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Australian Government
The Treasury
Review of the Insolvent Trading Safe Harbour

Submission to Independent Review Panel prepared by Wexted Advisors

1 October 2021

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GLOSSARY

Term	Definition
Act	Corporations Act 2001 (Cth)
Administrators	Voluntary Administrators
ASIC	Australian Securities and Investment Commission
ASX	Australian Securities Exchange
ATO	Australian Taxation Office or the Commissioner of Taxation
Better Outcome Test	A comparative analysis of stakeholder returns of the Course of Action, to that of an immediate external administration appointment
Board	Board of Directors
Course of Action	The key milestones that make up the corporate structuring plan of the proposed restructure under the Law
CVL	Creditors Voluntary Liquidation
DOCA	Deed of Company Arrangement
Explanatory Statement	Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017, Explanatory Memorandum
Government	Government of the Commonwealth of Australia
Harmer Report	Law Reform Commission's report entitled 'General Insolvency Inquiry' dated 13 December 1988
Law	The Insolvent Trading Safe Harbour legislation
MVL	Members Voluntary Liquidation
NFP	Not-for-profit organisation
Panel	The Safe Harbour Review Panel
Regulations	Corporations Regulations 2001 (Cth)
Scheme	Scheme of Arrangement
Section	Section of the Act, Section of this Submission
Submission	This Submission dated 1 October 2021
VA	Voluntary Administration
WXA	Wexted Advisors

1 SUMMARY

1.1 Introduction

1.1.1 We have prepared this Submission in response to the request for Submissions made by the Panel appointed to review the Insolvent Trading Safe Harbour Legislation (the Law).

1.1.2 Our firm has had considerable experience in Safe Harbour work. We have undertaken over 20 Safe Harbour engagements between late 2017 and 2021. Most of those engagements have been ASX listed companies, or significant private companies.

1.1.3 Our submission covers specific answers to the questions posed by the Panel (Section 3), case studies setting out the benefits of the Law to the clients of our firm (Section 4), and other reflections on the legislation (Section 5).

1.2 Our opinion

1.2.1 WXA believe that the Law has been a welcome addition to the restructuring landscape. It has legitimised informal restructuring processes that have been in place for a long time. It has provided Directors a meaningful process to objectively assess the options facing challenged businesses, and protection from possible litigation that would otherwise have seriously damaged the prospects of achieving a restructure.

1.2.2 We do not consider there should be any material change to the Law. Whilst there are refinements that could of course be made and may be suggested, we do not feel that additional codification should be a priority at this stage. We consider issues such as director and industry education, practitioner guidance on use and peak body support are the most important present requirements, to increase usage of the Law post the COVID-19 economic recovery period.

1.2.3 We make some comments in Sections 3 and 5 of the Submission about a small number of specific areas we believe can be targeted, to refine aspects of the Law that, in our practical experience, would benefit from review. These include clearer objectives for Better Outcome tests and more prescriptive use of Appropriately Qualified Entities for those tests.

1.2.4 The acceptance and stronger promotion of the Law will mark, in our view, a very important part of and role in the post COVID-19 recovery process. Business will require the confidence to continue to trade though strong headwinds, in a likely ambiguous environment. Governments will be keen to avoid significant insolvency events impacting on employment and growth. A clear pathway for distressed business to take appropriate steps towards recovery, without resorting to insolvency, will be an important step in that the broader economic debate.

1.2.5 We believe continuing the present Law, with limited change, achieves that end. The Law is straightforward and easy to access, it is a low-cost solution relative to formal administration processes, achieves strong director buy-in and can be easily brought to a conclusion when it works.

1.2.6 In our view, the evolution of the Law is also a positive development for the restructuring industry. Over many years, the industry has grappled with the linkages between informal restructuring work, the duties owed to companies at that time, and the transition of an entity, and an advisor, to a formal insolvency role. Safe Harbour makes clear the role of the restructuring advisor, with a proper segregation from the role and duties of a practitioner dealing with post failure questions. We believe this adds greatly to the credibility of and market confidence in restructuring processes.

1.3 Panel questions

1.3.1 We have provided in Section 3, our responses to the questions raised by the Panel, which we summarise below. We consider:

i. The Law works effectively and has been a critical addition to the restructuring tools available to company directors and restructuring advisors;

ii. Based on our aggregate experience, and direct feedback from directors of companies, the Law provides the necessary scope for directors to attempt to undertake a solvent restructure, instead of appointing an external administrator (or resigning) to avoid risk of personal liability;

iii. The interests of all classes of creditors and employees are advanced through the Law, when applied correctly;

iv. The insolvent trading prohibition serves an important purpose in restructuring assignments, and the Law provides a way to effectively balance the impact of the prohibition against the benefit of restructuring. The insolvent trading prohibition should be retained.

v. The COVID-19 experience has not impacted our view of the Law;

vi. We are not aware of misuse of the Safe Harbour regime, although our experiences are of course restricted to our clients who are mostly ASX listed clients;

vii. The Safe Harbour pre-conditions are appropriate and should not be changed, as they prevent clearly insolvent companies from accessing the legislation;

viii. The Law provides sufficient certainty to enable its effective use. We do not believe that there should be significant codification of the Law at this stage;

ix. We do believe there is merit in further clarification around the role of advisors, particularly around who may act as a 'Safe Harbour Advisor' and the circumstances in which an 'Appropriately Qualified Entity' is retained;

x. The Law has a reasonable degree of visibility amongst the insolvency and restructuring community. We consider that the education process for the Law is increasing its awareness outside that community and needs to be encouraged;

xi. We have not experienced any undue barriers or conflicts limiting our engagement with companies seeking safe harbour advice. In that regard, we consider that the Safe Harbour Advisor is a key participant in a restructure and should be completely free of any conflict or association with a later insolvency;

xii. We are not aware of any material accessibility issues impacting its use; and

xiii. Other than the few refinements we suggest, there are no material improvements or qualifications we would like to see made to the Law or the underlying prohibition on insolvent trading. For the most part, we consider a series of guiding principles for Practitioners, along with more education and exposure, would be of benefit rather than legislative amendment.

