Vantage Performance, who are we?

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

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

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

Additionally, we note Macaire Bromley, Executive Director and submission author, has also authored a comprehensive guide on "Safe harbour: a best practice guide for directors", in partnership with *Practical Law Insolvency and Restructuring*, which can be accessed here: Safe harbour: a best practice guide for directors | Practical Law (thomsonreuters.com)

Submission - public

This document comprises Vantage Performance's response to request for feedback and comments on: Review of the insolvent trading safe harbour

Closing date for submissions: 1 October 2021

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We are mindful that in many instances, whilst there will be varying views, it is evidence of actual use of safe harbour in practice that is of utmost importance, to facilitate this review.

Accordingly, we address first, evidence. Second, in light of that evidence, we provide our responses to the specific questions posted by Treasury.

A. Executive Summary: Review of the insolvent trading safe harbour

A summary of Vantage Performance's response to request for feedback and comments on "Review of the insolvent trading safe harbour" is summarised as follows:

- Vantage notes the overarching stated objective of the review 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. **In Vantage's submission, based on our direct experience including as set out in this document, the safe harbour is effective and fit for purpose in enabling company turnaround, promoting a culture of entrepreneurship, innovation and good corporate governance, save for a need to modify s588GA(4) to make compliance with that section more certain.**

- The safe harbour is an important tool in the legislative toolkit to support companies to restructure. Safe harbour supports both turnaround efforts and the pre-planning phase of any restructure via an insolvency appointment.
- In particular, *if used as intended as a turnaround framework*, focused by the text itself, on improving a company's financial position and achieving a better outcome, the framework is fit for purpose. In 78% of safe harbour engagements involving Vantage, that stated objective was achieved.

- The text of ss588GA(1)&(2) is fit for purpose, because its key substantive elements mirror the key elements of a successful turnaround:
  - have a plan;
  - founded upon good quality financial information (including forecasts);
  - developed and implemented with the assistance of an expert;
  - aimed at improving the outcome.

- Section 588GA(4) is too broad and captures more than serious or serial employee and tax compliance issues. In practice, the text inadvertently captures technical and trivial matters. **To address this issue, the section should be finite in time, finite in tax reporting obligations and exclude trivial matters. Please see Section D, Q7 and specific amendments proposed in Section D, Q13**.

- With increasing instances of companies experiencing financial difficulties in the current environment, the safe harbour is becoming increasingly relevant and necessary for companies and their directors. However, awareness is lacking.

- **Increased awareness and education are an important next step to support director awareness and understanding of safe harbour protection, including by government authorities:** at a minimum, ASIC needs to publish an 'ASIC guidance for directors: safe harbour' which currently does not exist or if it does, it cannot be readily located via a search, and update ASIC's insolvent trading guidance to reference safe harbour, which currently it does not. Business and industry bodies awareness and promotion is also an important next step in broadening director access to safe harbour.

- Vantage's consistent experience is that safe harbour is without doubt, working and greatly appreciated by directors. Director feedback is contained in section C, and includes quotes that echo the following:

'Late last year, I reached out to Vantage because I understood I needed safe harbour protection from January 2021 onwards, with the end of the government freeze on insolvent trading on 31 December 2020. I didn't fully understand safe harbour, just that I probably needed it, and was dubious about the actual benefits it could offer me.

As it turns out, safe harbour has proved to be far more than I expected – under the umbrella of safe harbour, Vantage has assisted to radically improve the quality of the company's financial information. I now have financial visibility over the impact of my decisions as CEO. Vantage has helped devise a series of initiatives, including to model their impact financially, to assist me with decision making about which initiatives to pursue and which to bin. Those initiatives have resulted in the company avoiding voluntary administration, returning very significant creditor arrears to a now clean aged payable ledger, implementing radical cost savings initiatives and operational efficiencies, and being focused weekly on forecast cash flows. This has been critical including to manage the ongoing difficulties associated with COVID lockdowns. But for safe harbour, I would not have reached out to Vantage. Because of safe harbour, I engaged Vantage and got a lot more than I expected. I now have a road map to see us through COVID and into a profitable viable future.

We did speak to one other firm about safe harbour advice. They told us that we didn't need it and spoke to us about voluntary administration options. We engaged Vantage instead.'

CEO, private mid-market company, group revenue $23m

B. Evidence – Vantage Performance safe harbour experience

During the 16 years that Vantage has provided turnaround services it has collated key data of its clients and of its safe harbour clients since September 2017. An analysis of this data is shown below.

1. Profile – average turnaround client, Vantage as adviser

Vantage is a boutique domestic business consulting firm, focused on building stronger and more resilient businesses to improve the rate of success. In its 16 years, Vantage has turned around circa 170 businesses and achieved an 85% turnaround success rate.

In this submission we make the following assumptions:

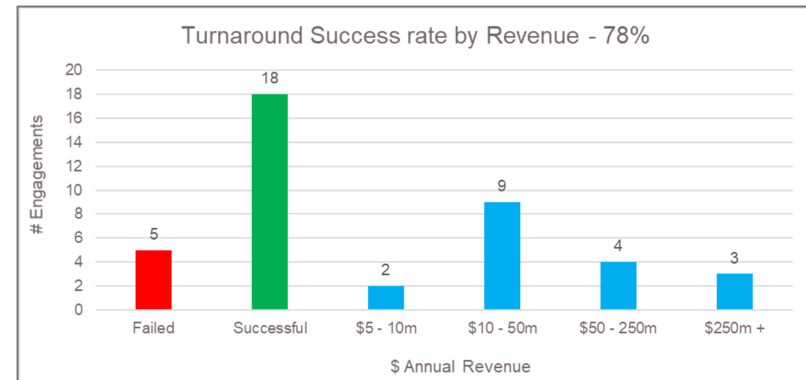
- **micro** (and start up) businesses – revenue less than $1m
- **small to medium** (**SME**) – revenue greater than $1m and less than $10m
- **mid-market** – revenue greater than $10m and less than $250m
- **large corporate / institutional market** – revenue greater than $250m

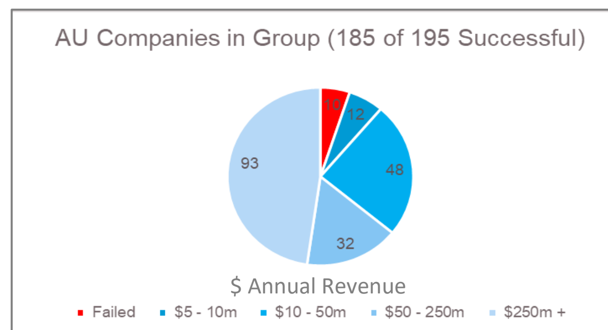
Our clients are typically SME and mid-market clients, private and listed, however we also assist institutional clients as part of a broader advisory team. Additionally, although not common, we have also assisted micro businesses.

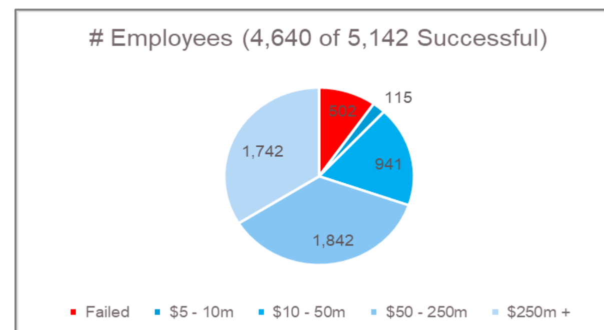
2. Summary profile – safe harbour engagements

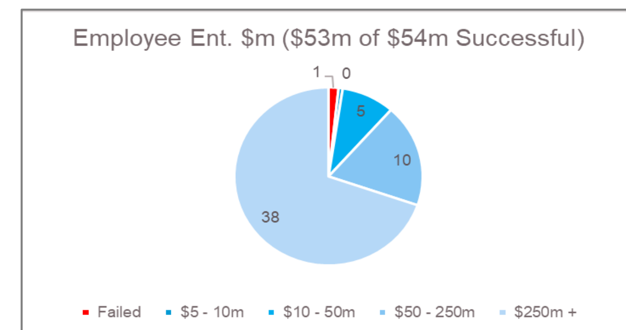
Since inception of safe harbour in September 2017, Vantage has been engaged as expert adviser in relation to 23 safe harbour engagements:

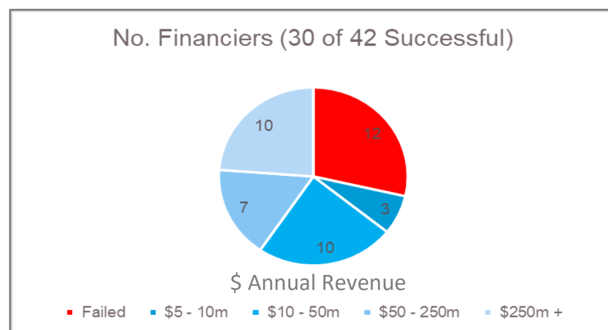
Metric	All Engagements	Successful Turnaround
No. of Clients	23	18* (78%)
No. of Australian Companies	195	185
Annual Turnover ($m)	$3,027m	$2,890m
No. of Employees	5,142	4,640
Employee Entitlements ($m)	$54m	$53m
No. Financiers	42	30
Secured debt ($m)	$1,388m	$1,244m
Unsecured creditor debt ($m)	$323m	$303m
ATO debt ($m)	$45m	$40m

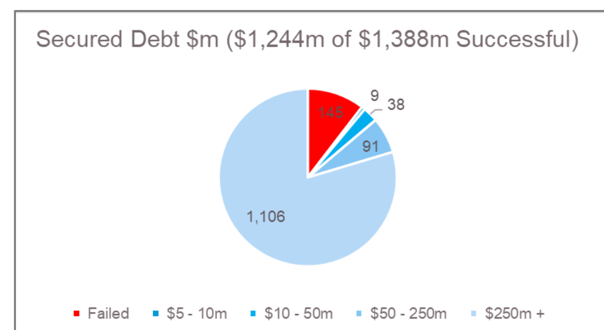


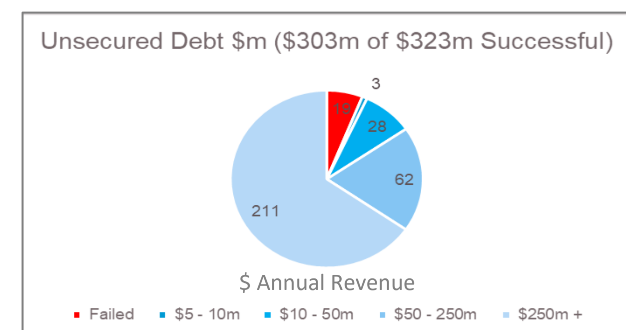












*note "successful turnround" avoided company failure via liquidation, and includes 13 clients turned around avoiding insolvency frameworks altogether, and 5 clients who turned around including to utilise a DOCA/scheme to implement an element of the turnaround plan for some but not all group entities.

