Law Council
OF AUSTRALIA

Business Law Section

30 September 2021

Market Conduct Division
Treasury
Langton Cres
PARKES ACT 2600

By email: SafeHarbourReview@treasury.gov.au

Dear Sir/Madam,

Independent Panel Review request for consultation on the insolvent trading safe harbour

This submission is made by the Insolvency & Restructuring Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

The Committee welcomes the Independent Panel's request for consultation and respectfully makes this submission on behalf of the Law Council of Australia.[1]

1 Are the safe harbour provisions working effectively?

1.1 In the Committee's experience, the safe harbour provisions[2] are working effectively for some segments of the market, but have not been widely adopted and utilised by other segments.

1.2 Safe harbour has been effectively used by small-to-medium sized *listed* companies and *large private* companies to facilitate successful restructuring outcomes. In particular, the safe harbour provisions have been used effectively to:

(1) Facilitate dialogue and enable directors of entities in these market segments to access breathing room to implement informal turn-around plans in periods of temporary financial distress which may otherwise have resulted in those companies being placed into voluntary administration or creditors' voluntary liquidation; and

(2) Drive better outcomes in formal insolvency processes, in particular by allowing directors time to formulate a deed of company arrangement proposal and to engage with creditors (particularly secured creditors)

[1] The statements in this submission reflect the opinions of the Committee and its members, and do not necessarily represent the views or policies of Committee members' employers, past or present, or any other organisation with which Committee members may otherwise be affiliated.
[2] In this submission, the expressions "safe harbour" and "safe harbour provisions" have the same meaning as used in the consultation paper, *Review of the insolvent trading safe harbour* (https://treasury.gov.au/sites/default/files/2021-09/205011-safeharbourreviewconsultationpaper.pdf)

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before placing a company into voluntary administration or creditors' voluntary liquidation.

1.2 The safe harbour provisions do not appear to have been widely used by *large listed* companies nor small-and-medium sized *private* companies (**SMEs**) and, in this respect, they are not working effectively, in the Committee's view.

1.3 In the case of large listed entities, anecdotal reports suggest that these entities are more likely to proactively manage liquidity risk before entering financial distress and/or have access to a broader range of refinancing and informal restructuring options, such that it is less likely that directors perceive the need to invoke the protection of safe harbour. Moreover, the use of safe harbour appears to have a "management failure" connotation in this segment. A director of a large listed entity may be wary of utilising safe harbour out of fear of it resulting in a black mark against the director's, or the entity's, name.

1.4 In the case of SMEs, the principal hurdles in using safe harbour include:

(1) Directors have often provided personal guarantees to the company's creditors and, accordingly, are more concerned about guarantor liability than prospective insolvent trading liability risk when a company faces financial difficulty, particularly where guarantees are secured by the family home. In those circumstances, the lack of any self-executing moratorium upon entry into safe harbour akin to s 440J of the *Corporations Act 2001* (Cth) (**Corporations Act**) means that directors have limited incentive to use the procedure; and

(2) Many SMEs facing financial difficulty do not meet the threshold criteria for the use of safe harbour in section 588GA(4) of the Corporations Act; namely substantial compliance with obligations to pay employee entitlements (particularly superannuation) and taxation lodgement obligations.

1.5 The Independent Panel may wish to consider the following matters:

(1) Can and should the shortcomings in the safe harbour regime for SMEs be addressed (for example, should eligibility criteria be relaxed such that all that is required is that any turn-around plan implemented during safe harbour results in payment of outstanding employee entitlements upon completion of the safe harbour period? Alternatively, consider an approach similar to that taken under the small-business restructuring procedure?[3]

(2) Given that it is now accepted in the market that entry into safe harbour need not be disclosed in order to comply with a listed entity's continuous disclosure obligations, is any further clarification required in this regard? The Committee considers issues of disclosure to the market are best left to the company. We do not consider there should be an express carve-out from the listing rules clearly exempting disclosure where safe harbour has been utilised[4]

[3] See *Corporations Regulations 2001* (Cth) (**Corporations Regulations**), reg 5.3B.24.

[4] The Committee maintains its previously expressed view that "issues of disclosure for public entities is best left to the companies and their management to determine rather than requiring public disclosure of the appointment of a restructuring adviser": see Law Council of Australia, *Submission in response to the Treasury 'National Innovation and Science Agenda – Improving bankruptcy and insolvency laws'* (26 May 2021), 14: https://www.lawcouncil.asn.au/publicassets/0f8d4d1c-1eb5-e611-80d2-005056be66b1/3153_-_National_Innovation_and_Science_Agenda_Improving_bankruptcy_and_insolvency_laws.pdf.

