



12 July 2017

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By Email: economics.sen@aph.gov.au

Dear Mr Fitt

RE: INQUIRY INTO THE TREASURY LAWS AMENDMENT (2017 ENTERPRISE INCENTIVES NO. 20 BILL 2017)

Thank you for the invitation to make a submission to this Inquiry. This submission focuses on the provisions regarding safe harbours for directors and changes to ipso facto clauses in commercial contracts.

We accept that the commercial environment has changed with new business models, financing models, payment technologies and other disruptions to traditional business methodologies. In light of the changing environment, we consider that voluntary administration can create disproportionate harm leading to the loss of an otherwise salvageable business. Allowing a limited safe harbour for directors as proposed reaches an appropriate balance between preserving the efforts associated with starting up a business or restructuring an existing business while protecting the interests of other businesses that trade with them.

The introduction of a safe harbour provision should be an incentive to directors try and save their businesses, generating greater accountability and loyalty to the ongoing existence of an entity. This may reduce incentives to 'phoenix' companies and this may create greater stability for stakeholders such as employees and suppliers.

We note provision s588GA(2)(d) where regard may be had to whether a director is obtaining advice from an appropriately qualified entity. This supports the findings of our recent Payment Times Inquiry regarding the importance of good management skills and financial literacy by small businesses with regards to cash flow noting this comes at a cost. It may be appropriate to consider schemes to allow early access to these resources and also to minimise the costs to small business of using these experts.

We support the limitations on safe harbours to require the business to meet its employee payments and taxation obligations. This creates a fair trade off for the benefit of the safe harbour protections. We would also note the on-going work being

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done on reforms to the Fair Entitlements Guarantee (FEG) scheme; efforts by the Australian Taxation Office (ATO) Phoenix taskforce; and proposals to introduce Director Identification Numbers. Noting these efforts, we suggest that consideration should be given to how the safe guards to the safe harbour proposals could be strengthened to account for sharp practices around complex group structures where the same individual acts as a Director on multiple related entities within a group.

The threshold for accessing safe harbour should account for an individual's actions as a Director across the group, in order to avoid situations where a Director could be seeking safe harbour for one or more entities within a group but purposely not for others. This should dissuade directors and/or unscrupulous advisers from parcelling up toxic businesses operations where employee payment or tax obligations haven't been met within a group of related entities. This should prevent Directors seeking to only rescue the "good businesses" which have met their employee payments and taxation obligations while the "bad businesses" are liquidated. This could be undertaken by a review of the operation of the safe harbour legislation after a suitable period of time.

As set out in our earlier submission, we support the Bill provisions that limit the operation of 'ipso facto' clauses. These contractual clauses have significant impacts on business viability that are often grossly disproportionate to the business risks involved and lead to significant consequential losses. Often these clauses strip value from a business, depriving other stakeholders from a remedy while solely preserving the rights of the party imposing the contractual condition. This office has seen these consequences of these clauses in some of the cases brought to our attention through our advocacy and assistance functions.

In summary, my office has a strong understanding of the impacts of insolvency and use of ipso facto clauses which have led to good small businesses being lost with unnecessary economic and social consequences. We believe this legislation is a good step to improve outcomes across the lifecycle of a small business.

Please do not hesitate to contact me or my advocacy director Mr James Strachan on [REDACTED] if you would like to discuss this submission or if you require any further details.

Yours sincerely,

[REDACTED]

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman