ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

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Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: SafeHarbourReview@treasury.gov.au

Review of the insolvent trading safe harbour

Thank you for the opportunity to make a submission in response to the consultation paper on the review of the insolvent trading safe harbour.

As you would be aware, ARITA advocated for the need for a defence from insolvent trading for many years prior to the commencement of the safe harbour reforms in September 2017. ARITA's advocacy began with our submission to Treasury in March 2010 in response to the insolvent trading safe harbour options paper and continued with our thought leadership paper 'A Platform for Recovery' in 2014 (the recommendations of which were largely taken up by the Productivity Commission in its 2015 report, 'Business Set-up, Transfer and Closure').

Most recently, ARITA reiterated its support for the safe harbour during the 'National Innovation and Science Agenda – Improving Corporate Insolvency Law' consultation in 2017[1] and throughout the subsequent introduction and implementation of the safe harbour reforms in September 2017.

To ensure appropriate representation of the views of our members when providing this submission, we have undertaken a member survey consisting of 47 questions. A statistically significant total of 108 ARITA Professional Members responded. This is the most comprehensive survey of restructuring, insolvency and turnaround professionals on this subject. Importantly, and with their consent, the survey replicates a series of questions first asked by Professor Ian Ramsay and Associate Professor Stacey Steele of The University of Melbourne in a 2019 survey that formed the basis for their 'Safe Harbour Reform of Directors' Insolvent Trading Liability in Australia: Insolvency Professionals' Views' research

[1] A copy of ARITA's submission to this consultation is attached at Appendix B as much of what ARITA said in this submission is relevant to the current review.

paper.[2] While we have not been able to complete a time series comparison of the data from the Ramsay-Steele survey and the ARITA survey, it is open to the Review Panel or others to do so.

Questions in the ARITA survey that are comparable to the Ramsay-Steele survey are asterisked in the survey results for ease of reference.

In addition, we specifically commend the Ramsay-Steele research findings to the Review Panel. Importantly, the Ramsay-Steele survey reflects views without the influence of COVID-19, although it had a shorter history to review.

The views of insolvency professionals are critical in the current work of the Review Panel because it is insolvency professionals who are the primary group dealing with companies in financial distress. They accordingly have a unique and valuable window of insight into the behaviour of directors. In addition, insolvency professionals all have a comprehensive understanding of Australian insolvency law and its practical operation that makes their views the most highly informed of any interest group.

We have incorporated the results of our survey into our responses to the questions raised in the consultation paper. We have also attached the full survey results as Appendix A.

Subject to the detailed commentary in the body of this submission, ARITA's key points in response to the consultation questions are:

1. Based on ARITA's survey results, we believe that the safe harbour provisions are being used with some success.

2. Our survey results indicate that insolvent trading laws have little impact on director behaviour, particularly at the SME level, however for those that do engage a safe harbour adviser it provides confidence to continue to trade in an attempt to achieve a better outcome and ensures greater accountability and discipline by directors and management teams.

3. In our view, where a safe harbour is being conducted in accordance with the requirements of the law, neither employees nor creditors should be adversely affected.

4. The availability of a safe harbour from insolvent trading would make no difference to directors of SMEs, however conversely, for directors of larger companies, including listed entities**,** the desire to avoid liability for insolvent trading is more likely to be a genuine consideration. Therefore, for directors of larger companies, the availability of a safe harbour from insolvent trading would make a difference to them.

[2] The 'Safe Harbour' Reform of Directors' Insolvent Trading Liability in Australia: Insolvency Professionals' Views Australian Business Law Review, Vol. 48, No. 1, 2020, pp. 7-26. U of Melbourne Legal Studies Research Paper No. 904 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630037.

5. The view of members is that the COVID-19 insolvent trading moratorium was used, at least by directors of SMEs, to 'kick the can down the road', however, sophisticated directors of larger enterprises used the moratorium as an opportunity to seek advice to take steps to make safe harbour protection available to them at the end of the moratorium.

6. There was consensus among respondents to ARITA's survey that the safe harbour regime is not being abused by directors to avoid reasonable and fair personal liability. Abuse of the eligibility requirements would seem to be difficult as they are generally quite binary, and it is not immediately obvious to us what other possible misuses may exist.

7. The pre-conditions to accessing safe harbour are what prevents it being used for illegal phoenix activity and stops inappropriate and unviable candidates for restructuring continuing to trade. ARITA continues to support these gateway requirements to ensure abuses do not occur and to serve as a clear guide as to what a suitable rescue candidate looks like, particularly given small businesses now have the benefit of small business restructuring under Part 5.3B of the Act.

8. Safe harbour was designed to provide "breathing space", "opportunity" and "confidence". We believe that the safe harbour regime is doing what it is was original conceived to deliver.

9. Feedback received raises concerns that the reference to 'appropriately qualified entity' in the legislation is not sufficiently clear and/or workable and supports a definition being added to the legislation. Registered liquidators are the only professionals with the appropriate skillset to undertake an analysis to determine that the course of action is likely to lead to a better outcome for the company than the immediate appointment of an administrator or liquidator.

10. The survey clearly indicates that there is not sufficient awareness of the safe harbour among advisers, with referrer accountants and lawyers having limited or no knowledge of safe harbour. Directors of SMEs are much more concerned about personal liability for personal guarantees and tax debts than insolvent trading.

11. Many insolvency professionals choose not to provide safe harbour advisory services either due to a preference to provide traditional formal insolvency services or that safe harbour doesn't align with their focus on SMEs. However, when it comes to businesses who may be seeking safe harbour advisory services, it is their inability to meet the legislative entry requirements and viability as a turnaround candidate that limit their capacity to access safe harbour.

12. The biggest issues facing businesses that are looking to restructure are a lack of money and resources to be able to fund the restructure, or simply leaving it too late to seek advice.

13. Key areas for improvement identified by our members centre around the clarification of key terms rather than the tax and employee entitlement eligibility requirements.

As always, we look forward to continuing to work closely with the Safe Harbour Review Panel, Treasury and the Australian Government generally to ensure that Australia's safe harbour regime works effectively and efficiently to encourage the restructuring of viable distressed businesses and to contribute to Australia's long-term economic success.

Please do not hesitate to contact either myself on 02 8004 4355, or Ms Kim Arnold, ARITA's Policy and Education Director, on 02 8004 4340 should the Review Panel or Treasury wish to discuss any aspect of our submission.

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have more than 2,200 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Around 80% of Registered Liquidators and Registered Trustees choose to be ARITA members.

ARITA's ambition is to lead and support appropriate and efficient means to expertly manage financial recovery.

We achieve this by providing innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large. In 2020, ARITA delivered 70 professional development sessions to over 8,200 attendees.

ARITA promotes best practice and provides a forum for debate on key issues facing the profession.

We also engage in thought leadership and public policy advocacy underpinned by our members' knowledge and experience. We represented the profession at 15 inquiries, hearings and public policy consultations during 2020.

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1 Consultation paper questions

1.1 Are the safe harbour provisions working effectively?

Key point 1: Based on ARITA's survey results, we believe that the safe harbour provisions are being used with some success.

We give a qualified yes to this question. The reason it is qualified is that, in our view, there has not yet been sufficient consideration of safe harbour by the courts.

It is difficult to say whether a lack of consideration by the courts is because the safe harbour is working, as historically few insolvent trading matters go before the courts.

From the survey, we know that safe harbour is being used, with:

- 53% of respondents saying they have done safe harbour work.[3]
- 10% of respondents indicating their firm had completed more than 20 safe harbour engagements.[4]
- 5% of respondents saying that safe harbour is the main work done by their firm[5]. This follows our understanding that some firms have come to specialise in providing safe harbour advice.
- Just under 10% of respondents indicating they personally had recommended safe harbour over 20 times since the commencement of the legislation.[6]
- 15% of respondents stating that the number of safe harbour engagements they have worked on in the last 12 months has either slightly or significantly increased.[7]
- A wide range of sizes of safe harbour engagements being undertaken with a mix of fees from less than $5,000 to more than $500,000 – but with the majority of safe harbour roles having been completed for less than $20,000.[8] The large fee jobs accord with our understanding of significant work being done for the likes of ASX200 clients.

We know that where an adviser had been engaged to develop a safe harbour plan, it gave their clients the confidence to continue to trade in an attempt to achieve a better outcome (supported by 74% of respondents).[9]

63% of respondents also agreed that the safe harbour process ensured greater accountability and discipline by directors and management teams.[10]

[3] ARITA Safe Harbour Survey September 2021 Question 3
[4] ARITA Safe Harbour Survey September 2021 Question 5
[5] ARITA Safe Harbour Survey September 2021 Question 6
[6] ARITA Safe Harbour Survey September 2021 Question 9
[7] ARITA Safe Harbour Survey September 2021 Question 7
[8] ARITA Safe Harbour Survey September 2021 Question 8
[9] ARITA Safe Harbour Survey September 2021 Question 12
[10] Safe Harbour Survey September 2021 Question 13

Successful company restructures without an external administration were achieved in the majority of safe harbour engagements,[11] with very few requiring the intervention of an external administrator to implement the restructure[12] (or otherwise ending up in liquidation following an unsuccessful restructuring attempt).[13]

When assessing the success of the safe harbour reforms, it is worth considering whether they successfully provided protection to directors in the event that the restructuring was unsuccessful. Respondents stated that:

- There were very few instances where a safe harbour plan they were involved with was subsequently relied on as a defence to an insolvent trading claim.[14]
- Where a safe harbour plan the adviser was involved with was put forward as a defence, it was largely successful.[15]
- There were few instances where a safe harbour plan was put forward as a defence in situations where respondents were acting as a liquidator.[16]
- Where a safe harbour plan was put forward to a respondent acting as a liquidator, the plan was of mixed success in dissuading the liquidator from pursuing a claim for insolvent trading.[17]

However, there is no evidence to suggest the safe harbour is changing wider market behaviour, particularly in the SME sector.

Despite the successful use of the safe harbour regime outlined above, the majority of respondents[18] to the survey disagreed or strongly disagreed that the safe harbour reforms were meeting their stated aims of achieving more successful company restructures outside of formal insolvency options and promoting a greater entrepreneurial culture in Australia.[19] This appears to be directly attributable to a lack of awareness of the regime.

Indeed, most respondents are of the view that there is limited knowledge of safe harbour within their accounting or lawyer referral networks[20] and it is these people that are often the first point of contact when a business starts experiencing financial distress.

We also note that very little director education exists to promote safe harbour as a rescue tool. This is reflected in the survey response that, of the directors that insolvency professionals interact with, a quarter did not even know that they had a duty as a director to

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[11] ARITA Safe Harbour Survey September 2021 Question 14
[12] ARITA Safe Harbour Survey September 2021 Question 15
[13] ARITA Safe Harbour Survey September 2021 Question 16
[14] ARITA Safe Harbour Survey September 2021 Question 32
[15] ARITA Safe Harbour Survey September 2021 Question 33
[16] ARITA Safe Harbour Survey September 2021 Question 34
[17] ARITA Safe Harbour Survey September 2021 Question 35
[18] 53% of respondents disagreed or strongly disagreed that the safe harbour reforms were achieving more successful company restructures outside of formal insolvency.
62% of respondents disagreed or strongly disagreed that the safe harbour reforms were promoting entrepreneurship.
[19] ARITA Safe Harbour Survey September 2021 Question 24
[20] ARITA Safe Harbour Survey September 2021 Question 25

avoid insolvent trading and a further 40% were 'not concerned' by insolvent trading even if they were aware of it.[21]

We note our long-expounded view that Australia's bankruptcy, restructuring, insolvency and turnaround regimes are among the most complex in the world. This acts as a barrier to awareness among directors and therefore means fewer businesses will avail themselves of the rescue options open to them soon enough to result in a successful turnaround of the business. **This is why ARITA continues to call for a comprehensive 'root and branch' review of Australia's insolvency laws.**

It is also our view that the temporary COVID-19 insolvent trading moratorium and the significant COVID-19 stimulus packages including cashflow boost, JobKeeper and the SME Loan Guarantee Scheme have significantly reduced the demand for and the uptake of safe harbour, particularly in the SME sector where directors have less knowledge of safe harbour[22] and will accordingly not have taken the opportunity to plan ahead and implement safe harbour strategies.

Here, we would also like to address a significant issue concerning the expectations of the safe harbour regime. As the initial advocates of this regime, we did not expect that safe harbour was going to be a rescue regime for micro and small businesses. Rather, our view and expectation was that safe harbour would always be more usable in medium to large firms that have better resources, assets, capacity and access to use the regime effectively. When the Productivity Commission recommended the adoption of the safe harbour regime, this was also implicit in its thinking.

Regrettably, this thinking was not embraced by the Government in the final form of the legislation, under which safe harbour was promoted as a 'one size fits all' approach. Indeed, this is also the cause for the weak guidance that exists in relation to the 'appropriately qualified entity' to undertake safe harbour work, with the Government seeking to create avenues for micro and small businesses to use under-qualified, 'cheap' advisers to facilitate this process. This was always an error in the approach.

In ARITA's seminal work on this, our 2014 'A Platform for Recovery' position paper, we strongly advocated for a 'micro restructuring' regime. This was adopted by the Productivity Commission and was the foundation for the Government adopting the new small business restructuring regime in Part 5.3B of the *Corporations Act 2001* (Cth) (Act) at the end of 2020. Regrettably, this regime is onerous and overly complex – largely being a duplication of Part 5.3A rather than the highly simplified and low-cost model ARITA had initially proposed to help facilitate the restructure of viable micro and small businesses.

[21] ARITA Safe Harbour Survey September 2021 Question 22
[22] ARITA Safe Harbour Survey September 2021 Question 22

1.2 What impact has the availability of the safe harbour had on the conduct of directors?

Key point 2: Our survey results indicate that insolvent trading laws have little impact on director behaviour, particularly at the SME level, however for those that do engage a safe harbour adviser it provides confidence to continue to trade in an attempt to achieve a better outcome and ensures greater accountability and discipline by directors and management teams.

The conduct of directors needs to be considered from three perspectives:

1. Whether insolvent trading concerns affect director behaviour at all.
2. Once an adviser is engaged to develop a safe harbour plan.
3. More widely, the general culture for attempting to restructure businesses and accepting that corporate failure happens.

The impact of insolvent trading laws on director behaviour

From the perspective of what affect insolvent trading laws have on director behaviour and whether safe harbour has changed this, respondents were firmly of the view that Australia's insolvent trading laws:

- Do not cause people to act too early in putting their business into external administration,[23] with 75% of insolvency professionals disagreeing that insolvent trading laws cause directors to act too early in putting their businesses into administration.
- Do not discourage directors from taking entrepreneurial business risk,[24] with 73% of respondents holding this view.

As noted in section 1.1 above, the survey clearly shows that directors of SMEs are largely not concerned about insolvent trading (41%) or do not even know what insolvent trading is (25%).[25] Directors of SMEs are much more concerned about their liability under personal guarantees (with lending to the company secured by directors' family homes and other assets) and personal liability for ATO debts.[26]

Once an adviser has been engaged to develop a safe harbour plan

From the survey, we know that where an adviser had been engaged to develop a safe harbour plan, nearly three-quarters of respondents said that it gave their clients the confidence to continue to trade in an attempt to achieve a better outcome[27] and 65% said it

[23] ARITA Safe Harbour Survey September 2021 Question 41
[24] ARITA Safe Harbour Survey September 2021 Question 42
[25] ARITA Safe Harbour Survey September 2021 Question 22
[26] ARITA Safe Harbour Survey September 2021 Question 23
[27] ARITA Safe Harbour Survey September 2021 Question 12

ensured greater accountability and discipline by directors and management teams of clients.[28]

Where respondents had recommended a safe harbour plan, responses indicated that the plan was either not implemented at all (44%) or fully implemented (30%), with the remainder (26%) spread between these extremes.[29] We explore later in this submission the reasons why safe harbour plans may not have been implemented in cases where this occurred.[30]

Culturally

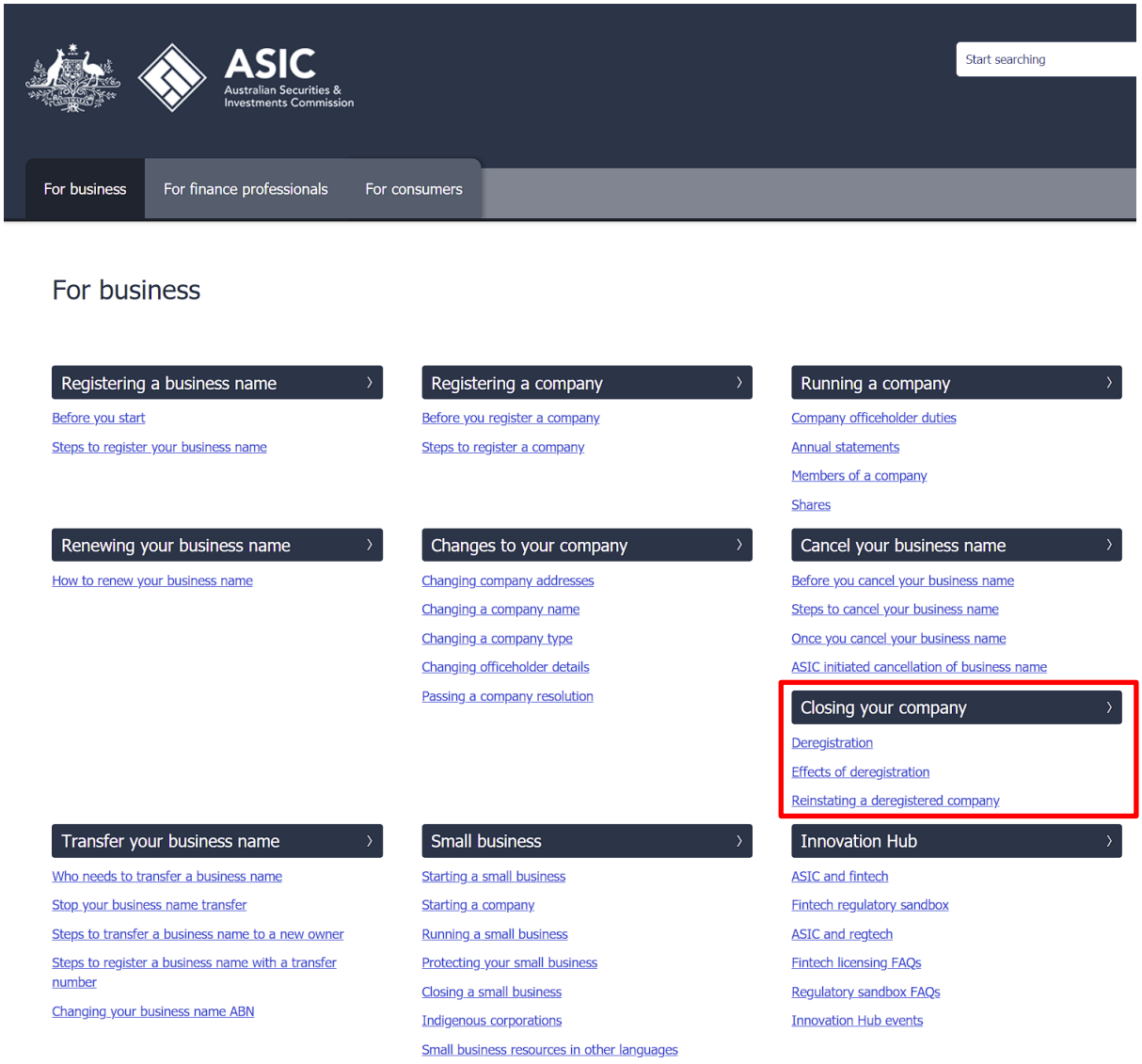
Changing culture takes more than passing legislation.

It takes directors' trusted advisers knowing about safe harbour so they can point directors towards an 'appropriately qualified entity' for advice. We know that directors and advisers are not knowledgeable about safe harbour[31] and we know that there is confusion about who is an 'appropriately qualified entity' to undertake an appropriate safe harbour engagement.[32] There is also evidence that the influence of unregulated 'pre-insolvency advisers' is negatively influencing the appropriate steps being taken by directors in financial distress.[33]

Cultural change also takes meaningful communication from business representative bodies and the Government to improve understanding. This has not happened in the case of the safe harbour reforms, which is evidenced by the lack of understanding of it among directors.

Indeed, we note that even in the Australian Institute of Company Directors 'Company Directors' course, there is precious little attention paid to options for managing a company in distress. But, perhaps more tellingly, ASIC's own website provides no guidance on safe harbour. Indeed, ASIC's website menu provides no advice on restructuring, insolvency or turnaround *at all* – with the only listed option on the menu being 'closing of a company', which incorrectly and unfortunately suggests that deregistration is the primary option.

[28] ARITA Safe Harbour Survey September 2021 Question 13
[29] ARITA Safe Harbour Survey September 2021 Question 11
[30] ARITA Safe Harbour Survey September 2021 Question 18
[31] ARITA Safe Harbour Survey September 2021 Question 25
[32] ARITA Safe Harbour Survey September 2021 Question 43
[33] ARITA Safe Harbour Survey September 2021 Question 18



Changing culture may also involve a complete review of whether the Australian approach of strict insolvent trading laws and safe harbour (with the corresponding element of uncertainty as to eligibility) is the right approach. As an alternative, the question may be posed whether Australian ought to, instead, adopt a *wrongful trading* liability approach similar to that adopted in the United Kingdom.[34]

ARITA does not adopt a particular preference for the current insolvent trading approach instead of the United Kingdom wrongful trading alternative. Nevertheless, given the results of ARITA's safe harbour survey clearly showing that insolvent trading appears to have little real, as opposed to perceived, influence in causing directors to place companies into administration too early, the merit in adopting the United Kingdom regulatory approach in Australia may be questioned. Indeed, it is one of the most common laments of insolvency professionals that directors of SMEs (less so larger entities) come for professional

[34] ARITA Safe Harbour Survey September 2021 Question 40 – respondents had mixed views on this question.

assistance in managing financial distress far too late – in fact, at the point where the business is usually unsalvageable. In these cases, there is no *premature* appointment of an insolvency practitioner under an administration notwithstanding a general public perception that premature appointments are common as a response to Australia's strict insolvent trading laws.

1.3 What impact has the availability of the safe harbour had on the interests of creditors and employees?

Key point 3: In our view, where a safe harbour is being conducted in accordance with the requirements of the law, neither employees nor creditors should be adversely affected.

In our view, where a safe harbour is being conducted in accordance with the requirements of the law, neither employees nor creditors should be adversely affected. As the business is continuing to trade:

- Employees will retain their jobs and their entitlements must be paid as they fall due in order for the safe harbour to continue to be available.
- Creditors will be paid in the ordinary course because, otherwise, the company runs the risk of recovery actions, including a winding up application, being taken. Even if creditors accept a compromise of outstanding debts as part of the safe harbour plan, they do so willingly and with an expectation of being able to maintain a future trading relationship with the company where they may, again, profit from that relationship.

81% of respondents to ARITA's survey felt that the safe harbour regime was neither fair nor unfair, quite fair or very fair on creditors.[35]

We note that the "better outcome" test of s588GA(7) is defined in as a better outcome for the company than the immediate appointment of an administrator, or liquidator, of the company. While it is not specific, therefore, that a "better outcome" would be delivered for creditors or employees, it is implicit. There is no doubt that there is an overall better outcome.

[35] ARITA Safe Harbour Survey September 2021 Question 47

1.4 How has the safe harbour impacted on, or interacted with, the underlying prohibition on insolvent trading?

Key point 4: The availability of a safe harbour from insolvent trading would make no difference to directors of SMEs, however conversely, for directors of larger companies, including listed entities, the desire to avoid liability for insolvent trading is more likely to be a genuine consideration. Therefore, for directors of larger companies, the availability of a safe harbour from insolvent trading would make a difference to them.

Respondents to the survey were of the view that directors of SMEs are more concerned about their exposure to personal guarantees given to support the company's debts than they are about insolvent trading.[36]

Therefore, the conclusion is that, for directors of SMEs, the availability of a safe harbour from insolvent trading would make no difference to them.

Conversely, directors of larger companies, including listed entities, are less likely to be required to offer personal guarantees and are often also better informed about the nature and scope of insolvent trading liability and broader directors' duties and regulatory requirements. For these directors, the desire to avoid liability for insolvent trading is more likely to be a genuine consideration. In addition to this, it is large companies that are more likely to have the resources available to obtain the required advice to trade on and pursue and implement a restructure.[37]

Therefore, the conclusion is that, for directors of larger companies, the availability of a safe harbour from insolvent trading would make a difference to them.

From our engagement with directors of larger corporates and with insolvency professionals undertaking the work, we are aware that many large companies have appointed a safe harbour adviser and had a plan developed. While for some, this was due to genuine concerns about solvency due to the economic effects of COVID-19 and shutdowns, for others it was simply a wise risk mitigation strategy in case of future events. Both of these approaches are valid and undoubtedly arose from directors having considered their obligations and duties under the Act and at general law.

There were mixed views expressed by respondents on the issue of whether safe harbour encourages directors to seek help earlier to resolve their financial and operational issues.[38] Based on the previous analysis of SMEs and larger companies, we suggest that this mixed view is likely to reflect differences in the size of companies that respondents dealt with.[39] We again note here that it has always been ARITA's view, as the original proponents of a safe harbour from insolvent trading liability, that the safe harbour would not be widely used by directors of micro and small businesses. An expectation to the contrary, as expressed in the

[36] ARITA Safe Harbour Survey September 2021 Questions 22 and 23
[37] ARITA Safe Harbour Survey September 2021 comments in Question 29
[38] ARITA Safe Harbour Survey September 2021 Question 30
[39] ARITA Safe Harbour Survey September 2021 Question 2

Explanatory Memorandum which introduced the safe harbour in 2017, was always misplaced and fed a false market perception of what the safe harbour was designed to achieve.

There was consensus among respondents that safe harbour has not affected the ability of liquidators to take reasonable and appropriate action against directors who have inappropriately traded their business while insolvent.[40] This largely seems to be because of the preconditions to the operation of the safe harbour, including the provision of a Report on Company Activities and Property (ROCAP) to any appointed liquidator. Failure to comply with those eligibility requirements may in fact make it easier for a liquidator to prove that the company was insolvent at a defined point in time and that safe harbour is not available.

Furthermore, the law incentivises the provision of comprehensive, complete and accurate books and records to a liquidator, due to the fact that information or books not provided to the liquidator cannot be used to support the operation of the safe harbour.[41] This means that liquidators are more likely to receive books and records where directors seek to rely on the safe harbour – resolving a common issue in SME liquidations of books and records not being provided.