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

2.1 Insolvency practitioners and lawyers have informed the Committee that where safe harbour is used, it can result in dialogue between directors in relation to liquidity issues and proactive engagement with creditors earlier in the decline curve. As such, the availability of safe harbour has improved directors' conduct by enabling them to engage in facilitative discussions with accountants and lawyers without the fear of insolvent trading liability and earlier in the decline curve.

2.2 Financiers (including banks) have indicated a willingness to continue providing finance to companies which are in safe harbour, and utilisation of safe harbour by a borrower's directors may be viewed favourably. Anecdotal reports indicate that in some instances banks have required the implementation of safe harbour as a pre-condition for the ongoing provision of finance used to implement a restructure. In this respect, the threshold criteria are useful as, by virtue of the implementation of the process, a bank can have comfort that an appropriate external advisor has been engaged, employee entitlements are up to date and taxation lodgement obligations have been (at least substantially) met. In this regard, safe harbour provides assurances which may make access to rescue finance more readily available at least for some segments of the market.

2.3 However, in light of the issue raised above in relation to the limited market segments which are currently utilising safe harbour, these positive developments are limited, in our view.

2.4 The Independent Panel may wish to consider the following matters:

(1) If modifications are made to the existing regime to make it more attractive to SMEs, would the impact on directors' conduct be more significant?

(2) Would the threat of insolvent trading liability significantly influence SME directors in practice? If the threat does not influence behaviour and accordingly safe harbour does not have any meaningful role in driving better conduct from SME directors in its current formulation, should amendments be made to the insolvent trading prohibition itself? For example, would it be appropriate to establish a mandatory carve-out from insolvent trading liability and director guarantor liability in respect of recourse to the family home?

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

3.1 To the extent that safe harbour has been used effectively to implement informal restructuring plans, this generally serves the interest of creditors and employees as better outcomes will often be achieved through informal restructures than by use of formal processes which result in enterprise value loss and diminished returns to creditors, in most cases. Insolvency practitioners have informed the Committee that safe harbour, even where ultimately unsuccessful in preventing formal insolvency, has also been used effectively by enabling more efficient transitions into voluntary administration and liquidation resulting in improved outcomes for creditors.

3.2 The Committee is unaware of instances where safe harbour has been abused by directors to the detriment of creditors and employees. If this concern is prevalent, and in order to avoid the risk that unscrupulous turnaround advisers may utilise safe harbour to promulgate phoenix and other creditor defeating activity, greater clarity ought to be provided in respect of which persons/entities qualify as an

"appropriately qualified entity" (**AQE**) under s 588GA(2). See further comments at question 9 below.

3.3 The Independent Panel may wish to consider the following matters:

(1) Are there any reports of safe harbour being used to escape voidable transaction liability?

(2) Are the new employee entitlement-defeating voidable transaction provisions[5] and the broader creditor-defeating disposition provisions[6] better suited to achieving the policy goals behind the introduction of the insolvent trading prohibition in the 1990s to protect employees and creditors?

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

4.1 There are not yet any reported decisions of which the Committee is aware, which have considered the application of safe harbour in any director's defence to the insolvent trading prohibition.

4.2 However, based on anecdotal reports, safe harbour has been particularly useful in circumstances where there is a pending refinance deadline in respect of which non-compliance may result in insolvency. In those circumstances, in the absence of the protection of safe harbour, it appears that directors would have been more inclined to place a company into voluntary administration in order to mitigate their risk of prospective insolvent trading liability.

4.3 The Independent Panel may wish to consider the following matter:

(1) Does safe harbour mitigate the incentive for a threatened action for breach of the insolvent trading prohibition to be used against directors by insolvency practitioners to leverage greater contributions into deeds of company arrangement or to avoid liquidation? Alternatively, does safe harbour allow an effective alleviation of this concern (if it exists), because the safe harbour still does not mitigate the risk of a threat of action for breach of other statutory director's duties for which no relief applies under safe harbour? If so, is this something which requires remediation?

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?

5.1 The Covid-19 insolvent trading moratorium removed the incentive for directors to utilise the safe harbour provisions (**COVID-19 Moratorium**).