1.4 Market perspectives

1.4.1 Our Submission incorporates a series of practical case studies. We have presently included seven (7) such case studies. In each case, the client in question has approved and supported the inclusion of the case study for the purposes of the Submission. Our case studies are set out in Section 4 below.

1.4.2 The case studies involve various industry sectors, circumstances, and profiles. In each case, the Safe Harbour resulted in a positive outcome. Generally, entities were saved from insolvency, creditor relationships were preserved, jobs saved and (importantly) business equity retained for investors. In our view, this is a primary benefit of the legislation: it provides protection to allow a Board to focus responsible energy on the preservation of equity value and (by extension) protect all other claims pre-ranking that equity.

1.4.3 Overwhelmingly, the anecdotal feedback from Directors involved in the Law is positive. They have been engaged and supportive of the process. They have developed, in the main, a far more meaningful understanding of the elements of the business contributing to recovery. They have acquired a genuine understanding of the impact of insolvency.

1.4.4 Furthermore, incoming directors have relied upon the provisions for comfort when accepting an appointment as a Director. We think this is one of the key take-outs from the Law: Qualified directors expressing a willingness to join the Boards of challenged entities, on the back of the protection the Law (often based on representations from an Advisor) provides.

1.5 Our perspectives

1.5.1 We have in Section 5 of the Submission, set out a series of other observations about aspects of the Safe Harbour process that we consider require more sector discussion.

1.5.2 We have briefly considered:

i. The qualifications of Advisors undertaking Safe Harbour work;

ii. The objective presentation of the Course of Action and Better Outcome;

iii. The issue of ASX disclosure;

iv. The interplay with Schemes of Arrangement; and

v. Independence.

2 INTRODUCTION

2.1 Background to the Review

2.1.1 Australia's insolvent trading laws impose a duty on directors to prevent a company from incurring debts whilst insolvent. Pursuant to Section 588G of the Corporations Act 2001 (the Act), a director may be personally liable for debts incurred by a company if there were reasonable grounds to suspect that the company was insolvent at the time the debt was incurred.

2.1.2 The threat of personally liability had the effect of encouraging directors of distressed companies to appoint an external administrator prematurely, instead of pursuing other restructuring options that may have resulted in the company's survival.

2.1.3 Section 588G of the Act was implemented in the 1990's following the findings of the Harmer Review. Australia imposes relatively strict laws with respect to insolvent trading.

2.1.4 In that context, businesses have, for a long time, sought to undertake restructuring informally, rather than through formal insolvency appointments. It is an accepted industry view that informal restructuring initiatives preserve more value for businesses, creditors, and investors than formal methods of insolvent restructuring. It is generally considered the value destruction attributable to formal insolvency appointments is, amongst other things, why insolvency is (and should remain) a last resort.

2.1.5 Over the last decade or so, there have been debates about reform of Section 588G.

2.1.6 The first piece of meaningful discourse was in 2010, when the Commonwealth Treasury released its paper discussing options for potential reform of Section 588G and considering whether it creates the optimal environment for appropriate and responsible level of risk-taking behaviour.

2.1.7 That analysis was advanced in 2015 by way of a report produced by the Productivity Commission titled *Business Set-up, Transfer and Closure* that focused on efficiency economic growth and the tendency of Australia's insolvent trading laws to promote the entrance of companies into formal insolvency proceedings prematurely. That report recommended a safe harbour from insolvent trading liability.

2.1.8 Ultimately, on 19 September 2017, the Treasury Laws Amendment (2017 Enterprise Incentives No.2) Act 2017 came into effect, establishing the safe harbour, allowing directors to make decisions relating to the restructuring of the company without undue risk of incurring personal liability. The objective of this legislation, as outlined in the Explanatory Memorandum, was "*to promote a culture of entrepreneurship and innovation to help drive business growth, local jobs and global success*".

2.1.9 In essence, the Law provided such a defence to an insolvent trading claim in circumstances where a director, following a suspicion of insolvency, was embarking on a 'course of action' that produced a 'better outcome' than the 'immediate appointment of an administrator or liquidator'.

2.1.10 The Law has been in place for four years. We note that the Law imposed few prescriptive requirements on Boards to access the safe harbour, or upon Practitioners providing advice on its implementation. We consider this has been beneficial. Practitioners have had the opportunity to determine for themselves the best manner in which to interpret the Law for the benefit of their clients.

2.1.11 It is difficult to know the extent of use of the Law, as one of its features (beneficial in our view) is the confidentiality of the process. It is clear the use of the Law was increasing throughout 2018 and 2019, its use was materially impacted by the COVID-19 Safe harbour provisions in 2020 and is now (in late 2021) seeing more regular usage.

2.1.12 Section 588HA of the Act requires that the Minister cause an independent review of the impact of the availability of the safe harbour, including on the conduct of directors, and the interests of creditors and employees. That review was expected after two years, but for several reasons (including take up and covid delays) is being instituted now.

2.1.13 We welcome the review and the opportunity to provide feedback to the Panel in this Submission.

2.1.14 When assessing the impact, it should be noted that the safe harbour provisions have only been in effect for a relatively short period. Also, the confidential nature of company restructuring that may have taken place under the safe harbour protection limits the availability of quantitative data, further emphasising the importance of stakeholder Submissions.

2.1.15 Noting these challenges, the review seeks feedback from stakeholders who may have experience in corporate distress and turnaround, including the degree to which they have engaged with the safe harbour reforms, both from an advisor and any potential subsequent administrator or liquidator point of view, and (for those involved in companies whose directors utilised the safe harbour defence) their experience engaging with the reforms in practice. The perspective of creditors and other stakeholders is also sought.