3. Safe harbour - outcomes

In our experience, the majority of our clients come to us seeking turnaround advice in the context of safe harbour. It is our experience, that safe harbour has definitely heightened awareness amongst directors of financially struggling companies to seek advice.

That is, invariably, it is safe harbour that prompted the company to reach out to Vantage and seek help.

Without exception, when a company seeks safe harbour advice from Vantage Performance, we always encourage the company to use the safe harbour as a turnaround framework and to engage us (or in the case of large institutional clients, an appropriate team of advisers) for that purpose, that is to provide both initial turnaround advice and ongoing assistance with implementation.

All of our safe harbour engagements involve clients where the risk of insolvency and voluntary administration is real; we routinely assist clients suffering genuine cash crisis where but for our engagement, the company would run out of cash and be placed into voluntary administration. That is, safe harbour is an early intervention tool, intentionally and expressly by its text, encouraging directors to utilise the framework as soon as they have any concerns about solvency; but equally it is beneficial and fit for purpose, to turn around a very distressed company.

The below analysis illustrates that the safe harbour tool is working effectively, including to promote ongoing assistance in implementing, not just developing, a plan with the assistance of an expert; and to promote payment of employee entitlements and tax lodgements. Relevantly, we observe that it was clients who did not have the ongoing assistance of an expert or who could not satisfy these mandatory compliance issues (by remedying identified issues), who were also clients who were not viable and ultimately failed.

Of our 23 engagements:

- All but three clients met all elements of safe harbour, two benefited from ss588GA(1)&(2) but not s588GA(4), and one did not meet any of the criteria. A further breakdown is as follows.

- 18 clients were successfully turned around and all but one did so under the umbrella of safe harbour protection:
  - 13 developed and implemented a turnaround plan and avoided insolvency frameworks altogether;
  - 4 developed and implemented a turnaround plan, where one element of the overall turnaround involved a strategic pre-planned voluntary administration or scheme of arrangement to restructure certain but not all group entities;
  - 1 developed and implemented a turnaround plan, involving a strategic pre-planned DOCA, utilising the framework set out in ss588GA(1)&(2) to guide the decision making process, notwithstanding due to non-compliance with s588GA(4) the client was unable to access safe harbour.

- The remaining 5 cases resulted in liquidation and company failure:
  - In one case, the client (referred to as, **Project X**) was unable to resolve outstanding unpaid employee entitlements (and therefore could not access safe harbour) and it was unable to come up with a viable plan including via DOCA, and the company proceeded into liquidation.
  - In another case, the key elements of the turnaround plan required key stakeholder agreement and the sale of certain assets at a particular value, neither of which elements eventuated and ultimately, the company had no viable alternative but to proceed into liquidation. This client did benefit from safe harbour protection and the better outcome test assisted the client in its decision making, including the ultimate decision to liquidate.
  - Three involved safe harbour advice and initial turnaround assistance only, without any ongoing advice:
    - All 3 clients ultimately proceeded into liquidation and experienced company failure.
    - All 3 clients received our initial advice including recommendations for a way forward, but in each case the client determined (against our advice) that no further assistance was required and they could implement the turnaround without assistance.
    - 2 of the clients did initially access the safe harbour – query whether they retained that protection having determined to ignore one of the elements in section 588GA(2) that a court may have regard to, and in our submission, on the facts, in the end they were unable to implement our recommendations and they were unable to monitor the viability of the necessary initiatives and adjust the plan accordingly, and failed.
    - 1 client (referred to as, **Project Y**) was likely not viable in any event and did not access safe harbour initially – it determined not to remedy identified serial tax lodgement failures, employee entitlements were unpaid and this was also not remedied, and the company failed. This is a good example of the type of company and its directors that section 588GA(4) is intended to capture. The employee and tax non-compliance issues were both serious and serial.

- We note that in two cases, our clients followed and accordingly benefited from ss588GA(1)(&(2), notwithstanding they did not meet s588G(4). In one case, this resulted in a successful turnaround. In the other case, this resulted in attempts to turnaround followed by liquidation.
- In our submission, the above exemplifies the manner in which safe harbour is working. It also demonstrates the inter-play between safe harbour and formal insolvency appointments, and the differing roles and relevance of both.

4. Safe harbour – company size

There has been some commentary and market feedback that suggests safe harbour is not fit for purpose other than for large corporates and institutional clients. This is not our experience.

Vantage has effectively assisted clients across the spectrum, without impediment, as follows:

- large corporate/institutional – 3 engagements
- mid-market – 17 engagements
- SME – 3 engagements

Our three smallest clients (annual turnover $4.2m, $5.4m and $7m respectively) accessed safe harbour protection, all three of our largest clients accessed safe harbour protection (two exceeding $500m and one exceeding $1b), as did 14 of our clients across the mid-market sector, representing the majority of our clients.

Vantage does not experience any impediment in providing safe harbour advice across the market, with only one exception being the micro market.

We find it more difficult to assist the micro market including due to our own internal pricing limitations. That said, our evidence based on our experience of the micro market is as follows:

- Our assistance to micro clients has centred around coaching them on building or improving a simple cash flow model, sales forecasting, basic budgeting, stock, debtor & creditor management. We have additionally worked with micro clients to strengthen their bookkeeping and basic accounting practices, usually via their existing accountant or external bookkeeping service to reduce this burden, so they may focus on better financial management of the business. We often find this can be the more significant challenge, to ensure accurate and timely billing and debt collection, creditor management and tax compliance. This assistance has traditionally been provided by Vantage under our turnaround growth framework. Although none of these appointments has historically involved safe harbour, there is no reason why the work that we undertook would not qualify a client to meet the criteria in ss588GA(1)&(2). Additionally, there is no reason why their existing accountant or external bookkeeping service would not be able to answer questions around s588GA(4) compliance, for us to assist a client to check off that element of the safe harbour framework.

- In January 2021 at the end of the COVID-19 insolvent trading moratorium, Vantage received around half a dozen safe harbour inquiries from micro businesses (all, revenue less than $500,000 seeking debt of circa $20k to $80k often to assist with wages) – we spent time in each case, inquiring as to their specific circumstances and discussed the key things they should be doing, namely to prepare a basic cash

flow forecast and ask their broker to assist them to raise the necessary funds and to speak with creditors, including the ATO, to put in place payment plans, that matched their forecast cash flow. Generally, based on the types of queries and the circumstances described, if that approach was not successful, the alternative Small Business Restructuring process was likely suitable to assist them to resolve creditor arrears. Generally, the businesses already had contact details for a liquidator from their accountant. In each case, the client took away the high level advice and we did not hear from them again, other than in two cases where we provided a guide on price and requested recent financials to assist us to better scope a possible engagement, and on receiving the request for information, they did not proceed further.

The question arises: why is it that Vantage is able to provide safe harbour advice across the spectrum and what change needs to be made?

We know that particular firms have told us that they are not able to provide advice to certain sized companies due to an inability to agree suitable pricing. However, that is not the determinative factor, on whether a framework is legally fit for purpose or not. We confirm, Vantage is readily able to provide advice to all market participants with the exception only of micro companies, and price is not an impediment.

Other feedback suggests that clients outside of the large institutional market are not able to access suitable advisers. We confirm, Vantage is able to provide advice to SME and mid-market clients and has the requisite experience.

Other feedback suggests that clients outside of the large institutional market are not aware of safe harbour or if they are, they are not able to identify suitable advisers via their accountant or lawyer.

It is our experience based on our discussions with industry participants and we expect that this is the real impediment, namely a lack of awareness and education, in turn leading to difficulty amongst SME and mid-market clients to identify a suitable adviser (see Q6 and Q10 in section D).

It is our experience with the onset of COVID-19 related difficulties, that the number of safe harbour inquiries has increased and the number of advisers providing safe harbour advice has increased. In particular, in February and March 2020, Vantage received an increased number of inquiries and again, from December 2020 onwards and continuing. The increased safe harbour inquiries directly correlate to COVID-19 and the period before and after the COVID-19 moratorium on insolvent trading. That is, awareness is increasing.

However, awareness and education remain ongoing issues – including that clients are asking for advice and either being turned away due to pricing issues or not given appropriate advice: this includes advisers who do not have experience in assisting a company to turn around and do not understand the underlying principles of the safe harbour framework in practice, who are giving “observational advice” which is not helpful to the client. See B5 below.

5. Safe harbour as a turnaround framework – not an observational framework

The safe harbour was crafted as and intended to be a turnaround framework. All of its elements are expressly fashioned following the principles of turnaround, specifically:

- have a plan;
- founded upon good quality financial information;
- developed and implemented with the assistance of an expert;
- aimed at improving the outcome.

Unfortunately, our market intel indicates to us, there are advisers in the industry who do not have the skills or experience or for other reasons, for example conflict of interest, are not utilising safe harbour as a turnaround framework. They are instead utilising the framework as an "observational framework" only which is not what was intended nor is it helpful to the client and renders it not fit for purpose. To be clear – it is not the text of the law here at fault – it is the misuse of the law, due to lack of understanding or experience or conflict of interest. The issues to be addressed are not in the text of the law but in creating awareness and training on the law in the context of turnaround principles.

Observational safe harbour involves the following:

- observing what a client is or is not doing;
- commenting on what is observed.

Often, advisers are doing this either:

- as lawyers or accountants without the skills to also assist the company to consider turnaround and restructuring options, and/or without bringing in other adviser/s to assist as part of a team of advisers; or
- insolvency practitioners who are accustomed to preparing Investigative Accountant reports for banks, or voluntary administration reports as voluntary administrators, and they are adapting those skills to observe and report on what they see, and given their experience, are tending to conclude that the entity is insolvent and needs to appoint a voluntary administrator.

In some cases, this is done on a basis where the insolvency practitioner takes the view that the nature of the observational work does not prevent them from accepting the very appointment that they recommend (voluntary administrator), or worse they undertake the work in such a manner as to intentionally not prevent them from accepting the very appointment which they intend at the outset to recommend. For example, they review the situation and say that having reviewed the situation, the client does not need safe harbour advice but needs voluntary administration advice.