[40] ARITA Safe Harbour Survey September 2021 Question 36
[41] Corporations Act 2001 section 588GB

1.5 What was your experience with the COVID-19 insolvent trading moratorium, and has that impacted your view or experience of the safe harbour provisions?

Key point 5: The view of members is that the COVID-19 insolvent trading moratorium was used, at least by directors of SMEs, to 'kick the can down the road', however, sophisticated directors of larger enterprises used the moratorium as an opportunity to seek advice to take steps to make safe harbour protection available to them at the end of the moratorium.

Since the commencement of the COVID-19 stimulus measures, the insolvent trading and statutory demand moratoriums, the commercial lease moratoriums and the protections afforded to borrowers in distress by banks at the end of March 2020, there has been a significant decline in the number of insolvency appointments (in excess of 50% of the pre-pandemic normal levels) which has not recovered to date.[42]

Considering the impact of the pandemic, lockdowns and trading restrictions on businesses, the obvious conclusion is that these combined measures have significantly deferred directors' consideration of financial problems. Indeed, our members have also reported a commensurate reduction in enquiries, so the reduction in appointments is not a reflection of directors having actively considered formal insolvency options to deal with financial distress before deciding not to pursue a formal appointment.

The view of members is that the insolvent trading moratorium was used, at least by directors of SMEs, to 'kick the can down the road'. On the other hand, sophisticated directors of larger enterprises used the moratorium as an opportunity to seek advice to take steps to make safe harbour protection available to them at the end of the moratorium.

We believe it is very important to note that when the insolvent trading and statutory demand moratoria were lifted at the end of 2020, there was no appreciable change in the level of insolvencies. This remains true even through the current long period of lockdowns and associated business closures experienced in New South Wales and Victoria – insolvency appointments have not risen despite the insolvent trading moratorium no longer being available.

Given the extraordinary number of businesses that have been 'temporarily' shuttered in New South Wales and Victoria in the current lockdowns, where there must be very valid concerns about the solvency of those companies who are suffering either complete or much reduced revenue despite mounting expenses, this is a clear demonstration that concerns about possible insolvent trading actions are, likely, overstated.

We believe that for most SME directors, their notion of 'going broke' is an abstract one. They have little or no understanding of what the process of insolvency involves or what remedies

[42] Refer https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-1b-notification-of-companies-entering-external-administration-and-controller-appointments-weekly/ for weekly insolvency statistics compiled by ASIC.

might be open to them. These directors simply know that they will run out of money and have to shut down. Indeed, all anecdotal information points towards the greatest fear of directors in going broke being the actions of the ATO or their lenders and the potential to lose their own home.

ARITA had thought that insolvencies would return to, or possibly exceed, their pre COVID-19 levels by now. However, the ATO has not recommenced recovery actions for debt and lenders are still largely not taking enforcement action. The ATO, of course, initiates the vast majority of winding up actions.

Furthermore, there is some doubt as to what action will be taken by creditors generally to recover COVID-19 debts – considering it may not be commercial for them to do so. As such, we are unsure when insolvencies will return to their historical levels.

1.6 Are you aware of any instances where safe harbour has been misused?

Key point 6: There was consensus among respondents to ARITA's survey that the safe harbour regime is not being abused by directors to avoid reasonable and fair personal liability. Abuse of the eligibility requirements would seem to be difficult as they are generally quite binary and it is not immediately obvious to us what other possible misuses may exist.

There was consensus among respondents that the safe harbour regime is not being abused by directors to avoid reasonable and fair personal liability.[43]

The eligibility requirements for the invocation of the safe harbour are set an appropriately high bar given the benefits that they confer. Abuse of these requirements would seem to be difficult as they are generally quite binary: they are either met or they are not.

As noted in section 1.4 above, where directors claim the protection of safe harbour, one eligibility requirement is the provision of books and records and a ROCAP to any appointed liquidator. The information provided when safe harbour is claimed may in fact make it easier for the liquidator to prove that the company was insolvent and safe harbour is not available. The work undertaken to prepare a safe harbour plan would also provide a subsequently appointed liquidator with a useful tool in assessing whether directors have engaged in action that may have contravened the law.

For businesses that undertake a successful turnaround under a safe harbour plan that involves debt compromise, it can only be done with the consent of creditors. This simply negates any risk of illegal phoenix activity.

It is not immediately obvious to us what other possible misuses may exist and our research reinforces this viewpoint.

[43] ARITA Safe Harbour Survey September 2021 Question 31

1.7 Are the pre-conditions to accessing safe harbour appropriate?

Key point 7: The pre-conditions to accessing safe harbour are what prevents it being used for illegal phoenix activity and stops inappropriate and unviable candidates for restructuring continuing to trade. ARITA continues to support these gateway requirements to ensure abuses did not occur and to serve as a clear guide as to what a suitable rescue candidate looks like, particularly given small businesses now have the benefit of small business restructuring under Part 5.3B of the Act.

The preconditions to accessing safe harbour are what prevents it being used for illegal phoenix activity and stops inappropriate and unviable candidates for restructuring continuing to trade. These preconditions prevent abuse of the safe harbour (see section 1.6 above).

We strongly supported these gateway requirements during the legislative process to ensure abuses did not occur and to serve as a clear guide as to what a suitable rescue candidate looks like.

Requirements to keep appropriate financial records

It is our view that directors will not be in a position to make a plan for the restructure of a company without proper books and records being available. We note the views of respondents that a lack of appropriate books and records is not a significant reason as to why respondents have not recommended safe harbour.[44]

Having inadequate books and records is a typical reflection of poor management. The very lack of appropriate books and records is a well-known causal factor for the failure of a business. And, while it can certainly be said that coaching directors of SMEs through the process of developing, maintaining and understanding good books and records may lead to future improved management of a business, it is unlikely that this is achievable in the timeframe required to save a distressed entity that is suitable for affording safe harbour protection. We note that inadequate books and records in larger businesses is a significant culpability matter.

Inconsistency in eligibility requirements in relation to taxation obligations

It is our view that substantial compliance with taxation reporting obligations and payment of employment entitlements remains an appropriate gateway requirement. Overall compliance with taxation *reporting* (not necessarily payment) and ensuring that employee entitlements are met reflects the minimum level of managerial diligence that should be afforded to a director seeking safe harbour protection.

However, ARITA has previously raised the issue of inconsistency in the eligibility requirements in relation to taxation obligations with the Australian Law Reform Commission

[44] ARITA Safe Harbour Survey September 2021 Question 20

as part of its current review of the legislative framework for corporations and financial services regulation.

For the safe harbour, the condition in s 588GA(4) of the Act is that the safe harbour is incapable of applying if, when a relevant debt is incurred or a disposition is made, the company is failing to 'give returns, notices, statements, applications or other documents as required by taxation laws' and that failure amounts to 'less than substantial compliance' or is otherwise one of two or more failures by the company to do any or all of those matters within the preceding 12 months.

A company undergoing a small business restructuring (SBR) under Part 5.3B of the Act is required by reg 5.3B.24 of the Corporations Regulations to be 'substantially complying' with its obligations to 'give returns, notices, statements, applications, or other documents required by taxation laws' in order to remain eligible to continue under the SBR process.

This is similar to the eligibility criterion stated for the safe harbour. However, the 'fallback' safeguard in relation to non-compliance with taxation obligations on two or more occasions in the preceding 12-month period, even if there has not been less than 'substantial' compliance, is not included in reg 5.3B.24.

In contrast, one of the core eligibility requirements for a company being able to undergo a simplified liquidation process is that, pursuant to s 500AA(1)(g) of the Act, the company has 'given returns, notices, statements, applications or other documents as required by taxation laws'. The test is not currently qualified by the 'substantial compliance' condition expressed in the eligibility requirements for the operation of the safe harbour and the SBR process, and the 'fallback' disqualification is also omitted, as it is for the SBR process.[45]

These eligibility conditions are intended to limit the likelihood of each of these more flexible insolvency processes – the pursuit of an informal restructuring under the safe harbour, the pursuit of a SBR or the implementation of a simplified liquidation – being abused through the evasion of taxation obligations that may have an appreciable impact on the public purse.

The formulation expressed in the context of the safe harbour is most apt to reflect that core policy consideration. It is fair and balanced in excusing minor circumstances of non-compliance, subject to any such minor non-compliance remaining a disqualifying circumstance if it is repeated over a 12-month period.

[45] We note that a 'substantial compliance' amendment to s 500AA(1)(g) has been proposed as part of the Treasury Laws Amendment (2021 Measures No. 5) Bill 2021 which is currently before the Senate.

To show the lack of alignment between the three tax compliance obligations, we have developed the following table based on the current provisions:

	Requirement to have complied with lodgements under taxation laws	Substantial compliance safeguard	One failure in 12 months safeguard
Safe harbour	✓	✓	✓
Small business restructuring	✓	✓	✗
Simplified liquidation	✓	✗	✗

The table reflects that, in the three different instances in the Act where compliance with taxation lodgement obligations is a qualifying factor, there are three different tests.

There is no basis for the same expression of the eligibility conditions in relation to taxation obligations not being replicated in identical wording for the safe harbour, the pursuit of a SBR and the implementation of a simplified liquidation. The existing alternative expressions creates inconsistency and a lack of coherence and consistency in implementing the underlying policy objective.

Inconsistency in eligibility requirements in relation to employee entitlements

There is a similar issue in relation to employee entitlements as taxation obligations with different eligibility requirements for safe harbour and small business restructuring.[46] These eligibility requirements should also be consistent.

SMEs and eligibility

Respondents recognised the barriers that the pre-conditions to safe harbour place in front of SMEs, with the majority suggesting that less than 10% of SMEs would qualify for safe harbour given employee entitlement and tax lodgement obligations.[47] However, this low eligibility percentage is not a good reason to remove or change the pre-conditions, remembering that small businesses now have the benefit of the new small business restructuring option under Part 5.3B of the Act – an alternative they did not have on the introduction of the safe harbour in September 2017. Again, we note that, as the pioneers of the original thinking behind safe harbour and micro and small business restructuring, the safe harbour regime was always intended for medium and large firms.

[46] Payment of employee entitlements is not an eligibility requirement for simplified liquidation.
[47] ARITA Safe Harbour Survey September 2021 Question 21

1.8 Does the law provide sufficient certainty to enable its effective use?

Key point 8: Safe harbour was designed to provide "breathing space", "opportunity" and "confidence". We believe that the safe harbour regime is doing what it is was original conceived to deliver.

Lack of confidence in the effectiveness of the safe harbour protection was cited as a mid-range reason for not recommending the use of the safe harbour protection.[48] It was also a cited reason for why safe harbour recommendations were not implemented.[49]

No matter how the safe harbour legislation is structured – and we note the extensive prior debate as to the appropriateness of safe harbour best being a defence or carve-out – the fact of the matter is that where a liquidator thinks there has been insolvent trading and safe harbour is claimed, the liquidator will consider whether the elements of eligibility for safe harbour were met. This can only be done after the event, when the possible liability for insolvent trading has already been incurred, the restructure has failed, and a liquidator has been appointed.

In fact, in instances where a safe harbour from insolvent trading is claimed, but the directors are ineligible, the insolvent trading claim may be easier for a liquidator to prove.

We understand that some in the director community may wish for safe harbour to, in some fashion, provide a 'get out of jail free card' level of certification of the measures that directors may put in place as they attempt to turn around a company, but this notion is fanciful. We cannot contemplate a suitable self-certification 'check-box list' to accommodate this. Indeed, the substantial phoenixing risks attached to having some type of certifying authority for the process would be concerning. It is, of course, proper for a court or a regulator to assess if malfeasance or some level of wrongful trading has occurred.

And so, while the law around safe harbour may not provide "certainty", we don't agree that "certainty" is the appropriate measure given the situation that these distressed entities are in. Safe harbour was designed to provide "breathing space", "opportunity" and "confidence". We believe that the survey results, taken as a whole and alongside the feedback of experienced safe harbour experts, show that the safe harbour regime is doing what it is was original conceived to deliver.

[48] ARITA Safe Harbour Survey September 2021 Questions 10 and 19
[49] ARITA Safe Harbour Survey September 2021 Question 18

1.9 Is clarification required around the role of advisers, including who qualifies as advisers, and what is required of them?

Key point 9: Feedback received raises concerns that the reference to 'appropriately qualified entity' in the legislation is not sufficiently clear and/or workable and supports a definition being added to the legislation. Registered liquidators are the only professionals with the appropriate skillset to undertake an analysis to determine that the course of action is likely to lead to a better outcome for the company than the immediate appointment of an administrator, or liquidator.

We note that ARITA strongly objected to the use of the term 'appropriately qualified entity' in the original Bill that created safe harbour. It was obvious to us at the time that this would be a significant problem in the operation of the legislation and we strongly believe we have been vindicated in our concerns.

Over 63% of respondents did not think that the reference to 'appropriately qualified entity' in the legislation is sufficiently clear and/or workable.[50]

When identifying what legislative reforms were required, respondents considered that a definition of 'appropriately qualified entity' needed to be added to the legislation.[51]

Who should be able to act as an appropriately qualified entity?

The adviser needs to be able undertake the analysis to determine that the course of action is likely to lead to a better outcome for the company[52] and provide this advice to the company's directors. Currently, a better outcome for the company means an outcome that is better for the company than the immediate appointment of an administrator, or liquidator, of the company.[53]

It is unreasonable to expect that directors would be able to undertake this assessment themselves. This is the purpose of the directors having to obtain advice from an appropriately qualified entity.[54]

Being qualified to undertake this analysis requires two major skills:

1. The ability to analyse financial information, which is a task most appropriately done by a qualified accountant.

[50] ARITA Safe Harbour Survey September 2021 Question 43
[51] ARITA Safe Harbour Survey September 2021 Question 37
[52] Corporations Act s588GA(1)
[53] Corporations Act s588GA(7)
[54] Corporations Act s588GA(2)

2. A deep understanding of insolvency and the likely alternative outcomes under liquidation or voluntary administration, which is a skillset that liquidators require in order to obtain their registration.

The majority of liquidators are also qualified accountants (eg CA, CPA) and therefore it is arguable that registered liquidators are the logical individuals to act as the 'appropriately qualified entity'. Liquidators also have the benefit of being a registered population subject to regulation by ASIC, with legislated professional indemnity insurance and continuing professional education requirements. For completeness, we note that you do not need to be a qualified accountant to become a registered liquidator, enabling others, such as suitably skilled and experienced lawyers, to obtain registration.

This is not to say that liquidators would act on their own. As with many external administrations and advisory roles, the liquidator would be supported by a team of professionals appropriate for the particular company. These advisers may include lawyers and operational experts, but it is the liquidator that would be responsible for the advice given to the directors, just as the liquidator is responsible for the actions taken in an external administration.

We note that, at the time of the Bill, the government held the view that using the term 'appropriately qualified entity' would allow micro and small businesses to find a 'cheaper' adviser. This approach was and remains a fundamentally flawed set of thinking. This is on the basis that:

- While we accept that it is a common perception that registered liquidators are 'expensive', this is a falsehood. The process of insolvency is expensive because of the excessive complexity and red tape in the regime, not the fees of liquidators per se. The majority of registered liquidators work in small accounting practices. They are not charging significant fees for their work. Again, while we note that safe harbour is not designed for micro and small businesses, any micro or small business directors believing safe harbour is suitable for the company's circumstances would be able to seek out a registered liquidator in a small, low-cost practice if they desired.

- The use of a supposed 'cheaper' adviser is problematic as this also correlates to less qualified. Directors availing themselves of this type of advice are likely to get poorer advice that may not only make it less likely for the company to be saved but may also place the directors at risk of prosecution – ironically, especially at risk of insolvent trading offences.

- There is significant scope for abuse here by allowing questionable 'pre-insolvency' advisers to insert themselves in the process – something that our survey indicates was a significant problem.[55] These advisers will often be recommending asset stripping and other similar behaviours at this point.

[55] ARITA Safe Harbour Survey September 2021 Questions 10, 18 and 19

- A lack of specificity in who ‘appropriately qualified’ entities are also leaves directors fundamentally uncertain as to who they should be seeking advice from.
- ‘Appropriately qualified’ entities may or may not be regulated – possibly putting them out of reach of ASIC and others if their advice is substandard.
- ‘Appropriately qualified’ entities may or may not be suitably insured to provide the advice they give – possibly leaving directors, and the company the advice was provided to, unable to secure suitable compensation if the advice is substandard and causes harm. We especially note here that accountants in general public practice are not insured to provide this type of advice. The Professional Standards Scheme under which CPA, CA and IPA accountants operate specifically carves out insolvency-related advice to a different category. If accountants are not insured directly under that much more expensive category of professional indemnity insurance, then they are not covered.

1.10 Is there sufficient awareness of the safe harbour, including among small and medium enterprises?

Key point 10: The survey clearly indicates that there is not sufficient awareness of the safe harbour among advisers, with referrer accountants and lawyers having limited or no knowledge of safe harbour. Directors of SMEs are much more concerned about personal liability for personal guarantees and tax debts than insolvent trading.

It is clear from the survey that there is not sufficient awareness of the safe harbour among advisers, with more than 70% of survey respondents indicating that accountants and lawyers in their referral network had limited or no knowledge of safe harbour.[56]

But what is also clear is that directors of SMEs are much more concerned about personal liability under personal guarantees (with lending to the company secured against their homes and other personal assets) and personal liability for tax debts than they are about insolvent trading.[57]

If a director is not concerned about insolvent trading, then safe harbour becomes largely irrelevant. And we view this point as being the most critical in the consideration of the effectiveness of the safe harbour laws.

When asked to place small, medium and large companies in order of the type of company that is most suitable for safe harbour, small companies were rated by our members as the lowest.[58] Again, we remind that it was always our view that this should be the case.

Over half of respondents indicated that only 0-10% of financially distressed SMEs would qualifying for safe harbour protection given the employee entitlements and tax lodgement obligations.[59]

However, since the commencement of the safe harbour regime, the Government has also introduced Part 5.3B Small business restructuring. So, arguably, the requirement for safe harbour to meet the needs of small business have been reduced.

However, there is a similar issue with small business restructuring as there is with safe harbour – directors and advisers do not know about it and therefore cannot take advantage of it.

Insolvency reform is not a 'Field of Dreams.'[60]. It is not a matter of 'build it and they will come'. It is important that these new processes are promoted by the Government and representative bodies and that advisers are educated about them and how to get further assistance for their clients. This type of promotion has not been pursued to date, which explains the responses to the survey questions. In fact, outside of information provided by

[56] ARITA Safe Harbour Survey September 2021 Question 25
[57] ARITA Safe Harbour Survey September 2021 Questions 22 and 23
[58] ARITA Safe Harbour Survey September 2021 Question 27
[59] ARITA Safe Harbour Survey September 2021 Question 21
[60] https://www.imdb.com/title/tt0097351/

ARITA and our members, there is very little information available about safe harbour. Of course, this tends to mean that awareness of the regime is likely to come too late to save some businesses. It would be far better if directors were aware of rescue options before they found themselves in high levels of financial distress.

From 2005 to 2010, ASIC ran a national insolvent trading program with a key objective of encouraging directors to identify insolvency indicators relating to their company and to seek professional advice at an early stage. ASIC's National Insolvency Coordination Unit[61] visited companies displaying solvency concerns and encouraged directors to seek advice from an insolvency professional about the appointment of an external administrator where significant insolvency indicators were identified. This program was very successful as an early intervention strategy[62]. However, a decision was made by ASIC to instead focus on regulating insolvency practitioners and the program was dropped. Programs like this are valuable education tools with the outcome report noting that:

> "A director is less likely to breach their duties under the *Corporations Act 2001* (Corporations Act) if they take into account the following key principles in carrying out their role:
>
> - maintain appropriate books and records
> - identify insolvency concerns and assess available options
> - seek professional advice; and
> - act in a timely manner."

[61] Comprised of 13 permanent specialist insolvency staff and 7 senior secondments from the insolvency profession as at August 2005

[62] ASIC REP 213 National insolvent trading program report 13 October 2010

1.11 In relation to potential qualified advisers, what barriers or conflicts (if any) limit your engagement with companies seeking safe harbour advice?

Key point 11: Many insolvency professionals choose not to provide safe harbour advisory services either due to a preference to provide traditional formal insolvency services or that safe harbour doesn't align with their focus on SMEs. However, when it comes to businesses who may be seeking safe harbour advisory services, it is their inability to meet the legislative entry requirements and viability as a turnaround candidate that limit their capacity to access safe harbour.

There are two issues to consider here:

1. If people who are otherwise qualified to act as a safe harbour adviser do not accept an appointment, why is that?
2. If a safe harbour adviser looks to take an appointment but ends up not being able to recommend it to the client, why is that?

It is clear that many insolvency professionals choose not to provide safe harbour advisory services either due to a preference to provide traditional formal insolvency services or that safe harbour doesn't align with their focus on SMEs. However, when it comes to businesses who may be seeking safe harbour advisory services, it is their inability to meet the legislative entry requirements and viability as a turnaround candidate that limit their capacity to access safe harbour.

Not taking safe harbour appointments

When we asked respondents why they are not taking safe harbour appointments, there was a mix of responses with the most common being:[63]

- 'I would prefer to take a formal appointment'. We do not view this as a problematic issue. If some practitioners prefer formal work and believe that their expertise is better suited there, this is a natural and ordinary response.
- 'I don't like the safe harbour legislation and find it hard to work within'. This is a more concerning response. Again, it is possibly attributable to many practitioners being more comfortable in working in the formal appointment space. But it may also reflect those who have genuine concerns about the operation of the legislation. Regrettably, we did not find data in our responses that would further bear this out.
- 'I am a lawyer/adviser'. This is notwithstanding that there is nothing in the Act which says that a lawyer or other adviser could not be a suitably qualified entity but anecdotally reflects the recognition that registered liquidators are the most appropriately qualified individuals to undertake such work.

[63] ARITA Safe Harbour Survey September 2021 Question 4

- ‘I am too concerned about the risks to myself/my practice (eg from future litigation against the advice I gave etc). This is a concerning response as it likely exposes that insolvency experts perceive that engagements of this type may be undertaken with either the primary or ancillary expectation that they may be sued if a rescue plan does not succeed. This is, of course, problematic given that the business would have already been at risk of failure without the development of a safe harbour plan. If it becomes an emerging trend that any safe harbour-protected rescue which fails automatically leads to litigation against the restructuring adviser, the intent of the legislation will be quickly undermined.
- ‘I don’t believe that there is suitable remuneration for the work you have to do.’ This issue also erodes the Government’s initial concerns that liquidators would be too expensive for this work. It tends to suggest that, especially in the SME space, there is an expectation that this work can be done very cheaply and our data shows that many safe harbour plans are being completed for under $5,000.[64]

One of the options for this survey question was ‘other’, so that respondents could state a reason other than one of the options listed. The comments in relation to this option can be largely summarised as a lack of opportunity or they practice in the SME space and SME’s either do not want to pursue safe harbour or are not eligible.

For the first point, it is important to note that where a registered liquidator provides advice concerning safe harbour, the liquidator is unable to take any subsequent formal appointment. This is a barrier to registered liquidators wanting to advise in the safe harbour space, but it is an appropriate barrier as independence of an external administrator to be able to investigate past activities of the company is essential.

Not recommending safe harbour appointments

When asked why respondents have not recommended the use of safe harbour protection for a client, there were again a mix of responses, with the most common being:[65]

- Failure/inability to meet the threshold requirement of payment of employee entitlements.
- Failure/inability to meet the threshold requirement of tax reporting.
- Excessive costs.
- Opposition from creditors.
- Lack of lender support.
- Advise from pre-insolvency advisers.
- Lack of confidence in effectiveness of the safe harbour protection.
- Liquidity issues.
- Fear/risk appetite.

[64] ARITA Safe Harbour Survey September 2021 Question 8
[65] ARITA Safe Harbour Survey September 2021 Question 10 and 19

Our survey asked a specific question regarding how often a lack of books and records was an additional reason why safe harbour was not recommended as being available to directors.[66] Very few respondents considered lack of books and records to be an issue.

[66] ARITA Safe Harbour Survey September 2021 Question 20

1.12 Are there any other accessibility issues impacting its use?

Key point 12: The biggest issues facing businesses that are looking to restructure are a lack of money and resources to be able to fund the restructure, or simply leaving it too late to seek advice.

The biggest issues facing businesses that are looking to restructure are a lack of money and resources to be able to fund the restructure, or simply leaving it too late to seek advice.

The current lack of recovery action by banks and the ATO during COVID-19 means that 'pressure points' which may have prompted directors to seek assistance are no longer being applied. This is particularly an issue with less sophisticated directors who are not as aware of their duties and obligations and are more likely to only take action when forced to do so following recovery action by the ATO or lenders.

More sophisticated directors are aware of their duties and obligations and are more conscious of reputational issues so are prepared to seek advice earlier.

The question is how to better educate less sophisticated directors about their duties and when they should be seeking expert advice regarding their company.

1.13 Are there any improvements or qualifications you would like to see made to the safe harbour provisions and/or the underlying prohibition on insolvent trading?

Key point 13: Key areas for improvement identified by our members centre around the clarification of key terms rather than the tax and employee entitlement eligibility requirements.

The survey asked respondents to consider a list of potential changes to the safe harbour regime and indicate what changes they would recommend.[67] The top five changes recommended were:

1. Only qualified advisers (registered liquidators) should be permitted to engage in safe harbour planning.
2. The legislation should include a definition of 'appropriately qualified entity.'[68]
3. The legislation should include more guidance on what 'substantial compliance' means in terms of paying employee entitlements and tax reporting.
4. The legislation should include more guidance on what constitutes a 'failure' in terms of paying employee entitlement and tax reporting.
5. The legislation should include more guidance on 'better outcome for the company'.[69]

These five recommendations were substantially ahead in priority of any of the other options available to respondents. Interestingly, there was little support among respondents for:

- The threshold requirement of payment of employee entitlements being repealed.
- The threshold requirement of tax reporting being removed.
- The threshold requirements of tax reporting being strengthened.

There was also limited support for the repeal of the insolvent trading and safe harbour provisions, with few respondents agreeing that Australia's insolvent trading laws are too strict.[70] As noted previously, there were very mixed views about whether a 'wrongful trading' framework of the kind adopted in the United Kingdom would be a better approach than the current insolvent trading/safe harbour approach adopted in Australia.[71]

Respondents generally supported the provision of better guidance or more specific wording on the 'reasonably likely' test[72].