5.2 Discussions among Committee members indicate that upon the commencement of the COVID-19 Moratorium:

(1) Very few safe harbour appointments were initiated and directors formed the view that they did not require safe harbour advice/protection in light of the COVID-19 Moratorium; and

(2) A number of existing safe harbour engagements were terminated as directors considered that there was no need for any ongoing safe harbour

[5] Corporations Act, Pt 5.8A.
[6] Corporations Act, s 588FDB.

protection given the protection which applied under the COVID-19 Moratorium.

5.3 As such, the COVID-19 Moratorium represents a lost opportunity to test the efficacy of the safe harbour provisions.

5.4 Against that background, the empirical research undertaken before the implementation of the COVID-19 Moratorium remains relevant and is reflective of current market practices now that the COVID-19 Moratorium has been lifted.[7]

5.5 A comparative analysis with the relief which applied in other jurisdictions may also provide lessons Australia might consider in future if circumstances warrant a special safe harbour and as part of this review:

(1) UK:

- Legislative provisions were enacted in the *Corporate Insolvency and Governance Act 2020* and subsequently renewed by the *Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020 (SI 2020/1349*)).

- These provisions operated by requiring a court to assume, in determining the amount, if any, that a director should be ordered to contribute to the assets of the company on a finding of wrongful trading, that the director is not responsible for any worsening of the financial position of the company or its creditors that occurs or occurred from 1 March 2020 until 30 September 2020 or from 26 November 2020 to 30 June 2021.

- An informative analysis of these provisions is set out in the article, "The UK Corporate Insolvency and Governance Act 2020: A move to a more debtor-friendly restructuring regime?"[8]

(2) Singapore:[9]

- Amendments were made to the wrongful trading provisions in s 239(6) of the *Insolvency, Restructuring and Dissolution Act 2018*.

- Amendments were to the effect that 'a company or variable capital company is not to be treated as incurring debts or other liabilities without reasonable prospect of meeting them in full if the debt or other liability is incurred —

  (a) in the ordinary course of the company's or variable capital company's business;

  (b) during the prescribed period; and

[7] See in particular Ian Ramsey and Stacey Steele, "The "Safe Harbour" Reform of Directors' Insolvent Trading Liability in Australia: Insolvency Professionals' Views" (2020) 48 *ABLR* 7.
[8] https://www.nortonrosefulbright.com/en/knowledge/publications/5ac21a15/the-uk-corporate-insolvency-and-governance-act-2020
[9] For a comparative analysis between the wrongful trading provisions in Singapore and the Australian regime see Stacey Steele, Ian Ramsay and Miranda Webster, "Insolvency Law Reform in Australia and Singapore: Directors' Liability for Insolvent Trading and Wrongful Trading" (2019) 28(3) *International Insolvency Review*, 363.

(c) before the appointment of a judicial manager or liquidator of the company or variable capital company'.

(3) Germany:

A comparison of Australian and German approaches is discussed in an article by Stacey Steele, "Directors' duties to prevent insolvent trading in a crisis: Responses to COVID-19 in Australia and lessons from Germany".[10]

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

6.1 No, the Committee is not aware of any instances where the safe harbour has been misused.

6.2 Rather than the safe harbour provisions being "misused", some practitioners have raised concerns about the costs of safe harbour when used in the context of listed companies and large private companies. There are anecdotal reports of circumstances in which individual directors have engaged their own accounting and legal safe harbour advisers which has led to unnecessary expense and complication.

6.3 The Independent Panel may wish to consider, particularly for large entities, whether obtaining a raft of safe harbour advisers can be better managed if greater clarity is provided as to the categories of practitioners who meet the AQE definition and what is in fact required in order to obtain the benefit of safe harbour protection?

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

7.1 The pre-conditions to accessing safe harbour mean that the safe harbour is unlikely to achieve its goals in providing relief for SME directors. The pre-conditions mean that the safe harbour is unlikely to be accessible to many SMEs facing liquidity problems and financial distress.

7.2 The Independent Panel may wish to consider the following matters:

(1) To which market segments is safe harbour protection directed? If the premise upon which the safe harbour continues to rely remains fostering entrepreneurial culture,[11] the pre-conditions should be adjusted to allow greater access to the procedure for SMEs.

