ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

31 January 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Bankruptcy Amendment (Enterprise Incentives) Bill 2017

Thank you for the opportunity to lodge a submission on the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 ('the Bill') to amend the *Bankruptcy Act 1966* (Cth) ('the Act') to provide for an automatic discharge from bankruptcy after one year (and related amendments).

Some of the points made in this submission were raised in our previous submission on the one-year bankruptcy reform announced in the Government's 'Proposals Paper on Improving bankruptcy and insolvency laws', part of the National Innovation and Science Agenda ('NISA Reforms'). ARITA's previous submission on the NISA Reforms is annexed for your ease of reference.

Key points

- While only around 20% of bankruptcies are business-related, we acknowledge that the Government's policy decision to implement 'one-year bankruptcy' appears to be based upon the conclusions and recommendations of the Productivity Commission's September 2015 Report into 'Business Set-up, Transfer and Closure' – ie, that reducing the default period of bankruptcy will have a positive economic impact.
- That said, there remain mixed views among our members (who practise in personal insolvency) as to whether a reduction of the default bankruptcy period will achieve the objectives stated in paragraph 4 of the Explanatory Memorandum to the Bill. Registered trustees have expressed concern for the risk of abuse of a one-year bankruptcy period and the emergence of serial bankrupts. There may be a risk that

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high-profile instances of the abuse of earlier discharge could undermine confidence in the bankruptcy regime;

- There is a concern among our members that the impact of 'one-year bankruptcy' will be similar to that of the previous 'early discharge' provisions in the Act which the Government repealed in 2002 (due to stated concerns that bankruptcy had been made 'too easy' and that a reduced period of bankruptcy discouraged debtors from entering formal or informal arrangements with creditors to settle debts).

- Reducing the default period of bankruptcy could impact on the prevalence of debt agreements as an alternative to bankruptcy. It is an open question as to how substantial, concurrent reforms to both bankruptcy and debt agreements will affect existing trends and the popularity of bankruptcies and debt agreements (as alternative procedures);

- The extension of income contribution obligations for two years following an automatic discharge after one year is an important measure to accompany any decision to reduce the default bankruptcy period. While there are measures open to a trustee in bankruptcy to enforce these obligations post-discharge, it is worth considering whether a breach of a discharged bankrupt's obligations of payment and provision of information should constitute an 'act of bankruptcy' under s 40 of the Act. This would make it easier and less costly to bring about a second bankruptcy for any discharged bankrupts who default on their income contribution obligations.

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents practitioners and other associated professionals who specialise in the fields of insolvency, restructuring and turnaround.

We have more than 2,000 members including accountants, lawyers, bankers, credit managers, academics and other professionals with an interest in insolvency and restructuring.

Some 84 percent of registered liquidators and 89 percent of registered trustees are ARITA members.

ARITA's mission is to support insolvency and recovery professionals in their quest to restore the economic value of underperforming businesses and to assist financially challenged individuals.

We deliver this through the provision of innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large.

The Association promotes best practice and provides a forum for debate on key issues facing the profession. We also engage in though leadership and advocacy underpinned by our members' knowledge and experience.

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1 Reducing the default bankruptcy period to one year

1.1 Basis for Government's policy decision and risk of abuse or anomalies

In our previous submission on the NISA Reforms, ARITA acknowledged the views and recommendations in the 2015 report of the Productivity Commission's Inquiry into *Business Set-up, Transfer and Closure*[1] ('PC Report') partly based on international experience and research, that a reduction in the bankruptcy period does have beneficial outcomes for the economy and entrepreneurial culture.

We assume that the PC Report provided much of the basis and support for the Government's decision to implement this reform. Indeed, paragraph 4 of the Explanatory Memorandum to the Bill states that:

> *As part of the National Innovation and Science Agenda these reforms aim to foster entrepreneurial behaviour and to reduce the stigma associated with bankruptcy. Reducing the automatic discharge to one year will reduce stigma, encourage entrepreneurs to re-engage in business sooner and encourage people, who have previously been deterred by the punitive bankruptcy laws, to pursue their own business ventures*.