Additionally, our market intel indicates to us that some advisers are saying that they cannot or will not advise on the mandatory compliance section and that whether the client meets the other criteria is all very uncertain and not yet tested by law. *(This contradicts Vantage's approach on the mandatory compliance section; based on our experience across 23 engagements, we assist our clients by asking questions and reviewing information, to assist the client to identify any non-compliances and if possible remedy them. See further B8 below.)*

In our experience, the above is happening not infrequently and we expect based on our experience and market intel, it is the main reason for safe harbour being less effective than it should be.

Evidence, by reference to Vantage experience:

Insolvency practitioners not providing turnaround advice

- Vantage was asked to pitch to a client, seeking safe harbour and turnaround assistance. We pitched against another firm, a mid-market accounting firm that offers insolvency services. The insolvency firm told the client that they did not need safe harbour and that a quick review of the financials indicated that the company should appoint them as voluntary administrator. Vantage informed the client that the safe harbour framework would not only provide necessary protection to the board but it would also guide them in what steps to take next. Vantage was engaged and the company stabilised its cash flow and avoided voluntary administration and within 6 months of our engagement, achieved its first EBITDA positive monthly results since inception. Vantage remains engaged to continue to support the client through to financial strength.
- A board member was receiving observational safe harbour advice from another firm, a well-established top tier insolvency firm, and was concerned that the company was being told it had to appoint a voluntary administrator. The board member sought a second opinion from Vantage. Vantage suggested turnaround options based on a review of their cash flow. Vantage was engaged to assist and the company avoided voluntary administration.
- A CEO was receiving observational safe harbour advice from another firm, a big four accounting firm, and was concerned that the company was being told that it had to appoint a voluntary administrator. The CEO sought a second opinion from Vantage. Vantage provided turnaround options. Vantage was engaged to assist and the company avoided voluntary administration.

Clients using lawyers as an insurance policy

- In three separate cases (two involving mid-market firm lawyers and in one case a top-tier firm lawyer, all well-known and well regarded by Vantage): a lawyer received a call from a client seeking safe harbour advice and the lawyer gave high level advice that the mandatory compliance section was a matter for the client to review and confirm, and that so long as it had a plan that would reasonably likely achieve a better outcome then the client had safe harbour. The lawyer went on in each case to qualify the advice, to say that the client should speak with Vantage for assistance.

- In all three situations the client took the view that high level legal advice gave the board the comfort they needed and that no further advice was necessary. Although the lawyers pressed for the appointment of Vantage, the companies each having received high level observational advice, took the view nothing more was needed – in one case, the initial high level observational advice lead the client to believe safe harbour was not helpful. In the other cases, the initial high level observational advice gave the client a false sense of security, that nothing more was needed.

Based on our discussions with law firms, we are aware that in particular this year, there are increasing client inquiries about safe harbour and not infrequently, these inquiries are resolved in the same manner set out above. This practice is unfortunate as the clients are not experiencing the potential benefits of safe harbour. As such, in our submission, there is a real need to address the lack of awareness on its proper use as a turnaround tool, particularly in the SME and mid-market.

As an aside, Vantage notes s588GA(3), evidential burden, which will likely be difficult for a client to meet if they do no more than obtain high level advice or purely observational advice without more.

6. Safe harbour – the expert adviser

Vantage is suitably qualified to act as expert adviser, as contemplated by the safe harbour.

It is noteworthy that Vantage does not provide formal insolvency services. Specifically, we do not act as registered or official liquidators, voluntary administrators, deed of company arrangement administrators, receivers, controllers, scheme administrators or small business restructuring practitioners, or other formal insolvency appointee.

In the case of companies experiencing financial challenges, Vantage provides business consultancy advice of the following nature:

- we work with our clients to develop and implement initiatives that improve their financial position, with a view to avoiding where possible formal insolvency appointments;
- our focus is to assist clients to turn around, or achieve a better outcome than they otherwise could;
- we do so by undertaking the following tasks (as applicable to the circumstances of the case):
    - 13-week cash flow modelling and 3-way financial forecasting and modelling;
    - working capital and operational turnaround analysis;
    - 100-day rolling turnaround initiatives plan – development and implementation;
    - internal and external stakeholder engagement and management;
    - source/raise capital;
    - debt restructuring;

- board advisory;
- strategic review and advice, SWOT analysis;
- chief restructuring officer, interim CFO or similar; and
- the ability to compare company turnaround initiatives to a voluntary administration or liquidation scenario, qualitatively and quantitatively.

If a formal insolvency process is required, we will assist a company to develop that plan under safe harbour, to then be implemented by an independent person.

This separation is to the benefit of our clients – our interests are directly aligned to the interests of the company and its stakeholders – that is, to consider all available options to improve the position of the company as whole. If initiatives are available by which the financial return overall is reasonably likely to be better outside of voluntary administration than within voluntary administration, then that is the course we will promote.

There may be a view that some clients must be "too far gone" to help and/or that in such circumstances, it is necessary to be a registered liquidator to assist. In our experience, this is incorrect. We assist clients across the spectrum, whether deeply insolvent and on the brink of a formal insolvency appointment or suffering early stage financial challenges (separately we also assist growth clients, which sits outside of the safe harbour framework). It is very common for Vantage to pitch for work, against an insolvency firm that is recommending voluntary administration.

See case examples in this Section B5 above, and also the following specific example, to exemplify that a company can be deeply distressed and practically run out of cash and still avoid formal insolvency and be turned around, with the appropriate advice under the umbrella of safe harbour:

- A company was told by a big 4 accounting firm that it had no option but to appoint a voluntary administrator. The company came to us seeking a second opinion. This company (SME – greater than $5m revenue) had $37k cash at bank. The company engaged us – it suffered a low point in cash at bank of $3k, but avoided voluntary administration and was turned around, and within 12 months it had in excess of $1.5m cash at bank and all creditors being paid within terms (including as agreed under repayment plans).

The specific experience required to achieve this result, is as described above.

7. Safe harbour – the better outcome test

There has been some commentary and market feedback that suggests the better outcome test is not clear in practice. In our submission and based on our experience, this is not correct. To the contrary, our experience of the better outcome test is that it is a powerful element to guide directors in their decision making, particularly in relation to deeply distressed companies.

The confusion appears to relate to the need to compare an outcome to voluntary administration or liquidation. We note in practice the following:

- If a company is placed into liquidation, the company will be wound up, creditors may be paid a dividend from any available assets, and the company will ultimately be deregistered.
- If the company is placed into administration and at the end of the administration creditors vote for the company to be wound up, the same outcome will result. If, in an administration, a deed of company arrangement (DOCA) is proposed by any party and the administration creditors vote in favour of the DOCA, the available assets will be dealt with, and any return to creditors of the company will be made in accordance with, the terms of the DOCA.
- In the absence therefore of any DOCA proposal, the counterfactual for the purposes of safe harbour is an immediate liquidation.
- It is only where there is a genuine DOCA proposal being canvassed that is a real and viable option, that an administration outcome would also need to be considered. To the extent that there are risks associated with such DOCA, for example, execution risk, or risk associated with costs and delay, they represent factors to be taken into consideration when comparing the DOCA outcome to the courses of action being pursued by the company outside of the voluntary administration process.

The EM (at [1.56]-[1.57]) provides this guidance on what is required of directors in considering a counterfactual voluntary administration or liquidation scenario:

> *"A director is not required to undertake an exhaustive examination of the consequences which might flow from the appointment of an administrator or liquidator. Directors are required to determine, in the circumstances, whether it is reasonably likely that a chosen course of action will lead to a better outcome for the company, when compared with the consequences which would follow from the immediate appointment of an administrator or liquidator in the ordinary course of events. It is neither necessary, nor desirable, for directors to contemplate all of the vicissitudes which could follow from the appointment of an administrator or liquidator. Directors are not expected to predict the future in order to invoke the safe harbour.*

> *The benefit of hindsight should not impose unrealistic expectations on the decisions of a director or the board or the actions of the company at the time*."

Whilst qualitative data is also important, the most powerful tool to test the better outcome is a via the security statement (a commonly known industry tool which exemplifies a liquidation outcome by reference to a company's balance sheet).

A security statement is a helpful and convincing document that guides directors in both the planning and implementation phases of their restructuring. As a plan is developed, the outcome under the plan can be compared to the outcome under the security statement. If a particular DOCA scenario is contemplated, that outcome can be added to the security statement, alongside the liquidation outcome.

The security statement assists boards to devise the plan. If a security statement indicates that a certain outcome is available to stakeholders via a liquidation (or DOCA), then in order to continue to trade, the directors must be focused on plans that provide more to stakeholders as a whole.

So long as the courses of action being pursued remain reasonably likely to deliver a better outcome for the company than the outcome evidenced by the security statement, the directors have the comfort that they need to continue to pursue the plan. If it becomes plain that a DOCA scenario may provide the better outcome, the directors can shift their focus to firming up the elements of that plan (including to get comfort around creditor support), with a view to appointing a voluntary administrator.

The appointment of a voluntary administrator was formerly a fraught decision, with no clear yardstick for the point at which the board should 'give up on shareholders and employees'. Now, the safe harbour better outcome test provides directors with a clear factual basis on which to make decisions. The safe harbour also provides the opportunity for any voluntary administration to be well planned, in turn increasing the prospect of the return to creditors being greater than it might otherwise be.

A case example includes:

- A company was suffering a near term cash deficit and its ability to trade through was dependant on agreeing revised terms with a material supplier. If revised terms could not be agreed on a basis that was viable for the company, based on its forecast cash flows (which in turn, were dependant on several initiatives intended to improve profitability), the company would have no alternative but to resolve creditor arrears via a voluntary administration and DOCA proposal. Considering the company's industry and licence requirements, it was anticipated that the voluntary administration would carry significant trading risk and would adversely impact value, along with high implementation costs.

The board was guided by both qualitative data and quantitative data in comparing the terms ultimately proposed by the material supplier to both a liquidation outcome and a possible DOCA outcome (Vantage prepared a 3-way financial model to model the financial impact of the negotiations, a security statement, a voluntary administration cash flow forecast and anticipated DOCA fund that would likely be required to avoid liquidation). This data assisted the board in its decision making and it also aided the negotiations – ultimately, cognisant of the 'worse case voluntary administration outcome' the parties were able to reach an agreement that was better (for the individual parties to the negotiation and all other stakeholders overall) and the company avoided voluntary administration.