[67] ARITA Safe Harbour Survey September 2021 Question 37
[68] This is supported by Question 43 where respondents were strongly of the view that the reference to "appropriately qualified entity" was not clear or workable.
[69] This is supported by Question 45 where respondents were strongly of the view that safe harbour could be improved with better guidance/more specific wording around the 'better outcome for the company' test.
[70] ARITA Safe Harbour Survey September 2021 Question 39
[71] ARITA Safe Harbour Survey September 2021 Question 40
[72] ARITA Safe Harbour Survey September 2021 Question 46

What change should be made to better outcome?

ARITA has previously raised the issue of uncertainty in the standard of 'better outcome' with the Australian Law Reform Commission as part of its current review of the legislative framework for corporations and financial services regulation.

While there are express factors in s 588GA(2) of the Act taken into account in assessing whether a course of action is 'reasonably likely' to produce a better outcome, there is a degree of difficulty associated with the better outcome standard itself.

In contrast to formal insolvency processes in the form of liquidation and voluntary administration, the purported 'better outcome' under the s 588GA safe harbour is not clear.

For liquidation, the best outcome is clearly maximising the return available for the company's creditors – a liquidator inherently being appointed in circumstances where a company is no longer viable. For voluntary administration, the stated aim in s 435A of the Act is to maximise the chance of the company, or as much as possible of its business, continuing in existence, or otherwise to produce a better monetary return to creditors than would be achieved in an immediate winding up. Yet, under an informal restructure pursued for the purpose of the safe harbour, the underlying context of the outcome is missing from the legislation.

A better outcome might be the continued existence of the company or its business, or it could be a better financial return in a distribution of the company's assets for creditors. The company's creditors – from employees to suppliers, customers and primary financiers – would each have a different view on what would be the best outcome from their own perspectives, and it is very difficult task for directors to make this assessment and achieve a balanced approach as a precondition for the operation of the safe harbour.

To ensure greater clarity for directors and practitioners, which would provide a greater incentive to resort to the safe harbour in the pursuit of an informal restructuring, the reference point for what is a 'better outcome' ought to be expressly stated in s 588GA of the Act, with reference to the continued existence of the company or its business or otherwise the achievement of a better financial return for creditors.

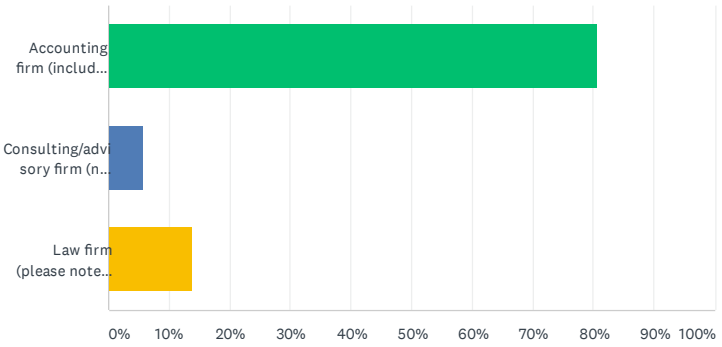
Consideration could be given to development of a list of factors to be considered, similarly to how there is a list of factors for the courts to consider when approving or reviewing remuneration under s 60-12 of the Insolvency Practice Schedule (Corporations). ARITA is available to assist the Review Panel or Treasury to develop such a list.

Appendix A

Results of ARITA Safe harbour survey of members

Q1 Which best describes the type of firm you work in

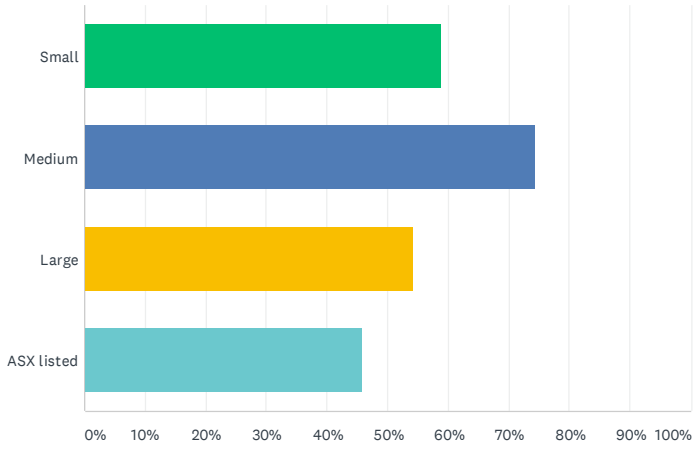
Answered: 108 Skipped: 1



ANSWER CHOICES	RESPONSES	
Accounting firm (including insolvency only and multi-practice firms)	80.56%	87
Consulting/advisory firm (no registered liquidators)	5.56%	6
Law firm (please note some of the questions in this survey may not be relevant to you – please skip those questions)	13.89%	15
TOTAL		108

Q2 What size of business/appointment does your practice usually accept engagements from? (select all that normally apply)

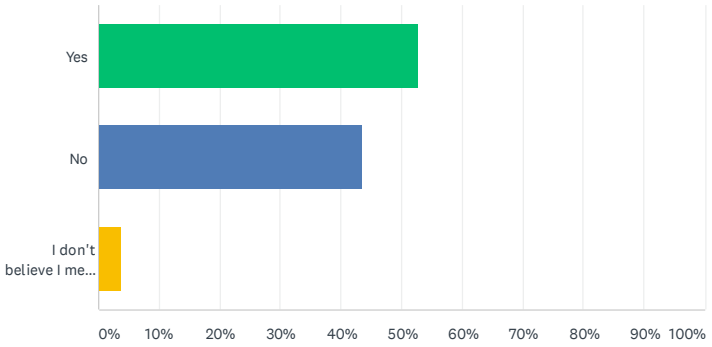
Answered: 109 Skipped: 0



ANSWER CHOICES	RESPONSES	
Small	58.72%	64
Medium	74.31%	81
Large	54.13%	59
ASX listed	45.87%	50
Total Respondents: 109		

Q3 Have you been engaged by a client to develop a safe harbour plan/turnaround or a ‘better outcome’ test?

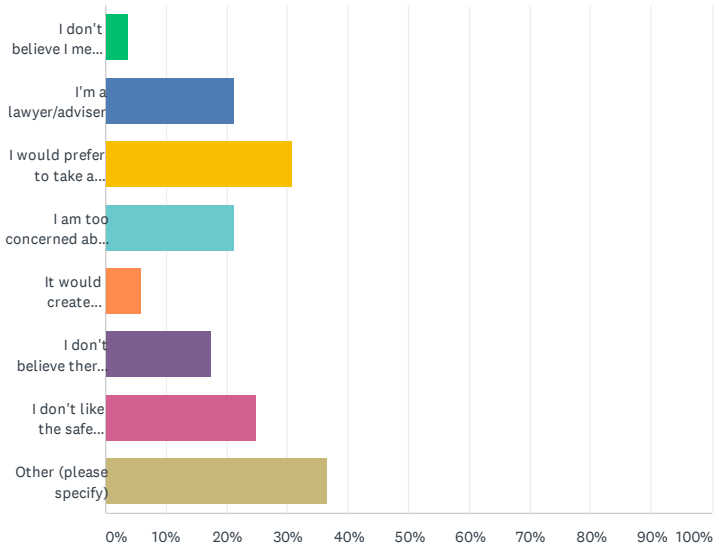
Answered: 108 Skipped: 1



ANSWER CHOICES	RESPONSES	
Yes	52.78%	57
No	43.52%	47
I don't believe I meet the requirements to be a "suitably qualified" entity to undertake this work	3.70%	4
TOTAL		108

Q4 If you are not taking safe harbour appointments, why not?

Answered: 52 Skipped: 57



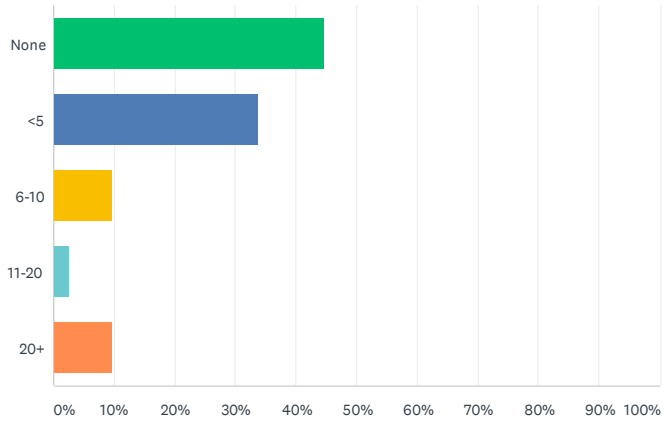
ANSWER CHOICES	RESPONSES	
I don't believe I meet the requirements to be a "suitably qualified" entity to undertake this work	3.85%	2
I'm a lawyer/adviser	21.15%	11
I would prefer to take a formal insolvency appointment	30.77%	16
I am too concerned about the risks to myself/my practice (eg from future litigation against the advice I gave etc)	21.15%	11
It would create conflicts in my practice	5.77%	3
I don't believe there's suitable remuneration for the work you have to do	17.31%	9
I don't like the safe harbour legislation and find it hard to work within	25.00%	13
Other (please specify)	36.54%	19
Total Respondents: 52		

#	OTHER (PLEASE SPECIFY)	DATE
1	Clients, who are predominately SME, haven't sought to enter Safe Harbour.	9/9/2021 8:46 AM
2	The right opportunity to use the safe harbour legislation has not come about yet for me.	9/7/2021 2:06 PM
3	I have not been approached to give advice	9/6/2021 7:31 PM
4	There remain significant risks in assessing whether a better outcome has been achieved where there are differential outcomes for some creditors i.e. whilst in aggregate the outcome is better, some creditors may be substantially worse off.	9/6/2021 4:21 PM
5	I don't have the right PI cover	9/5/2021 2:30 PM
6	Lack of opportunities - i.e. I don't believe Safe Harbour is being widely used	9/5/2021 10:34 AM
7	Prospective appointment did not ultimately and was trumped by a VA	9/4/2021 5:25 PM
8	I refer them to an experienced safe harbour practitioner	9/3/2021 5:41 PM
9	Never been asked to take such an appointment.	9/3/2021 9:15 AM
10	Not approached for these services.	9/2/2021 10:21 PM
11	Opportunity hasn't presented itself	9/2/2021 8:38 PM
12	The large majority of SMEs seeking turnaround advise do not meet the safe harbour eligibility requirements. Micro business can't afford safe harbour advice	9/2/2021 4:00 PM
13	Have not been requested to undertake one	9/2/2021 3:04 PM
14	Directors of small business, at risk of insolvency, cannot afford safe harbor appointments and instead tend to rely upon the lack of commerciality faced by liquidators considering the pursuit of insolvent trading. This legislation protects people who have something to lose should a liquidator consider pursuing them for insolvent trading.	9/2/2021 3:02 PM
15	No opportunity to as yet - no approaches	9/2/2021 2:48 PM
16	Not suitable for the market that we operate within	9/2/2021 2:34 PM
17	There has been no demand for it.	9/2/2021 2:22 PM
18	Just never taught myself how to do it.	9/2/2021 2:22 PM

19	There has not been much call for it	9/2/2021 2:19 PM

Q5 How many safe harbour engagements (including better outcome tests) has your firm undertaken?

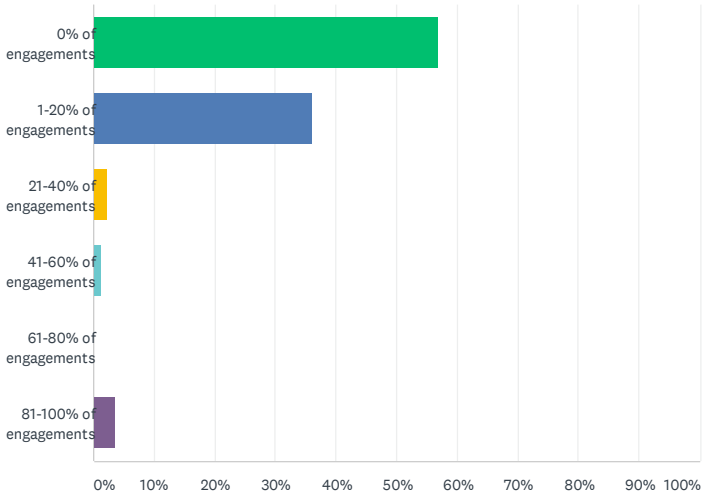
Answered: 83 Skipped: 26



ANSWER CHOICES	RESPONSES	
None	44.58%	37
<5	33.73%	28
6-10	9.64%	8
11-20	2.41%	2
20+	9.64%	8
TOTAL		83

Q6 In the last 12 months, what percentage of your restructuring, insolvency and turnaround engagements have been safe harbour advisory engagements?*

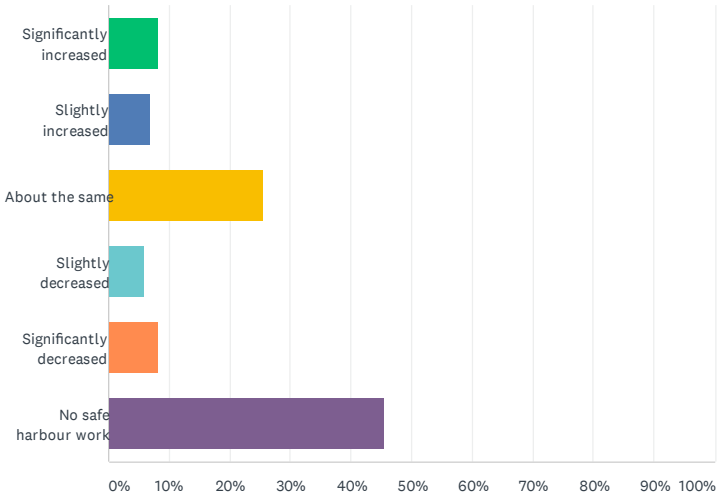
Answered: 86 Skipped: 23



ANSWER CHOICES	RESPONSES	
0% of engagements	56.98%	49
1-20% of engagements	36.05%	31
21-40% of engagements	2.33%	2
41-60% of engagements	1.16%	1
61-80% of engagements	0.00%	0
81-100% of engagements	3.49%	3
TOTAL		86

Q7 How have the number of safe harbour engagements you work on changed over the course of the last two years

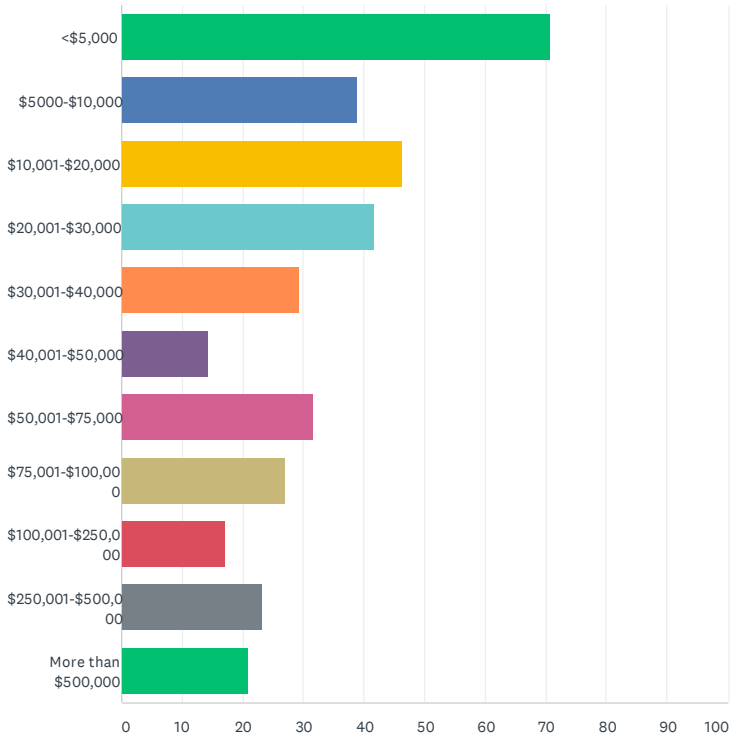
Answered: 86 Skipped: 23



ANSWER CHOICES	RESPONSES	
Significantly increased	8.14%	7
Slightly increased	6.98%	6
About the same	25.58%	22
Slightly decreased	5.81%	5
Significantly decreased	8.14%	7
No safe harbour work	45.35%	39
TOTAL		86

Q8 For all the safe harbour engagements you've undertaken, please describe the percentage distribution of fees you've charged across those appointments (Must add to 100)Enter, as an integer (don't add the "%" sign), the rough percentage of appointments where fees were in each band. Skip the question if haven't undertaken any safe harbour engagements

Answered: 41 Skipped: 68



ANSWER CHOICES	AVERAGE NUMBER	TOTAL NUMBER	RESPONSES
<$5,000	71	990	14
$5000-$10,000	39	195	5
$10,001-$20,000	46	555	12
$20,001-$30,000	42	750	18
$30,001-$40,000	29	410	14
$40,001-$50,000	14	170	12
$50,001-$75,000	32	285	9
$75,001-$100,000	27	296	11
$100,001-$250,000	17	138	8
$250,001-$500,000	23	186	8
More than $500,000	21	125	6
Total Respondents: 41			

#	<$5,000	DATE
1	50	9/10/2021 3:41 PM
2	100	9/9/2021 8:48 AM
3	20	9/9/2021 8:12 AM
4	100	9/8/2021 11:53 AM
5	100	9/6/2021 7:34 PM
6	100	9/6/2021 5:59 PM
7	0	9/6/2021 3:28 PM

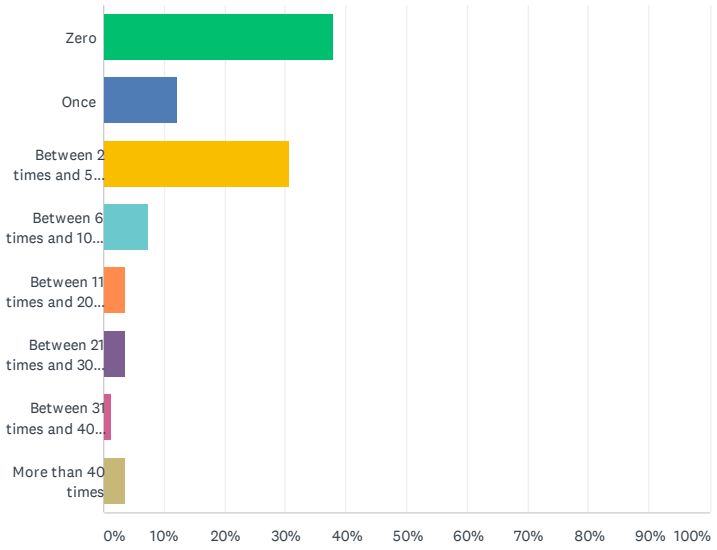
8	0	9/3/2021 2:58 PM
9	100	9/2/2021 10:22 PM
10	20	9/2/2021 7:20 PM
11	100	9/2/2021 3:04 PM
12	100	9/2/2021 2:49 PM
13	100	9/2/2021 2:27 PM
14	100	9/2/2021 2:20 PM
#	**$5000-$10,000**	**DATE**
1	0	9/9/2021 8:12 AM
2	90	9/7/2021 8:50 AM
3	100	9/6/2021 4:20 PM
4	5	9/6/2021 3:28 PM
5	0	9/3/2021 2:58 PM
#	**$10,001-$20,000**	**DATE**
1	50	9/10/2021 3:41 PM
2	0	9/9/2021 8:12 AM
3	50	9/7/2021 4:00 PM
4	100	9/7/2021 12:04 PM
5	100	9/7/2021 11:43 AM
6	10	9/6/2021 3:28 PM
7	30	9/4/2021 3:33 AM
8	0	9/3/2021 2:58 PM
9	25	9/2/2021 4:06 PM
10	10	9/2/2021 2:46 PM
11	100	9/2/2021 2:41 PM
12	80	9/2/2021 2:21 PM
#	**$20,001-$30,000**	**DATE**
1	20	9/9/2021 2:37 PM
2	0	9/9/2021 8:12 AM
3	50	9/7/2021 4:00 PM
4	50	9/7/2021 2:20 PM
5	10	9/7/2021 8:50 AM
6	10	9/6/2021 9:32 PM
7	100	9/6/2021 4:23 PM
8	5	9/6/2021 3:28 PM
9	100	9/5/2021 8:41 PM
10	50	9/4/2021 3:33 AM
11	100	9/3/2021 2:58 PM
12	10	9/3/2021 2:44 PM
13	10	9/3/2021 1:00 PM
14	10	9/3/2021 9:25 AM
15	100	9/2/2021 8:32 PM
16	50	9/2/2021 4:30 PM
17	25	9/2/2021 4:06 PM
18	50	9/2/2021 2:46 PM
#	**$30,001-$40,000**	**DATE**
1	50	9/9/2021 2:37 PM
2	0	9/9/2021 8:12 AM
3	50	9/7/2021 2:20 PM
4	25	9/6/2021 9:32 PM
5	5	9/6/2021 3:28 PM
6	20	9/4/2021 3:33 AM
7	0	9/3/2021 2:58 PM
8	20	9/3/2021 2:44 PM
9	20	9/2/2021 7:20 PM

10	25	9/2/2021 4:06 PM
11	100	9/2/2021 3:24 PM
12	10	9/2/2021 2:46 PM
13	65	9/2/2021 2:22 PM
14	20	9/2/2021 2:21 PM
#	**$40,001-$50,000**	**DATE**
1	20	9/9/2021 2:37 PM
2	0	9/9/2021 8:12 AM
3	25	9/6/2021 9:32 PM
4	5	9/6/2021 3:28 PM
5	0	9/3/2021 2:58 PM
6	20	9/3/2021 2:44 PM
7	15	9/3/2021 1:00 PM
8	15	9/3/2021 9:25 AM
9	20	9/2/2021 7:20 PM
10	20	9/2/2021 5:57 PM
11	25	9/2/2021 4:06 PM
12	5	9/2/2021 2:46 PM
#	**$50,001-$75,000**	**DATE**
1	80	9/9/2021 8:12 AM
2	5	9/6/2021 3:28 PM
3	0	9/3/2021 2:58 PM
4	20	9/3/2021 2:44 PM
5	15	9/3/2021 1:00 PM
6	15	9/3/2021 9:25 AM
7	25	9/2/2021 5:57 PM
8	25	9/2/2021 2:46 PM
9	100	9/2/2021 2:19 PM
#	**$75,001-$100,000**	**DATE**
1	10	9/9/2021 2:37 PM
2	0	9/9/2021 8:12 AM
3	40	9/6/2021 9:32 PM
4	100	9/6/2021 4:33 PM
5	30	9/6/2021 3:28 PM
6	11	9/4/2021 6:02 PM
7	0	9/3/2021 2:58 PM
8	20	9/3/2021 2:44 PM
9	25	9/2/2021 5:57 PM
10	25	9/2/2021 4:30 PM
11	35	9/2/2021 2:22 PM
#	**$100,001-$250,000**	**DATE**
1	0	9/9/2021 8:12 AM
2	15	9/6/2021 3:28 PM
3	48	9/4/2021 6:02 PM
4	0	9/3/2021 2:58 PM
5	10	9/3/2021 2:44 PM
6	20	9/2/2021 7:20 PM
7	20	9/2/2021 5:57 PM
8	25	9/2/2021 4:30 PM
#	**$250,001-$500,000**	**DATE**
1	0	9/9/2021 8:12 AM
2	15	9/6/2021 3:28 PM
3	41	9/4/2021 6:02 PM
4	0	9/3/2021 2:58 PM
5	50	9/3/2021 1:00 PM

6	50	9/3/2021 9:25 AM
7	20	9/2/2021 7:20 PM
8	10	9/2/2021 5:57 PM
#	**MORE THAN $500,000**	**DATE**
1	100	9/9/2021 12:04 PM
2	0	9/9/2021 8:12 AM
3	5	9/6/2021 3:28 PM
4	0	9/3/2021 2:58 PM
5	10	9/3/2021 1:00 PM
6	10	9/3/2021 9:25 AM

Q9 How often have you personally recommended using the safe harbour protection since it was introduced?*

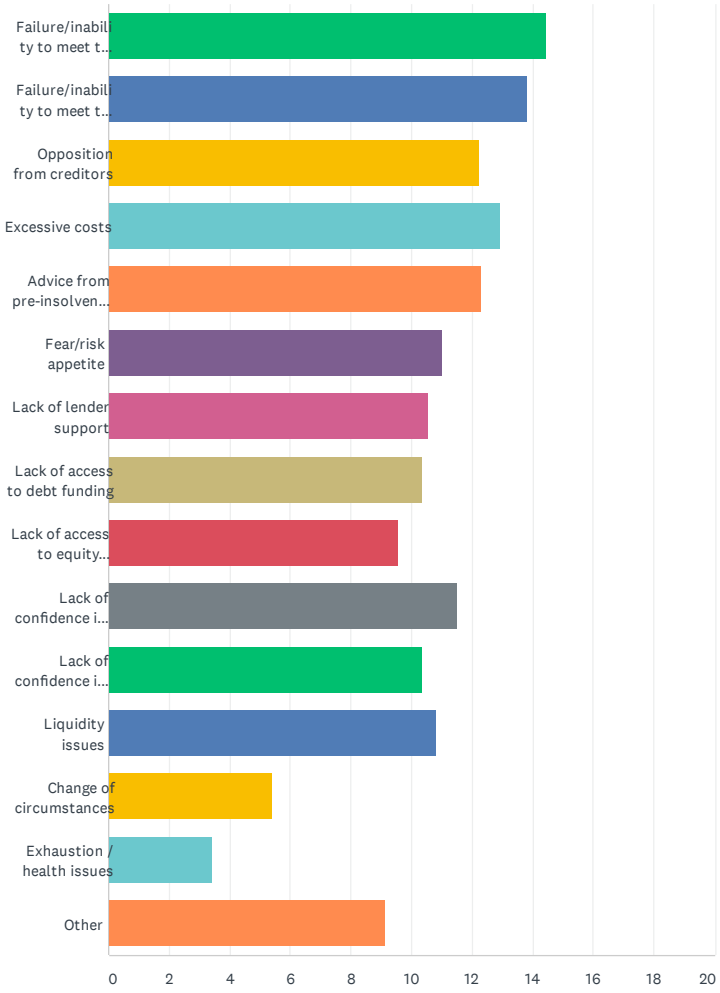
Answered: 82 Skipped: 27



ANSWER CHOICES	RESPONSES	
Zero	37.80%	31
Once	12.20%	10
Between 2 times and 5 times	30.49%	25
Between 6 times and 10 times	7.32%	6
Between 11 times and 20 times	3.66%	3
Between 21 times and 30 times	3.66%	3
Between 31 times and 40 times	1.22%	1
More than 40 times	3.66%	3
TOTAL		82