2.1.16 The overarching intent is to determine the effectiveness of the reforms, and whether they are fit for purpose in enabling company turnaround and promoting a culture of entrepreneurship and innovation.

2.1.17 Our Submission follows.

3 RESPONSES TO DISCUSSION QUESTIONS

3.1 Are the safe harbour provisions working effectively?

3.1.1 We believe the safe harbour provisions work effectively and have been a critical addition to the restructuring tools available to company directors and restructuring advisors.

3.1.2 One of the stated aims of the Law, as set out in the Explanatory Statement, was to create an environment where directors are encouraged towards positive restructuring initiatives rather than the premature appointment of Administrators, to address insolvent trading liability concerns.

3.1.3 The Law provides directors with a strong incentive to focus on value-creating strategies focussed on the preservation of value for equity holders rather than creditors (and so, by extension, to all creditors).

3.1.4 In the engagements we have presented in Section 4, the Better Outcome Tests conducted throughout the engagements demonstrated that the immediate appointment of an Administrator would have generally resulted in, amongst other things, destruction of value, lower returns to creditors and loss of jobs.

3.1.5 Wexted Advisors have advised on over 20 safe harbour engagements. Most of those companies would have entered external administration without the benefit of the Law. Instead the vast majority continue to trade today with the preservation of existing equity value.

3.1.6 The companies to which we provide Safe Harbour services are invariably listed companies or large private companies. The provisions are not as effectively accessible to SMEs, but we do not believe there should be amendments specifically to address that perceived shortcoming, which should be addressed by other means.

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

3.2.1 Based on our aggregate experience in Safe Harbour engagements, and also direct feedback from directors of companies we advise, the Law provides the necessary scope for directors to attempt to undertake a solvent restructure, instead of appointing an external administrator (or resigning) in order to avoid risk of personal liability.

3.2.2 Directors have been prepared to continue trading in an attempt to achieve a better outcome, and to take reasonable risks to preserve a challenged but viable business, in circumstances where they are receiving Safe Harbour advice.

3.2.3 In particular, we have found Directors develop a very clear view of the specific debts being incurred as part of the Course of Action alongside an objective assessment of the benefits arising from incurring those debts and develop a good understanding of the consequences of various actions. That is, we are seeing considerable buy in to the process, and a greater degree of accountability and discipline in their knowledge and management of the steps required to effect rehabilitation.

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

3.3.1 In our experience, the interests of all classes of creditors and employees are advanced through the Law when applied correctly.

3.3.2 Better Outcome Tests undertaken throughout our engagements confirm that unsecured creditors and trade suppliers invariably would have received significantly lower returns upon the immediate

appointment of an external administrator. In many cases this is because equity capital has been available in the Course of Action, that is not available in an insolvency appointment.

3.3.3 We also note that, in many cases, the appointment of an external administrator would have resulted in a nil return to unsecured creditors, and accordingly creditors would not have objectively been disadvantaged in the event that the restructure plan fails.

3.3.4 The ATO, a significant creditor in distressed companies can also benefit as those companies considering safe harbour are incentivised to keep tax lodgements up to date.

3.3.5 The primary benefit of the Law to employees is the preservation of the business and employment. Companies considering safe harbour protection are also, as such, incentivised to keep employee entitlements up to date.

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

3.4.1 We believe the insolvent trading prohibition serves an important purpose in restructuring assignments. It is important that directors are aware that there are consequences to breaching established protocols, and that there is clear 'guideposts' in place against which Safe Harbour protection, and the related Courses of Action and Better Outcome, are tested.

3.4.2 In the recent past we have seen (usually in our capacity as Expert Insolvency Accountants preparing Solvency Reports) the impact of Directors attempting a restructure, without the benefit of the Law. The lack of a clear framework and counterfactual assessment against which a restructure is compared, means that Directors either react too early to the threat of insolvent trading, or (absent professional guidance) acted too late.

3.4.3 We consider the Law provides a way to effectively balance these competing interests. With the assistance of the Safe Harbour Advisor, a Board can assess the current financial position, the objective value of a Course of Action, and the objective value of the insolvency counterfactual, all with the benefit of professional and impartial advice, from a person with no stake in the outcome.

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

3.5.1 There was a decrease in enquiry about Safe Harbour protection during the COVID-19 insolvent trading moratorium, expiring 31 December 2020. This was anticipated, taking into consideration that directors had little incentive to incur additional costs associated with the Safe Harbour protection whilst obtaining the benefits of the Law.

3.5.2 The COVID-19 experience has not impacted our view of the Safe Harbour provisions. We consider the Government response to COVID-19, including the Safe Harbour and Insolvency moratoriums, were an appropriate and responsible measure that addressed the specific circumstances facing companies in 2020. We do not consider, however, the provisions (which relieved companies from the requirement for Eligibility, a Course of Action, or a Better Outcome Test) are suited to the requirements of an economy in recovery mode post COVID-19.

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

3.6.1 We are not aware of misuse of the Safe Harbour regime, although our experiences are of course restricted to our own clients.

3.6.2 Anecdotally, we understand there are cases where a Safe Harbour Advisor might provide a very low cost form of protection based on a 'checklist' style approach to the legislation, without undertaking any meaningful analysis, generally on the basis that, particularly for SME's, the prospect of an insolvent trading claim is low.

3.6.3 We also accept that, in places, the law is used to 'pre-plan' a Voluntary Administration process, that is, to provide the Board with protection while a stable administration process is in preparation. Whilst we have not taken such appointments ourselves, we have no firm objection to that use of the Law, per se. On the basis the Course of Action is being pursued to affect a restructure (utilising Voluntary Administration as a restructuring tool) that proves a better outcome than the immediate appointment, we believe that is consistent with the intention of the legislation.