(2) Consider whether it would be appropriate for the threshold issues to be aligned with the relaxed thresholds which apply in respect of the new small business restructuring process.[12]

(3) Consider whether, rather than requiring payment of outstanding employee entitlements as a pre-condition, it would be preferable if the "course of action" contemplated must ensure that the company will "become compliant" with those obligations during the plan?[13]

[10] 30(1) 2021 *International Insolvency Review* 89-110.
[11] Commonwealth, Second Reading Speech, *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017* (Cth), 1 June 2017 (Michael McCormack) in which it was stated the purpose of the suite of reforms which included the safe harbour provisions was to "*promote the preservation of enterprise value for companies…reduce the stigma of failure associated with insolvency and encourage a culture of entrepreneurship*."
[12] Corporations Regulations, reg 5.3B.24.
[13] Ibid.

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

8.1 The Committee considers that the current law lacks certainty in three key respects:

(1) There is insufficient guidance provided as to who may act as an AQE (which is dealt with in the Committee's response to question 9);

(2) There is insufficient guidance as to what a "better outcome" entails; and

(3) There is limited guidance as to the meaning of "substantial compliance" with taxation lodgement obligations and the payment of employee entitlements which are each necessary preconditions for directors to avail themselves of safe harbour (and where otherwise constrained by the matters set out in s 588GA(4)(b)(ii) in respect of '2 or more failures').

8.2 The Committee considers that the safe harbour mechanism may be more attractive to directors if greater legislative guidance was provided as to what constitutes a "better outcome". Currently, a "better outcome" is defined as "an outcome that is better for the company than the immediate appointment of an administrator, or liquidator, of the company". However, it is unclear whether a "better outcome" is intended to:

(1) Require a greater return to the general body of creditors than in a liquidation / voluntary administration / deed of company arrangement counterfactual and, if so, on what basis the counterfactual benchmarking return ought to be calculated; and

(2) Involve consideration of qualitative factors, such as whether the maintenance of enterprise value and goodwill value by avoiding formal appointments, is relevant to the "better outcome" assessment.

8.3 In circumstances where there are still no reported cases (of which the Committee is aware) considering the operation of the safe harbour provisions such that no jurisprudence has developed which provides any guidance as to what constitutes a "better outcome", there is an imperative for legislative clarification in this regard.

8.4 The Committee also considers that further legislative guidance on the meaning of "substantial compliance" would be helpful (particularly if the Committee's views expressed in 1.5(1) and 7.2(3) are taken into account). Currently, guidance appears in the Explanatory Memorandum[14] which is not as easily accessible to market participants when compared with the legislation itself. Consideration should be given to amending section 588GA to provide greater certainty or, alternatively, providing further guidance in regulations. The case law concerning the permissible return to, and discrimination between, creditors under a deed of company arrangement when compared with a liquidation counterfactual may be useful in this regard.[15]

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

9.1 The Committee considers that clarification as to who is eligible to act as an AQE and what is required in order to adequately fulfil the role of an AQE is needed.

[14] https://treasury.gov.au/sites/default/files/2019-03/C2017-010_EM_Corporate_Insolvency_Law.pdf
[15] See e.g. *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd* (1996) 22 ACSR 169; *Hagenvale Pty Ltd v Depela Pty Ltd and Another* (1995) 17 ACSR 139; *Sydney Land Corp Pty Ltd v Kalon Pty Ltd* (1997) 26 ACSR 427; *In the matter of Connections Total Fitness for the Family Pty Limited (administrator appointed)* [2014] NSWSC 75, *Shafston Avenue Construction Pty Ltd, in the matter of CRCG-Rimfire Pty Ltd (subject to deed of company arrangement) v McCann* [2019] FCA 1426.

9.2 It would be appropriate for AQE eligibility criteria be prescribed in regulations so as to provide greater certainty for users of the safe harbour. The Committee considers that the following eligibility criteria ought to be considered by the Independent Panel:

(1) Full membership of an industry body such as the Australian Restructuring Insolvency & Turnaround Association (**ARITA**), Turnaround Management Association, Chartered Accountants Australia & New Zealand, CPA Australia or State based lawyer registration boards; and

(2) Minimum professional indemnity insurance coverage requirements.

9.3 The Independent Panel may also wish to consider whether registration as a tax agent or Small Business Restructuring Practitioner is sufficient in order to be eligible as an AQE to advise SME directors.

9.4 The Committee considers that confining AQEs to registered liquidators would restrict access to the safe harbour mechanism and that the eligibility criteria should facilitate the appointment of a broader range of practitioners (albeit members of professional bodies with disciplinary and regulatory oversight and with professional indemnity insurance coverage).

9.5 The Commonwealth, through the Australian Securities and Investments Commission (**ASIC**) could maintain a register of AQEs.