8. Mandatory compliance under s588GA(4) – evidence of identified compliance issues

Upon engagement, Vantage assists clients to consider whether or not they are complying with s588GA(4) of the Corp Act and if not, whether they are able to rectify any non-compliances. We also assist clients to take a view on whether a non-compliance is substantial or not based on how long the non-compliance has been ongoing, how material in value the non-compliance is and whether it is technical or trivial, in the circumstances of the company. As is observed by the evidence below, some non-compliances are plainly on any view not substantial. Others are plainly on any view substantial. However, there are examples where the position is not clear.

We note, the clients below fall across the spectrum of size (SME, mid-market and institutional) – initial non-compliance upon engaging Vantage is experienced across the board and company size is not a factor as regards whether there is a subsisting non-compliance and whether the company is able to remedy it to access safe harbour.

Rather, governance (or lack of and misconduct), risk and policy with appropriate controls and systems including across group entities, and cash flow are the drivers for whether a company is likely to be compliant or readily become compliant – as observed from the commentary below.

Most common non-compliance issues identified	Outcome
Outstanding lodgements with the ATO (2 of 23 clients)	In all but two of our 23 clients, clients were comfortable that all known lodgement obligations with the ATO (excluding SGC statements, addressed separately below) were up to date at the time of our engagement. In each case, clients assumed that their understanding of their tax lodgement obligations including as advised by their tax accountant was complete, and generally, this captured BAS – PAYG, GST, FBT, Income Tax, Single Touch Payroll. If pressed however by the expansive definition of taxation reporting obligations (see below), neither clients nor their tax advisers were willing (understandably) to provide anything other than a suitably qualified statement. Of note, in the two cases where tax lodgements were not up to date, the clients were unable to access safe harbour and were not successfully turned around and ultimately, were placed into liquidation. These clients are Project X and Project Y referred to in section B3 above: • Project X, a group with multiple employing companies, was not aware that it was required to be registered across all employing companies for FBT. The client remedied the non-compliance and met its FBT lodgement obligations (although it was unable to pay those obligations and it also had outstanding SG that it was unable to pay - see below). • Project Y had not lodged income tax returns for the past two years in several group entities, and in addition had unpaid SG (see below). Project Y elected not to remedy these non-compliances. On one view, it would be argued by reference to this experience, that the mandatory compliance section is working and is beneficial and is capturing those entities that are not suitable for turnaround but rather ought to proceed into formal insolvency to be resolved via that mechanism. **We agree – the mandatory compliance has its place and is seen in these instances to be identifying those companies that might be said to be poorly run, inadequately resourced and lacking in appropriate controls – in turn, picking up companies that are not viable.** **However the section is too broad and has too many unintended consequences** (including as identified by the further examples given in this section B8 table below).

<table>
<tr><th>Most common non-compliance issues identified</th><th>Outcome</th></tr>
<tr><td></td><td>
The following construction issues arise that we recommend be addressed by amendment:

All clients were generally aware of their material taxation lodgement obligations, BAS – PAYG & GST, FBT, Income Tax and Single Touch Payroll.
However, in fact taxation reporting obligations are not defined in s588GA(4):

Based on our search to identify a finite list of tax reporting obligations to guide company directors in meeting this mandatory compliance element, we were unable to locate such a list, rather we located a Practice Statement within the ATO’s legal database that itself does not purport to be a finite list: PS LA 2011/15 | Legal database (ato.gov.au)
This web page and a further review of relevant taxation law acts, reveals that there are many curious and relatively immaterial tax reporting obligations, none of which should be relevant for the purposes of determining whether a director has access to safe harbour.

Vantage is concerned that company directors are being required by law to mandatorily comply with an element of law that is unclear. Vantage submits, in the context of a mandatory compliance regime, the obligations should be finite and clear, bringing to directors’ attention material taxation lodgement obligations only, that need to be a part of their governance/risk framework and are material to the ATO.
Vantage is concerned that the generic statement to tax reporting obligations is too broad, resulting in the following:

It risks a technical trip of s588GA(4) that directors may be unaware of and should not be unfairly penalised by.
It does not helpfully guide directors and so risks having the opposite impact to that intended – if one can never be certain, why bother attempt to comply.
A finite list of material obligations will create certainty and elevate those obligations that are threshold material lodgement obligations across all companies, for directors’ attention and to the benefit of the ATO.

By reason of the materiality of this issue, it is addressed more comprehensively in section D at Q7 below.
</td></tr>
</table>

<table>
<tr><th>Most common non-compliance issues identified</th><th>Outcome</th></tr>
<tr><td>Late implementation of wage increases (2 of 23 clients)</td><td>In two instances clients had not implemented mandated wage increases when required:
One client was 17 days late in implementing a pay increase under its Enterprise Bargaining Agreement (EBA). The increase was due to take effect on 1 Jan – this occurred due to the departure of the relevant staff member prior to 1 Jan; that staff member was replaced on 4 Jan and identified the issue within only weeks of commencing in the role and the issue was immediately rectified.
A second client did not correctly register the EBA with Fair Work when implementing an intra-group restructure, which involved the transfer of certain staff to a new group company. At engagement, our review identified an increase in the award rates in excess of the EBA rates, creating a wages underpayment. On becoming aware of the issue, it was immediately rectified and disclosure of the oversight was made to the union and all affected staff.
With the rectification of the issues, both clients were afforded the protection of safe harbour.

The following construction issues arise however, that need to be addressed by amendment:
Does the failure in each case above amount to one failure or one failure per employee, or in the second case one failure for every wage run that the staff are under-paid, due to the original oversight? The law needs to be plain in this regard. In our submission, each should only comprise one failure.
Does the failure in each case above amount to a non-substantial failure as both occurred due to oversight and were not intentional? We view the first example to be plainly non-substantial. It is less clear with the second example, where the failure occurred over time – and involved a relatively larger aggregate underpayment by the time the error was identified. It could be argued to be substantial or non-substantial on the facts. The law needs to be plain in this regard. In our submission, whether something is substantial or not should depend on an analysis of the non-compliance as it first occurred, and not any ongoing repercussion.</td></tr>
</table>

Most common non-compliance issues identified	Outcome
Late payment of superannuation guarantee (SG), giving rise to an outstanding superannuation guarantee charge (SGC) lodgement obligation (8 of 23 clients)	In relation to 8 clients, superannuation guarantee (**SG**) payments were identified as being received by the relevant fund after the due date: • 4 instances – payment remitted on or just before the due date and no time allowed for clearing of funds including via clearing house – resulting in a technical not substantial late payment, although recurring over a period of time; • 3 instances – payment delayed intentionally due to cash flow issues and subsequently paid – resulting in late payment (with the question of substantiality dependant on the circumstances) *(see further discussion below re these 3 instances)*; • 1 instance – the employee did not provide the employer their super fund details; the employer set aside the full amount due and chased weekly for 2 months, however the employer was not aware of its obligation to remit the super to its default fund in such circumstances pending receipt of the employee nominated fund details – resulting in late payment (with the amount determined on balance to be insubstantial – that is in value, in the context of the company's overall obligations and circumstances); • 8 instances – no lodgement of superannuation guarantee charge (**SGC**) statements for the above mentioned late payment of SG; • 7 instances – on identifying the relevant late payments (in the main, prior non-compliances) and non-lodgement of SGC statements (subsisting non-compliances), the subsisting non-compliances were rectified; • 1 instance – the entity elected not to rectify the subsisting non-compliance, non-lodgement of SGC statement – it was an employing company with no other business and all staff were paid and it was fully funded to meet all debts as and when due; other group members did meet the compliance element and obtained safe harbour protection. With the rectification of the issues, or where they were deemed to be the only issue and not substantial, all clients who determined that they needed it, were afforded the protection of safe harbour.

<table>
<tr><th>Most common non-compliance issues identified</th><th>Outcome</th></tr>
<tr><td></td><td>The construction issues arise however that need to be addressed by amendment:
• The two-strikes rule captures technical and trivial non-compliances – the section needs to be amended accordingly.
• The late payment of SG automatically triggers an SGC statement lodgement obligation – that is, no matter how trivial (e.g. late payment by 1 day), the two-strikes rule will always be enlivened in the event of the late payment of SG (unless the client is aware of it, and lodges the relevant SGC statement, which in the ordinary course will not be the case) – the section needs to be amended accordingly.
• See below for further commentary on SGC statements – a tax reporting obligation.</td></tr>
<tr><td>Non-payment of SG (3 of 23 clients)</td><td>In 3 instances (including Project X and Project Y mentioned above), clients had knowingly not paid SG for a period prior to our engagement, due to insufficient cash flow.

None of the clients were able to rectify the non-compliances to gain access to safe harbour protection.

Two nonetheless utilised our engagement to test possible turnaround initiatives including a pre-planned restructure via voluntary administration – one of these successfully devised a deed of company arrangement that was accepted by creditors and the company is today continuing in operation; the other failed (Project X).

The third was Project Y, which also failed.

The following arises from these examples:
• The mandatory compliance element is working to identify those companies suitable for turnaround and those who are more suited to formal insolvency frameworks.</td></tr>
</table>

<table>
<tr><th>Most common non-compliance issues identified</th><th>Outcome</th></tr>
<tr><td>SGC lodgements – late payment of SG, resulting in an unidentified requirement to lodge SGC (8 of 23 clients)</td><td>In 8 instances, the impact of late or under-payment of SG, is that an SGC taxation reporting obligation arises.

In 5 of these 8 instances, the late or under-payment was an oversight and technical or trivial in nature; none the less the SGC statement is a technical requirement that arises.

We have previously made submissions to Treasury in relation to this issue. We will resubmit that paper privately. In short, in our submission:

• the two-strikes rule is flawed, in that it did not contemplate the dual impact of late or under-payment of SG and the corresponding obligation to lodge an SGC statement (effective double counting);
• the law needs to be amended to avoid any non-compliance in relation to technical or trivial matters; and
• taxation reporting obligation should exclude SGC statements, unless the obligation to lodge the SGC statement relates to a serious late or under-payment of SG.