3.6.4 Indeed, we have seen very positive and productive use of the Safe Harbour provisions, in tandem with Schemes of Arrangement, to avoid Voluntary Administration outcomes while seeking court mandated creditor moratoriums and concessions. We think this is a very useful process for significant companies seeking 'debtor controlled' restructuring.

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

3.7.1 In our view, the Safe Harbour pre-conditions are appropriate.

3.7.2 The tax lodgements and payment of employee entitlements provide necessary and effective protection to two of the most at-risk classes of creditors in a distressed business, whilst not being so onerous so as to burden an already struggling company and make a successful restructure more challenging.

3.7.3 One of the issues we consider may require some industry discussion, is the manner in which a Safe Harbour engagement is commenced. The legislation indicates that, inter alia, the protection applies from the point at which a Course of Action is implemented. This can be distinguished, in places, from the time at which a Safe Harbour advisor is appointed. Our firm does not provide retrospective coverage of a Course of Action prior to our appointment. However, we imagine that, in circumstances where a Course of Action is tested in a subsequent insolvent trading proceeding, that Directors may plead a back-date' of that protection. This will be a question of evidence.

3.7.4 It might be that a remedy for this issue is that there is clarity around the role of the 'Appropriately Qualified Entity' and that a Course of Action does not qualify for a defence unless it falls within the provisions of a review conducted under Section 588GA(2)(d). We comment on this issue in Section 5.

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

3.8.1 In our view, the Law provides sufficient certainty to enable its effective use.

3.8.2 We do not believe that there should be significant codification of the Law at this stage. There has not been, as we understand it, any legal precedent created to test the effectiveness of its use (which is, in itself a measure of its effectiveness). We acknowledge some industry participants may consider *Re Balmz Pty Ltd (In Liquidation)* [2020] VSC 652, tested the effectiveness of the use of safe harbour, we disagree.

3.8.3 We consider that more certainty from the Law will be a result of: (i) the increasing use of the Law as a viable restructuring tool accepted by all company's stakeholders; (ii) education for directors and creditors about the positive purpose of the Law; and (iii) test cases defeating insolvent trading claims made by liquidators against companies who have responsibly accessed the Law.

3.8.4 We consider, properly accessed, those claims will be very difficult to run during the safe harbour period, as long as the process has been well executed.

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

3.9.1 We believe there is merit in further clarification around the role of Advisors, particularly around who may act as a 'Safe Harbour Advisor' and the circumstances in which an Appropriately Qualified Entity is retained.

3.9.2 We do not consider the role of Safe Harbour Advisor be limited to registered liquidators. There are many instances where a Company has a trusted advisor, who may not be a registered liquidator, undertaking that task, such as a capital markets advisor, or a solicitor or very experienced independent director or governance expert. Many of these parties are equally (if not more) skilled in turnaround work which involve different skills to insolvency work.

3.9.3 We believe the market is best positioned to determine this issue, and Advisors will emerge based on skill and experience. We do accept though, there is merit in codifying preferred qualifications. Consideration might be given by peak bodies to recommending to directors Safe Harbour Advisors skilled in the area, which might include registered liquidators, holders of equivalent qualifications in corporate finance, various certified turnaround professionals, lawyers with demonstrated restructuring experience, or specialists others recommended by those people.

3.9.4 We consider that, in relation to the requirements of the Better Outcome Test in Section 588GA(2)(d) that an 'Appropriately Qualified Entity' should be a registered liquidator. We consider that individual tasked with the Better Outcome Test, should undertake an objective, financial assessment of the Course of Action, and the financial implication of an insolvency on each class of creditor.

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

3.10.1 We consider that the education process for Safe Harbour is increasing its awareness and needs to be encouraged.

3.10.2 The Law has a reasonable degree of visibility amongst the insolvency and restructuring community. We are aware that only a small number of Practitioners are regularly using the Law as a material part of their practice areas. We believe this is a function, in the main, of larger firms remaining focussed on the provision of higher profitability and leverage formal appointments, and smaller firms having meaningful and busy practices focussed on insolvency.

3.10.3 Given entry into Safe Harbour is not a disclosable event, it is very difficult for market participants to assess the (unquestionable, in our view) success of the procedure. We believe the only solution to that issue is the continued exposure of the success of the Law by industry participants, and peak bodies.

3.10.4 We have seen limited interest, awareness, and uptake of the safe harbour regime by SMEs. We note that in our experience, SMEs are particularly at risk of trading whilst insolvent, as it is those directors of SME's whose personal assets and income are tied up with those of the company. Those directors are more incentivised to risk trading through insolvency. This is an issue that, in our view, requires separate addressing and a possible expansion and refinement of the Small Business Restructuring provisions.

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

3.11.1 We have not experienced any undue barriers or conflicts.

3.11.2 We consider that the Safe Harbour Advisor is a key participant in a restructure. In that regard, we consider it is critical the Safe Harbour Advisor is free from any perception of conflict of interest. An appointment as (or acting in the capacity of) a Safe Harbour Advisor must preclude a Practitioner from taking an appointment as Voluntary Administrator or Creditors Voluntary Liquidator for the company.

3.11.3 We consider this may be a reason some Practitioners are reluctant to embrace the Law, as it works to preclude them from such appointments, and so 'work-arounds' are found to ensure the advice excludes 'Safe Harbour' advice.

3.11.4 There needs to be clarity in this area, such that a pre-appointment advisor providing Better Outcome advice, is specifically excluded from a subsequent appointment. This will assist address, in our view, the long-held market perception that pre-appointment advisors can place their own interests above the company's interests, and will, in our view, result in a more productive and credible restructuring sector being properly embraced by the business community.

3.11.5 Furthermore, we consider there are areas a Safe Harbour Advisor can provide advice that is allied to the Course of Action being recommended. These include inter alia, stakeholder advocacy, debt or equity advisory roles, involvement as a Scheme Administrator or Expert, or a Members Voluntary Liquidator. None of those roles require the subsequent testing of the Safe Harbour Advisor's better outcome opinion upon an insolvency.