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

10.1 The Committee considers that there is insufficient awareness of the availability and operation of the safe harbour provisions, particularly among SME directors.

10.2 We believe measures should be taken to promote greater awareness of the insolvent trading prohibition itself and the availability of safe harbour. In particular, the provision of a specific user-friendly, plain English safe harbour guide via the outreach website maintained by ASIC would assist.

10.3 The Committee also considers that many SME directors and general accountancy practitioners lack sufficient knowledge of insolvency processes generally and the availability of safe harbour. Consideration may be given to the implementation of:

(1) Targeted training for directors and professionals most likely to be involved in advising SMEs such as accountants, including a module concerning insolvent trading and safe harbour; and

(2) An online learning module or ASIC regulatory guide for directorship fundamentals - including financial literacy and topics such as the prohibition of insolvent trading and the availability of safe harbour. Alternatively, when a person is appointed as a director, an information pack could be automatically produced and sent by ASIC?

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

11.1 Other than where the rules of an industry body prevent them doing so[16], there is uncertainty as to whether an AQE retained for the purposes of a safe harbour

[16] For example, section 1.6.8 of Practice Statement: Insolvency 1 - Independence of ARITA's Code of Professional Practice.

engagement may permissibly be appointed subsequently as a voluntary administrator or liquidator.[17] Some practitioners may face a difficult decision in having to choose between the safe harbour engagement and any later voluntary administration or liquidation engagement, which may in some circumstances disincentivise the acceptance of a safe harbour engagement. If a safe harbour engagement does not result in turning the company around, then from an efficiency perspective, the benefits of the AQE taking on the subsequent formal external administration should not be downplayed.

11.2 Further regulatory guidance may assist to resolve these issues. For example, the Committee considers that it may expressly prescribe the circumstances in which an AQE may accept a subsequent formal appointment. The supervising liquidator procedure may provide useful guidance in this regard in order to address the risk of actual or perceived conflicts of interest.

11.3 Insolvency practitioners have also informed the Committee that some directors have expressed hesitancy in obtaining their own independent safe harbour advice as a result of the lack of certainty around key issues under the law (see above response to question 8).

12 Are there any other accessibility issues impacting its use?

12.1 The principal barriers to use of safe harbour by SME directors are canvassed in the response to question 7.

12.2 Insolvency practitioners have informed the Committee that the following issues may limit accessibility and could contribute to lack of utilisation of the safe harbour procedure:

(1) Where multiple Australian Taxation Office (**ATO**) repayment plans in respect of SME taxation liabilities have not been complied with, SME directors are likely ineligible to use safe harbour;

(2) Under safe harbour, directors do not obtain any relief from liability for breach of duties under sections 180-183 of the Corporations Act, which may disincentivise the use of the procedure, particularly in the case of large listed entities where directors' duty enforcement risk is likely more pronounced;

(3) There is no relief provided from directors' personal liability for taxation liabilities under director penalty notices while the safe harbour process remains on foot.[18]

12.3 Turnaround professionals with whom Committee members have spoken have identified an issue with the use of superannuation clearing houses. Whilst a company may pay the superannuation payable to its employees to the clearing house by the due date, depending on when that payment is made (for example, if made on the last day of the period), the superannuation clearing house may not pay the superannuation to the employees' superannuation accounts until after the due date, meaning there is a technical non-compliance with paying superannuation into the employees' accounts by the time it is due for payment. If this happens two

[17] See e.g. *Re Ten Network Holdings Ltd* 252 FCR 519 for commentary as to the circumstances in which it may be appropriate for a practitioner who has provided prior commercial advice to an entity in financial difficulty to be subsequently appointed as that entity's administrator.

[18] *Taxation Administration Act 1953* (Cth) Sch 1 ss 269-20 and 269-25. See further, Corey Byrne, "Rescuing the Rescue Culture? Australian Corporate Restructuring After the Safe Harbour and Ipso Facto Reforms" (2019) 27 *Insolvency Law Journal* 122, 139.

or more times in a 12-month period, debts incurred during the periods of non-compliance could fall outside of safe harbour protection.

12.4 There is uncertainty as to whether a company's directors are eligible to qualify for the safe harbour where a superannuation guarantee charge (**SGC**) has arisen and remains unpaid, even where it is subject to an ATO instalment payment plan.