By reason of the materiality of this issue, it is addressed more comprehensively in section D at Q7 below.</td></tr>
</table>

Most common non-compliance issues identified	Outcome
Practical difficulties – day to day examples	**The following section includes day to day practical difficulties that arise for companies seeking to comply with s588GA(4) mandatory compliance. The examples involve situations where, in Vantage's submission, safe harbour should definitely apply and not be excluded nor should the two strikes rule be enlivened, and the company should not be required to rely on the discretion of the court.** **These examples need to be taken into account, in considering how s588GA(4) should be amended and whether s588GA(6) is fit for purpose or needs to be broader.**
Staff logging time or overtime – late logging of timesheets resulting in payment of the time or overtime in a different pay period	In our experience, a common issue that arises where staff are required to log their own time, including overtime, in relation to any pay period – wages can only be paid according to the time, including overtime, actually logged – however routinely staff log their time or overtime late, resulting in payment in the period in which it is notified. For the purposes of safe harbour, the company is required to investigate and undertake a contract/award review to ascertain whether this involves a late payment of wages or not, and also to consider whether any protocols could be implemented to improve the ability to capture time in the relevant pay period – noting however that in some very large complex groups, it may be impractical or too expensive to fully rectify the issue so that it could never be said with certainty that all time for the relevant pay period is in fact on time, and that inevitably some time or overtime will be paid in the ordinary course in the following pay period. If this involved a non-substantial breach of the non-compliance section, then it will inevitably breach the two-strikes rule and not be capable of remedy, with the only relief available to the board being the discretionary relief in s588GA(6).
Recent departure of personnel resulting in a lack of clarity around compliance and difficulty in	In our experience, one of the most common issues that we encounter, is that senior management and the relevant heads of department are only recently (last 6 months or less) employed by the company. In such cases, the company lacks deep knowledge to comment on compliance matters beyond the period

Most common non-compliance issues identified	Outcome
obtaining certainty for anything other than a recent period	during which the relevant personnel have been employed – this impacts the degree of confidence with which personnel are able to confirm compliance or not, for the benefit of the company's board seeking to rely upon the safe harbour protection. In our experience, where the relevant personnel are long standing, it is far easier to get a higher degree of confidence around historical compliance or to identify gaps. Conversely, where the relevant personnel are new or relatively new – which is very common in a turnaround scenario, including as a specific business improvement initiative to upskill – it tends to be difficult to get a high degree of confidence around historical compliance or to identify gaps, with boards needing to rely on "reasonable endeavours" and "making all reasonable / best effort inquiries in good faith". The current section is too onerous and unfairly penalises directors, particularly those who are new or who support the engagement of new staff, to improve the business – involving no specified finite period of time to be reviewed. If a non-compliance was subsequently identified, the board would need to rely upon s588GA(6).
Inadvertent data entry resulting in late payment of superannuation for 2 days	A client's employee provided the company with superannuation details and they were inadvertently incorrectly entered or the employee had inadvertently provided the incorrect details and the superannuation payment bounced. The issue was immediately rectified but resulted in the technical payment of superannuation 2 days late. This is not substantial – but query whether a SGC statement is now required which trips the two strikes rule if not lodged – requiring the board to turn to the relief under s588GA(6) which would likely apply although it is a discretionary matter. Such trivial or technical matters should not be a distraction or concern for directors (already under immense pressure and stress in a turnaround context) – they should be addressed by an amendment to the law – so that the focus can remain on the more material elements of safe harbour.

C. Evidence - director feedback on safe harbour

1. Vantage Performance director survey re safe harbour

Vantage conducted an anonymous survey which was issued to company directors. The results of that survey are summarised below *(from a range of possible responses: strongly agree, agree, neutral, disagree, strongly disagree – it is noted, no participants disagreed)*.

Company Size	**5-19 employees***			**20-199 employees**			**200+ employees**		
Survey Results (%)	Strongly Agree	Agree	Neutral	Strongly Agree	Agree	Neutral	Strongly Agree	Agree	Neutral
Safe harbour gave me confidence to continue trading and try to obtain a better outcome.	-	100%	-	67%	33%	-	71%	29%	-
Safe harbour enabled my company to survive the financial challenges it experienced.	-	100%	-	50%	33%	17%	57%	43%	-
Implementing safe harbour was worthwhile.	-	100%	-	67%	33%	-	86%	14%	-
The framework encouraged us as directors to closely monitor the financial position of the business, engage early with external experts, and decide whether to restructure the business or move quickly to formal insolvency.	-	-	100%	83%	17%	-	71%	29%	-
Safe harbour also improved our corporate governance, management reporting and statutory compliance.	-	-	100%	33%	33%	33%	-	100%	-

* results for company size 5-19 employees based on responses received from only one director – included to illustrate safe harbour in a smaller company but cannot otherwise be said to be reflective of views of that size company more broadly.

2. Vantage Performance has spoken directly with company directors of clients. Directors have agreed to provide quotes as regards their experience of safe harbour.

In speaking with directors to obtain quotes and also in our general conversations with clients following a successful turnaround, there is a hesitancy by many directors to publicly state they have been through a turnaround and utilised safe harbour. Once directors and their companies have successfully completed a turnaround, they wish to put it behind them and move on with growing the business. They often say to us that a turnaround, even when successful, is one of the most stressful times of their lives. Accordingly, their privacy is respected and all quotes are provided on an anonymous basis.

‘A pro-active Board mind-set, complemented by the ability of Vantage Performance to clearly articulate the nuances of Safe Harbour, made for a quick, but informed decision that saved 1400 jobs.

The Board in deciding not to appoint an Administrator to the Group, have enacted a cost-out program that has re-positioned the business to trade out of its present situation and redefine itself, to address the future.

This opportunity would not have been possible without the Board being able to avail itself of Safe Harbour, under the guiding hand of Vantage Performance.’

Chairman, Unlisted Public Construction Group Client, Turnover $100M

“Being able to access the protection of Safe Harbour was a vital part of our turnaround strategy developed with the support of Vantage Performance and without it the Board would not have been willing to trade on and attempt to restructure the group”

Chairman, ASX Healthcare client, Mid-Market.

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

'Without doubt, being one of 4 directors of a medium sized company and some 500 full time and part time employees relying on us along with a range of small and large creditors, Safe Harbour enabled us to create a plan and work for the betterment of these stakeholders rather than do the easier action of putting the business into administration to preserve the legal position of directors.'

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

'We were able to improve the situation of the vast majority of smaller creditors and all employees by being able to take advantage of the Safe Harbour provisions. This was primarily because the directors were under less personal pressure and we could more meaningfully deal with financiers and regulators knowing that we had time and protection to remedy as many issues as possible.'

Director ASX Listed Transport Company (revenue $60M)

'Late last year, I reached out to Vantage because I understood I needed safe harbour protection from January 2021 onwards, with the end of the government freeze on insolvent trading on 31 December 2020. I didn't fully understand safe harbour, just that I probably needed it, and was dubious about the actual benefits it could offer me.

As it turns out, safe harbour has proved to be far more than I expected – under the umbrella of safe harbour, Vantage has assisted to radically improve the quality of the company's financial information. I now have financial visibility over the impact of my decisions as CEO. Vantage has helped devise a series of initiatives, including to model their impact financially, to assist me with decision making about which initiatives to pursue and which to bin. Those initiatives have resulted in the company avoiding voluntary administration, returning very significant creditor arrears to a now clean aged payable ledger, implementing radical cost savings initiatives and operational efficiencies, and being focused weekly on forecast cash flows. This has been critical including to manage the ongoing difficulties associated with COVID lockdowns. But for safe harbour, I would not have reached out to Vantage. Because of safe harbour, I engaged Vantage and got a lot more than I expected. I now have a road map to see us through COVID and into a profitable viable future.

We did speak to one other firm about safe harbour advice. They told us that we didn't need it and spoke to us about voluntary administration options. We engaged Vantage instead.'

CEO, private mid-market company, group revenue $23m

‘The protection of Safe Harbour saved our organisation from being placed in voluntary administration, something that would have devastated our staff with over 1,000 jobs at risk, and our network of large and SME business clients dependent on us. As importantly, it would have eliminated manufacturing in Australia for one more industry, with long term impact. In our experience, there are elements of Safe Harbour that need to be clearer and less ambiguous, but its continued existence will save more companies and jobs in the future.’

Chairman, ASX-listed national manufacturing company in operation for over 50 years.

> ‘The Safe Harbour process has been useful, and required the Directors to remain intensely vigilant and fully understand the details of their business.
>
> The Safe Harbour protection has afforded the Directors some comfort that, provided they act in the best interest of creditors and are reasonably satisfied that their plan is reasonably likely to achieve a better outcome for creditors than Administration/Liquidation, then they can manage their way through tough times; rather than merely throwing in the proverbial towel with the result that creditors receive a small dividend.
>
> However, the challenge with the 2-strikes rule, is that it does not have a materiality threshold, which means that some Directors may opt for the easier path of Administration / Liquidation after their second immaterial strike, if they think there is a risk that they no longer have safe harbour protection.
>
> A materiality threshold could be developed so that Directors remain vigilant, without diminishing their best endeavours to continue to comply with the requirements of the section and their obligations generally.
>
> **CEO, listed engineering and construction company, revenue $300m+**’

‘In 2020, our industry what shut down by COVID-19 and our supply chain stopped functioning, putting significant financial pressure on our company. At the time, it seemed that the company might have to go into voluntary administration if we could not turn things around. Safe harbour provided me as a director breathing space – I would not have felt comfortable continuing to trade without safe harbour given insolvent trading risk. We put safe harbour in place with the help of our advisers at the beginning of this year, which protected our board, and focused the executive team on developing a plan, making sure the underlying financial information was reliable and implementing the plan. Nine months later, we are travelling much better, the business is profitable again and the risk of voluntary administration is no longer a worry for the board.’

Director and Shareholder, agribusiness client with revenue of $50m+

'Accessing Safe Harbour was a vital part of our turnaround strategy developed with the support of Vantage Performance and without it the Board would not have been willing to trade on which was ultimately successful.'

Director, National Franchisor, Revenue $50M

'Safe harbour literally saved the company from being placed into voluntary administration which given our industry and accreditation requirements, would have been devastating to the value and would have resulted in the complete wipe out of all unsecured creditors including significant shareholder loans and supplier arrears. With the benefit of safe harbour, the board was willing to trade on (without it, it would not have been) and implement a range of turnaround initiatives recommended by Vantage. As a result, all unsecured creditors arrears have now been resolved and all creditors are now being paid within terms.'

Long-standing board member of a mid-market health sector facility

'Safe Harbour provided an alternative to involuntary administration for the Board who were concerned of the risks in operating under severe financial stress and uncertainty as a result of Covid-19. The Board was able to focus on re-structuring the business with our creditors and bankers, and thereby saving the livelihoods of the majority of our workforce, without the fear of insolvent trading. If anything, Safe Harbour needs to be promoted widely so that small and mid-tier businesses can also benefit, as are the large corporates.