3.11.6 There are, in our view, parties who should not be providing Safe Harbour advice. These will include firms who act or have acted as Auditors of the entity or would otherwise be prejudiced by its insolvency.

3.12 Are there any other accessibility issues impacting its use?

3.12.1 We are not aware of any material accessibility issues.

3.12.2 As mentioned above, in time thought needs to be given to the clear mechanisms for commencing and ending Safe Harbour appointments, better education for directors about how to access qualified advisors, and the most appropriate activation mechanism in that regard.

3.13 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?

3.13.1 We do not consider there should be material amendment to the Law.

3.13.2 For the most part, we consider a series of guiding principles for practitioners, more education and exposure, would be of more benefit than legislative amendment.

3.13.3 As such, matters such as the process to assess eligibility, the protocol for appointment and retirement, interaction with other advisors, independence, objective testing, and related matters are, in our view, best dealt with via education and exposure of the Law to the market.

3.13.4 If there was to be legislative amendment, we would restrict that to a clearer codification of the requirements of Section 588GA(2)(b), such that the appointment of an of Appropriately Qualified Advisor under that section is a prerequisite, rather than a matter a director might have regard to.

4 CASE STUDIES AND FEEDBACK

4.1 Case studies

4.1.1 We have curated a collection of illustrative case studies based on our market experience. A summary of those case studies is provided in the table overleaf, and the full case studies are appended hereto.

4.1.2 We note that we have obtained consent and support of each of the appended cases, except for Project Kent, for which we are awaiting same (and so the detail of this cases is not yet included).

Table: Summary of Case Studies

	Market Cap	Jobs preserved	Overview
Project Kent	+$50M	~75	Publicly listed global medical technologies company facing liquidity issues. Wexted Advisors assisted the Board to stabilise operations, secure capital and embark on an operational restructure. Company remains listed on ASX.
Project Fitzroy	-	~100	Publicly listed insurance company impacted by regulatory changes, experiencing a significant rise in policy lapse rates resulting in liquidity problems. Assisted in considering various options and in negotiating an exit strategy with the head insurer to maximise return to shareholders. Shareholder value preserved and returned, followed by a solvent wind down.
Project Oakwood	+$10M	~800	Publicly listed manufacturing company seeking to restructure debt facilities, streamline operations and optimise working capital requirements. Restructure successfully implemented, with 75% of jobs preserved. Company remains listed on the ASX.
Project Salford	-	~100	Large private infrastructure company with maturing debt facilities. Assisted the Board to consider and execute on options including a refinance or divestment of business units. Successful divestment completed, enabling business to continue, all jobs preserved.
Project George	-	~125	Large private infrastructure company with liabilities of +$75M and ongoing litigation. Assisted Board to consider a range of options including litigation and mitigated damages claims on current projects. The appointment has been ongoing for three years, we continue to assist the company to evaluate various options.
Project Major	+$100M	~1,500	Publicly listed company in natural resources sector, facing expiration of significant debt facility and declining commodity prices.

	Market Cap	Jobs preserved	Overview
			Assisted in obtaining covenant waivers, the divestment of non-core assets, capital raise and restructure of significant debt. Company remains listed on ASX.
Project Lanigan	+$50M	~100	Publicly listed company operating in the financial services sector facing liquidity issues due to COVID-19. The restructure and recapitalisation were complex and involved a large number of counterparties (+15 lenders) with competing interests, the support of whom was required for the completion of the transaction. Deleveraged balance sheet and working capital available and is well positioned to grow post COVID-19 restrictions lifting. Remains listed on ASX.

4.1.3 The clear conclusion from the Case Studies is that jobs were saved, and market capitalisation (or equity investment) was preserved via operational and financial restructuring initiatives, many of which involved the introduction of new capital, co-operation of stakeholders and maintenance of good governance processes.

4.2 Feedback

4.2.1 We have sought feedback directly from directors of companies to which we have provided Safe Harbour advice, for the purposes of this Submission.

4.2.2 At an aggregate level, the feedback demonstrated that directors believed the Law led to a better outcome. Additionally, the directors indicate they would have appointed external administrators to their companies in the absence of safe harbour. The feedback also demonstrated that directors considered the Safe Harbour eligibility thresholds were reasonable.

4.2.3 We received further feedback that a limited moratorium on creditors' claims may increase the likelihood of success of a potential restructure. Our view is that moratoriums may be effective to the extent that informal arrangements may be made with key stakeholders. However, in our view a statutory moratorium would not be suitable for the Safe Harbour regime, as this would necessitate disclosure to the market, which would not be practical or feasible for our clients (outside the terms of a Creditors Scheme of Arrangement, which we refer to in Section 5 below).

4.2.4 Overall, feedback from the market was overwhelmingly supportive of the Law, and the benefits provided to the subject company, its employees, creditors, shareholders, and other stakeholders.

4.2.5 Further, and as set out in Section 3.2, we have found directors involved in the process develop a very clear view of the specific debts being incurred as part of the Course of Action, alongside an objective assessment of the benefits arising from incurring those debts and develop a good understanding of the consequences of various actions. We are seeing considerable buy-in to the process, and a greater degree of accountability and discipline in their knowledge and management of the steps required to effect rehabilitation.

5 OUR PERSPECTIVES

5.1 Introduction

5.1.1 In addition to the issues raised in addressing the Panel Questions, we make a series of other observations based on our experiences in advising companies utilising the Law. We make these comments in the interests of informing the Panel on issues that arise based on our experience, rather than necessarily as areas where we consider legislative amendment is required.

5.2 Qualification, Codification, and refinement of Advisor roles

5.2.1 We gave this issue consideration in Response 9 in Section 3 of the Submission.

5.2.2 We believe there is merit in further clarification around the role of Advisors, particularly around who may act as a 'Safe Harbour Advisor' and the circumstances in which an Appropriately Qualified Entity is retained.