Q10 If you have not recommended the use of the safe harbour protection for a client, can you indicate the reasons why not? Please choose up to 5 of the most common reasons that apply from the following list and rank them in order of importance with 1 being the most common reason. *

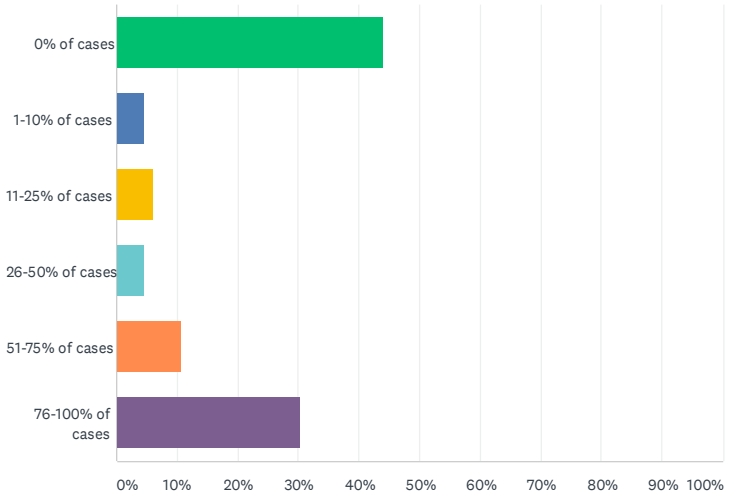
Answered: 49 Skipped: 60



	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Failure/inability to meet the threshold requirement of payment of employee entitlements	66.67% 24	19.44% 7	8.33% 3	2.78% 1	2.78% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Failure/inability to meet the threshold requirement of tax reporting	12.50% 4	65.63% 21	12.50% 4	9.38% 3	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Opposition from creditors	0.00% 0	10.00% 1	30.00% 3	30.00% 3	30.00% 3	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Excessive costs	26.67% 4	13.33% 2	20.00% 3	26.67% 4	0.00% 0	6.67% 1	6.67% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Advice from pre-insolvency advisers	0.00% 0	28.57% 2	14.29% 1	14.29% 1	42.86% 3	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Fear/risk appetite	8.33% 1	0.00% 0	25.00% 3	0.00% 0	16.67% 2	33.33% 4	8.33% 1	0.00% 0	8.33% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Lack of lender support	0.00% 0	27.27% 3	9.09% 1	0.00% 0	9.09% 1	0.00% 0	36.36% 4	9.09% 1	0.00% 0	9.09% 1	0.00% 0	0.00% 0	0.00% 0	0.00
Lack of access to debt funding	8.33% 1	16.67% 2	8.33% 1	16.67% 2	0.00% 0	0.00% 0	0.00% 0	33.33% 4	8.33% 1	0.00% 0	8.33% 1	0.00% 0	0.00% 0	0.00
Lack of access to equity funding	0.00% 0	0.00% 0	18.18% 2	9.09% 1	27.27% 3	0.00% 0	0.00% 0	0.00% 0	36.36% 4	9.09% 1	0.00% 0	0.00% 0	0.00% 0	0.00
Lack of confidence in effectiveness of the safe harbour protection	19.05% 4	9.52% 2	23.81% 5	9.52% 2	14.29% 3	0.00% 0	0.00% 0	4.76% 1	0.00% 0	19.05% 4	0.00% 0	0.00% 0	0.00% 0	0.00
Lack of confidence in the specific safe harbour plan	22.22% 4	0.00% 0	11.11% 2	27.78% 5	5.56% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	27.78% 5	5.56% 1	0.00% 0	0.00
Liquidity issues	13.04% 3	4.35% 1	26.09% 6	17.39% 4	13.04% 3	4.35% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	21.74% 5	0.00% 0	0.00
Change of circumstances	0.00% 0	0.00% 0	12.50% 1	12.50% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	75.00% 6	0.00
Exhaustion / health issues	0.00% 0	0.00% 0	0.00% 0	14.29% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	85.71
Other	26.67% 4	0.00% 0	13.33% 2	13.33% 2	13.33% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00

Q11 Where you recommended a safe harbour proposal, in what percentage of cases were your recommendations fully or mostly implemented by the clients?*

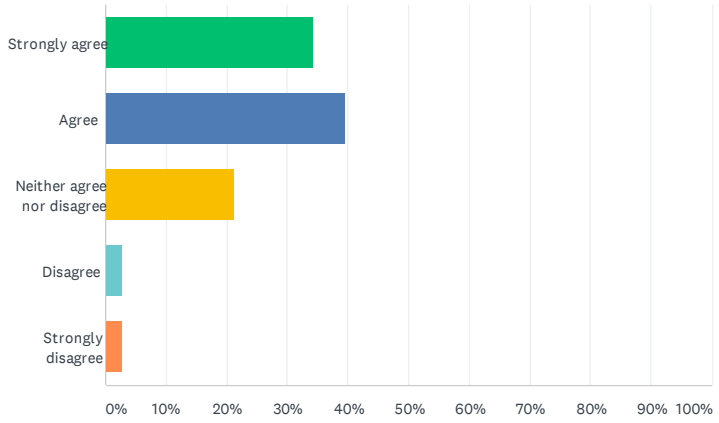
Answered: 66 Skipped: 43



ANSWER CHOICES	RESPONSES	
0% of cases	43.94%	29
1-10% of cases	4.55%	3
11-25% of cases	6.06%	4
26-50% of cases	4.55%	3
51-75% of cases	10.61%	7
76-100% of cases	30.30%	20
TOTAL		66

Q12 Where you have been engaged to develop a safe harbour plan, did it give your clients the confidence to continue trading on in an attempt to achieve a better outcome?

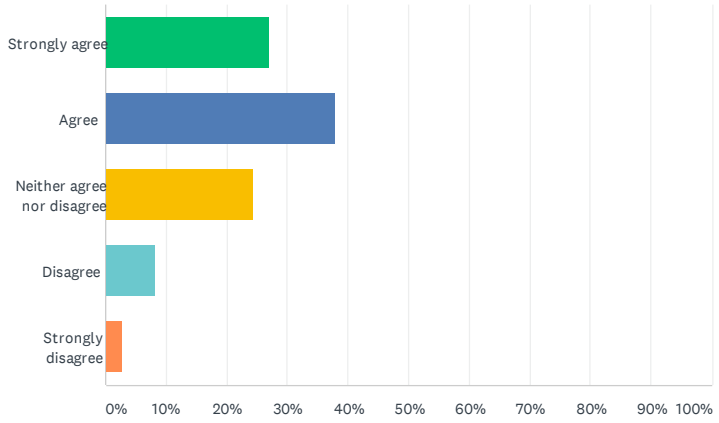
Answered: 72 Skipped: 37



ANSWER CHOICES	RESPONSES	
Strongly agree	34.21%	13
Agree	39.47%	15
Neither agree nor disagree	21.05%	8
Disagree	2.63%	1
Strongly disagree	2.63%	1
TOTAL		38

Q13 Where you have been engaged to develop a safe harbour plan, did it ensure greater accountability and discipline by the directors and management team of your clients?

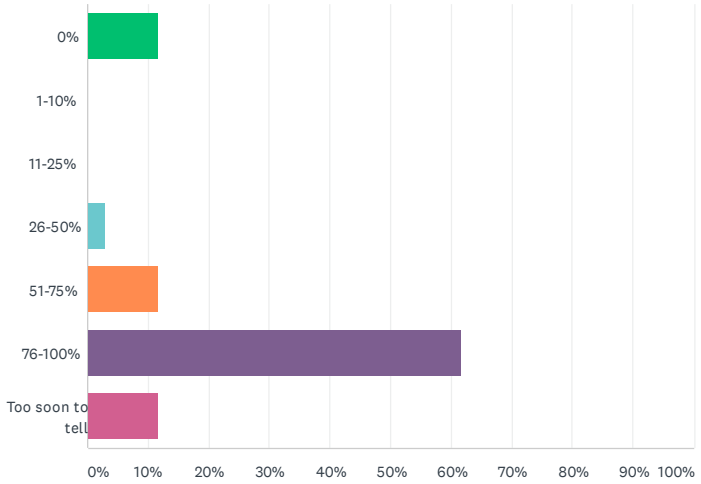
Answered: 71 Skipped: 38



ANSWER CHOICES	RESPONSES	
Strongly agree	27.03%	10
Agree	37.84%	14
Neither agree nor disagree	24.32%	9
Disagree	8.11%	3
Strongly disagree	2.70%	1
TOTAL		37

Q14 Where you have been engaged as a safe harbour adviser, what percentage resulted in a successful company restructure/turnaround without any form of external administration appointment having to occur? *

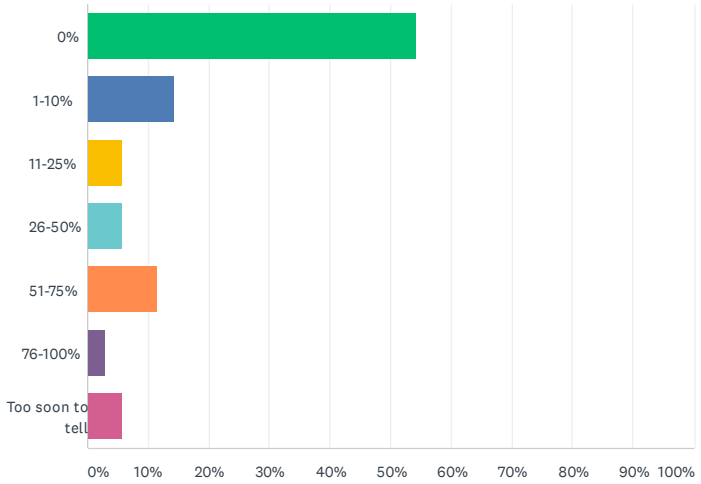
Answered: 69 Skipped: 40



ANSWER CHOICES	RESPONSES	
0%	11.76%	4
1-10%	0.00%	0
11-25%	0.00%	0
26-50%	2.94%	1
51-75%	11.76%	4
76-100%	61.76%	21
Too soon to tell	11.76%	4
TOTAL		34

Q15 Where you have been engaged as a safe harbour adviser, what percentage resulted in a successful company restructure/turnaround through a form of external administration appointment subsequent to your safe harbour work? *

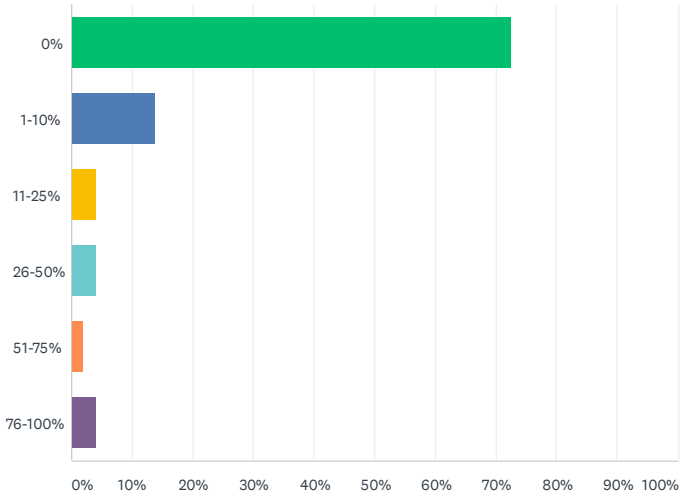
Answered: 71 Skipped: 38



ANSWER CHOICES	RESPONSES	
0%	54.29%	19
1-10%	14.29%	5
11-25%	5.71%	2
26-50%	5.71%	2
51-75%	11.43%	4
76-100%	2.86%	1
Too soon to tell	5.71%	2
TOTAL		35

Q16 Where you have been engaged as a safe harbour adviser, what percentage resulted in liquidation of the company despite your plan? (Note that this includes where directors did not follow your plan/recommendations)

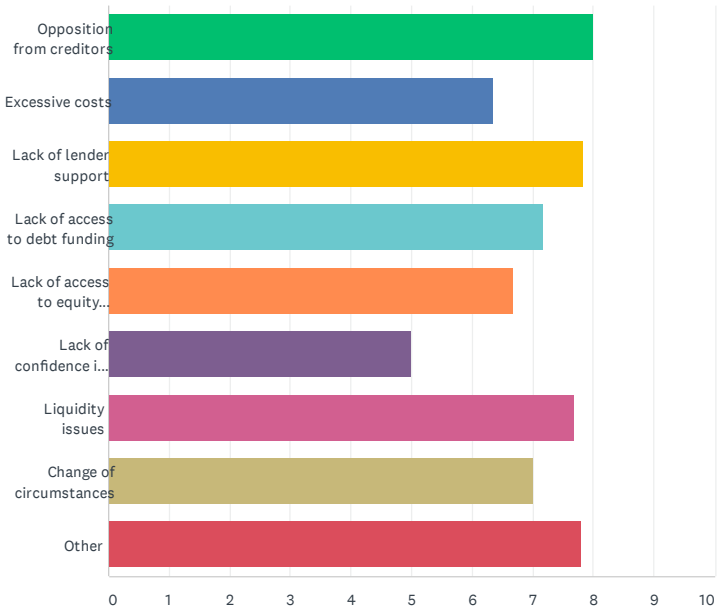
Answered: 51 Skipped: 58



ANSWER CHOICES	RESPONSES	
0%	72.55%	37
1-10%	13.73%	7
11-25%	3.92%	2
26-50%	3.92%	2
51-75%	1.96%	1
76-100%	3.92%	2
TOTAL		51

Q17 For those clients that implemented a safe harbour recommendation, but the company ultimately entered liquidation, what were the most common reasons why the restructure did not work? Please choose up to 5 of the most common reasons that apply from the following list and rank them in order of importance, with 1 being the most common reason. *

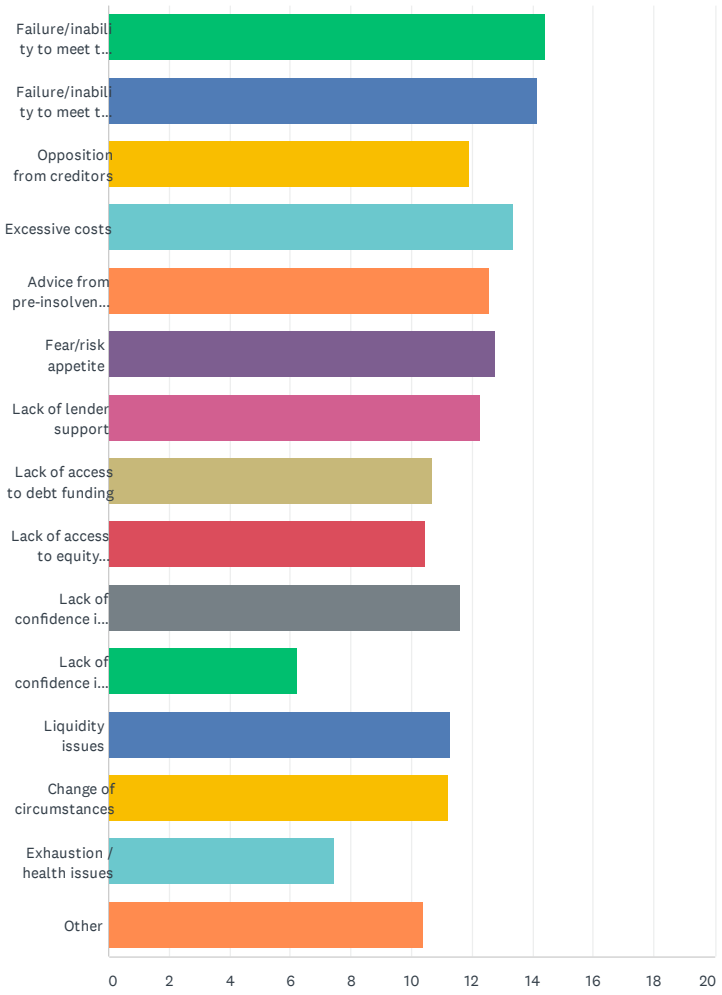
Answered: 15 Skipped: 94



	1	2	3	4	5	6	7	8	9	TOTAL	SCORE
Opposition from creditors	57.14% 4	14.29% 1	14.29% 1	0.00% 0	14.29% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	7	8.00
Excessive costs	33.33% 1	33.33% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	33.33% 1	0.00% 0	3	6.33
Lack of lender support	33.33% 2	33.33% 2	16.67% 1	16.67% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	6	7.83
Lack of access to debt funding	33.33% 2	16.67% 1	0.00% 0	33.33% 2	16.67% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	6	7.17
Lack of access to equity funding	16.67% 1	16.67% 1	33.33% 2	16.67% 1	0.00% 0	0.00% 0	16.67% 1	0.00% 0	0.00% 0	6	6.67
Lack of confidence in the specific safe harbour plan	0.00% 0	0.00% 0	0.00% 0	0.00% 0	100.00% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	2	5.00
Liquidity issues	16.67% 1	50.00% 3	16.67% 1	16.67% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	6	7.67
Change of circumstances	16.67% 1	16.67% 1	50.00% 3	0.00% 0	0.00% 0	16.67% 1	0.00% 0	0.00% 0	0.00% 0	6	7.00
Other	60.00% 3	0.00% 0	20.00% 1	0.00% 0	20.00% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	5	7.80

Q18 For those clients that did not implement your recommendation, what were the most common reasons why the recommendations were not implemented? Please choose up to 5 of the most common reasons that apply from the following list and rank them in order of importance, with 1 being the most important reason.*

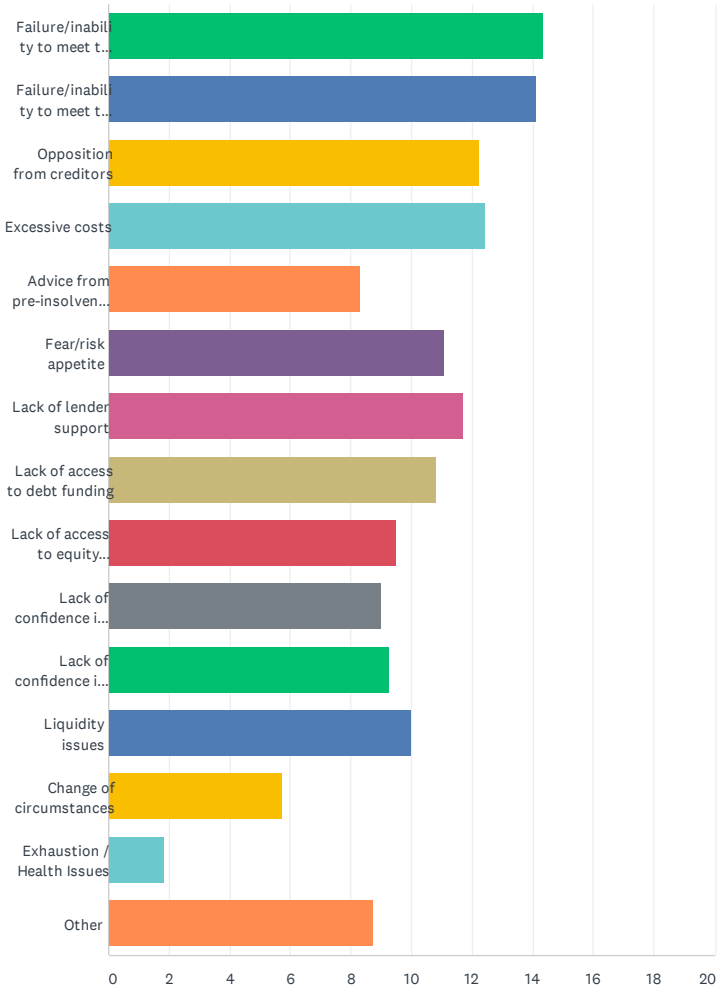
Answered: 39 Skipped: 70



	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Failure/inability to meet the threshold requirement of payment of employee entitlements	56.25% 9	31.25% 5	6.25% 1	6.25% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.0
Failure/inability to meet the threshold requirement of tax reporting	40.00% 8	40.00% 8	15.00% 3	5.00% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.0
Opposition from creditors	12.50% 1	25.00% 2	0.00% 0	25.00% 2	12.50% 1	12.50% 1	0.00% 0	0.00% 0	12.50% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.0
Excessive costs	27.27% 3	18.18% 2	27.27% 3	18.18% 2	9.09% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.0
Advice from pre-insolvency advisers	33.33% 3	11.11% 1	0.00% 0	0.00% 0	44.44% 4	11.11% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.0
Fear/risk appetite	16.67% 2	25.00% 3	33.33% 4	0.00% 0	8.33% 1	0.00% 0	16.67% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.0
Lack of lender support	25.00% 2	25.00% 2	25.00% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	12.50% 1	0.00% 0	12.50% 1	0.00% 0	0.00% 0	0.00% 0	0.0
Lack of access to debt funding	0.00% 0	11.11% 1	22.22% 2	33.33% 3	0.00% 0	0.00% 0	0.00% 0	11.11% 1	11.11% 1	0.00% 0	11.11% 1	0.00% 0	0.00% 0	0.0
Lack of access to equity funding	11.11% 1	0.00% 0	11.11% 1	11.11% 1	33.33% 3	0.00% 0	0.00% 0	11.11% 1	11.11% 1	11.11% 1	0.00% 0	0.00% 0	0.00% 0	0.0
Lack of confidence in effectiveness of the safe harbour protection	20.00% 2	20.00% 2	20.00% 2	0.00% 0	10.00% 1	10.00% 1	0.00% 0	0.00% 0	0.00% 0	10.00% 1	10.00% 1	0.00% 0	0.00% 0	0.0
Lack of confidence in the specific safe harbour plan	0.00% 0	0.00% 0	0.00% 0	25.00% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	25.00% 1	50.00% 2	0.00% 0	0.0
Liquidity issues	8.33% 1	16.67% 2	33.33% 4	16.67% 2	0.00% 0	0.00% 0	8.33% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	8.33% 1	8.33% 1	0.0
Change of circumstances	10.00% 1	20.00% 2	30.00% 3	20.00% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	20.00% 2	0.0
Exhaustion / health issues	0.00% 0	11.11% 1	11.11% 1	11.11% 1	11.11% 1	11.11% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	33.3
Other	38.46% 5	0.00% 0	0.00% 0	15.38% 2	23.08% 3	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.0

Q19 If (after being engaged by a client) you have not recommended the use of the safe harbour protection, can you indicate the main reasons why not?Please choose all the reasons that apply from the following list and list the reasons in order of importance with 1 being the most important reason.

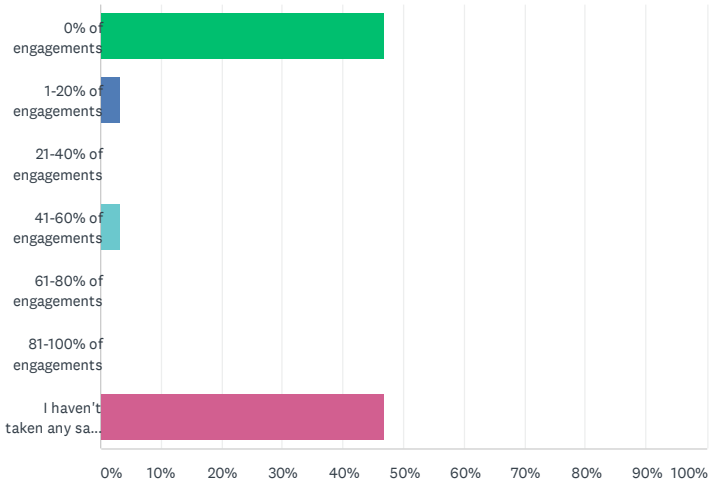
Answered: 37 Skipped: 72



	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Failure/inability to meet the threshold requirement of payment of employee entitlements	63.64% 14	18.18% 4	13.64% 3	0.00% 0	4.55% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Failure/inability to meet the threshold requirement of tax reporting	31.82% 7	54.55% 12	4.55% 1	9.09% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Opposition from creditors	11.11% 1	11.11% 1	44.44% 4	11.11% 1	0.00% 0	0.00% 0	11.11% 1	11.11% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Excessive costs	7.14% 1	14.29% 2	35.71% 5	14.29% 2	21.43% 3	0.00% 0	7.14% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Advice from pre-insolvency advisers	0.00% 0	14.29% 1	0.00% 0	0.00% 0	28.57% 2	14.29% 1	0.00% 0	14.29% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	14.29% 1	0.00
Fear/risk appetite	0.00% 0	0.00% 0	25.00% 3	33.33% 4	8.33% 1	16.67% 2	0.00% 0	8.33% 1	8.33% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Lack of lender support	9.09% 1	27.27% 3	0.00% 0	18.18% 2	9.09% 1	9.09% 1	27.27% 3	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Lack of access to debt funding	10.00% 1	10.00% 1	20.00% 2	10.00% 1	0.00% 0	10.00% 1	0.00% 0	30.00% 3	10.00% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00
Lack of access to equity funding	0.00% 0	0.00% 0	10.00% 1	20.00% 2	20.00% 2	0.00% 0	10.00% 1	0.00% 0	30.00% 3	10.00% 1	0.00% 0	0.00% 0	0.00% 0	0.00
Lack of confidence in effectiveness of the safe harbour protection	18.18% 2	0.00% 0	9.09% 1	0.00% 0	18.18% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	36.36% 4	18.18% 2	0.00% 0	0.00% 0	0.00
Lack of confidence in the specific safe harbour plan	16.67% 2	8.33% 1	8.33% 1	16.67% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	8.33% 1	0.00% 0	33.33% 4	0.00% 0	8.33% 1	0.00
Liquidity issues	14.29% 2	14.29% 2	14.29% 2	7.14% 1	14.29% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	7.14% 1	0.00% 0	28.57% 4	0.00% 0	0.00
Change of circumstances	12.50% 1	0.00% 0	0.00% 0	0.00% 0	12.50% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	25.00% 2	50.00% 4	0.00
Exhaustion / Health Issues	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	83.33
Other	41.67% 5	8.33% 1	0.00% 0	0.00% 0	0.00% 0	8.33% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	8.33

Q20 How often is a lack of appropriate books and records an additional reason why you haven't recommended safe harbour as being available to directors?