Non-executive Director, ASX-listed company with a national workforce

D. Review of the insolvent trading safe harbour – questions posed by Treasury

Question & Summary Response	Comment
Q1. Are the safe harbour provisions working effectively? **A1.** Yes, save for our comments at Q6 and Q7 and see also Q10.	It is the experience of Vantage and Vantage's clients that the safe harbour provisions are working effectively. See evidence in sections B and C. In particular, *if used as intended as a turnaround framework*, focused by the text itself, on improving a company's financial position and achieving a better outcome, the framework is fit for purpose. In 78% of safe harbour engagements involving Vantage, that stated objective was achieved. The key elements of a successful turnaround include: • have a plan, • founded of good quality financial information (including forecasts), • developed and implemented with the assistance of an expert, • aimed at improving the outcome. **These are the key elements of the safe harbour. As such, the text of the law is fit for purpose in terms of supporting companies to restructure and survive.** **However, our experience suggests that the employee and tax compliance element needs to be refined to facilitate certainty. Additionally, misuse and a need for increased awareness are impacting the effective use of the safe harbour.** See our comments at Q6, Q7 and Q10.
Q2. What impact has the availability of the safe harbour had on the conduct of directors?	It is our day to day experience that safe harbour guides directors on what it is that they need to do, when faced with financial challenges, namely:

<table>
<tr>
<td>A2.Very positive (see C2), although see our comments at Q6.</td>
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the framework provides the basis on which the board can determine whether or not to continue to trade or appoint a voluntary administrator;
the framework provides the board and the executive with specific items that they must focus on including to have a plan aimed at improving the financial position and achieving a better outcome when tested against the alternative of an immediate voluntary administration or liquidation;
the framework encourages directors to seek expert advice;
the framework requires the board and the executive to have access to good quality reliable financial information;
the framework requires the board and the executive to ensure they are paying employees and making tax lodgements on time;
the framework requires the board and the executive to remain informed, of the financial position, of the forecast position, of the options, of the initiatives which are being implemented and tracking the success of the initiatives, always testing what is being done against a voluntary administration/liquidation outcome.

One client said to me (Executive Director, CEO), as a result of following the safe harbour framework, he now has financial visibility and an understanding of the financial implications of his business decisions, which he has never had previously. This has radically transformed his ability to manage the business. He now makes business decisions based on data, not hope.
These impacts are real and are genuinely resulting in companies and jobs being saved. Often, executives and management will make decisions based on what they ‘think’ they should do – the safe harbour framework focuses them on the outcome of their plans, which requires them to measure the financial implications of their plans before undertaking them.
See section C, including C2 for direct quotes from directors on their experience with safe harbour.
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<td>Q3. What impact has the availability of the safe harbour had on the interests of creditors and employees?</td>
<td>Safe harbour provides the company with the opportunity to engage with material stakeholders to consider whether an outcome is possible that would, overall, be better for all, rather than voluntary administration or liquidation. Safe harbour expressly, by its text, encourages parties to negotiate in good faith with a view to supporting a company facing financial difficulties, to work together to achieve a better outcome. It is expressly, in nature, collaborative.</td>
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<td>A3. Very positive, although see our comments at Q6.</td>
<td>In Vantage’s experience and in our submission, the benefits of this approach are both financial and emotional – although it may not always be viable, it is a far superior result to work together to achieve a better outcome if at all possible.

In 78% (18 of 23) of safe harbour engagements that Vantage was engaged in, our client was turned around and avoided liquidation, and the position of creditors and employees as a whole was improved:

• In 72% (13 of 18) of safe harbour engagements that Vantage was engaged in, our client achieved its turnaround without any insolvency administration, and all employees were paid in full and all creditors were either paid in full or paid an amount that they were prepared to accept, which in all cases was more than they would have received had the company proceeded into voluntary administration. Overall, all creditors and employees were better off and received more than a voluntary administration or liquidation outcome.
• In 28% (5 of 18) of safe harbour engagements that Vantage was engaged in, the creditors and employees of most entities in the client group were paid in full, and some creditors and employees of a few subsidiaries of a client group were paid pursuant to a DOCA or a scheme. Overall, the majority of creditors and employees were better off and received more than a voluntary administration or liquidation outcome; and for some creditors and employees they received more than they would have received in a liquidation outcome.
• In 22% (5 of 23) of safe harbour engagements that Vantage was engaged in, the client was not able to be turned around, a better outcome could not be forged outside of insolvency administration, and ultimately proceeded into liquidation.

For further detail, see section B2 and B3.</td>
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<td>A4. How has the safe harbour impacted on, or interacted with, the underlying prohibition on insolvent trading?</td>
<td>It has incentivised directors to seek safe harbour advice, where otherwise they would have considered voluntary administration, resignation or trading whilst insolvent without protection as their only options.

In all 23 cases, directors sought safe harbour advice to avoid the underlying prohibition on insolvent trading and generally, at the time of engagement, without a full understanding of the benefits of safe harbour as a turnaround tool. Safe harbour in the context of insolvent trading was the express reason why the board or directors sought expert advice.</td>
</tr>
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<tr><td>A4. It has incentivised directors to seek safe harbour advice.</td><td>This is extremely positive.

To put this in context, when the underlying prohibition on insolvent trading was effectively put on hold due to COVID-19 during 2020 (the COVID-19 insolvent trading moratorium), boards and directors did not, or were less likely, to seek expert advice.

This was detrimental; see Q5.</td></tr>
<tr><td>Q5. What was your experience with the COVID-19 insolvent trading moratorium, and has that impacted your view or experience of the safe harbour provisions?

A5. Companies were less likely to seek expert advice, to their detriment.</td><td>Directors did not, or were less likely, to seek expert advice and have a plan. Benefit of and need for s588GA reinforced.

It was our experience that directors who otherwise would have sought safe harbour advice did not and so missed out on the opportunity to implement turnaround sooner.

Whilst the COVID-19 insolvent trading moratorium gave directors necessary relief in a deeply uncertain time, and for that limited purpose, we acknowledge it was welcome by the director community, the unfortunate consequence was that many directors took it as licence to trade whilst insolvent, without putting in place a plan.

Unfortunately, it removed the liability without incentivising the company to do something, leading to the very conduct that safe harbour seeks to avoid – the approach of doing nothing or not seeking expert advice.

Vantage’s direct experience involved:
• with the onset of COVID in early 2020, a significant increase in safe harbour inquiries from mid-February 2020 to mid-March 2020;
• with the onset of the COVID-19 insolvent trading moratorium, an immediate drop off of new safe harbour inquiries for the rest of 2020;
• at the end of the COVID-19 insolvent trading moratorium, an immediate increase in new safe harbour inquiries from mid-December 2020 onwards.

In late March 2020, Vantage advised all existing safe harbour clients to continue to follow the safe harbour framework:
• by reason that the framework is actually a turnaround tool; and</td></tr>
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- to ensure that when the moratorium ended, the company would be compliant with s588GA(4) on a 12 month look back basis.

However, as mentioned above, from late March 2020 Vantage did not receive any new safe harbour enquiries or instructions until mid-December 2020 onwards. By way of case example of the detrimental effect:

- A client had the benefit of government funding during 2020 and the insolvent trading moratorium and during this period, did not seek safe harbour advice (*because of* the moratorium).

In mid-December 2020 the client engaged us to assist with safe harbour and turnaround advice (*because* the moratorium was ending). Due to certain pre-existing non-compliances that needed to first be remedied, the client was not able to access safe harbour until mid-February 2021.

The client's financial information was of poor quality. We assisted the client to build cash flow forecasts and improve the underlying data and prepare a 3-way forecast. That work took 6 weeks to complete. It was not until that work was near completion that we were able to identify the client had only two months cash runway available. That is, the client had failed to use 2020 whilst it had an insolvent trading moratorium and government funding, to strengthen its business.

Instead, we have been assisting the client to strengthen its business – but in far more difficult circumstances than would have been the case had we been engaged last year.

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Q6. Are you aware of any instances where safe harbour has been misused?

A6. Yes, it has been used as an observational tool and not a

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We refer to our comments in section B5.

Unfortunately, our market intel indicates to us, there are advisers in the industry who do not have the skills or experience or for other reasons, for example conflict of interest, are not utilising safe harbour as a turnaround framework.

They are instead utilising the framework as an "observational framework" only which is not what was intended nor it is helpful to the client and renders it not fit for purpose. To be clear – it is not the text of the law here at fault – it is the misuse of the law, due to lack of understanding or experience or conflict of

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turnaround framework – see also Q10.	interest. The issues to be addressed are not in the text of the law but in creating awareness and training on the law in the context of turnaround principles. Additionally, unfortunately, the simplicity and power of the framework, which focuses directors on the better outcome, is not as broadly understood as it needs to be. For example, we refer to our comments in section B7 – the better outcome test utilising a security statement analysis provides convincing evidence to directors, to guide their decision making. In our submission, the test is clear and helpful; however awareness and education are needed. See Q10.
Q7. Are the pre-conditions to accessing safe harbour appropriate? **A7.** Yes but the mandatory compliance ss(4) needs to be varied to promote certainty. This is required, notwithstanding the discretionary relief in ss(6).	In our view, the substantive framework set out in ss588GA(1)&(2) is fit for purpose and is working. See our comments at Q1 to Q4. There is some industry lack of understanding as to the practical working out of the framework. In our submission, this is not a matter for the text of the law but experience, awareness and understanding. See Q6, Q9 and Q10. In section B8, we have set out our practical experience of s588GA(4), mandatory employee and tax compliance. As is plain from this evidence, s588GA(4) in practice is unclear and unwieldy. As such, in our submission the text needs to be amended. In our submission, it is important that a director can be certain about whether or not they have complied with s588GA(4). There should be no or as little as possible, uncertainty about a mandated compliance element, and compliance should not fall to a court discretion where the plain meaning of the substantive section could be improved. This can be achieved in our view, or be better achieved, by amending the section, without mitigating its important role in protecting employees and ensuring material tax lodgements are up to date. • The amendments need to address the following key issues:Technical and trivial matters are all too readily caught by the current text. This is notwithstanding it was the express intent that such matters not be caught. See hyperlink: Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 – Parliament of Australia (aph.gov.au)

	In particular, the following extract under "Paying employee entitlements and complying with tax obligations": *In relation to the use of the phrase 'less than substantial compliance', it would appear that the provisions are intended to ensure that full compliance is not required, and will operate to ensure that directors are able to access the safe harbour despite a compliance failure which is 'technical or trivial in nature'. This point was made by the Australian Institute of Company Directors (AICD):* *... a technology failure may cause a payment to be delayed by 24 hours. In this circumstance, it would be unjust to deny the director the protection of s 588GA(1). The qualification is therefore a necessary common sense addition to render the Bill effective in practice, and not susceptible to failure on the basis of legal technicalities.* *The Explanatory Memorandum confirms:* *a director will not be eligible for the safe harbour protection if the company is either **serially** failing to meet its obligations, or there has been **a serious failure by the company to substantially meet** its obligations to pay employee entitlements or meet tax reporting obligations.* • On a plain reading of the text of the section, any non-compliance that is subsisting is a relevant non-compliance for the purposes of s588GA(4) – as a result, this captures a non-compliance whether it first occurred in the past week or 5 years ago. If a non-compliance occurred and is subsisting, that needs to be remedied for a director to have access to the safe harbour. If this analysis is correct, the law needs to be amended. If this analysis is incorrect the law needs to be amended to clarify the position. Specifically, to create certainty, the law should be amended to be finite in time – and relate only to non-compliances that first occurred in the past [12] months and are subsisting at the time the debt is incurred. It is noted, practically, if a non-compliance occurred historically (more than [a year] before) and has not been noticed or agitated by any relevant party, that in itself suggests the non-compliance is not material. If [12] months is considered too short, then in our submission, such finite period of time that creates certainty is required.