5.2.3 We do not consider the role of Safe Harbour Advisor be limited to registered liquidators. We have seen appointments where that role is performed effectively by solicitors, supported by registered liquidators (such as ourselves) in relation to the Better Outcome Test. We do consider that, in relation to the requirements of the Better Outcome Test in Section 588GA(2)(d) that an 'Appropriately Qualified Entity' should be a registered liquidator.

5.2.4 We consider that, subject to the Course of Action under consideration, a Safe Harbour Advisor might need to be the holder of an Australian Financial Services Licence (AFSL) where the Course of Action includes the provision of financial product advice. If, for example, the Safe Harbour advisor is playing a key role in a Course of Action involving new equity capital pursuant to a prospectus, such a requirement could be necessary.

5.3 Course of Action and Better Outcome

5.3.1 We also gave this issue consideration in Response 9 and Response 13 in Section 3 of the Submission.

5.3.2 We consider the Course of Action and the Better Outcome, should be based on an objective, financial assessment of the returns available to equity holders. We have reviewed restructuring plans where the Course of Action and the Better Outcome assessment are limited to a narrative assessment, supported by a management representation.

5.3.3 We do not consider such an assessment is sufficient. We note the Explanatory Statement issues with the legislation considered the assessment did not need to be exhaustive. However, we consider the assessment is of gravity, and should involve a carefully documented, financial assessment of the impact of the Course of Action, and the Better Outcome assessment, on each class of creditor and on equity. In our view, such an analysis implies the involvement of a registered liquidator.

5.3.4 Further, we do not consider it sufficient that Directors 'have regard to' the involvement of an appropriately qualified entity in this assessment. We suggest a clearer codification of the requirements of Section 588GA(2)(b), such that the appointment of an of Appropriately Qualified Advisor under that section is a prerequisite, rather than a matter a director might have regard to.

5.4 Periodic assessing the Better Outcome

5.4.1 Section 588GA(1)(b)(iii) provides that safe harbour protections ends when the restructure plan ceases to be reasonably likely to lead to a better outcome for the company. This suggests that the directors and their advisors should reassess the 'better outcome' dynamically throughout the restructure plan.

5.4.2 In our experience, market conditions can alter the company's circumstance rapidly, particularly upon completion of key milestones in a multi-stage restructure plan. It may be that shortly after the completion (or failure) of a key milestone, circumstances change, and the restructuring plan needs to be amended. Equally, at that stage, the Better Outcome assessment should be undertaken based on different factual matrix.

5.4.3 Thought should be given to the appropriate frequency of these reassessments, to ensure that the interests of the company and its stakeholders are sufficiently protected.

5.5 ASX disclosure requirements

5.5.1 We have had considerable exposure to the question of disclosure in relation to Safe Harbour advice for listed companies.

5.5.2 The ASX have indicated: *"The fact that an entity's directors are relying on the insolvent trading safe harbour to develop a course of action that may lead to a better outcome for the entity than an insolvent administration, in and of itself, is not something that ASX would generally require an entity to disclose under Listing Rule 3.1. Most investors would expect directors of an entity in financial difficulty to be considering whether there is a better alternative for the entity and its stakeholders than an insolvent administration. The fact that they are doing so is not likely to require disclosure unless it ceases to be confidential, or a definitive course of action has been determined."*

5.5.3 We think this is the appropriate position. It would be counterproductive to the achievement of a Course of Action for the appointment of a Safe Harbour Advisor to be disclosable. In any event, the elements of the Course of Action that are market sensitive of themselves, will require an appropriate disclosure.

5.6 Schemes of Arrangement

5.6.1 On 2 August 2021, the Treasury released a consultation paper seeking feedback on changes to improve creditors' schemes of arrangement in Australia.

5.6.2 We note that on 17 September 2021 the TMA provided an extensive response to the Consultation Paper, reviewing the current use of creditors' schemes of arrangement in Australia, considering the lessons from similar international reforms and recommending several reforms that should be undertaken in Australia. We do not propose to outline those here.

5.6.3 We consider that there are positive linkages between safe harbour protection and the use of Schemes of Arrangement, to avoid significant formal and long-term insolvency appointments with a terminal outcome.

5.6.4 A Safe Harbour Advisor is well placed to promote and manage a Course of Action that is implemented via Creditors and Members Schemes. From our advisory experience with Creditor and Members Schemes, in our view, the Safe Harbour Advisor can play an important and central role in such restructures.

5.7 Independence and conflict of interest

5.7.1 We gave this issue consideration in Response 11 in Section 3 of the Submission.

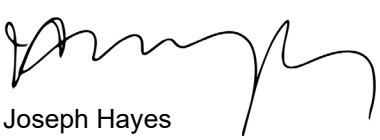
5.7.2 We consider that the Safe Harbour Advisor is a key participant in a restructure. In that regard, we consider it is critical the Safe Harbour Advisor is free from any perception of conflict of interest. An appointment as (or acting in the capacity of) a Safe Harbour Advisor must preclude a Practitioner from taking an appointment as Voluntary Administrator or Creditors Voluntary Liquidator for the company.

5.7.3 There needs to be clarity in this area, such that a pre-appointment advisor providing Better Outcome advice, is specifically excluded from a subsequent insolvency appointment. An external administrator must be able to impartially assess whether the safe harbour advice and better outcome assessment were reasonable, and in turn whether there may be potential claims that a liquidator may bring against the director, their Advisors, the auditors, and insurers.

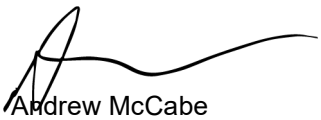
5.7.4 There are, in our view, parties who should not be providing Safe Harbour advice. These will include firms who act or have acted as Auditor of the entity or would otherwise be prejudiced by its insolvency.

