



Australian Government



Australian  
**Small Business and  
Family Enterprise**  
Ombudsman

1 October 2021

Market Conduct Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

*via email: SafeHarbourReview@treasury.gov.au*

Dear Sir/Madam

### **Review of the insolvent trading safe harbour**

Insolvency processes are extremely challenging for small business owners, with many reporting a loss of control and lack of transparency as soon as they enter the insolvency system. The 2017 insolvent trading safe harbour amendments are widely considered to be of little practical relevance to small businesses. Through extensive stakeholder consultation with practitioners, small business trusted advisers, and small business advocates, stakeholders consistently report that the relative complexity and cost of use of the 2017 safe harbour provisions prohibit small businesses from availing themselves of that cover. For example:

- The small business restructuring safe harbour, which came into effect on 1 January this year, and the 2017 safe harbour provisions both require companies to have their payments of employee entitlements and reporting to the Australian Taxation Office up to date.

However, the 2017 safe harbour provisions require substantial compliance with those two criteria for the previous 12 months, a far more onerous test for most small businesses.

- For company directors to benefit from protection under the 2017 safe harbour provisions, they need to begin to develop and implement courses of action that are reasonably likely to lead to a better outcome for their company than other options. This may include the directors deciding whether to engage with appropriately qualified advisers.

In contrast, under the small business restructuring provisions safe harbour is triggered simply by the directors resolving that the company is or is likely to become insolvent and appointing a restructuring practitioner.

As such, consideration should be given to ensuring the 2017 safe harbour provisions are fit for purpose for small enterprises, rather than simply seeking to raise awareness of their existence.

While acknowledging the advice of Treasury officials that this review relates specifically to the 'safe harbour' provisions, it would be remiss of me to not once again highlight our view that the broader insolvency and restructuring framework as it applies to smaller enterprises is in urgent need of review and refinement. The utility and effectiveness of welcome initiatives of Government can be significantly improved by some fine-tuning of implementation parameters that can encourage earlier engagement, utilisation, value preservation and usefulness for smaller businesses.

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Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Mike Kearney on 02 5114 6119 or at [michael.kearney@asbfeo.gov.au](mailto:michael.kearney@asbfeo.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bruce Billson', written in a cursive style.

**The Hon Bruce Billson**  
Australian Small Business and Family Enterprise Ombudsman