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In attempting to identify a finite list of taxation reporting obligations, it cannot be located. In our submission, a director should not be mandated to do something at law unless the framework is clear and specific. In our submission, the taxation reporting obligations that represent the material obligations for companies in Australia, ought be described in a finite list. There will be unusual adhoc obligations that ought not have any impact on a director's ability to access safe harbour or not.

Specifically, to create certainty, the law should be amended to be finite in tax reporting obligations – namely, BAS - PAYG, GST, FBT, Income Tax, Single Touch Payroll and SGC (but in the case of SGC excluding any lodgement requirement arising from a technical or trivial late or under-payment of SG). If the government is of the view there is another specific material obligation, then it would also be included.
Vantage does not submit that a company is not otherwise required to comply with all of its tax reporting obligations, and that the ATO does not retain all of its rights accordingly. Vantage simply submits that the intent of the law is not currently being met as the obligations are infinite in time and undefined in reach, even by the ATO's own website guidance (also mentioned in section B8 above): PS LA 2011/15 | Legal database (ato.gov.au)
Such narrowing by reference to specific obligations does not alleviate a company of its obligations – it simply means, certain obligations are called out for attention and if those are not met, safe harbour is not available.

The amendments that Vantage submits are necessary are set out in Q13.
The question arises: is s588GA(6), together with other discretionary relief sections in the Corp Act, sufficient for directors? In our submission, no:
We appreciate that directors have access to the discretionary relief in ss(6) and other sections of the Corp Act such as s1317S and s1318. Although these remain important sections, a director (noting the backdrop
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	of a stressful financial environment) should not be turning to such sections in the hope that in a litigated environment a court will exercise discretion in their favour. • It is little comfort, and counterproductive, for a director at the time of assessing whether to pursue a turnaround, to be also assessing the need for discretionary court relief at a later date to resolve an uncertainty within the safe harbour legislation as to the scope of their historical tax and employee compliance record and if that relief will be forthcoming. • Of note, s588GA(6), s1317S and s1318 are unavailable at the time of considering the availability of safe harbour to provide any comfort. • Safe harbour was intended to be, and needs to be, a framework of sufficient certainty as to incentivise director behaviour. It also needs to be of sufficient certainty, to avoid risk of future protracted litigation. • The author was involved in the matter of Reynolds Wines, Hall v Poolman, where a director was subjected to the financial and emotional toll of years of litigation, to be relieved under these discretionary sections. • S588GA(4) needs to be amended with the benefit of practical experience, which evidences that its reach is broader than intended by the legislature, to provide a clear framework for directors. This is the very benefit of the law review. The opportunity to amend the law and address the issue should not, in Vantage's submission, be missed. We are conscious in making this submission, that it may not be made at all or with such conviction by others. However, we are also aware that in many cases, advisers are electing not to assist clients with this particular element of the framework in the hands-on way that Vantage does – and accordingly, they may not have the practical experience to be fully cognisant of the issues. Indeed, this is the direct feedback that we have received from several leading industry participants. This should not be an impediment to the Review Committee very seriously considering what amendment to ss(4) could be helpfully recommended.

Other issues

Question & Summary Response	**Comment**
Q8. Does the law provide sufficient certainty to enable its effective use? **A8.** Yes, subject to Q7.	Yes, subject to our response to Q7. Additionally, on the better outcome test, see section B7 – in our experience, and submission, the better outcome test is clear and provides certainty, when utilised in the context of quantitative (security statement) and qualitative data.
Q9. Is clarification required around the role of advisers, including who qualifies as advisers, and what is required of them? **A9.** No, although the EM guidance could be expanded to refer to tasks/skills; also see Q10.	The flexibility in the text of the law was intended and remains fit for purpose. It is highly undesirable and in our submission not necessary, to further define or restrict the text of the law, nor the overriding *feature* of the law as described in the Explanatory Memorandum (**EM**), that appropriately qualified means "fit for purpose". Rather, the role of the adviser and who qualifies and what they should be doing is a question of experience, education and awareness. In our submission, experience can be addressed by expanding the current guidance outlined in EM, to identify the types of skills that would qualify an expert as having the appropriate experience (if thought necessary or helpful to directors). Re education and awareness, see Q10 below. **The EM Guidance - current** The issue raised by this question was carefully considered in the context of the Bill: Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 – Parliament of Australia (aph.gov.au) Having regard to the underlying submission of TMA Australia: *"The existing wording of the test reflects the fact that the variety of appropriate advisors to a company are as diverse as Australian businesses themselves ... In our view, the test should remain broad to allow a company to seek the advice that is right for their business. No exhaustive list of*

	accreditations can possibly cover the range of skill sets and practical experience which can be effectively brought to bear on a turnaround ... For this reason, the TMA does not support limiting the definition to require the advisor be a member of/accredited by a special interest group – for example registered liquidators ... Under the present test, advisors must be "appropriately qualified" in the sense that they are "fit for purpose". Advisors will be exposed to adverse legal action if their advice and/or "better outcome opinion" is incorrect. In our view, under the present test, firms and individuals are appropriately incentivised to carefully consider their qualifications, practical experience and resources before accepting an engagement." It was concluded that the text of the law was appropriate and that the EM appropriately addressed suitable guidance (at [1.66] to [1.74]), including: • The EM (from [1.69]: *"Appropriately qualified" in this context is used in the sense of "fit for purpose" and is not limited merely to the possession of particular qualifications. It is for the person who appoints the adviser to determine whether the adviser is appropriate in the context, having regard to issues such as:* ○ *the nature, size, complexity and financial position of the business to be restructured;* ○ *the adviser's independence, professional qualifications, good standing and membership of appropriate professional bodies (or in the case of an advising entity, those of its people);* ○ *the adviser's experience; and* ○ *whether the adviser has adequate levels of professional indemnity insurance to cover the advice being given.* *The particular qualifications needed by the adviser will vary on a case-by-case basis."* • For larger or more complex businesses, the EM (at [1.74]) notes that it is generally expected that advice will be obtained from an appropriate professional:

	○ *With minimum educational qualifications as a condition of eligibility to practice or give the advice (and who is subject to continuing professional development obligations whether by law or by membership of a professional association).* ○ *With appropriate levels of professional indemnity insurance to cover the advice given.* ○ *Who is bound by an enforced code of conduct or similar professional standards (whether under the law or by membership of a professional body).* **The EM Guidance - future** We note that TMA Australia's quote (see above) went on to say: *"Over time, we expect that industry standards and best practice will evolve regarding the experience and qualifications necessary to engage in the various Safe Harbour work streams."* We agree that best practice is continuing to evolve. We note that Vantage has successfully assisted clients to benefit from safe harbour as intended by the text of the law, as an adviser over 23 engagements. As such, amongst others, Vantage's experience is relevant to consider what additional guidance might be helpful to directors. In our submission, if specific guidance is considered beneficial, then the guidance that would be helpful to directors, is guidance that tells them what the expert they engage needs to be equipped to do. The key qualifier for Vantage is its experience over 16 years in assisting clients to turn around, improve their financial position and achieve a better outcome than the client would likely have achieved had they not engaged Vantage. The specific tasks that we undertake to deliver such outcomes include: • build, and then update and monitor, cash flow and 3-way financial forecasting and modelling; • working capital and operational turnaround analysis and initiatives development and implementation; • 100-day rolling turnaround initiatives plan – development and implementation;

- stakeholder engagement, communication & management;
- source/raise capital;
- debt restructuring;
- strategic review and advice, SWOT analysis;
- the ability to compare company turnaround initiatives to a voluntary administration or liquidation scenario, qualitatively and quantitatively;
- acting in the role of adviser, chief restructuring officer (as an individual or team, depending on size and complexity), interim CFO or similar – in all cases working closely with relevant management and executives, often on-site or equivalent virtual;
- board advisory to support turnaround phase, director appointments to support growth phase.

In our submission, additional guidance around **tasks or skills** is helpful to directors.

In our submission, this is far more helpful than reference to any particular industry body and moreover reference to a particular industry body is unnecessary and unhelpful, for the following reasons:

- The EM already provides sufficient guidance around the desirability for professional qualifications, membership of a professional body, appropriate professional indemnity insurance and like – if a director seeks the benefit of safe harbour, the director is incentivised to seek out such experience.
- In our view, it is highly undesirable to amend the law or the EM to seek to categorise the expert by reference to any particular body however. Those with the requisite experience include:
  - Vantage (not registered liquidators and including personnel with a mix of accounting and legal and M&A and other skills);
  - MA Moelis (not registered liquidators, a financial services firm);
  - individuals known personally to Vantage who we routinely work with and are qualified to be appointed as Chief Restructuring Officer, CEO, GM, CFO or COO (on an interim basis), to provide working capital and operational turnaround executive assistance. In the mid-market and large corporate market, such a person is usually appointed as part of the solution, along with external advisers, and can include that person as a member of a Vantage team fulfilling the role. However, in the SME market and mid-market, such a person provides an excellent stand alone solution at an appropriate price point.

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Reference to a ‘body’ in the text of the law is fraught and will likely (inadvertently) exclude people who need to be included. Additionally, it will include people who do not have the requisite experience.
Reference to a ‘body’ may exclude individuals best suited to assist the client; particularly in the SME market and mid-market. Conversely, a reference to skills will capture them.