6 EXECUTION

SIGNED AND DATED: 1 October 2021



Joseph Hayes
Partner
Wexted Advisors



Andrew McCabe
Partner

Rajiv Goyal
Partner

Appendices

Appendix A	Case Study – Project Fitzroy
Appendix B	Case Study – Project Oakwood
Appendix C	Case Study – Project Salford
Appendix D	Case Study – Project Major
Appendix E	Case Study – Project Lanigan
Appendix F	Case Study – Project George

Case Study: Project Fitzroy

Overview	▪ Wexted Advisors provided safe harbour advice to a publicly listed insurance offering direct life insurance and other products to customers. The company was impacted by regulatory changes and experienced a significant rise in policy lapse rates resulting in liquidity shortfall ▪ Wexted Advisors assisted in considering various options, and in negotiating an exit strategy with the head insurer to maximise the potential return for shareholders and protecting policyholders during the transition period
Company Profile	▪ ASX-listed group, ~100 employees, with a significant number of policyholders ▪ Negatively impacted by Hayne Royal Commission, with no new revenue being generated ▪ Significant loss of policies, unsecured creditors, lease liabilities
Appointment Profile	▪ 12 months ▪ Wexted Advisors appointed Safe Harbour Advisors on 13 January 2019, appointment concluded on 20 January 2020
Better Outcome Assessment	▪ Impact of an external administrators' appointment: ~100 staff likely to be made redundant, reliant on FEG, up to 47 cents in the dollar return to unsecured creditors ▪ No return to equity holders
The Restructuring Plan	▪ Business review and evaluation of options ▪ Negotiations and sale of trail commission on policy holders premiums ▪ Stable wind down and exit of liabilities by way of a Members Voluntary Liquidation
Directors and Officers	▪ Board stability during uncertain period - safe harbour regime provided time and security needed to formulate and execute a restructure, where otherwise an administrator would have been provided disruption for policyholders, compliance with their AFSL, and eroded value for employees, creditors and shareholders ▪ New directors as a result of safe harbour engagement
Creditors and Employees	▪ A significant portion of employees of the Group were successfully transferred to administer the policy book for the purchaser ▪ Certain employees were made redundant and were paid their entitlements by the Company
Outcome	▪ The group of companies was under a controlled and stable process, solvently wound down, to allow for the preservation and return of capital to shareholders ▪ We consider that this preservation of value would in large part not been possible if not for the availability of the safe harbour regime

Case Study: Project Oakwood

Overview	▪ Wexted Advisors provided safe harbour advice to a publicly listed manufacturing company as it sought to restructure debt facilities, streamline operations and optimise working capital requirements ▪ Our role included reviewing the short-term financial position of the company, and developing a Corporate Structuring Plan
Company Profile	▪ ASX-listed company, with over 1,000 employees ▪ High debt-levels, which was exacerbated by COVID-1 ▪ Significant unsecured creditors, including lease liabilities
Appointment profile	▪ 12 months
Better Outcome assessment	▪ Estimated return to secured creditors in external administration ~80 cents in the dollar ▪ Employees likely to be made redundant, with employee entitlements +$100M. Entitlements to be funded by the Fair Entitlements Guarantee Act ▪ No return to unsecured creditors. No return to equity holders ▪ Industry disruption and negative impact on over 1,000 businesses
The Restructuring Plan	▪ Business review and evaluation ▪ Capital raise and restructured debt facilities ▪ Implemented cost saving initiatives and negotiated / compromised key creditor claims
Directors and Officers	▪ Board stability during uncertain period - safe harbour regime provided time and security needed to formulate and execute a restructure, where otherwise an administrator would have been (potentially prematurely) appointed over the Group
Creditors and employees	▪ Majority of employees (~75%) jobs saved ▪ Secured creditor continues to be paid in the ordinary course of business ▪ Noteholders converted debt to equity ▪ Unsecured creditors continue to be paid in the ordinary course ▪ Equity preserved
Outcome / *12 months on?*	▪ Continues to trade on the ASX. Market cap in the range of $10M to $50M ▪ The preservation of jobs and equity would not have been possible if not for the availability of the safe harbour regime

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Case Study: Project Salford

Overview	▪ Wexted Advisors provided safe harbour advice to a large private infrastructure company ▪ Prepared a Corporate Structuring Plan for the Board which confirmed the company will be able to meet its debts as and when they fell due
Company Profile	▪ A large private infrastructure company ▪ Maturing debt facilities during sale divestment process
Appointment Profile	▪ 8 months ▪ Wexted Advisors were Safe Harbour Advisors from May 2019 to January 2020
Better Outcome Assessment	▪ Impact of an external administrators' appointment, ~100 staff likely to be made redundant, reliant on the Commonwealth's Fair Entitlement Guarantee Scheme ▪ No return to unsecured creditors ▪ No return to equity holders
The Restructuring Plan	▪ Business review and evaluation of options ▪ Negotiations and management of financiers to provide covenant waivers and debt extensions to allow divestment process to continue ▪ The safe harbour process provided time to subordinated debt holders to consider the alternative options available. This additional time, allowed subordinated debt holders to agree to a higher return than any return in an immediate external administration
Directors and Officers	▪ Board stability - safe harbour regime provided time and security needed to formulate and execute a restructure to provide a better return to stakeholders than an external administration.
Creditors and Employees	▪ Safe harbour regime provided stability and advisors independence provided third party comfort to financiers during uncertain period ▪ Successful divestment completed, enabling business to continue, all ~100 jobs saved ▪ Secured creditors repaid in full, with subordinated debt holders receiving higher returns than an external administration ▪ Unsecured creditors received 100 cents in the dollar
Outcome	▪ The divestment was successfully completed, providing a better outcome for all stakeholders than an immediate external administration ▪ We acknowledge, a divestment would have been possible in a receivership and / or administration process, however, any distressed sale would have negatively impacted on the sale price and returns to stakeholders. In addition, receivership fees and expenses would have also eroded returns to stakeholders ▪ This preservation of value would not have been possible if not for the availability of the safe harbour regime