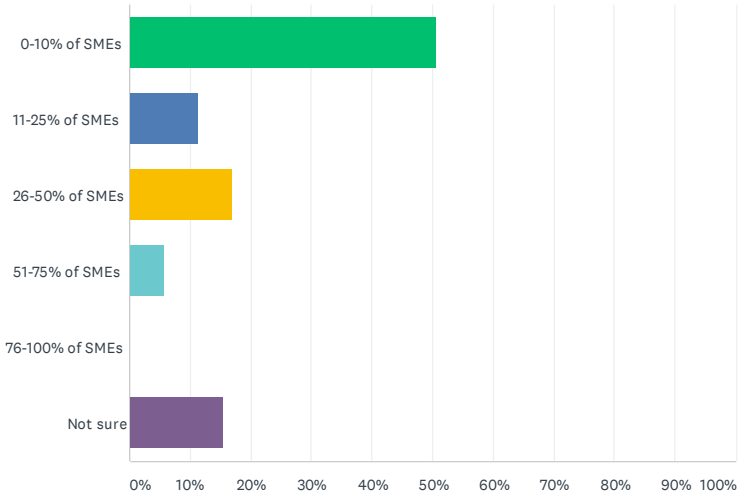
Answered: 64 Skipped: 45



ANSWER CHOICES	RESPONSES	
0% of engagements	46.88%	30
1-20% of engagements	3.13%	2
21-40% of engagements	0.00%	0
41-60% of engagements	3.13%	2
61-80% of engagements	0.00%	0
81-100% of engagements	0.00%	0
I haven't taken any safe harbour appointments/not applicable	46.88%	30
TOTAL		64

Q21 In your experience, as a percentage, what percentage of financially distressed SMEs would qualify for safe harbour protection given the employee entitlement and tax lodgement obligations?

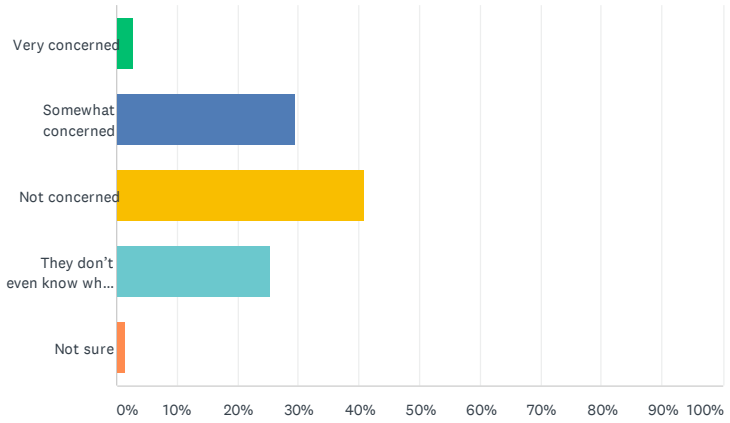
Answered: 71 Skipped: 38



ANSWER CHOICES	RESPONSES	
0-10% of SMEs	50.70%	36
11-25% of SMEs	11.27%	8
26-50% of SMEs	16.90%	12
51-75% of SMEs	5.63%	4
76-100% of SMEs	0.00%	0
Not sure	15.49%	11
TOTAL		71

Q22 In your experience, how concerned about insolvent trading liability are directors of SMEs?

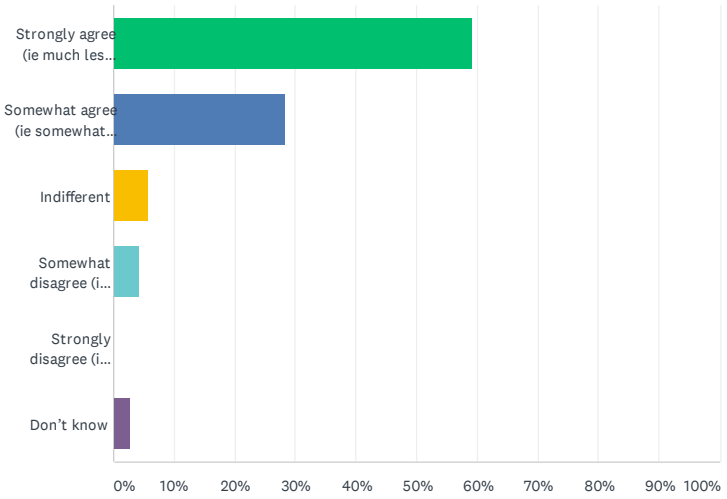
Answered: 71 Skipped: 38



ANSWER CHOICES	RESPONSES	
Very concerned	2.82%	2
Somewhat concerned	29.58%	21
Not concerned	40.85%	29
They don't even know what insolvent trading is until I tell them	25.35%	18
Not sure	1.41%	1
TOTAL		71

Q23 In your experience, are directors of SMEs less concerned about personal liability for insolvent trading given their personal liability through personal guarantees to financiers and trade suppliers, business lending secured against residential premises and the ATO's existing ability to lower the corporate veil and make directors personally liable for PAYG, superannuation and more recently GST?

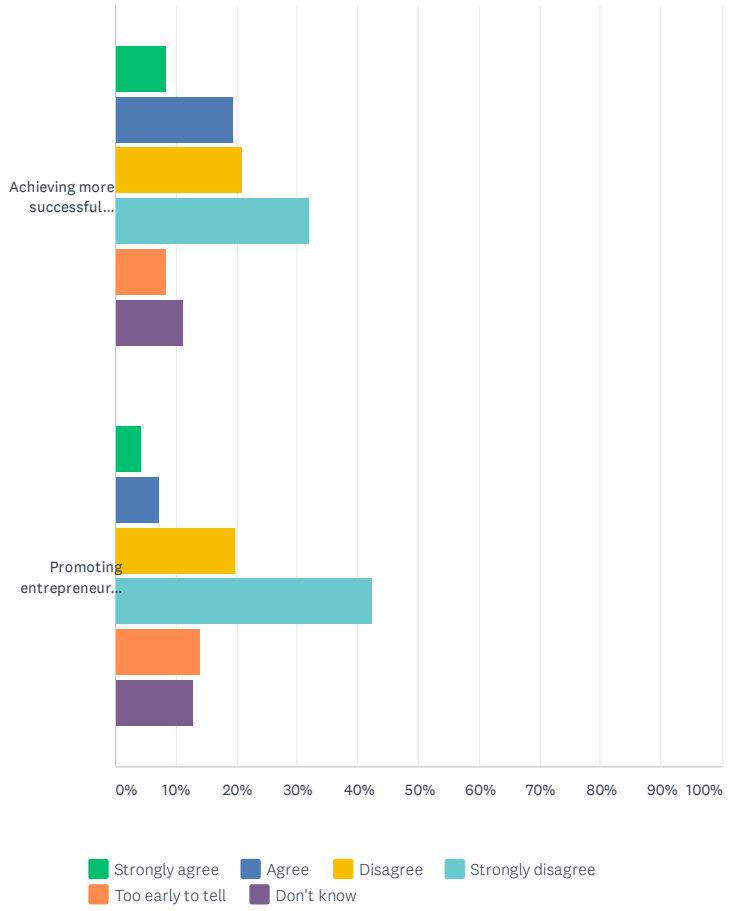
Answered: 71 Skipped: 38



ANSWER CHOICES	RESPONSES	
Strongly agree (ie much less concerned about personal liability for insolvent trading)	59.15%	42
Somewhat agree (ie somewhat less concerned about personal liability for insolvent trading)	28.17%	20
Indifferent	5.63%	4
Somewhat disagree (ie somewhat more concerned about personal liability for insolvent trading)	4.23%	3
Strongly disagree (ie much more concerned about personal liability for insolvent trading)	0.00%	0
Don't know	2.82%	2
TOTAL		71

Q24 When the safe harbour reforms were introduced, the government stated that they were aimed at achieving more successful company restructures outside of formal insolvency and promoting entrepreneurship by business people. How successful do you think the reforms have been at: *

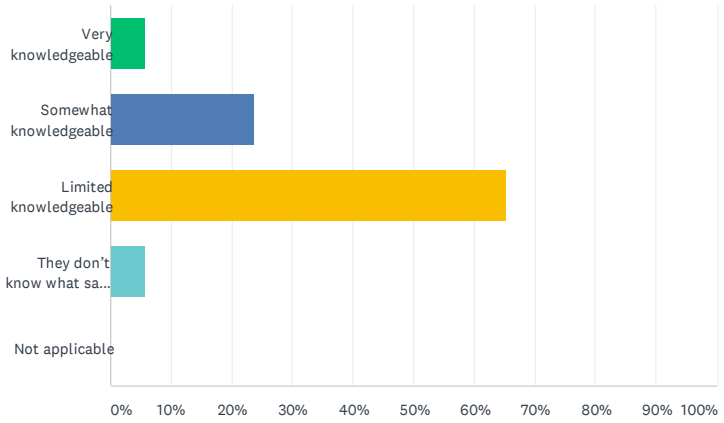
Answered: 72 Skipped: 37



	STRONGLY AGREE	AGREE	DISAGREE	STRONGLY DISAGREE	TOO EARLY TO TELL	DON'T KNOW	TOTAL
Achieving more successful company restructures outside of formal insolvency	8.33% 6	19.44% 14	20.83% 15	31.94% 23	8.33% 6	11.11% 8	72
Promoting entrepreneurship by business people	4.23% 3	7.04% 5	19.72% 14	42.25% 30	14.08% 10	12.68% 9	71

Q25 In your experience, what best describes the knowledge of safe harbour amongst your accounting / lawyer referral networks?

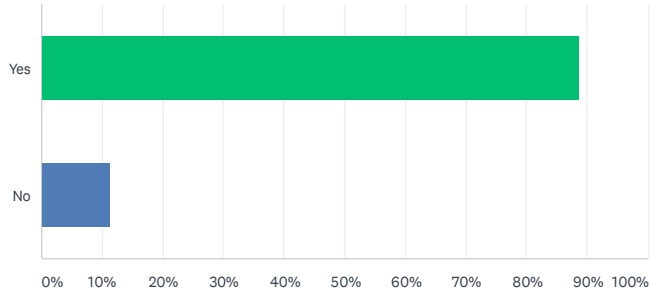
Answered: 72 Skipped: 37



ANSWER CHOICES	RESPONSES	
Very knowledgeable	5.56%	4
Somewhat knowledgeable	23.61%	17
Limited knowledgeable	65.28%	47
They don't know what safe harbour is	5.56%	4
Not applicable	0.00%	0
TOTAL		72

Q26 Do you think that the safe harbour reforms are better suited to certain types of companies (e.g. size of company or whether the company is public or private)? *

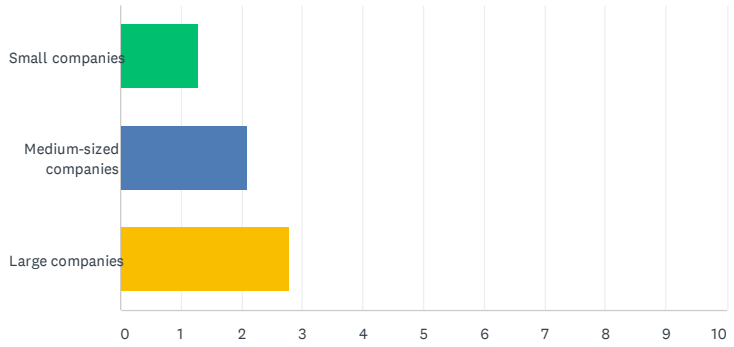
Answered: 71 Skipped: 38



ANSWER CHOICES	RESPONSES	
Yes	88.73%	63
No	11.27%	8
TOTAL		71

Q27 If you think that the safe harbour reforms are better suited to companies of a certain size, please choose all the types of companies from the following list that you think are suitable for the safe harbour reforms and rank them in order, with 1 being the type of company which you think is most suitable? *

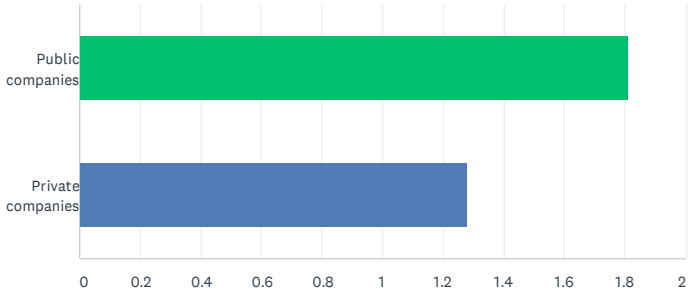
Answered: 68 Skipped: 41



	1	2	3	TOTAL	SCORE
Small companies	10.20% 5	6.12% 3	83.67% 41	49	1.27
Medium-sized companies	10.00% 6	90.00% 54	0.00% 0	60	2.10
Large companies	86.36% 57	6.06% 4	7.58% 5	66	2.79

Q28 If you think that the safe harbour reforms are better suited to public or private companies, please rank them below, with 1 being the most suitable?*

Answered: 57 Skipped: 52



	1	2	TOTAL	SCORE
Public companies	81.13% 43	18.87% 10	53	1.81
Private companies	28.00% 14	72.00% 36	50	1.28

Q29 If you think that the safe harbour reforms are better suited to certain types of companies, why do you think this? *

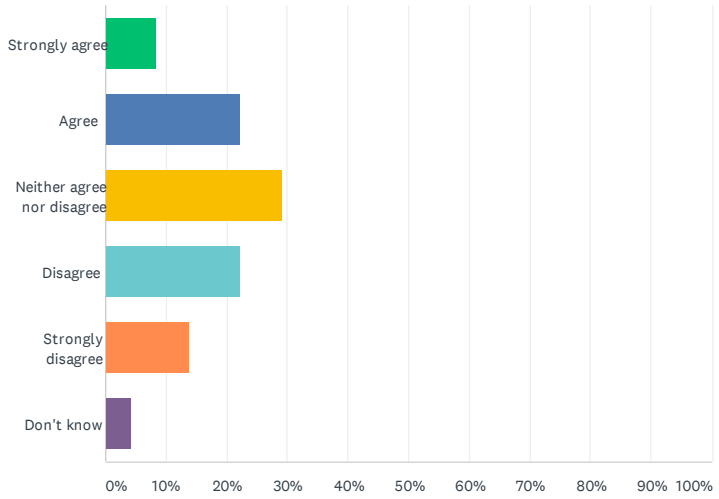
Answered: 51 Skipped: 58

#	RESPONSES	DATE
1	Cost, knowledge about Safe harbour and resources available to trade on and restructure	9/10/2021 3:46 PM
2	Larger companies with professional directors are more keen to avoid insolvent trading, compared to directors of smaller companies who usually personally guarantee major debts, including bank debt and landlords.	9/9/2021 2:42 PM
3	A level of financial understanding is required so that when the director(s) approach a practitioner for assistance, the Company has some air in the lungs. The majority of directors in the SME space approach a practitioner when they can no longer pay net wages.	9/9/2021 12:14 PM
4	Continuous disclosure obligations for public companies compete with the principles of safe harbour	9/9/2021 10:11 AM
5	cost	9/9/2021 9:56 AM
6	For large companies: Management is more sophisticated and less likely to be subject to personal guarantees. There is more capital available to fund a workout.	9/9/2021 8:53 AM
7	extent of publicity, extent of potential insolvent trading claims if not undertaken, costs and risks of an appt versus a VA or CVL, sufficient resources to ensure employee entitlements and lodgemnets up to date	9/9/2021 8:45 AM
8	Public large companies are more likely to meet the requirements and it is more cost effective. Proper safe harbour is at least a $50k fee	9/9/2021 8:20 AM
9	Cost	9/8/2021 4:30 PM
10	Private companies have less transparency - safe harbour can be viewed as detrimental to a business. Therefore, public companies likely to avoid.	9/8/2021 11:57 AM
11	risk appetite	9/7/2021 4:16 PM
12	Directors have no personal liability, balance sheets can support required advice and implementation of strategy, books and records are compliant with section 286 of Corps Act, Directors are more "sophisticated"	9/7/2021 2:03 PM
13	More likely to qualify for safe harbour Better educated in relation to directors duties and insolvent trading Able to pay for safe harbour advice	9/7/2021 12:26 PM
14	Depends on the plan and impact on stakeholders. Different situations impact differently.	9/7/2021 11:50 AM
15	Costs and complexity make it largely unviable for smaller businesses. Director's in smaller businesses are also not generally concerned about the risks of trading whilst insolvent.	9/7/2021 8:58 AM
16	Sophistication of directors, independent directors worried about personal liability	9/6/2021 9:36 PM
17	they have the finances and shareholder support to implemetn plans	9/6/2021 7:38 PM
18	Medium size private companies normally have adequate accounting systems & personally involved management	9/6/2021 4:29 PM
19	Most SME companies have limited regard for restructuring options given their personal stake in the outcome i.e. they are fully exposed personally to failure so preferring their creditors is a choice of putting their personal financial outcomes behind creditors. AS such, it is unrealistic to consider that owner managed companies will adopt safe harbour. This contracts with directors of public companies who don't have the same personal investment in the outcome and so are more likely to consider their obligations to creditors.	9/6/2021 4:28 PM
20	Public Companies and Large Private Companies generally have adequate substance worthwhile of being protected, and directors with heightened concerns of insolvent trading and directors duties.	9/6/2021 3:42 PM
21	Professional/independent directors	9/6/2021 8:50 AM
22	Public companies may be impacted by announcements however it should provide/add an element of confidence to the process if significant issues present.	9/5/2021 8:50 PM
23	Public companies are more likely to have access to external funding which is often required for any restructure. SME's often do not have access to external funding and / or the business owner does not want to dilute his ownership / control. Safe Harbour works best if you have non-exec directors, as they are typically, professional, more risk adverse and less willing to just allow the business to trade on, without obtaining the protection from the Safe Harbour legislation.	9/4/2021 6:12 PM
24	Better record keeping More sophisticated Access to complex insolvency advice	9/4/2021 5:44 PM
25	Cost, criteria, risk	9/4/2021 11:43 AM
26	Director sophistication and director reputation concerns are drivers. Better access to new debt/equity.	9/4/2021 3:40 AM
27	Companies with non-executive directors are better suited to the safe harbour protections Companies without non-executive directors ie: smaller companies' whose owners & directors are the same people, often pledge their homes/personal assets as security (required by Australian Banks), so possible insolvent action does not resonate with them because if their company fails they've already lost all their family wealth.	9/3/2021 6:13 PM
28	Public and larger companies typically have greater access to cash resources, debt and equity funding in order to achieve a successful restructure. Directors of larger companies are often	9/3/2021 3:02 PM

	more sophisticated and identify risks earlier than directors of smaller companies. Early intervention is essential to a successful restructure.	
29	Larger companies have NED's who are more concerned about personal liabilities, can fund advisor fees, and generally have more options to restructure - ie share markey capital raise	9/3/2021 2:50 PM
30	Safe harbour is more easily met and implemented in companies with a strong governance culture. I have seen varied levels of good governance in small, medium and publicly listed companies. Large listed are usually well governed, but not always. Whilst not always, large Co. are usually better able to implement a turnaround plan. Less well managed companies have greatly benefited from having to meet the safe harbour requirements.	9/3/2021 1:36 PM
31	NEDs and Directors have more at stake than directors of small companies.	9/3/2021 9:37 AM
32	Only the larger public companies will have access to the required working capital to qualify and work through a safe-harbour given no moratorium of creditor claims.	9/3/2021 9:21 AM
33	Better systems, processes and reporting to enable the entity to recognise when safe harbour / advice is required in an early stage	9/2/2021 11:24 PM
34	Safe Harbour is better suited to those companies that have strong governance, business processes for recognising, paying employee entitlements and lodging tax returns, and record-keeping; or are willing to to improve them. Typically this happens when there are non-executive and/or skilled Directors on the Board.	9/2/2021 7:50 PM
35	sophistication of other advisers and cost	9/2/2021 6:02 PM
36	The cost of conducting a proper safe harbour engagement, fulfilling the relevant requirements and ongoing monitoring cannot legitimately done for less than $100k. Anyone doing them for cheaper (which are many) can not be doing the job properly and risk being sued if things go awry.	9/2/2021 5:24 PM
37	Cost of safe harbour advice is often prohibitive for a small business, and they do not have the cashflow plus the employee entitlement threshold cannot often be met.	9/2/2021 4:53 PM
38	larger the better /sound business behind the proposal	9/2/2021 4:49 PM
39	Director risk profile is different for public companies vs small private companies	9/2/2021 4:08 PM
40	Shit legislation that a gold fish gave more consideration too. Too expensive and time consuming for SME. So basically only drafted for the top end of town that prefer a differing type of restructure with debt equity exchanges, share releases under a DOCA etc	9/2/2021 3:41 PM
41	More suitable to larger public companies that have professional independent directors concerned about corporate governance	9/2/2021 3:32 PM
42	Safe Harbour is not relevant to the majority of financially stressed small companies due the the eligibility criteria and the cost associated with such appointments.	9/2/2021 3:08 PM
43	Need strong in house accounting and financial management expected of a public company.	9/2/2021 3:01 PM
44	Cost and complexity would generally make formal insolvency appointments more attractive to small private companies in my experience.	9/2/2021 2:54 PM
45	The legislation is complex which increases the cost involved. This makes it prohibitive for small and medium sized businesses.	9/2/2021 2:54 PM
46	ASX reporting requirements would likely require a public entity to advise the market.	9/2/2021 2:44 PM
47	Directors of large companies plan better for financial difficulty and generally have better access to capital for restructuring and better systems to ensure lodgements are in order and employees paid.	9/2/2021 2:42 PM
48	The need to keep information confidential (except for the lenders) can only be achieved in a Private Company	9/2/2021 2:38 PM
49	The hurdle requirements and records are more likely to be met and held by larger SME's and large corporations especially those with NED's, it can apply to smaller companies but there is a cost versus reward threshold when they may already be exposed personally to a significant amount of the debt and therefore insolvent trading is seldom a consideration.	9/2/2021 2:34 PM
50	It would appear that the directors of public companies are more risk adverse and will seek assistance earlier.	9/2/2021 2:25 PM
51	The company needs to be bankable and attract sufficient capital investment to support the company during the implementation of a safe harbour plan and private companies are more suited because there are less onerous public disclosure requirements.	9/2/2021 2:25 PM

Q30 Does safe harbour encourage directors to seek help earlier to resolve their financial/operational issues?

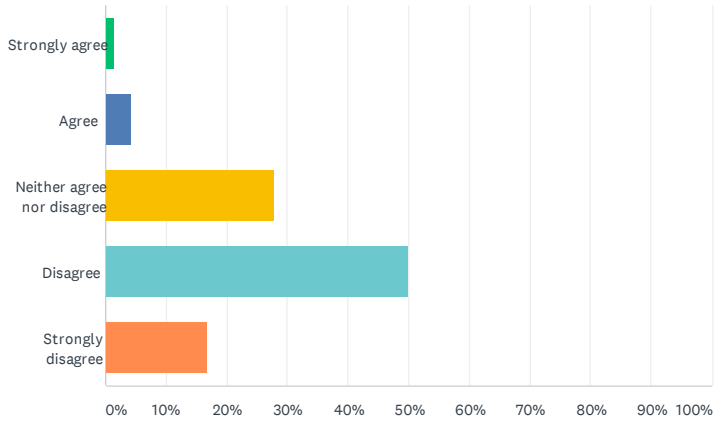
Answered: 72 Skipped: 37



ANSWER CHOICES	RESPONSES	
Strongly agree	8.33%	6
Agree	22.22%	16
Neither agree nor disagree	29.17%	21
Disagree	22.22%	16
Strongly disagree	13.89%	10
Don't know	4.17%	3
TOTAL		72

Q31 Do you think the safe harbour regime is being abused by directors to avoid reasonable and fair personal liability?