12.5 It appears that a company cannot satisfy the requirement in section 588GA(4)(a)(i) if a SGC has arisen and remains unpaid. An SGC only arises where a company has failed to pay its superannuation to its employees' accounts by the due date. The company must therefore not be 'paying the entitlements of its employees by the time they fall due' if a SGC charge has arisen and remains owing. That would appear to be the case even if the company has entered into an instalment payment plan with the ATO (which are generally entered into under section 255-15 of the *Taxation Administration Act 1953* (Cth) (**TAA**). The fact the ATO has agreed to the payment of the SGC by instalments does not change the fact that the company failed to pay its superannuation to its employees' accounts by the due date, and that failure cannot arguably be rectified until the SGC relating to the unpaid superannuation is paid (and perhaps even the superannuation deposited by the ATO into the employees' accounts).

12.6 In addition, in the decision of *Clifton (in their capacity as liquidators of Solar Shop Australia Pty Ltd (In Liq) ACN 092 562 877 v Kerry J Investment Pty ltd (t/as Clenergy)* ACN 108 633 227 (2020) 143 ACSR 1, the Full Court of the Federal Court found that an ATO instalment payment plan under section 255-15 of TAA did not vary the time at which the tax debts the subject of the instalment plan were due and payable. When an instalment payment plan includes SGC amounts, the plan will accordingly not have the effect that the time for payment of SGC is varied.

12.7 Directors of companies subject to ATO payment plans which include SGC may consider that they are eligible for safe harbour when in fact they are not.

12.8 In light of the above issues, the Committee considers that the Commonwealth ought to undertake a holistic review of various provisions of the Corporations Act which may either directly or indirectly disincentivise the use of safe harbour.

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?

13.1 The Committee retains the view expressed in its submission to the Treasury in relation to the 'National Innovation and Science Agenda – Improving bankruptcy and insolvency laws' agenda dated 26 May 2016 that the maintenance of the existing insolvent trading prohibition should be reconsidered.[19]

[19] Law Council of Australia, *Submission in response to the Treasury 'National Innovation and Science Agenda – Improving bankruptcy and insolvency laws'* (26 May 2016): https://www.lawcouncil.asn.au/publicassets/0f8d4d1c-1eb5-e611-80d2-005056be66b1/3153_-_National_Innovation_and_Science_Agenda_Improving_bankruptcy_and_insolvency_laws.pdf. For further commentary as to the appropriateness of Australia's existing insolvent trading prohibition see Robert Baxt, "How Forgiving Can a Court Be of Directors' Breaches of Duty?" (2007) 35 *ABLR* 370, 372–373; Colin Anderson and David Morrison, "Should Directors Be Pursued for Insolvent Trading Where a Company Has Entered into a Deed of Company Arrangement" (2005) *13 Insolv LJ* 163, 166; Leanne Whitechurch, "Should the Law on Insolvent Trading Be Reformed by Introducing a Defence Akin to the Business Judgment Rule?" (2009) *17 Insolv LJ* 25; Jason Harris, "Director Liability for Insolvent Trading: Is the Cure Worse Than the Disease?" (2009) 23(3) Australian Journal of Corporate Law 266, 275. Patrick Lewis, "Insolvent Trading Defences after Hall v Poolman" (2010) 28 *C&SLJ 396*; Stacey Steele and Ian Ramsay, "Insolvent Trading in Australia: A Study of Court Judgments from 2004 to 2017" (2019) *27 Insolv LJ* 156.

13.2 In this respect, the Independent Panel may consider developments in other jurisdictions such as the United Kingdom and Singapore. Such procedures typically provide for liability of directors in more limited circumstances than Australia's current insolvent trading regime and where:

(1) They knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation; and

(2) Did not take every step with a view to minimising the potential loss to the company's creditors.

13.3 The Independent Panel may wish to turn its mind to whether a wrongful trading prohibition complemented by the existing suite of directors' duties and antecedent transaction provisions (including in particular those dealing with creditor defeating dispositions and transactions avoiding payment of employee entitlements) would provide sufficient protection to creditors, while at the same time more effectively facilitating and promoting corporate rescue in appropriate cases.

13.4 If the existing insolvent trading prohibition is to be maintained, the Committee recommends that the Independent Panel consider the interaction between the safe harbour provisions and the provisions dealing with directors' duties. This interaction is not well understood and requires further clarification.

Conclusion and further contact

The Committee would be pleased to discuss any aspect of this submission.

Please contact the chair of the Committee, Scott Butler, at Scott.Butler@hallandwilcox.com.au or on 0448 939 439, if you would like to do so.

Yours faithfully

Greg Rodgers
Chair, Business Law Section