by Michael Fingland, CEO and Founding Director. Michael is a Chartered Accountant with over 20 years of experience in corporate restructuring and turnaround, both in Australia and the United Kingdom. He is a current member and former Director of the Turnaround Management Association and a Queensland Committee member of Australian Restructuring Insolvency and Turnaround Association.

Macaire Bromley, Executive Director NSW and submission author

Vantage in NSW is led by Macaire Bromley, Executive Director. Macaire is a former partner of a global law firm and former accountant, with over 20 years of experience in corporate restructurings and turnaround gained in Australia, the UK and the UAE. She is a graduate of the Australian Institute of Directors (AICD), Company Directors Course, she has co-authored director training and presented webinars for the AICD as a turnaround and safe harbour subject matter expert, and is a member of the Turnaround Management Association of Australia. Macaire is well regarded as being a forerunner and highly influential advocate of safe harbour law reform in Australia.

Andrew Birch, Executive Director WA

Vantage in Western Australia is led by Andrew Birch, Executive Director. Andrew is a chartered accountant, registered liquidator, and a graduate of the Australian Institute of Directors, Company Directors Course. He has been working in corporate recovery, corporate advisory, and corporate turnaround since 1994 in Australia, and prior to that for 3 years in the United Kingdom.

Kevin Higgins, Executive Director Qld

Kevin, a CPA, brings more than 18 years of corporate restructuring experience to the firm. He has proven himself to be a proactive and successful Chief Restructuring Officer; having led start-up, turnaround and high growth organisations. Memberships include CPA, Turnaround Management Association of Australia and Australian Restructuring Insolvency and Turnaround Association.