Answered: 72 Skipped: 37



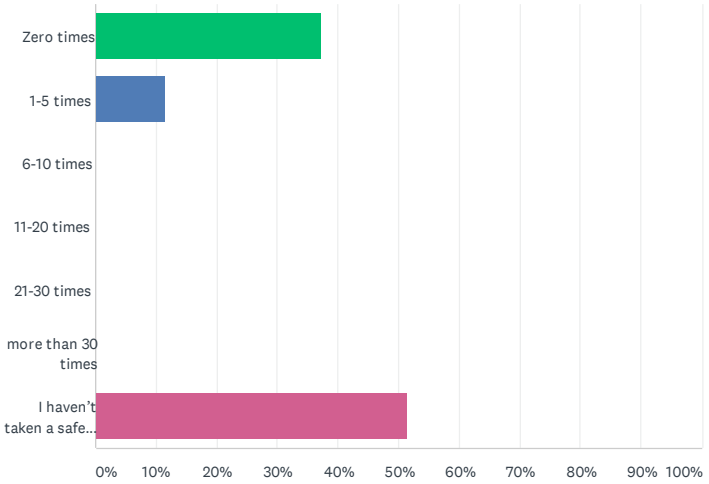
ANSWER CHOICES	RESPONSES	
Strongly agree	1.39%	1
Agree	4.17%	3
Neither agree nor disagree	27.78%	20
Disagree	50.00%	36
Strongly disagree	16.67%	12
TOTAL		72

#	DO YOU HAVE ANY OTHER COMMENTS ABOUT THIS?	DATE
1	I am unsure why this was even brought in, directors already had numerous defences, in the ACt and in case law, to insolvent trading claims, including where they take reasonable and honest action in the interest of the company even when it is insolvent. Difficult to see unique benefit to this versus putting funds either towards defending insol trading claims or VA and DOCA (DOCA can prevent voidable transaction claims against the director also)	9/9/2021 8:45 AM
2	Safe harbour is barely being used. There are numerous other mechanisms that we find directors are using to avoid said responsibilities.	9/9/2021 8:20 AM
3	I have not seen abuse in my experience	9/6/2021 9:36 PM
4	I don't think they would know (if mid to small), more likely to avail of phoenix type behaviour	9/5/2021 8:50 PM
5	The Safe Harbour legislation has been poorly communicated to directors. Very few directors are even aware of the legislation. Normally we spend a significant amount of time upfront having to explain to directors what the Safe Harbour legislation is, and why it is relevant to them. They are normally sceptical at first, as they have no knowledge and awareness of the legislation.	9/4/2021 6:12 PM
6	Focus would be on preserving the business not avoiding personal liability	9/4/2021 5:44 PM
7	Director who are prepared to abuse their position arent likely to worry about SH governance	9/3/2021 2:50 PM
8	Given the safe harbour regime, it's difficult to see how safe harbour of itself would do this. I've not seen this, however I do not review other advisor's work, but am well connected to the front-end and back-end of banks, IPs and lawyers.	9/3/2021 1:36 PM
9	If you qualify then you can't abuse.	9/3/2021 9:21 AM
10	I'm not sure how that would be possible, given it is ultimately a Judge's decision on whether the Directors had the benefit of the safe harbour protection.	9/2/2021 7:50 PM
11	So little up take and no data to make comment	9/2/2021 3:41 PM
12	I don't think the avaialbility of safe harbour influences directors at all. Most seem more concerned aboout personal liability crystalising from other sources and ways to effectively manage that risk. In my experience there has been little if any enthusiasm for safe harbour.	9/2/2021 2:54 PM
13	The single biggest issue is no director wants to make the admission in their board minutes that they face potential insolvency and have enacted safe harbour , and trade on be it an SME or Listed company. Also those who meet the thresholds don't think they have a problem. Those SMEs who can't meet the thresholds usually also can't afford to pay any professional advisors at any stage of distress. Most restructuring work is bank instigated and paid by them or by companies large enough who have left some cash in the tin. Most SME directors simply fly the plane into the mountain as no one ever goes to jail for insolvent trading and they are not commercially viable actions to run as the director always has no assets . Safe Harbour was pushed by the big law firms to protect their public Director clients , who usually have no skin in the game. If they let it be open slather and said don't worry about the thresholds or self incriminating in the minute books , but said use an RL, and some lower threshold for what is reasonable for a plan, then you might get more take up. Disclosure though is the biggest issue	9/2/2021 2:51 PM

	so you will have creditors apoplectic if they provided new credit without protection so maybe they need a super priority from the date of, even if they don't know etc. Also keep the lawyers out of this review. They are not the ones in the firing line that take on personal liability or providing the commercial advice . They also want to move in and take our work away from us .	
14	The requirements are very strict and haven't seen a director utilise such protection as yet.	9/2/2021 2:44 PM
15	Experience shows the educated Directors understand the value of retaining goodwill and are committed to preserving same with the better outcome.	9/2/2021 2:38 PM
16	I have not witnessed this at all. All assignments to date are directors trying to maximise an outcome whilst avoiding personal liability.	9/2/2021 2:34 PM

Q32 As a safe harbour adviser, how many times has a safe harbour plan you have been involved in subsequently been put forward in argument to protect a defendant director from an insolvent trading claim against that director: *

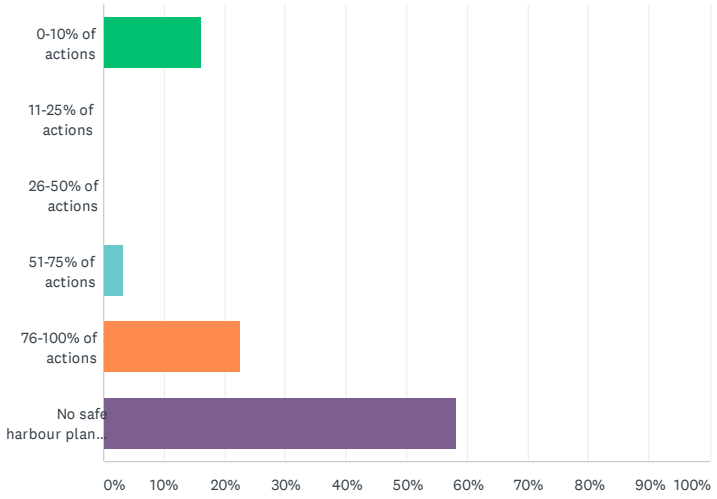
Answered: 70 Skipped: 39



ANSWER CHOICES	RESPONSES	
Zero times	37.14%	26
1-5 times	11.43%	8
6-10 times	0.00%	0
11-20 times	0.00%	0
21-30 times	0.00%	0
more than 30 times	0.00%	0
I haven't taken a safe harbour advisory appointment	51.43%	36
TOTAL		70

Q33 As a safe harbour adviser, in what percentage of actions was your safe harbour plan successful in protecting a director from liability for insolvent trading?*

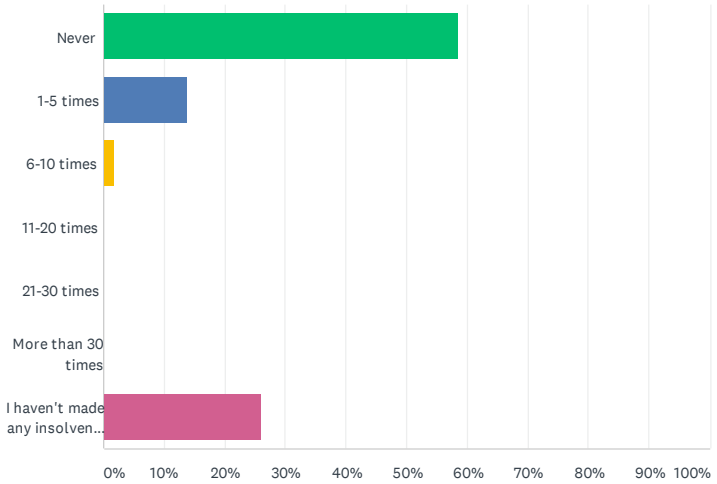
Answered: 69 Skipped: 40



ANSWER CHOICES	RESPONSES	
0-10% of actions	16.13%	5
11-25% of actions	0.00%	0
26-50% of actions	0.00%	0
51-75% of actions	3.23%	1
76-100% of actions	22.58%	7
No safe harbour plan I have been involved in has been used in argument to protect a director from an insolvent trading action	58.06%	18
TOTAL		31

Q34 As a liquidator, how many times has a safe harbour defence been put forward by directors as a defence to insolvent trading claims you were considering taking against them?

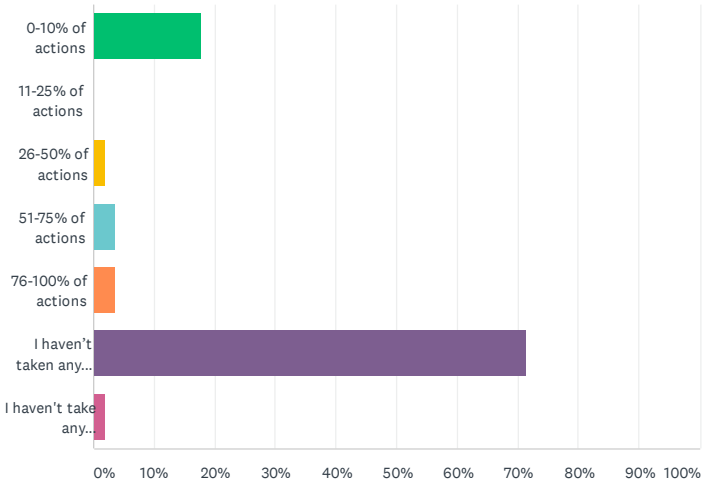
Answered: 68 Skipped: 41



ANSWER CHOICES	RESPONSES	
Never	58.62%	34
1-5 times	13.79%	8
6-10 times	1.72%	1
11-20 times	0.00%	0
21-30 times	0.00%	0
More than 30 times	0.00%	0
I haven't made any insolvent trading claims against directors since safe harbour came in	25.86%	15
TOTAL		58

Q35 As a liquidator, where you have been appointed and found a safe harbour plan was in place, in what percentage was that plan successful in dissuading you from pursuing an insolvent trading claim?

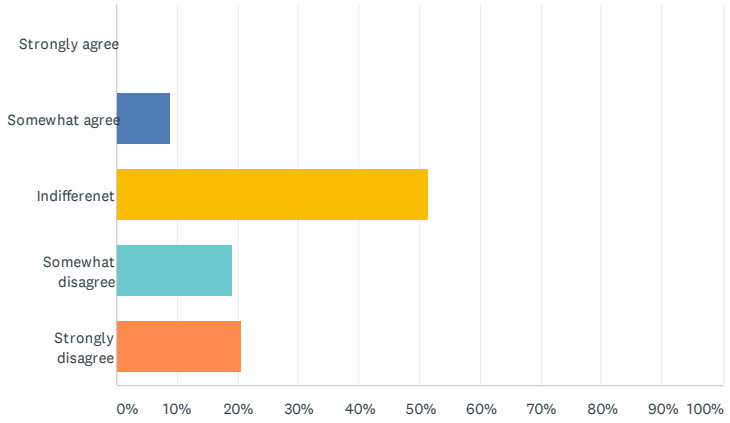
Answered: 68 Skipped: 41



ANSWER CHOICES	RESPONSES	
0-10% of actions	17.86%	10
11-25% of actions	0.00%	0
26-50% of actions	1.79%	1
51-75% of actions	3.57%	2
76-100% of actions	3.57%	2
I haven't taken any appointments where a safe habour plan has been in place	71.43%	40
I haven't take any appointments where there was any insolvent trading	1.79%	1
TOTAL		56

Q36 Do you think that safe harbour has made it too hard to take reasonable and appropriate action against directors who have inappropropriately traded their businesses while insolvent?

Answered: 68 Skipped: 41

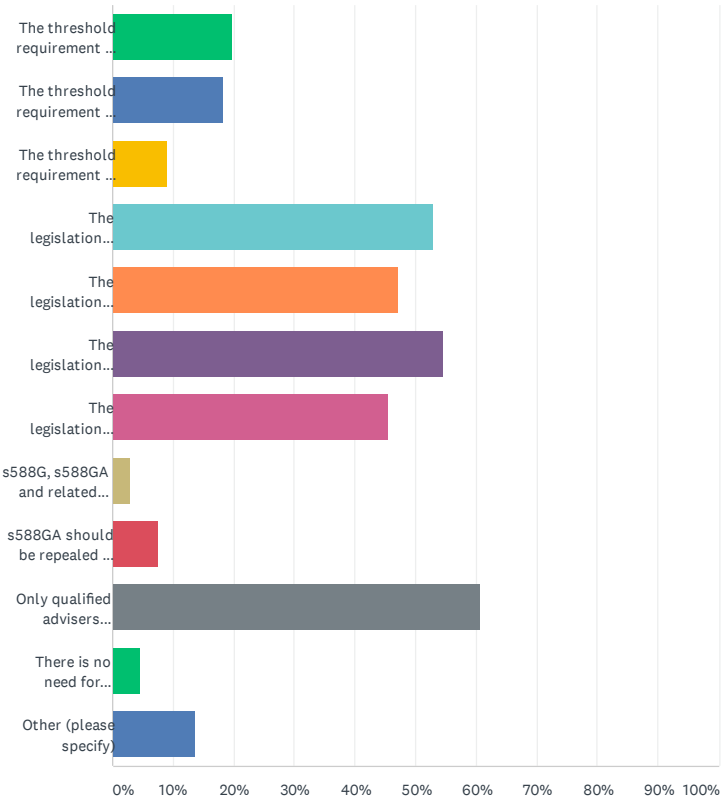


ANSWER CHOICES	RESPONSES	
Strongly agree	0.00%	0
Somewhat agree	8.82%	6
Indifferenet	51.47%	35
Somewhat disagree	19.12%	13
Strongly disagree	20.59%	14
TOTAL		68

#	DO YOU HAVE ANY OTHER COMMENTS ON THIS ISSUE?	DATE
1	Again, they are barely used. I tend to find that the argument is raised by the director only after the demand is sent. Set-off and lack of appropriate funding is a much bigger issue here.	9/9/2021 8:22 AM
2	Over the next few years there will be significant opportunity to pierce through the safe harbour defence and the appropriately qualified entity to pursue directors for insolvent trading claims.	9/6/2021 3:47 PM
3	Not evident	9/5/2021 8:51 PM
4	Insolvent trading claims are hard and expensive. They are not rivers of gold.	9/4/2021 3:41 AM
5	If their behaviour was "inappropriate" I still have s 180-183 to rely on	9/3/2021 2:52 PM
6	I'm not an IP.	9/3/2021 1:40 PM
7	As the law currently stands, if a safe harbour protected turnaround were to fail, I expect the liquidator might find a loop-hole around non or late payment of employee entitlements or late lodgement of tax returns at key times, and then the Liquidator might use the status of safe harbour to establish that the Directors believed the company was insolvent. So the reality is that safe harbour could make it easier to take action against directors.	9/2/2021 7:59 PM
8	Not really relevant to SME Companies	9/2/2021 3:09 PM
9	These plans are so rare, the occurence of effective plans is even rarer. They simply don't exist at the SME end of the market.	9/2/2021 2:56 PM
10	The onus under 588GB is on the director to advise the Liquidator (where the Liquidator requests for it) that a safe harbour plan was in place, otherwise they are unable to rely upon such evidence in a further proceeding. Early provision of the plan will enable a better assessment to be undertaken regarding insolvent trading.	9/2/2021 2:48 PM

Q37 Based on your experience with the safe harbour reforms, would you recommend any of the following? *

Answered: 66 Skipped: 43



ANSWER CHOICES	RESPONSES	
The threshold requirement of payment of employee entitlements should be repealed	19.70%	13
The threshold requirement of tax reporting should be removed	18.18%	12
The threshold requirement of tax reporting should be strengthened	9.09%	6
The legislation should include more guidance on what 'substantial compliance' means in terms of paying employee entitlements and tax reporting	53.03%	35
The legislation should include more guidance on what constitutes a 'failure' in terms of paying employee entitlements and tax reporting	46.97%	31
The legislation should include a definition of 'appropriately qualified entity'	54.55%	36
The legislation should include more guidance on 'better outcome for the company'	45.45%	30
s588G, s588GA and related provisions should be repealed	3.03%	2
s588GA should be repealed and a new defence to s588G created instead	7.58%	5
Only qualified advisers (registered liquidators) should be permitted to engage in safe harbour planning	60.61%	40
There is no need for further reform [please specify below why you think there is no need for further reform]	4.55%	3
Other (please specify)	13.64%	9
Total Respondents: 66		

#	OTHER (PLEASE SPECIFY)	DATE
1	Need two regimes. One for SME's and one for large companies. The aim being to create a less onerous and costly process for small businesses in the appropriate circumstances	9/9/2021 8:25 AM
2	588G sould be strenghtened to provide better protection for creditors and more incentives for companies to use the safe harbour.	9/7/2021 9:12 AM
3	The biggest single issue with the legislation is that there is insufficient awareness of the legislation, and the benefits thereof..	9/4/2021 6:22 PM
4	Too early to say yet	9/4/2021 5:51 PM
5	Directors who make a genuine attempt to turn the company around to achieve a better outcome, who substantially pay employees and lodge tax returns, and who reasonably believe	9/2/2021 8:30 PM

	that the courses of action were reasonably likely to result in a better outcome, should not need to be overly concerned that a Judge may later disagree when a Liquidator presents information that was not available to the directors contemporaneously.	
6	s588G should be strengthened so that directors are compelled to seek advice sooner. eg non payment of employee entitlements or super could be an assumption of insolvency meaning liqudator does not need to spend money and time to leap the burden of proof.	9/2/2021 6:07 PM
7	Registered liquidators should be the only person qualified to conduct safe harbour work	9/2/2021 4:59 PM
8	whole lot scrapped	9/2/2021 3:46 PM
9	See earlier comments	9/2/2021 2:57 PM

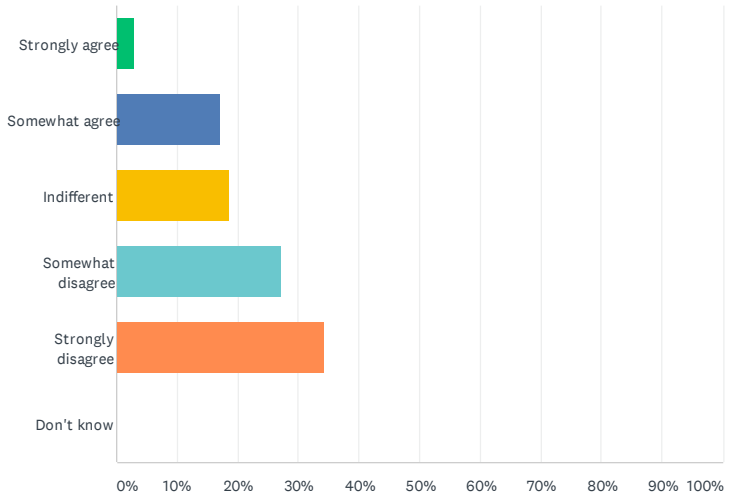
Q38 If you recommended any reforms, why do you think these reforms are needed? *

Answered: 27 Skipped: 82

#	RESPONSES	DATE
1	Ease of clarification about when safe harbour applies.	9/9/2021 2:46 PM
2	I think the strict approach to the threshold requirements could be softened to "substantial compliance". there are times when claims are not paid/resolve for various reasons. the strict approach excludes too many companies	9/9/2021 12:25 PM
3	To encourage greater use of the intended purpose of the regime	9/9/2021 10:15 AM
4	Because it is a shambles and impractical in its current form	9/9/2021 8:49 AM
5	The whole process is too expensive, and too onerous	9/9/2021 8:25 AM
6	The test is extremely broad and doesn't contain any objective parameters, which makes giving constructive, practical legal advice challenging.	9/8/2021 4:43 PM
7	it is still very untested, and therefore difficult to demostrate the benefit of safe harbour to directors	9/7/2021 4:19 PM
8	Provide better clarity and to encourage better engagement and eligibility for companies.	9/7/2021 12:37 PM
9	Guidance provides less ambiguity. Only qualified advisors (registered liquidators) should be in a position to plan as they have the experience with the counterfactual outcome to truly demonstrate better outcome.	9/7/2021 11:59 AM
10	Insolvent trading is rampant in Australia, with almost all liquidations having a situation where directors traded whilst insolvency - especially in small businesses. The laws against insolvent trading need to be strengthened to provide a stronger incentive to prevent insolvent trading. Safe Harbour advice should be restricted to registered liquidators as the only appropriately qualified and regulated professionals to provide this advice. There is no similarly regulated group.	9/7/2021 9:12 AM
11	Given the likelihood of differential outcomes for creditors, who will have traded without knowledge of the safe harbour plan, there is too much risk in determining what would or should have been a better outcome when weighing upt the risk of failure of the business plan.	9/6/2021 4:31 PM
12	Clarity	9/6/2021 8:54 AM
13	Safe harbour should not be relevant to classes of creditors. Other legislation should penalise directors for contrived avoidance	9/5/2021 8:57 PM
14	The biggest single change required is to drive awareness of the legislation and its benefits to directors.	9/4/2021 6:22 PM
15	The concepts are too uncertain and lack definition. The barriers to entry are too high.	9/4/2021 3:45 AM
16	The system is open to abuse by pre-insolvency advisors who represent to clients that they are an appropriately qualified entity. Better outcome for the company can be construed a number of different ways. Inevitably, continuing to operate as a going concern appears a better outcome than an immediate liquidation in 99% of cases.	9/3/2021 3:07 PM
17	Without any case law there remains unhelpful uncertainty about what some provisions mean - a test case could help	9/3/2021 2:57 PM
18	In one of the Safe Harbour engagements that I have been involved with, the payroll department is paying over 400 employees weekly or fortnightly across WA, Victoria, NSW and Queensland on a myriad of Awards and contracts based on timesheets. Every now and again a mistake is made, and sometimes there is a late payment equivalent to less than 5% of the payroll, which in every case has been rectified in less than 2 weeks. It would be blatantly unfair if the Directors of this company, who are trying to comply with the law, did not have safe harbour protection on the basis of a technical, minor or insubstantial late payment.	9/2/2021 8:30 PM
19	compel directors to seek advice sooner.	9/2/2021 6:07 PM
20	To avoid unregulated advisors providing advice that doesn't fulfil the requirements it is supposed to	9/2/2021 5:26 PM
21	Complete removal of pre-insolvency and poorly qualified people from the safe harbour space, who perform shoddy work and smear the registered component of the profession.	9/2/2021 4:59 PM
22	Re-write the Corp Legislation properly, get rid of IPR and IPS, and actually do the job Legislators were paid to do....but this time listen to the practitioners on the ground	9/2/2021 3:46 PM
23	Provide clarity so that directors are more willing to utilise the protection. Also make it more accessible for smaller businesses whilst ensuring that appropriate protections are in place.	9/2/2021 3:02 PM
24	If there is merit in the original reforms, the definitional and pre-requisite elements must be clarified. Surely only those who are qualified to assess an insolvency outcome can make comparisons against one in order to satisfy the 'better outcome' test?	9/2/2021 2:59 PM
25	To be able to actually use the SH provisions	9/2/2021 2:57 PM
26	The changes would ensure that there are clearer definitions and remove some of the grey area and thus avoid costs of litigation or avoiding litigation over unclear terminology.	9/2/2021 2:48 PM
27	Seek to avoid ambiguity where it exists.	9/2/2021 2:47 PM

Q39 Do you believe that Australia's insolvent trading laws are too strict?

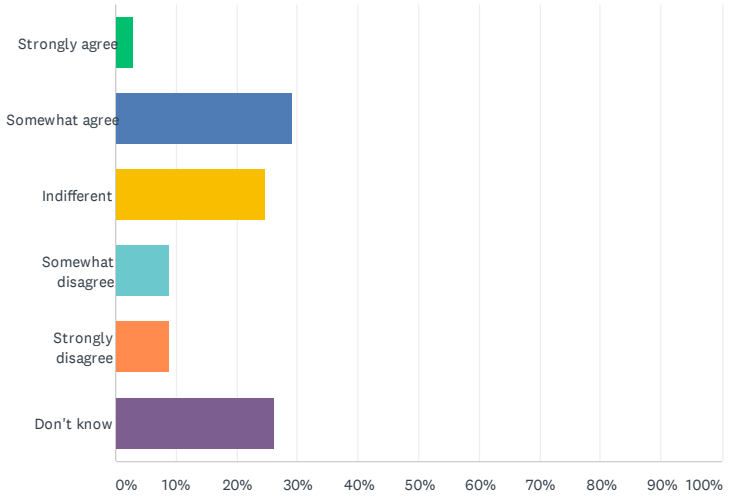
Answered: 70 Skipped: 39



ANSWER CHOICES	RESPONSES	
Strongly agree	2.86%	2
Somewhat agree	17.14%	12
Indifferent	18.57%	13
Somewhat disagree	27.14%	19
Strongly disagree	34.29%	24
Don't know	0.00%	0
TOTAL		70

Q40 Do you believe that Australia would be better served moving to a “wrongful trading” framework as found in the UK, rather than our current “insolvent trading” framework?

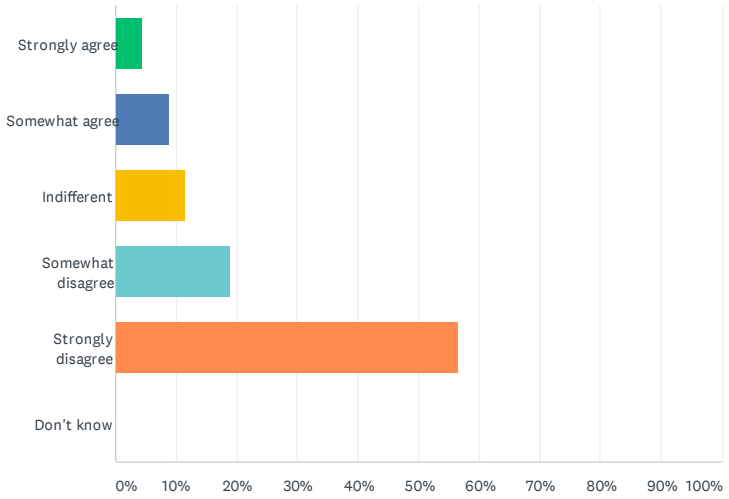
Answered: 69 Skipped: 40



ANSWER CHOICES	RESPONSES	
Strongly agree	2.90%	2
Somewhat agree	28.99%	20
Indifferent	24.64%	17
Somewhat disagree	8.70%	6
Strongly disagree	8.70%	6
Don't know	26.09%	18
TOTAL		69

Q41 Do you believe that Australia's insolvent trading laws cause people to act too early in putting their business into external administration?

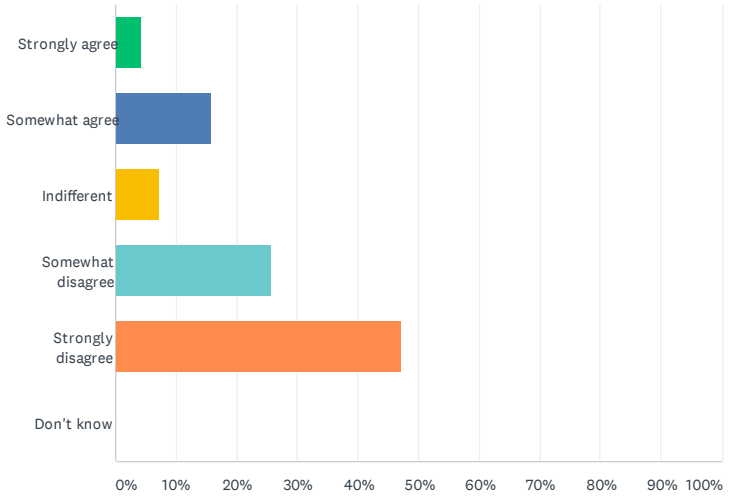
Answered: 69 Skipped: 40



ANSWER CHOICES	RESPONSES	
Strongly agree	4.35%	3
Somewhat agree	8.70%	6
Indifferent	11.59%	8
Somewhat disagree	18.84%	13
Strongly disagree	56.52%	39
Don't know	0.00%	0
TOTAL		69

Q42 From your experience in dealing with directors, do you believe that Australia's insolvent trading laws discourage directors from taking entrepreneurial business risks?