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<tr><td>Q10. Is there sufficient awareness of the safe harbour, including among small and medium enterprises?

A10. No, but it is beginning to increase, it being recalled that upon the introduction of safe harbour, it was agreed a cultural shift in Australia was required.</td><td>
In our experience and submission, awareness is beginning to increase (in particular since the impact of COVID-19 on businesses), which is encouraging.
We note that when the safe harbour was first introduced, it was expressly recognised that a cultural shift was required in Australia’s restructuring and insolvency landscape, and one of the stated objectives of the safe harbour was to promote a culture of entrepreneurship and innovation. That cultural shift in the turnaround landscape is starting, and in our submission safe harbour is directly responsible for that, but there is still a way to go.
There remains insufficient education and awareness as regards safe harbour and/or safe harbour as a turnaround tool, and/or the proper use of its elements in practice amongst:

accountants and lawyers;
insolvency practitioners;
directors; and
financiers,

with the exception of pockets of those categories of persons.
Our experience is not limited to SMEs, rather this is something to be addressed across the entire market. See Q6.
Given the very significant benefits of safe harbour as evidenced, we propose that investment in continued education and awareness is warranted, as follows (in all cases focused on safe harbour as a turnaround tool, not an observational framework, and highlighting the types of tasks and skills that an adviser should have – see Q9):
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- **Government bodies including ASIC and ATO** to address the current silence on point:
  - ASIC to issue a guide for directors on safe harbour and to update its insolvent trading guidance to refer to safe harbour and cross-refer to the safe harbour guidance.
  - ATO to amend its policies and tax payer guidance, to request a company to assess their safe harbour eligibility as a condition of considering a payment plan.
- **Accounting bodies** promoting awareness of safe harbour and how their members can play a vital role in helping to ensure clients (in particular, micro-SME and mid-market companies) meet the obligations and referring clients to an appropriately qualified advisor to assist with the turnaround.
- **Banks and second tier financiers** – noting some banks are already promoting awareness - increasing the internal awareness of their client-facing business bankers of safe harbour, so that when they see customer early warning signs of financial distress they can encourage them to seek appropriate advice and safe harbour protection. Credit policies be updated for safe harbour when assessing customer support requests, specifically to encourage customers to access such protection (which when used properly, will operate in the best interests of the customer and the bank, in improving outcomes).
- **Industry bodies** (AICD, BCA, ABA, TMA, ARITA, law societies etc) – who are already promoting awareness - continuing to promote awareness of safe harbour to their members, that it is not an observational framework and ongoing assistance in executing the turnaround plan leads to better outcomes. As regards director and business group bodies, greater education to their director membership of the existence and direct benefits of safe harbour, it is not a set and forget assessment and it drives good governance.

In the micro, SME and mid-market, the company's external accountant, general commercial lawyer and banker are very often the director's first point of contact for advice and are in a position of influence. Improving these parties awareness of safe harbour as a turnaround tool would likely directly positively impact directors in properly assessing their financial position and better accessing safe harbour.

ASIC providing safe harbour guidance and updating its insolvent trading guidance would provide a valuable independent reference point for directors and their advisors to access. Industry bodies addressing the negative practices we've identified would improve the quality, appropriateness and effectiveness of the safe harbour and insolvency advice some advisers are providing.

	Finally, we note that education and awareness needs to be practically focused based on the suite of on deal experience now available – education cannot be distracted or hesitant by reason only that it is not court tested, rather it should focus on the weight of experience about how it is being implemented with successful results.
Q11. In relation to potential qualified advisors, what barriers or conflicts (if any) limit your engagement with companies seeking safe harbour advice? **A11.** Formal insolvency options advice	Specifically, for Vantage – we do not experience any barrier because we do not accept formal insolvency appointments and we are nimble in our approach to pricing, which allows us to operate across the SME, mid-market and large corporate/institutional market. However, we are cognisant of the following barrier or conflict: where an adviser is better equipped or experienced to offer insolvency services as opposed to turnaround services, there can be a (unintentional, sub-conscious) bias to provide advice on what is known and familiar. We understand ARITA's position is that an insolvency practitioner who offers safe harbour advice cannot also accept a voluntary administrator appointment. We understand this measure is to ensure there is no conflict in reviewing one's own pre-appointment advice. In our experience, the unfortunate unintended consequence of these combined factors, is that some advisers are tending to recommend voluntary administration instead of assisting the company with safe harbour or providing observational safe harbour advice so as to not create a conflict of interests for a later voluntary administration appointment. See section B5 for further detail.
Q12. Are there any other accessibility issues impacting its use? **A12.** See Q7, Q9 and Q10.	In our experience, companies of all sizes can readily access safe harbour, with the exception perhaps of micro companies. Specifically, Vantage operates across the spectrum with our smallest safe harbour client at $4.2m revenue and our largest safe harbour client at $1.2b revenue. See our comments in sections B2 and B4, for further detail. The real accessibility issue is the issue of experience, education and awareness. See Q9 & Q10 above. Q7 also raises issues with mandatory compliance.

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Q13. 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?

Q13. Yes, see Q7, Q9 and Q10.

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See Q7. In this section we provide specific suggested amendments for consideration, that address the more significant concerns addressed by this submission.

Section 588GA(4) to be amended to provide the following effect:

- "If a non-compliance **first occurred** in the **last 12 months** and is subsisting and is substantial, or if a non-compliance **first occurred** in the **last 12 months** and is subsisting and is non-substantial and is one of more than one non-compliance that **first occurred** (whether or not subsisting) in the last 12 months but **excluding in all cases, technical or trivial non-compliances**, then safe harbour does not apply for so long as that or those non-compliances are subsisting"

  Or in our submission, the superior outcome: a non-compliance for such purposes would be defined by clear and express parameters, for example:

  "a failure that was not rectified within [60] days of it first occurring, or that is not technical or trivial* in nature."

  ** "technical and trivial, or trivial" may be necessary and/or preferred*

  A more conservative approach would involve a longer look back period, and a shorter rectification period. What matters is that any variation brings certainty whilst still meeting the objective of capturing serious and serial issues.

- **588GA(4)(a)(ii):** "give returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the Income Tax Assessment Act 1997)"

  be amended to read:

  "give such returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the Income Tax Assessment Act 1997) as set out in the [Corp Regulations] from time to time" – and that this list be finite as follows:

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	“**BAS – PAYG, GST, FBT, Income Tax, Single Touch Payroll and SGC**” “irrespective of the above, any **failure to lodge an SGC statement** where the late or under payment of superannuation contribution was: ○ **trivial or technical in nature; or** ○ **rectified within [3] months**, be disregarded for the purposes of s588GA(4)(a)” **See also suggestions at Q9 and Q10.** There are other questions raised in section B8, that have come up in practice that could also be addressed, for example to clarify that a late under payment of wages is a single failure, not a failure per employee. Although we appreciate attempting to define such matters may be difficult.

E. Review of the insolvent trading safe harbour – Consultation Paper background commentary, observations

Extract from Consultation Paper commentary	Response	Observation
Under Operation, refer text "At their core, the reforms provide directors with a safe harbour **defence** from the civil insolvent trading provisions of section 588G(2) of the Corporations Act."	A carve out, not a defence	Vantage notes, safe harbour is a carve out not a defence. At all times where insolvent trading is referenced for example by government or its agents, ASIC, ATO etc, it is important that it be recognised that safe harbour is a carve out (not a defence) and therefore safe harbour must be mentioned. That is, it must be plain to the audience that s588G does not apply at all if s588GA does. This is an important part of the need for greater awareness and education – see Q10 above.
Under Operation, refer text "The safe harbour provisions include rules around when the safe harbour protection is available to directors. The safe harbour is not available if the company **has failed, within the previous 12 months, to substantially comply with:** • its obligation to pay its employees (including their superannuation), and • its tax reporting obligations."	The law is not plain and needs to be amended to make it plain	The commentary on first reading, appears to assume that the law provides for a 12 month testing period. The commentary also refers to substantial compliance in a 12 month period, which for completeness, is not technically correct – a company can fail to comply twice whether or not substantial and lose safe harbour. If a 12 month testing period is in fact the intended and proposed, or understood, effect of the law – then the law needs to be amended to make that plain and to eradicate market confusion arising on the current text of the law. The current text of the law provides that safe harbour does not apply if, at the time that the relevant debt is incurred, the company is failing to meet

		any one or more of its employee entitlement or taxation law reporting obligations, and that failure is either: • substantial, or • one of two or more failures by the company to do any or all of those matters during the 12-month period ending when the debt was incurred. (Section 588GA(4), CA 2001.) That is, directors may not have the benefit of safe harbour if there are non-compliance issues, depending however on the nature of the non-compliance. It is generally understood that the text of the law requires directors to take into account all instances of subsisting non-compliance and all instances of non-compliance that were subsisting in the previous 12 months. That is, it is generally understood that a non-compliance that is subsisting could have occurred outside of the 12 month period, but if it was not remedied, then it remains a 'failing to do one of more of' the things required of it, bringing that non-compliance within s588GA(4) of the CA 2001. If the generally understood principles around the concept of a subsisting non-compliance are wrong, and rather the ambit of s588GA(4) goes no further than a non-compliance which first occurred in the previous 12 months, then the section should be amended to make this expressly plain. Irrespective of the correct construction of the current text, it is our submission that s588GA(4) should be amended – see Q7 and Q13 above.

Under Assessing the Impact, refer text "When assessing their 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 to this process. 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 adviser 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."	Vantage notes the elements of confidentiality and flexibility that are highly desirable to directors – when compared to public formal processes.	Vantage agrees with the observation that in general, safe harbour engagements are confidential in nature. Vantage agrees that the confidential nature makes it difficult for parties outside of those giving and receiving the advice, to accurately appreciate the extent to which it is being used and whether or not it is fit for purpose and its impact on the company and its stakeholders. **Vantage also notes however the importance of confidentiality and specifically, that this is a key feature of the safe harbour that facilitates its use and is greatly appealing to directors.** Taken together with its flexibility, the confidential feature is a key reason in our submission for its success, particularly in directors proactively seeking advice, and in stabilising the company and negotiating with key stakeholders whose support to any plan is required. If the safe harbour was public, this would disincentivise its use and make it less workable. A confidential opportunity under a flexible framework to save a company will always be more appealing to directors than any public process, less so one involving deemed insolvency and more formal processes, which directors will not willingly take up. Safe harbour offers the invaluable opportunity to attempt to improve the company's position, recognising that where that is not possible, of course more public processes with greater formalities become necessary.

Appendix

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

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

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

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

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

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