



Australian Government

Government Response to the Review of the Insolvent Trading Safe Harbour

March 2022

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Introduction

The safe harbour was established under the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* as part of the Government's National Innovation and Science Agenda. It provides protection for company directors from personal liability for insolvent trading if the company is genuinely attempting to restructure.

The overarching aim of the safe harbour is to encourage directors to seek advice early on how to restructure and save financially distressed but viable companies, rather than closing down prematurely to avoid personal liability. This supports a culture of entrepreneurship and innovation, by providing breathing space for distressed businesses.

As part of the 2021-22 Budget, the Government announced that it would commence an independent Review into the insolvent trading safe harbour (the Review), to ensure that the safe harbour provisions remain fit for purpose and its benefits can extend to as many businesses as possible.

To support this commitment, an independent panel chaired by Ms Genevieve Sexton, with Ms Leanne Chesser and Mr Stephen Parbery as panel members, was appointed to undertake the Review. The Review was held for a three-month period between August and November 2021.

The Review highlighted the need to simplify and clarify the safe harbour provisions to improve the understanding of the provisions among directors and advisers. The need to promote awareness and education of the safe harbour to support the operation of the legislative provisions was also noted.

The Government thanks the independent Panel for the excellent manner in which the Review was conducted and for the work involved in completing the Review. The Government also thanks all those who made submissions to the inquiry or otherwise contributed to its work.

The Government's response to the Review's recommendations is below.

Government response to the Review of the Insolvent Trading Safe Harbour

Recommendation	Government response
<p>Recommendation 1</p> <p>The Review recommends that section 588GA(1)(a) of the <i>Corporations Act 2001</i> (Act) be amended to include a reference to a person starting to suspect the company is in financial distress (in addition, and as an alternative to, a person starting to suspect that the company may become or be insolvent).</p>	<p>The Government agrees to this recommendation.</p> <p>Establishing solvency and insolvency under section 95A of the Act requires complex analysis which can be challenging for directors to engage with.</p> <p>The Government agrees that the concept of financial distress may be more easily understood by directors.</p>
<p>Recommendation 2</p> <p>The Review recommends that the safe harbour protections extend to the obligations of directors under section 596AC, and that section 588GA be amended to refer to subsections 596AC(1) and (3).</p>	<p>The Government notes this recommendation.</p> <p>Section 596AC relates to agreements or transactions that avoid employee entitlements. The Government will undertake further consultation before considering whether to implement this recommendation.</p>
<p>Recommendation 3</p> <p>The Review recommends that section 588GA(1)(b) be amended to specifically refer to debts incurred in the ordinary course of business.</p>	<p>The Government agrees to this recommendation.</p> <p>The Government considers that this amendment would assist in facilitating directors’ understanding that debts incurred ‘directly or indirectly in connection’ with a course of action extend to debts incurred in the ordinary course of business.</p>
<p>Recommendation 4</p> <p>The Review recommends that a plain English ‘best practice guide’ to safe harbour be developed by Treasury in consultation with key industry groups. The Review recommends that this guide set out general eligibility criteria for appropriately qualified advisers.</p>	<p>The Government agrees to this recommendation.</p> <p>The Government recognises the benefits that a best practice guide to safe harbour would have for directors and advisers.</p> <p>The Government considers that a best practice guide should be developed in consultation with key industry bodies, noting that the Australian Securities and Investments Commission (ASIC) would be the appropriate agency to release such guidance. The Government notes the Review’s specific guidance suggestion below.</p>

Recommendation	Government response
<p>Recommendation 5</p> <p>The Review recommends section 588GB be amended, to clarify that:</p> <ul style="list-style-type: none"> if books and records are in a director’s possession and control (even if they are not the books and records ‘of the company’), and those books and records are not provided to the administrator or liquidator at the time of a formal appointment, <p>then the director will also be prevented from producing those books and records to establish safe harbour in any relevant proceeding.</p>	<p>The Government agrees to this recommendation.</p> <p>The Government considers that this legislative change would make the section consistent with the director’s obligations under other provisions of the Act which require a director to deliver all books in their possession that relate to the company.</p>
<p>Recommendation 6</p> <p>The Review recommends either the reference to the term ‘restructuring’ in section 588GA(2) be replaced or the definition of restructuring in section 9 be updated to include a definition of that term for the purpose of section 588GA(2)(e).</p>	<p>The Government agrees to this recommendation.</p> <p>Implementing the recommendation will avoid confusion given the Act’s existing definition of ‘restructuring’ in section 9, which is defined by reference to restructuring under the small business restructuring regime.</p>
<p>Recommendation 7</p> <p>The Review recommends that section 588GA(2)(d) be amended by replacing the reference to ‘an appropriately qualified entity’ with ‘one or more appropriately qualified advisers’.</p>	<p>The Government agrees to this recommendation.</p> <p>The Government considers that this amendment would clarify that, in working out whether a course of action is reasonably likely to lead to a better outcome for the company, the key consideration is the receipt of appropriate advice, and not that the advice need come from only one adviser.</p>
<p>Recommendation 8</p> <p>The Review recommends that section 588GA(2)(d) be amended to expressly state that regard may also be had as to whether the <i>company</i> is receiving advice from one or more appropriately qualified advisers who have been given sufficient information to provide appropriate advice.</p>	<p>The Government agrees to this recommendation.</p> <p>This amendment would expressly cover situations where the company, rather than a director, has sought the appropriate advice, reflecting the commercial reality as to who is likely to seek the advice.</p>