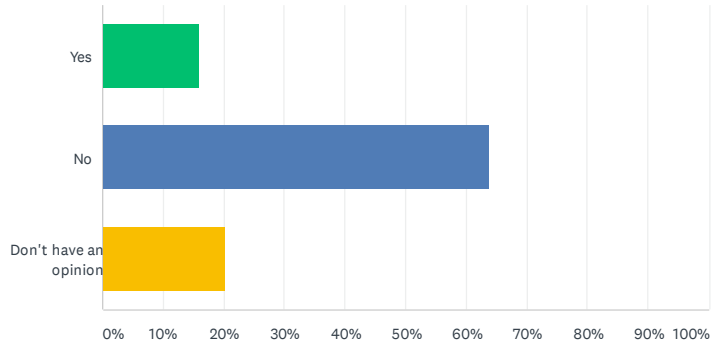
Answered: 70 Skipped: 39



ANSWER CHOICES	RESPONSES	
Strongly agree	4.29%	3
Somewhat agree	15.71%	11
Indifferent	7.14%	5
Somewhat disagree	25.71%	18
Strongly disagree	47.14%	33
Don't know	0.00%	0
TOTAL		70

Q43 Do you think that the reference to ‘appropriately qualified entity’ in s588GA(2)(d) is sufficiently clear and/ or workable? *

Answered: 69 Skipped: 40

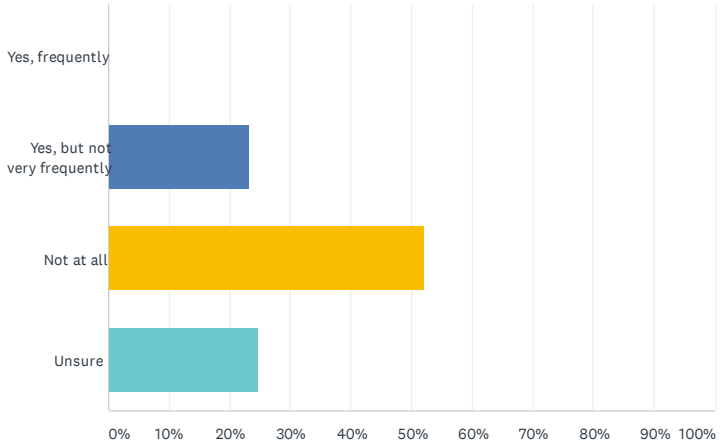


ANSWER CHOICES	RESPONSES	
Yes	15.94%	11
No	63.77%	44
Don't have an opinion	20.29%	14
TOTAL		69

#	IF YOU WISH TO EXPLAIN YOUR ANSWER, PLEASE DO SO BELOW.	DATE
1	There is a divergence of views as to whether this entity should be an accountant or a legal adviser. My anecdotal experience is that accountants are keen for legal advisers to give the "better outcome" advice (with their role limited to an analysis of the financials standing behind the restructure plan) so as to avoid conflicting themselves out of future appointments. However, speaking as a legal adviser, it is challenging for us to give a "better outcome" opinion which does not rely entirely on, and is given subject to, the financial analysis as to whether the course of action represents a better outcome or not.	9/8/2021 4:43 PM
2	It is not clear who is qualified.	9/7/2021 11:59 AM
3	No - should be defined as a registered liquidator only.	9/7/2021 9:12 AM
4	Open to interpretation, although case law will assist with independence issues and who is best qualified to undertake the better outcome assessment (i.e. Registered Liquidators).	9/6/2021 3:57 PM
5	It’s not clear which gives flexibility but users may not be given the right advice	9/5/2021 8:57 PM
6	I understand why the concept was left vague initially, so as to encourage directors to get external, professional advice. However, a director may be at risk, if the adviser that they select, is subsequently not considered by the court to be appropriately qualified.	9/4/2021 6:22 PM
7	It needs to be registered liquidators or lawyers.	9/4/2021 3:45 AM
8	But think you should be a liquidator and therefore governed by ASIC	9/3/2021 2:57 PM
9	It would be difficult to prescribe appropriate qualifications for the wide variety and size of companies that may use safe harbour. Additionally it may drive up the cost of advice which will negatively impact SMEs who arguably need good advice the most and less financial capacity to pay for it. Education around directors duties and safe harbour would assist directors in assessing the the proposed advisor is appropriately skilled and qualified to assist them in their circumstances. The question presumes only one advisor is involved in what is needed to achieve the better outcome etc.	9/3/2021 2:04 PM
10	It would be too difficult to legislate appropriate qualifications for all situations. It’s better that the Directors should form their own view on whether the person is appropriately qualified to assist the Directors i) navigate the safe harbour law, ii) achieve a better outcome. Ultimately, though, it is always going to come down to a Judge’s decision on whether it was reasonable for the Directors to think that the person was appropriately qualified.	9/2/2021 8:30 PM
11	Appropriately qualified entity should be restricted to fully registered liquidators only.	9/2/2021 4:59 PM
12	Useless just like the definition of insolvent.	9/2/2021 3:46 PM
13	Reference to "entity" is shallow and needs to refer to a person specifically qualified.	9/2/2021 2:56 PM
14	It is "sufficiently" clear but could be made a lot clearer.	9/2/2021 2:48 PM

Q44 Are you aware of financiers, trade credit suppliers, etc changing terms of trade to include clauses that require disclosure of directors operating with a reliance on the safe harbour provisions?

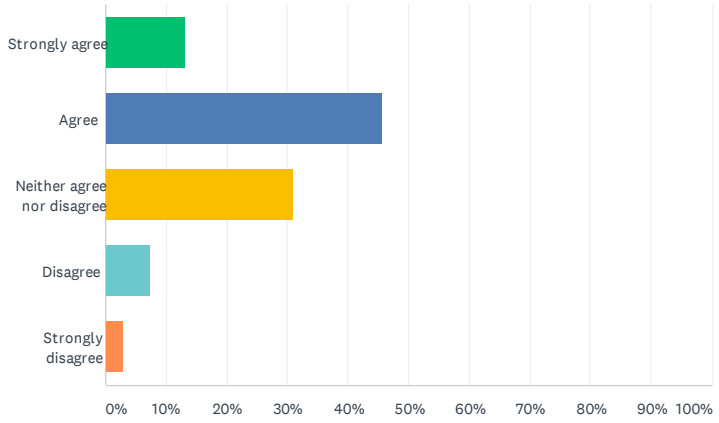
Answered: 69 Skipped: 40



ANSWER CHOICES	RESPONSES	
Yes, frequently	0.00%	0
Yes, but not very frequently	23.19%	16
Not at all	52.17%	36
Unsure	24.64%	17
TOTAL		69

Q45 Do you think the safe harbour legislation could be improved with better guidance/more specific wording around the "better outcome for the company test"?

Answered: 68 Skipped: 41



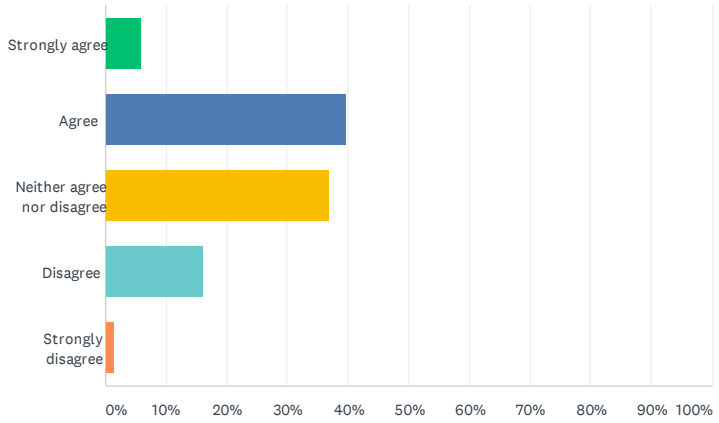
ANSWER CHOICES	RESPONSES	
Strongly agree	13.24%	9
Agree	45.59%	31
Neither agree nor disagree	30.88%	21
Disagree	7.35%	5
Strongly disagree	2.94%	2
TOTAL		68

#	WHY DO YOU THINK THIS?	DATE
1	Ease of clarification about when safe harbour applies.	9/9/2021 2:46 PM
2	I think taking a prescriptive approach might inhibit the flexibility and unique circumstances, it never works.	9/9/2021 12:25 PM
3	Because there are a number of financial and qualitative factors that can be considered to make "better outcome for the company"	9/9/2021 8:49 AM
4	See above.	9/8/2021 4:43 PM
5	It is currently vague and open to exploitation.	9/7/2021 9:12 AM
6	For ASX listed companies, if you remain listed and preserve equity for shareholders, then all creditors will be paid in full.	9/6/2021 3:57 PM
7	I think the concept is quite clear.	9/4/2021 6:22 PM
8	It is a meaningless standard. Lacks definition.	9/4/2021 3:45 AM
9	safe harbour legislation is by and large irrelevant to SMEs	9/3/2021 5:42 PM
10	Better outcome for the company can be construed a number of different ways. Inevitably, continuing to operate as a going concern appears a better outcome than an immediate liquidation in 99% of cases. So any possibility of continuing as a going concern can reasonably pass the better outcome test.	9/3/2021 3:07 PM
11	Is "better" a purely financial test? What if it was a worse dividend than liquidation but the company continued to trade (lose more now but get a long term customer)?	9/3/2021 2:57 PM
12	Better education on directors duties to creditors etc and what is a 'better outcome' is needed. More specific wording may be limiting.	9/3/2021 2:04 PM
13	Better wording in legislation is always a good idea so we don't have to go to court all the time for directions.	9/3/2021 9:26 AM
14	We help Directors assess whether the courses of action are reasonably likely to achieve a better outcome by i) considering whether the company has the resources available to complete the courses of action, and ii) whether the outcome if achieved, will be better by comparison of the estimated outcome as a going concern versus best and worst case liquidation scenarios. However, I expect that every appropriately qualified entity performs this role slightly differently, and perhaps there could be some guidance around how to assess better outcome.	9/2/2021 8:30 PM
15	The legislation was a waste of resources just like the Simplified Liq	9/2/2021 3:46 PM
16	What is the baseline for better outcome. Is it liquidation, administration, SBR and which class of creditor (employees vs unsecured creditors)	9/2/2021 3:02 PM
17	To take the grey out of it and given directors a clear path.	9/2/2021 2:57 PM

18	A better outcome can be defined in so many ways not all of which will involve monetary returns (c in $ analysis) so it allows scope for a broader range of measures that can be employed to achieve a better outcome for the Company. Ultimately it will only be tested on those that fail in which case "reasonableness" will be the ultimate test as the better outcome was not achieved.	9/2/2021 2:48 PM

Q46 Do you think the safe harbour legislation could be improved with better guidance/more specific wording around the "reasonably likely" test?

Answered: 68 Skipped: 41

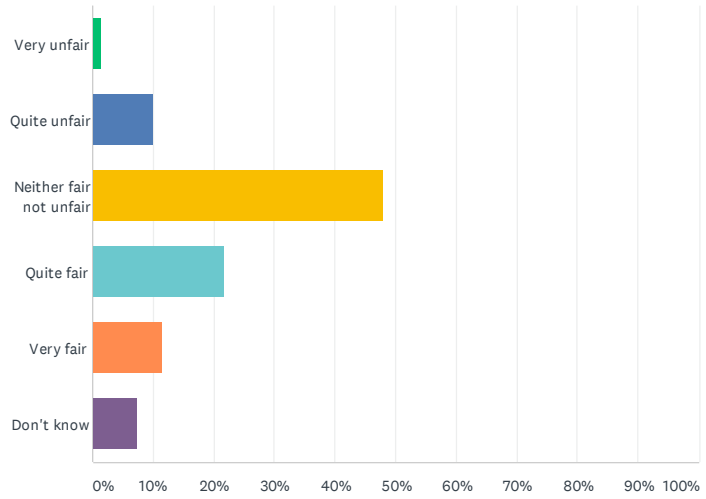


ANSWER CHOICES	RESPONSES	
Strongly agree	5.88%	4
Agree	39.71%	27
Neither agree nor disagree	36.76%	25
Disagree	16.18%	11
Strongly disagree	1.47%	1
TOTAL		68

#	WHY DO YOU THINK THIS?	DATE
1	Ease of clarification about when safe harbour applies.	9/9/2021 2:46 PM
2	The potential benefits of safe harbour and SBR provisions are severely diminished due to the levers that cause directors to engage with the insolvency profession are not being used. Banks no longer take enforcement action and the ATO takes anywhere from 2 to 7 years before they take action in collecting unpaid debts. Directors only seek assistance when they have insufficient funds to pay net wages or key suppliers. At that point in time a restructuring of a Company is no longer viable. It is inconceivable that during a global pandemic with severe restrictions on certain industries that there has been a significant decline in external appointments.	9/9/2021 12:28 PM
3	I think taking a prescriptive approach might inhibit the flexibility and unique circumstances, it never works.	9/9/2021 12:25 PM
4	An objective measure of reasonableness is appropriate to minimise the impermissible use of hindsight to second guess decisions	9/8/2021 4:43 PM
5	Reasonably likely is a well-understood term.	9/7/2021 9:12 AM
6	I think the concept is quite clear.	9/4/2021 6:22 PM
7	safe harbour legislation is by and large irrelevant to SMEs	9/3/2021 5:42 PM
8	I think this is generally and sufficiently understood	9/3/2021 2:57 PM
9	Education and guidance is needed. Being prescriptive and inadvertently limiting 'reasonably likely' would be counter productive to the objectives of safe harbour. This test is highly situational dependent.	9/3/2021 2:04 PM
10	It's always better to have greater clarity on what key words mean. The EM is a useful guide, but many people may not have read it, in which case they may find it difficult to explain what reasonably likely means when discussing it with Directors.	9/2/2021 8:30 PM
11	See above	9/2/2021 2:57 PM
12	Horses for courses. Every outcome needs to be justified and the risks identified so the test best left as it stands.	9/2/2021 2:56 PM
13	See above.	9/2/2021 2:48 PM

Q47 Do you think the safe harbour regime is unfair on creditors?

Answered: 69 Skipped: 40



ANSWER CHOICES	RESPONSES	
Very unfair	1.45%	1
Quite unfair	10.14%	7
Neither fair not unfair	47.83%	33
Quite fair	21.74%	15
Very fair	11.59%	8
Don't know	7.25%	5
TOTAL		69

#	COMMENTS ON THIS ISSUE?	DATE
1	This question makes no sense given the better outcome test an that creditors rights always remain in tact through out the process.	9/9/2021 12:25 PM
2	Appears safe harbout would apply in specific circumstances and hard to say unfair on creditors as insol trading claims unlikely to yield improved return to creditors in liquidation anyway	9/9/2021 8:49 AM
3	The regime, on the whole, seeks to strike an appropriate balance between creditor protection and encouraging a culture of turnaround and entrepreneurship. In my view, a structured, appropriate attempt to turnaround a company with the benefit of safe harbour protection is often no less beneficial to unsecured creditors than a VA (particularly if the directors propose a DOCA which has the effect of insulating them from liability for insolvent trading) or a liquidation (given the time and cost involved in making a recovery for insolvent trading)	9/8/2021 4:43 PM
4	The Safe Harbour regime doesn't have to be reported - given there is financial distress it doesn't give the creditor the opportunity to consider its trading position with the Company.	9/7/2021 2:08 PM
5	On the basis that there are qualified advisers providing better prospects of turning the company around.	9/7/2021 12:37 PM
6	The regime is an attempt to provide a better outcome. Fairness would need to be assessed on a plan by plan basis - what are the outcomes under the individual plan.	9/7/2021 11:59 AM
7	Directors are taking steps, i.e. obtaining advice, to restructure the business in a way which is reasonably likely to lead to better return than an immediate external administration. Therefore, the Safe Harbour regime is expected to provide a better return to creditors than the alternative.	9/6/2021 3:57 PM
8	This is ok, it's what happens next that is relevant.	9/5/2021 8:57 PM
9	Creditors are more likely to be better off if the directors undertake a Safe Harbour plan, particularly if the directors are able to successfully restructure the business - which has been our experience.	9/4/2021 6:22 PM
10	safe harbour legislation is by and large irrelevant to SMEs	9/3/2021 5:42 PM
11	Given no moratorium on creditor claims, they don't care as their accounts still have to be paid.	9/3/2021 9:26 AM
12	Ultimately creditors benefit if their debts are paid and they have an ongoing supplier relationship. Safe Harbour does not enable Directors to recklessly run up debt with suppliers without fearing the consequences, because a Judge may decide that the courses of action were not reasonably like to lead to a better outcome.	9/2/2021 8:30 PM
13	potential preference action if it fails	9/2/2021 4:52 PM
14	See earlier comments . Providing new credit for when a company admits its facing insolvency.	9/2/2021 2:57 PM
15	Fair only if proper monitoring of the plan is undertaken and commercial decisions made to	9/2/2021 2:56 PM

	terminate if plan not achieved. No delays in terminating is crucial for creditors who would have benefitted from the risks undertaken by Directors.	
16	Each assignment would have its unique issues and in each case their may be fair or unfair outcomes for creditors, i.e. a large supplier provides stock immediately before a change in circumstances renders a safe harbour plan unlikely to achieve a better outcome, that creditor does not have PPSR and loses rights to a large supply. Alternatively the same order is received, the company under safe harbour continues to trae, realises the stock during its ongoing trading whilst one of the courses of action (going concern sale) is achieved, the sale is paid for, business preserved and supplier continues to supply.	9/2/2021 2:48 PM

Appendix B

ARITA Submission to National Innovation and Science Agenda – Improving corporate insolvency law

ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

27 May 2016

The Manager
Corporations and Schemes Unit
Financial Systems Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: insolvency@treasury.gov.au

Dear James

Improving bankruptcy and insolvency laws – Proposals Paper April 2016

The Australian Restructuring, Insolvency & Turnaround Association (ARITA) is grateful for the opportunity to provide feedback on the Government's Proposals Paper on Improving bankruptcy and insolvency laws as part of the National Science and Innovation Agenda reforms announced by the Prime Minister last year.

Two of the three proposed reforms – a safe harbour for directors and a limitation on the operation of ipso facto clauses – are key ARITA policy positions that were adopted in the final report of the Productivity Commission's Inquiry into Business Setup, Transfer and Closure through our advocacy.

While we believe that some important challenges must be resolved in the drafting, the intent of the provisions in the Proposals Paper appears to align with ARITA's published policy positions.

ARITA remains concerned that many of our interconnected policy recommendations – as adopted by the Productivity Commission – such as pre-positioned sales and streamlined SME liquidations, still need to be addressed to create a true business rescue culture in Australia.

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents practitioners and other associated professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have more than 2,200 members including accountants, lawyers, bankers, credit managers, academics and other professionals with an interest in insolvency and restructuring.

Some 84 percent of registered liquidators and 89 percent of registered trustees are ARITA members.

ARITA's mission is to support insolvency and recovery professionals in their quest to restore the economic value of underperforming businesses and to assist financially challenged individuals.

We deliver this through the provision of innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large.

The Association promotes best practice and provides a forum for debate on key issues facing the profession. We also engage in though leadership and advocacy underpinned by our members' knowledge and experience.

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1 Reducing the default bankruptcy period

1.1 Misconduct

Recommendation 1.1: ARITA acknowledges the proposal to reduce the default bankruptcy period but notes that mechanisms are required to protect the integrity of the regime.

While we acknowledge the basis of the Government's decision to reduce the default bankruptcy period to one year, ARITA's members who practice in bankruptcy have mixed views as to whether it will achieve the desired objectives.

We do however note the views and recommendations in the report of the Productivity Commission's Inquiry into Business Setup, Transfer and Closure[1] partly based on international experience and research, that a reduction in the bankruptcy period does have beneficial outcomes for the economy and entrepreneurial culture. This supports the Government's intention in these reforms being implemented.

As the Productivity Commission's Report acknowledges, if the default period is reduced, it is important that mechanisms are retained or added that provide protection for abuse. For example, we recommend that the right of trustees to object to the discharge of a bankrupt be strengthened and continue to allow a trustee to extend the period of bankruptcy for up to eight years.[2]

The grounds for filing an objection to discharge, as detailed in section 149D of the *Bankruptcy Act 1966* (the Bankruptcy Act), are extensive and we do not believe that these need to be changed. However we believe that the following grounds could be added:

- if the discharge would prejudice the administration of the estate, and
- if the trustee has determined that the bankrupt will have on-going obligations after bankruptcy and more time is required to assess the bankrupt's capacity and willingness to comply with those obligations.

As noted in the Proposals Paper, the reduced bankruptcy period may lead to practical challenges for trustees in gathering sufficient evidence to support filing of an objection within the reduced one-year period. On this basis, we believe that the standard of evidence to support an objection should reflect this fact.

In addition to the standard of evidence required, we believe that a provision should be made for a trustee to file an objection on an interim basis, for a limited period, where more time is required to substantiate a permanent objection. A lesser standard of evidence in support of an interim objection would be required. This interim objection would then need to be followed

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[1] Productivity Commission 2015, Business Set-up, Transfer and Closure, Final Report 75, Canberra. At pp 334-342. As to Ireland (p 337-338), it has since the Report implemented its reduction in the bankruptcy period to one year, with a three year income contribution regime.

[2] Consistent with recommendation 12.1 of the Report.

by a further permanent objection to discharge within that interim period or else the objection lapses.

1.2 Ongoing obligations for bankrupts

Recommendation 1.2: ARITA believes that the majority of current obligations placed on bankrupts should continue to apply for a minimum of three years, including the obligation to pay income contributions. Any failure to comply with the obligations could be an act of bankruptcy, or alternatively allow the discharge of the bankrupt to be reversed.

1.2.1 Requirement to assist Trustee

In order to balance the benefits of a reduced bankruptcy period, we support proposal 1.2.1 to change the Bankruptcy Act to ensure the obligations on a bankrupt to assist in the administration of their estate remain even after they have been discharged in order to allow for the proper administration of the bankruptcy by the trustee. To some extent the law requires this at present: s 152. For example, a former bankrupt can be summonsed for their public examination under s 81 of the Bankruptcy Act.[3]

In addition to the general requirement pursuant to section 152 of the Bankruptcy Act to 'give such assistance as the trustee reasonably requires', we believe that the majority of the specific obligations currently placed on a bankrupt should be ongoing for the a minimum of three years, subject to any extension of the bankruptcy period due to an objection. These include:

- complying with all requests made by the trustee
- supplying all books, bank statements and other documents that the trustee requests
- advising the trustee of a change in address
- advising the trustee if their income increases from that already disclosed
- returning a completed statement of income form each year if asked to do so by the trustee
- advising the trustee immediately if the bankrupt forgot to disclose any assets or creditors in their Statement of Affairs
- fully and truthfully disclose to the trustee all property and its value, and
- not disposing of any property vested in the trustee.

Ensuring compliance with the ongoing obligations is necessary to maintain the integrity of the bankruptcy regime. Even if there are other alternatives to encourage compliance, the ultimate consequence of non-compliance should be a return to bankruptcy. We believe that

3 *Official Receiver v Todd* (1986) 14 FCR 177; [1986] FCA 463.

there are two alternatives in this regard, that non-compliance is either an act of bankruptcy or a grounds for reversing the discharge from bankruptcy.

Non-compliance could be added to the various acts of bankruptcy in s 40 of the Bankruptcy Act, and this could ultimately result in another bankruptcy. The commission of an act of bankruptcy permits bankruptcy proceedings to be commenced but also usually determines the date of commencement of any new bankruptcy, although we believe that any such mechanism should somehow connect the 'new' bankruptcy with the previous bankruptcy and effectively be a continuation of the previous administration.

Otherwise there may be a situation whereby there are no or limited creditors in the second estate (if the bankrupt had incurred no debts subsequent to discharge) and any benefits arising from the second estate not flowing to the existing pool of creditors (for example, through ongoing income contributions).

Alternatively, this non-compliance could be grounds to have the discharge of the bankrupt reversed and the period of bankruptcy extended as if an objection to discharge had been lodged. This option may be administratively more effective in ensuring the continuation of the original estate and that any future benefits are made available to the existing pool of creditors.

In either situation, consideration will need to be given to how any transactions in the intervening period are dealt with.

We note the Law Council's submission suggests extending automatic disqualification from managing a corporation (section 206B of the *Corporations Act 2001*) to people who have outstanding notices to provide information to a trustee in bankruptcy where those notices have been outstanding for more than one month.

ASIC could add those persons to the disqualified persons register on receipt of evidence from the trustee of the outstanding notice. The trustee could have an obligation to advise ASIC that the notice has been satisfied and ASIC will remove the person from the disqualified persons register. The person may refer the notice from the trustee to the Inspector-General in Bankruptcy for review.

We agree with this proposal, but would extend it to non-compliance with any obligation that a bankrupt is required to comply with in the post-discharge period.

1.2.2 Income contributions

ARITA strongly believes that the separation of the obligation to pay income contributions from the default bankruptcy period, and the continuance of that obligation for three years, subject to any extension for misconduct, is a necessary adjunct to the reduced default term.

Income contributions provide a substantial source of funds for trustees and creditors.[4]

We also highlight that income contributions are only assessed based on after-tax income exceeding an indexed threshold and only half of any income over the threshold is payable to the estate.

However, there needs to be a mechanism to enforce the contributions after discharge, for the remaining two-year period. Non-payment can be a matter which results in the consequences detailed above at 1.2.1. The amount not paid can be a debt recoverable in a court of competent jurisdiction, and there may be some process of recording that default on the National Personal Insolvency Index (NPII).

1.3 Restrictions

Recommendation 1.3: ARITA supports proposal 1.3.1a to reduce credit restrictions under the Act to one year, subject to any extension for misconduct.

1.3.1 Access to credit

Access of a former bankrupt to credit is important to encourage entrepreneurial endeavours and reduce the associated stigma of bankruptcy. ARITA supports proposal 1.3.1a to reduce credit restrictions under the Bankruptcy Act to one year, subject to any extension for misconduct.

We believe that it is appropriate to reduce the period for personal insolvency information in credit reports[5] and suggest that the retention period should simply be two years from the date of discharge which addresses the needs for any longer period of disclosure due to any extension of the period of bankruptcy.

We accept that while the retention of the permanent record of bankruptcy in the NPII may not meet the objective of a fresh start, encourage and facilitate further entrepreneurial endeavours and reduce the associated stigma, it is important that the fact of the bankruptcy remain on permanent record. Bankruptcy has a significant legal impact on the bankrupt and other parties, and a record of its occurrence should not be removed.

1.3.2 Overseas travel

ARITA supports the reduction of the overseas travel restriction to one year, subject to any extension for misconduct but we consider that the bankrupt should still have to notify the

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[4] AFSA selected statistics:

- Table 13: Monies administered by the Official Trustee under Parts IV and XI of the Bankruptcy Act
- Table 14: Monies administered by registered trustees in administrations under Parts IV and XI of the Bankruptcy Act

[5] See s 20X Privacy Act 1988.

trustee of the travel if it is within the further two-year period. This supports our other recommendation at 1.2.1.

1.3.3 Licences and industry associations

ARITA supports the Government working with relevant professional, industry and licensing associations with a view aligning restrictions with the reduced period of bankruptcy, where appropriate. In that respect, from our brief research into the wording of these restrictions, some refer to the period of bankruptcy and others refer to three years.

For example, as to the latter, s 56AC of the *Queensland Building and Construction Commission Act* 1991 refers to a person excluded from holding a building licence as an individual who 'takes advantage of the laws of bankruptcy or becomes bankrupt (relevant bankruptcy event), and 3 years have not elapsed since the relevant bankruptcy event happened.'