Case Study: Project Major

Overview	▪ ASX-listed company in the natural resources sector ▪ Following COVID-19 in around March 2020, and the decline in commodity prices, the Company was faced with financial and operational challenges with a fall in revenue and a significant debt facility expiring in the short-term ▪ The Company was in breach of financing covenants, and market conditions were negatively impacting on the future earnings outlook
Company Profile	▪ Annual revenue of ~$300M, and employed ~1,500 staff
Appointment Profile	▪ 9 months ▪ Wexted Advisors was appointed financial advisors to the appropriate qualified entity in June 2020, and concluded in February 2021
Better Outcome Assessment	▪ Engaged independent expert to assist in valuing industry specific assets. Prepared counterfactual assessment of estimated returns in a receivership / voluntary administration scenario. Consideration provided to expected professional fees (receivership fees and expenses of ~$15M) and significant holding costs ▪ Under external administration, employee entitlements ($40M) to be paid in full ▪ Secured creditors estimated to receive between 65 cents to 80 cents ▪ No return to unsecured creditors. No return to equity
The Corporate Structuring Plan	▪ We assisted the Company, and their legal advisors, to develop, implement and refine the Corporate Structuring Plan ▪ The Plan included the obtaining covenant waivers, the divestment of non-core assets, capital raise and restructure of debt
Directors and Officers	▪ The Board and Management were afforded time to formulate and execute the restructure during an uncertain period of COVID-19 ▪ This time and the protection afforded under the safe harbour regime, provided an opportunity for the Board to negotiate and work with financiers to explore and maximise the return for stakeholders
Creditors and employees	▪ As part of the restructure, ~1,100 jobs were saved ▪ Secured creditors received higher returns than an external administration. Receivership fees and expenses and holding costs were avoided ▪ Unsecured creditors received 100 cents in the dollar ▪ Equity was preserved
Outcome	▪ The Company remains listed on the ASX, with market capitalisation +$100M

Case Study: Project Lanigan

Overview	▪ Wexted Advisors undertook the better outcome assessment of an ASX Listed finance company facing liquidity issues due to COVID-19 ▪ The Corporate Structuring Plan included the restructure and recapitalisation of the business to maintain liquidity through COVID-19 ▪ The restructure and recapitalisation were complex and involved a large number of counterparties (+15 lenders) with competing interests, the support of whom was required for the completion of the transaction
Company Profile	▪ ASX-listed company that provides funding services ▪ Liquidity constraints due to impact of COVID-19 on revenue
Appointment Profile	▪ 5 months ▪ Appointed in February 2021 (a) as Financial Advisor to the Company, and (b) by the Company's Legal Advisors (the appropriately qualified entity) to assist with Better Outcome Assessment. These roles concluded in June 2021
Better Outcome Assessment	▪ Under an external administration scenario, employees to be paid in full, from circulating asset recoveries ▪ Secured creditor estimated returns of 25 to 75 cents in the dollar ▪ No return to unsecured creditors. No return to equity
The Corporate Structuring Plan	▪ Refinance lenders (first ranking), and convert other lenders (second) to equity ▪ Raise equity to maintain liquidity and provide working capital post COVID-19 ▪ Obtain key stakeholder support for the Plan, including financiers
Directors and Officers	▪ The Board had the option of appointing a voluntary administrator, or restructuring under the safe harbour regime to preserve the business, jobs and provide a better return for stakeholders
Creditors and employees	▪ The safe harbour provisions saved ~100 employees' their jobs ▪ Provided a better return to secured creditors ▪ Unsecured creditors were paid 100 cents in the dollar, in the ordinary course of business
Outcome	▪ Executed the Plan, raising equity and reducing debt by ~75% ▪ Remains listed on the ASX, with a market capitalisation of ~$50M ▪ Deleveraged balance sheet and working capital available, and is well positioned to grow post COVID-19 restrictions lifting

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Case Study: Project George

Overview	▪ Wexted Advisors provided safe harbour advice to a large private infrastructure company ▪ Assisted the Board to consider a range of options including litigation and mitigated damages claims on current projects ▪ Prepared a Corporate Structuring Plan for the Board which confirmed the company will be able to meet its debts as and when they fell due, based on securing a +$30M financing facility
Company Profile	▪ A large private infrastructure company ▪ Significant infrastructure projects ▪ Liabilities of +$75M, plus contingent liquidated damages claims ▪ Ongoing litigation claims
Appointment profile	▪ ~3 years ▪ Wexted Advisors appointed Safe Harbour Advisors on 3 December 2018, and continue to provide advice under the Corporate Structuring Plan
Better Outcome assessment	▪ Impact of an external administrators' appointment: ~125 staff likely to be made redundant. Employee entitlements and redundancy costs of +$3M ▪ Secured creditor to receive 90 cents in the dollar ▪ No return to unsecured creditors. No return to equity
The Restructuring Plan	▪ Business review and evaluation of options ▪ Legal advice obtained on the potential liquidated damages claims and the offsetting litigation claim ▪ Negotiations with financiers to secure a +$30M financing facility to trade through financial challenges
Directors and Officers	▪ Board and Management stability - safe harbour regime provided time and security needed to formulate and execute a restructure, where otherwise a receiver or administrator may have been appointed ▪ The additional layers of reporting and oversight by financiers, and advisors, added to reporting requirements and stakeholder management
Creditors and employees	▪ Funding facility enabled business to continued trading, complete projects and mitigate liquidated damages claims, saving ~125 jobs ▪ Funding facility, employees and unsecured creditors all being paid within terms in the ordinary course of business
Outcome / *12 months on?*	▪ The commercial approach adopted by the Board, combined with financier support has enabled the company to implement and progress the Corporate Structuring Plan under the safe harbour provisions. ▪ This has preserved jobs, ensured creditors are paid, and preserved equity.