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<p>Recommendation 9</p> <p>The Review recommends amending subsections 588GA(4)(a) and 588GA(4)(a)(i) to align the wording of those provisions with the wording of the employee entitlement safeguard in Regulation 5.3B.24.</p>	<p>The Government agrees to this recommendation.</p> <p>The Government agrees that achieving consistency in the reference to payment of employee entitlements with the wording used in the relevant small business restructuring regulation is desirable.</p> <p>The amendment would harmonise the terminology of the Act and the small business restructuring regulation without changing the intended operation of the provisions.</p>
<p>Recommendation 10</p> <p>The Review recommends that a finite list of tax reporting obligations be included in subsection 588GA(4)(a)(ii).</p>	<p>The Government notes this recommendation.</p> <p>The Australian Taxation Office (ATO) assists businesses to ensure that their tax reporting obligations are met. The Government will consider the inclusion of tax reporting guidance for directors in the ‘best practice guidance’ referred to at Recommendation 4.</p>
<p>Recommendation 11</p> <p>The Review recommends the deletion of subsection 588GA(4)(b)(ii).</p>	<p>The Government agrees to this recommendation.</p> <p>The recommended change would assist directors in determining their compliance with the safe harbour pre-conditions by removing the prescriptive reference to more than one failure in complying with the relevant obligations to pay employees and meet tax lodgments. This will allow a wholly principles-based approach to ensuring compliance under subsection 588GA(4) given the retained requirement for ‘substantial compliance’ with those obligations.</p> <p>The Government will consider how to provide further clarity to assist stakeholders with the interpretation of substantial compliance, referred to below in the response to Recommendation 12.</p>

Recommendation	Government response
<p>Recommendation 12</p> <p>The Review recommends that a definition of substantial compliance be included in the Act, to assist stakeholders to interpret the requirements of subsection 588GA(4).</p>	<p>The Government notes this recommendation.</p> <p>The Government agrees with the Panel’s view that substantial compliance should not be assessed against each individual obligation to pay employees and meet tax lodgments.</p> <p>The Government will progress reforms to clarify that substantial compliance only involves two assessments, firstly as to whether there is substantial compliance with obligations to pay employees as whole, and secondly, whether there is substantial compliance with obligations to meet tax lodgments as a whole.</p>
<p>Recommendation 13</p> <p>The Review recommends that data on safe harbour utilisation be collected and reported upon, as part of the reports received from voluntary administrators and liquidators.</p>	<p>The Government notes this recommendation.</p> <p>These reports and associated data from administrators and liquidators are received and managed by ASIC.</p> <p>The Government has also progressed reforms to enhance the ability of regulators and the Registrar to collect business-related data to support law and policy as part of the Modernising Business Registers program.</p>
<p>Recommendation 14</p> <p>The Review recommends that Treasury commission a holistic in-depth review of Australia’s insolvency laws.</p>	<p>The Government notes this recommendation.</p> <p>The Government has an extensive agenda regarding measures to improve Australia’s insolvency framework for both small and large businesses. On 1 January 2021, the Government introduced new insolvency processes suitable for small businesses, which are the most significant reforms to Australia’s insolvency framework in 30 years. The Government also announced reforms to creditors’ schemes of arrangement and conducted consultation on clarifying the treatment of corporate trusts in insolvency over the course of 2021.</p>
<p>Specific guidance suggestion</p> <p>In addition to Recommendation 4, the Review strongly supports an update being made to ASIC Regulatory Guide 217 to refer to the insolvent trading prohibition, and the safe harbour provisions, together with general guidance on the operation of the relevant provisions.</p>	<p>The Government notes this recommendation, which is directed towards ASIC.</p>