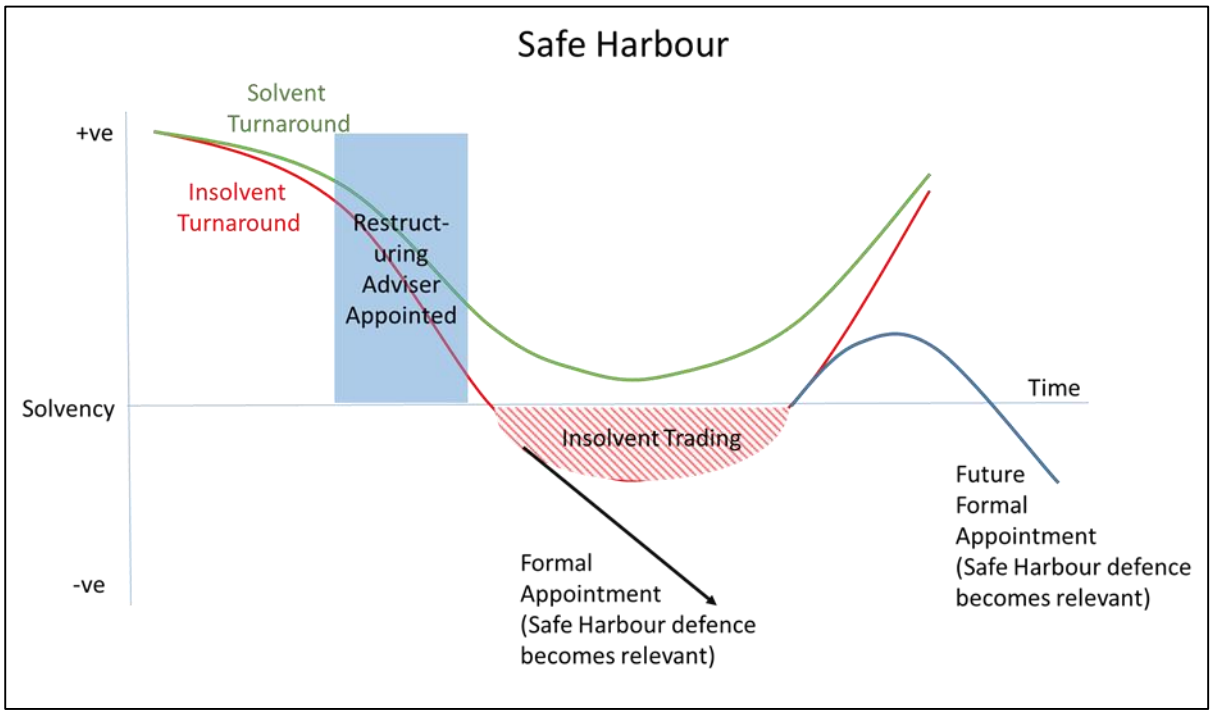
As to the former, s 206B(3) of the *Corporations Act 2001* (Corporations Act) refers simply to a person being under restriction as an 'undischarged bankrupt'.

2 Safe Harbour

2.1 Background

ARITA has been a long-time advocate for a safe harbour defence to encourage directors to seek appropriate professional advice in order to increase the options available to companies in financial distress, while still providing protection for the interests of creditors.

This diagram depicts how ARITA believes a safe harbour defence should operate in terms of the financial distress timeline.



Both safe harbour models detailed in the Proposals Paper make reference to returning the company to solvency. We do not believe that a safe harbour defence needs to be solely based on the aim of returning the company to solvency and we discuss this issue further below.

2.2 Safe Harbour Model A

Recommendation 2.2: ARITA supports the proposed safe harbour Model A with some modifications.

Model A from the Proposals Paper

It would be a defence to s588G if, at the time when the debt was incurred, a reasonable director would have an expectation, based on advice provided by an appropriately experienced, qualified and informed restructuring adviser, that the company can be returned to solvency within a reasonable period of time, and the director is taking reasonable steps to ensure it does so.

The defence would apply where the company appoints a restructuring adviser who:

a) is provided with appropriate books and records within a reasonable period of their appointment to enable them to form a view as to the viability of the business, and

b) is and remains of the opinion that the company can avoid insolvent liquidation and is likely to be able to be returned to solvency within a reasonable period of time.

The restructuring adviser would be required to exercise their powers and discharge their duties in good faith in the best interests of the company and to inform ASIC of any misconduct they identify.

ARITA's policy positions

ARITA's Policy Positions paper issued in February 2015, details a safe harbour based on a business judgement rule with the following elements, that directors:

- make a business judgement in good faith for a proper purpose
- after informing themselves about the subject matter of their judgement to the extent they reasonably believe to be appropriate
- rationally believe that the judgement is in the best interests of the company (and its shareholders)
- have taken all proper steps to ensure that the financial information of the company necessary for the provision of restructuring advice is accurate, or is ensuring that all resources necessary in the circumstances to remedy any material deficiencies in that information are being diligently deployed

- were informed with restructuring advice from an appropriately experienced and qualified professional engaged or employed by the company, with access to all pertinent financial information, as to the feasibility of and means for ensuring that the company remains solvent, or that it is returned to a state of solvency within a reasonable period of time

- it was the director's business judgement that the interests of the company's body of creditors as a whole, as well as members, were best served by pursuing restructuring, and

- the director took all reasonable steps to ensure that the company diligently pursued the restructuring.

We see many of the elements of ARITA's safe harbour defence in Model A, with the exception of the requirement to consider the interests of the company's body of creditors as a whole, as well as members. We maintain that this is an important element. In this regard, we refer you to the decision in The Bell Group case.[6]

As noted in our Policy Positions paper, directors should not be permitted to view the restructuring moratorium provisions as a relaxation or reduction of their responsibilities. If anything, their responsibilities should be seen as being heightened during this period by the business judgement rule requiring positive and beneficial governance thresholds to be met before the rule can be relied upon.

In situations where the obligations for the safe harbour protections are not met, the insolvent trading criteria should, in our view, be made easier for a liquidator to prove in order to be able to obtain compensation for the affected creditors. In this regard, we refer you our further discussion at section 4 of this submission.

Requirement to return to solvency

We hold concerns that the requirement to return the company to solvency is not the appropriate test. Rather, a restructuring that takes place during the safe harbour period may actually involve the sale of all or part of the business for proper value to an unrelated third party, with the original company remaining insolvent after the sale occurs.

However, as a result of the sale being undertaken outside of, and in advance of, a formal insolvency appointment, a better price is able to be achieved for the business and the creditors of the original company are much better off. This is in line with ARITA's policy on pre-positioned sales which was also a recommendation in the Productivity Commission's 2015 report into Business Set-up, Transfer and Closure (Productivity Commission Report 75)[7].

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6 *Westpac Banking Corporation v the Bell Group Ltd (in liq)* (No 3) [2012] WASCA 157.

7 Productivity Commission 2015, Business Set-up, Transfer and Closure, Final Report 75, Canberra.

We suggest that the appropriate test should instead be that the director took reasonable steps to minimise a significant risk of loss to the creditors of the company.

2.2.1 The restructuring adviser

ARITA agrees that the restructuring adviser would need to be an appropriately experienced and qualified individual, who is an accredited member of an organisation approved by the Minister, with its own:

- disciplinary framework
- educational framework, and
- ethical standards.

Each of the above are essential elements of what defines a professional association, which is defined by Professions Australia to be

> 'a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others. It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community.'[8]

We do believe that the education framework should include topics which are specifically relevant to the restructuring work typically undertaken with a distressed business, as well as a comprehensive knowledge of insolvency law and an ability to ascertain financial viability.

To maintain the integrity of the safe harbour framework, we believe that a restructuring adviser should be a registered professional who is subject to regulatory oversight.

We strongly believe that that only professionals who have obtained the qualification of ARITA Professional Membership or are a registered liquidator should be able to oversee this process given their innate high level understanding of insolvency law that is required to facilitate the restructuring of the company or its business and ensure directors appropriately discharge their duties. Persons without this level of qualification may place creditors and other stakeholders in an otherwise worse position.

We provide this matrix which sets out the relevant professional bodies and what we consider to be their ability to meet the criteria set out in the Proposals Paper. We have also considered Continuing Professional Development requirements as we believe that the

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8 http://www.professions.com.au/about-us/what-is-a-professional

requirement to maintain ongoing education is a fundamental requirement for such an adviser.

Restructuring adviser matrix

Affiliation	Professional body status	General ethics requirements	Insolvency specific professional standards	Professional conduct oversight and complaints	Post Grad insolvency/ turnaround specific education required for membership	Insolvency/ turnaround CPD requirements	Insolvency/ turnaround CPD education offered?
ARITA[9]	Yes	Yes	Yes	Yes	Yes [10]	Yes (40 hours per annum)	Yes – structured and topical CPD offered nationally
Registered Liquidator	Government	No	No	Yes (regulator)	Under Insolvency Law Reform Act	Yes	No
CAANZ	Yes	Yes	APES 330 only	Yes	No	Limited [11]	No
CPA	Yes	Yes	APES 330 only	Yes	No	Limited [12]	1 course [13]
Law Societies	Yes	Yes	No	Yes	No	No	Some
Turnaround Management Association (TMA)	No	Limited	No	No	No [14]	No	Yes

We note that the *Insolvency Law Reform Act 2016* (ILRA), provides for different classes of registration for registered liquidators: s 20-35. Consistent with the current sub-class for receivers, we suggest that an additional sub-class could be established for restructuring advisers. Such a sub-class would enable professionals who meet the registration criteria to be considered by an appropriately convened committee.

The ILRA also provides for the qualification, experience, knowledge and abilities required for registration to be prescribed in the Insolvency Practice Rules (IPRs) and we suggest that this is the appropriate forum to set out the registration requirements, including the approved membership organisations.

9 ARITA Professional Members include accountants from both CAANZ and CPA as well as lawyers who hold Law Society membership.

10 ARITA education requirements for admittance as a Professional Member are two subjects from a possible three post-graduate level insolvency and restructuring subjects. Each subject is studied via distance education and takes 12 weeks to complete (study of 6-8 hours per week required).

11 CAANZ requires a minimum 20 hours of CPD per year and a total of 120 hours for a three-year period. Holders of statutory registration must complete 40% of their CPD in the specialist field.

12 CPA require a minimum 20 hours of CPD per year and a total of 120 hours for a three-year time period. Registered liquidators must complete 50% of their CPD in the specific field.

13 Five self-study modules of an intermediate level.

14 TMA education requirements are three, three-day modules on restructuring topics. Completion of the education requirements is not required to become a TMA member.

We understand that the ILRA will also expand persons eligible to become a registered liquidator to include solicitors. The IPRs will provide clarification on qualifications that will be required for registration.

Independence of the restructuring adviser

We have considered the independence of the restructuring adviser. We see that a company is most likely to turn to its existing advisers' firm, particularly where it is a multidisciplinary practice, for assistance in times of distress. If the firm has registered restructuring advisers, we do not see why they could not take the appointment.

The restructuring adviser is engaged by the company to act for the company. This is different to the fiduciary role taken by a registered liquidator in a liquidation or voluntary administration where they are acting for all of the creditors and have strict independence requirements.

The independence requirements in the ARITA Code of Professional Practice, for example, do not apply to receiverships, as this is a contractual appointment between the secured creditor and the receiver. We would not envisage that they would extend to a restructuring adviser.

We do however agree that the restructuring adviser must not be an officer of the company or related entity, or a relative of an officer of the company or related entity. We see that such roles and relationships would create an inherent conflict with the duty to the company.

Unregulated insolvency advisers (pre-insolvency advisers)

In recent years there has been a proliferation of unregulated insolvency advisers (also called pre-insolvency advisers). These businesses undertake prominent advertising (radio, online, billboard, etc.) and claim to offer advice to directors on how to protect themselves in an insolvency. These advisers are not registered liquidators and are often not members of any professional body or even qualified as accountants or lawyers.

Many of these advisers give advice to directors of distressed businesses to avoid their legal obligations coming into insolvency, providing guidance that includes methods of asset stripping, destruction of books and records or advice on how to reduce the extent of investigations any future liquidator may be able to undertake. These unregulated advisers undermine the integrity of the insolvency regime.

ARITA is concerned that the creation of the role of 'restructuring adviser' will attract the interest of this group. If suitable regulation, registration, qualification and oversight is not placed around the role, the safe harbour provisions are likely to rapidly become subject to abuse. We note that the Law Council's submission also supports this view.

Further, to build a better culture of business restructuring in Australia, ARITA is strongly of the view that more needs to be done to outlaw unregulated insolvency advisers and to actively prosecute directors who follow their advice.

Viability

ARITA believes that viability, or potential viability, is a different measure than solvency and a test for viability by the restructuring adviser should not be dependent on solvency.

ARITA's response to the Draft Productivity Commission Report into Business Set-up, Transfer and Closure of May 2015 noted that ARITA believes that, like insolvency, there are a number of factors which must be considered when considering viability.[15] These would include, but not be limited to:

- that there is a business to rescue or restructure as a going concern
- that the business is sustainable for its purpose
- that it has current and/or future profitability, and
- has access to future capital requirements.

A once-off event may make a viable business insolvent, or different business units within one company may be viable despite an overall insolvent position, or a business may be viable if operated by an owner with the necessary capital to maintain/inject into the business.

The factors that should be taken into account when considering viability are extensive and may be unique to the specific circumstances. An appropriately qualified and experienced restructuring adviser should be able to use their discretion to determined viability, however it would be reasonable to expect that some guidance was provided.

Obligations and protections

ARITA agrees with the following obligations and protections suggested in the Proposals Paper, that the adviser be:

- appointed by the company, not the directors, and thus owe any duties to the company
- required to exercise their powers and duties in good faith in the best interests of the company
- not be civilly liable to third parties for an erroneous opinion provided that it was honestly and reasonably held
- unable to be appointed in any subsequent insolvency of the company (or any company which bought the original company's business) without the leave of the Court, and
- specifically carved out of the expanded definition of director contained in the Corporations Act.

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15 Being submission DR 53 referred to at 14.1 of the Productivity Commission Report 75.

We do not believe that it would be appropriate for a restructuring adviser to have a specific obligation to inform ASIC of any misconduct they identify. We believe that any such obligation would be a deterrent to the engagement of restructuring advisers and not encourage the directors to seek early advice.

In addition to the above, we note that International Ethics Standards Board for Accountants (IESBA) is currently working with the Australian Accounting Professional and Ethical Standards Board (APESB) to implement a requirement for accountants to refer breaches of the law, subject to certain safeguards, to relevant authorities. A restructuring adviser, if covered by the Accounting Professional and Ethical Standards, would be subject to this obligation without having to impose a specific obligation.

ARITA supports the proposal in McGrathNicol's submission that payments made to restructuring advisers (or security taken to for such payments) should not be capable of claw back under the unfair preference regime in section 588FA of the Corporations Act. We believe that is important that such protection should not extend to protection for uncommercial transactions.

2.2.2 Other features of safe harbour

We highlight that any law reform needs to offer protection from any unintended consequences in relation to a breach of directors' duties, such as those imposed by sections 180 - 184 of the Corporations Act, by virtue of the directors' valid reliance on the safe harbour defence and attempts at restructuring. We refer to the submissions of the Law Council of Australia to the Productivity Commission's Inquiry into Business Set-up, Transfer and Closure which addresses the issues that may arise from the court judgments in The Bell Group.[16]

We agree with the Law Council that any safe harbour provision needs to be carefully drafted.

We agree that any requirement to inform ASIC or the ASX (beyond the existing continuous disclosure requirements) could undermine the ability of the director to explore the restructuring or turnaround of the company outside of a formal appointment. Any public disclosure of financial distress may lead to the same (or more) issues than are currently experienced when appointing a voluntary administrator.

In particular, creditors would not have the same guarantee for payment of debts incurred by the company that they have in a voluntary administration (where the administrator is personally liable for payment – s 443A, Corporations Act*)* and they may be reluctant to continue to deal with the company. They may also more forcefully attempt to recover any debts owed.

16 *Westpac Banking Corporation v the Bell Group Ltd (in liq)* (No 3) [2012] WASCA 157; see footnote 4. Submissions 14 and 36

2.2.3 Where safe harbour is not available

ARITA agrees with the proposed circumstances where safe harbour would not be available and supports any limits which encourage directors and the company to comply with their duties and obligations. We also support any limits which discourage the inappropriate dealing with assets, particularly unlawful phoenixing of businesses without true value being made available to creditors.

However, we are not confident that ASIC has sufficient resources, time or focus to undertake this role unless a straight forward criterion for ineligibility is set that does not require discretion in any determination by ASIC. We instead prefer that this is an issue determined by the Court.

We also have concerns about safe harbour not being available where significant employee entitlements that accrue during the safe harbour period are not paid. We note that there is no requirement for an employer to pay accrued employee entitlements, unless for example the employee requests to take leave. Those entitlements accrue until such time as the employee wishes to use them, or their employment is terminated – they are not moneys that the company can pay as they accrue.

If the restructuring were to be unsuccessful, and liquidation were to occur, all employees would generally be terminated and accrued entitlements would become due, but they are not due until that time.

We refer you further to our discussion at 4.2 regarding the incurring of debts for the purposes of insolvent trading actions.

2.3 Safe Harbour Model B

Recommendation 2.3: ARITA supports the safe harbour defence proposed in Model A and does not support the carve out proposed in Model B

Model B from the Proposals Paper

Section 588[G][17] does not apply:

(a) if the debt was incurred as part of reasonable steps to maintain or return the company to solvency within a reasonable period of time, and

(b) the person held the honest and reasonable belief that incurring the debt was in the best interests of the company and its creditors as a whole, and

(c) incurring the debt does not materially increase the risk of serious loss to creditors.

[17] We note that the reference in Model B in the Proposals Paper was simply to s588 rather than s588G. We believe that this was an oversight and have corrected the reference in our submission.

As noted above, ARITA supports the safe harbour defence proposed in Model A and does not support the carve out proposed in Model B.

ARITA has also consulted widely with other relevant professional bodies in preparing our submission and we note that a number of those tend to favour Model B or hybrids thereof, recognising that it is, potentially, more supportive of directors. We believe that, for example, Law Council and Australian Institute of Company Directors are of this view.

While we are respectful of their position, as ARITA represents those most likely to be undertaking the work of restructuring advisers and, indeed, as those who will be required to manage a business should it actually move into a formal appointment, we believe Model A provides a solution that better balances creditors' reasonable rights and opportunities for proper investigation of errant directors with greater scope for responsible business risk taking, innovation and entrepreneurialism and, most importantly, to save otherwise viable businesses.

From our considered viewpoint, a hybrid Model B is workable and would be acceptable to ARITA, however, Model A delivers a better public policy balance.

We comment on what amendments we would suggest for Model B below.

We observe that the burden of proof already lies with the liquidator to prove insolvent trading. Once proved, the burden of proof to resist a claim should rest with the director. It does not seem reasonable to require a liquidator to establish that the company traded while insolvent and then also establish that the director had breached a limb of the carve out.

Amendments to Model B

We do not agree that directors should have the protection from insolvent trading unless they engage a suitably qualified restructuring adviser. We strongly believe that without a statutory requirement to engage such a regulated professional the provision would be open to abuse. If the government chooses to proceed with Model B, we recommend that the same requirements for a restructuring adviser that are proposed in Model A, including our comments at 2.2.1 above, are incorporated into Model B.

Noting that the terms are also applicable to Model A, we support the inclusion of the indicia of 'reasonable steps' and 'reasonable time'. However, we are of the view that to ensure certainty these should properly appear in the legislation or regulations, even if otherwise explained in the Explanatory Memorandum which accompanies any legislation.

We are of the view that the following commentary previously discussed in relation to Model A should equally apply to Model B:

- protection against unintended consequences discussed at 2.2.2 in relation to a breach of directors' duties, such as those imposed by sections 180 - 184 of the Corporations Act, by virtue of the directors' valid reliance on the safe harbour defence and attempts at restructuring
- no mandatory requirement to disclose the appointment of a restructuring adviser discussed at 2.2.2, and

- any restrictions on the availability of safe harbour discussed above at 2.2.3.

3 Ipso Facto

3.1 Background

ARITA agrees that any term of a contract or agreement which terminates or amends that or any other contract or agreement (or any term of any contract or agreement), by reason only that an 'insolvency event' has occurred should be void, subject to necessary exclusions.

3.2 The ipso facto model

Recommendation 3.2: ARITA supports the implementation of a limitation of the operation of ipso facto clauses.

We believe that a provision as such as Proposal 3.2 would extend to other instances, such as the acceleration of payments or the imposition of new arrangements for payment, or a requirement to provide additional security for payment.

In relation to 3.2b, we query as to what circumstance the retrospective operation is proposed to apply. We would support retrospective operation if it were to apply to ipso facto clauses in existing contracts or agreements in relation to new insolvency administrations which begin after the commencement of the change in the law. However, we would not support retrospective operation to insolvency administrations which began prior to the commencement of any legislation.

ARITA has concerns regarding the insolvency events included in the ipso facto proposal and suggests that:

- The list should be expanded to include liquidations (including provisional liquidation) as many liquidations have businesses which require this protection, consistent with the obligation of the liquidator to carry on the business of the company with a view to its sale: s 477(1)(a) of the Corporations Act.
- The application to receivers and controllers should be limited to managing controllers over the whole or substantially the whole of the company's assets, where a business is being managed, and not to appointments simply involving the sale of an asset.
- A company entering a Deed of Company Arrangement should be removed from the list as any issues regarding ongoing contracts should be resolved during the voluntary administration period and any moratorium should not be extended to a period when an independent external administrator is not in control of the company.

  We further note that the Deed Administrator generally has no liability for debts incurred during the Deed and thus the counterparties to the contracts do not have any protection regarding payment. However, we instead say that the prior insolvency

event should not be able to be relied on as a grounds for termination or alteration of a contract subsequent to the conclusion of a formal appointment. The counterparty would instead have to rely on another ground if they wish to take action in respect of the contract.

In addition to the ipso facto proposal, we also support the introduction of a specific provision enabling a Scheme of Arrangement, subject to court approval, to have a stand-alone moratorium against creditor claims.

We note however, that this should be integrated with consideration of issues such as whether a registered insolvency practitioner is appointed and liability for amounts that become payable during the moratorium period. Without the introduction of a moratorium against creditor claims it would still be necessary to appoint an external administrator prior to a Scheme of Arrangement to provide such protection.[18]

3.2.1 Anti-avoidance

In addition to the anti-avoidance measures detailed in the Proposal Paper, ARITA suggests including a statutory provision enabling an external administrator to apply to the court for an order restricting the termination of a contract where they believe a supplier is undermining or avoiding the intent of the proposed ipso facto restriction and the termination of the contract is not in the best interests of the creditors of the company as a whole.

Any such measure should include protection where contracts contain 'termination for convenience' clauses which may be relied upon purely to avoid the operation of the ipso facto provisions. ARITA understands that such clauses are common in mining contracts and are effectively open termination clauses which do not require an event or circumstance to occur to allow termination.

With the introduction of safe harbour and the appointment of a restructuring adviser, we see that this is likely to be incorporated into contracts as an event of default. Therefore, we agree with Henry Davis York's submission that a counterparty to a contract should be prohibited from retrospectively relying on the appointment of a restructuring adviser as a termination event, once a formal insolvency regime has commenced or in the case of a scheme of arrangement, an application has been filed with the court.

3.2.2 Exclusions

ARITA recognises, and agrees with, the need to specifically exclude certain 'prescribed financial contracts' from the operation of the ipso facto proposal.

We are not subject matter experts in relation to such contracts and are unable to provide specific comment on what contracts or classes of contracts should be specifically included. However, we comment that we believe that any ipso facto restriction should not prevent a

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[18] This recommendation is in accordance with ARITA's Policy Position Paper of February 2015 and recommendation 14.6 of the Productivity Commission Report 75.

secured creditor from taking advantage of their right to appoint a controller if currently allowed to do so under the law (for example in the decision period in a voluntary administration under section 441A).

We suggest that any exclusions appear in the regulations, or similar, so that there is flexibility to amend this list as required.

3.2.3 Appeal

In addition to the power to apply to the court regarding anti-avoidance provisions, ARITA agree that affected counterparties should have a similar power to apply to the court to appeal against the operation of the ipso facto restriction. We agree with the Law Council that the appeal should be limited to the operation of the ipso facto clause and not the terms of the contract generally.

4 Other issues

In addition to the specific matters raised in the Proposals Paper, ARITA also notes the following matters which we believe are important factors to be considered in implementation of the proposed reforms.

4.1 Productivity Commission recommendations

The Productivity Commission's report on the Inquiry into Business Setup, Transfer and Closure made a number of interconnected recommendations from ARITA's policies that still need to be addressed to create a true business rescue culture in Australia.

This table summarises the proposals recommended in the Productivities Commission's Report and the current status of the recommendations.

Productivity Commission 2015 proposals	Status
Safe harbour	Announced
Ipso facto	Announced
Streamlined SME liquidations	Awaited
Public interest administration fund	Awaited
Pre-positioned sales	Awaited
Voluntary Administration – one month for a company to show its viability	Awaited
Scheme of arrangement moratorium	Awaited
Receiver's duty to unsecured creditors	Awaited
Review of the Fair Entitlements Guarantee (FEG)	Awaited
Director identity number	Awaited
One-year bankruptcy	Announced
Bankruptcy contributions to continue after bankruptcy	Proposed

ARITA awaits the Government's response to the Report and again highlights the interdependence of many of these proposed reforms.

4.2 Underlying obligations in s 588G

We believe that consideration should be given to streamlining or easing the burden of proof upon a liquidator for a s 588G insolvent trading action where the safe harbour defence is not available. That is, where the requirements of safe harbour protection are not met, it should be less onerous than it is currently for a liquidator to take action for insolvent trading. This might be achieved by the following:

- Streamlining or easing the burden of satisfying the existing elements of a claim under s 588G, for example, as to proof of insolvency and reasonable grounds to suspect insolvency.

- Deeming certain obligations and debts which accrue during (or are attributable to) the safe harbour period (but which may not be 'incurred' during the safe harbour period) to be 'debts incurred' for the purposes of s 588G.

  One example might be employee entitlements which arise under contracts entered into prior to the safe harbour period. Certain employee entitlements may accrue and be partly attributable to a period of service which spans the safe harbour period, but not be 'incurred' or payable during that period.

  We note that s 588G(1A) already deems certain actions of a company to be 'debts incurred' for the purposes of s 588G. This provision might be expanded to address moral hazard concerns relating to the Fair Entitlements Guarantee or to 'catch' other obligations which a company incurs or undertakes during the safe harbour period but which may not fall within the concept of a 'debt' incurred (such as retailer gift cards).

- A general expansion of the reach of s 588G to a class or category of obligations beyond that of 'debts' incurred (though we believe that directors should not be held responsible for failing to prevent all provable claims which might arise during the safe harbour period).

4.3 Australian Financial Services Licence

The advice provided by a restructuring adviser may fall within the current requirements for holding an Australian Financial Services Licence (AFSL). Registered liquidators are currently not required to hold an AFSL for undertaking formal insolvency administrations. We believe that a specific exemption should also apply to restructuring advisers on the basis that if they were a sub-class of registered liquidator, they would already be subject to regulation and oversight by ASIC.

We have also raised this issue with ASIC.