The PC Report noted that business-related bankruptcies constitute only around 20% of all bankruptcies.[2] However, the PC Report stated that 'despite the relatively small number of 'entrepreneurial' bankrupts, the potential benefits to this group are large.'[3]

That said, among our members who practise in the field of personal insolvency (bankruptcy) there are divided views as to whether this stated goal will be achieved by the reduction of the default bankruptcy period to one year. Apart from scepticism as to the 'untapped entrepreneurialism' which will be engaged by a one-year default period of bankruptcy, registered trustees are more familiar than most with the practices and behaviour of those debtors who will seek to either abuse or 'game the system' of a one-year bankruptcy for their own benefit (and to the detriment of creditors). Earlier discharge would also appear to increase the risk of 'serial' bankrupts.

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[1] Productivity Commission Inquiry Report 'Business Set-up, Transfer and Closure', No.75, 30 September 2015, p 341, Recommendation 12.1.
[2] Ibid, p 320: 'While non-business related bankruptcies relating to consumer unemployment, income and use of credit are the dominant sources of bankruptcy, business-related factors are responsible for approximately 20 per cent of all bankruptcy, and 16 per cent of all cases of personal insolvency in Australia.'
[3] Ibid, p 342.

While such debtors and practices are in the minority, high-profile instances of the abuse of a one-year default bankruptcy period could potentially undermine public and business community confidence in the bankruptcy regime.

Indeed, a loss of confidence in the regime is what caused the Government in 2002 to repeal an ‘early discharge’ system which had then been in operation for around nine years. The Explanatory Memorandum to the Bankruptcy Legislation Amendment Bill 2002 (Cth) stated, in relation to the ‘abolition of early discharge’, that those provisions ‘*are most often cited as the cause of concern that bankruptcy is too easy*.’[4]

The Explanatory Memorandum to that Bill also stated that ‘*[t]he reduced period of bankruptcy is seen to discourage debtors from trying to enter formal or informal arrangements with their creditors to settle debts, and provides little opportunity for debtors to become better financial managers.*’[5] This point bears consideration today when considering the potential effect one-year bankruptcy will have on the use of formal alternatives to bankruptcy such as:

- personal insolvency agreements under Part X of the Act;
- compositions (annulments) under s 73 of the Act; and
- debt agreements under Part IX of the Act (addressed in detail at [1.2] below).

For example, there may be an anomalous disincentive for debtors to contemplate Part X personal insolvency agreements because, in comparison with bankruptcy, debtors will be disqualified from managing a corporation (including acting as a company director) until the terms of a personal insolvency agreement have been fully complied with: s 206B(4) of the *Corporations Act 2001* (Cth). There may also be little incentive (during the course of a bankruptcy) to propose compositions and annulments under s 73 of the Act when bankrupts need only wait one year to obtain a discharge.

Indeed, proposing a s 73 composition and annulment arguably is an existing path for genuine entrepreneurs to overcome the hurdle of bankruptcy and pursue ‘bankable’ business ventures.

The essential point is that anomalies may arise when alternative arrangements are compared with one-year (as opposed to three-year) bankruptcy. These anomalies could reduce the number of ‘better outcomes’ for creditors which those alternative arrangements are intended to produce (and for which three-year bankruptcy currently serves as an incentive).

1.2 Incentives and disincentives for debt agreements versus ‘one-year bankruptcy’

The PC Report canvassed at length the use of bankruptcy and the two ‘alternative’ procedures of debt agreements and personal insolvency agreements. The PC Report – and

[4] Bankruptcy Legislation Amendment Bill 2002 (Cth), Explanatory Memorandum, para 42.
[5] Ibid.

its recommendations – appear to partly proceed from the stated basis (or starting point) that 'bankruptcy is still the dominant personal insolvency process.' The PC Report also recognised however, that the alternative procedure of debt agreements had 'increased to unprecedented levels' and that agreement alternatives to bankruptcy 'are becoming more popular.'[6]

More recent statistics reported by the Australian Financial Security Authority (AFSA) demonstrate that:

- In 2016/17, the number of debt agreements was the highest on record (13,597) which was 45.1% of total personal insolvency activity (new personal administrations under the Act) and there were 16,320 bankruptcies (54.1% of personal insolvency activity). This reinforces the trend of increasing popularity of debt agreements: around the time of the PC Report in 2014/15, the respective numbers and proportions were 10,911 (39%) debt agreements and 17,163 (61.3%) bankruptcies;[7]

- In both the June and September 2017 quarters, around 24% of bankrupts entered a business-related bankruptcy, around 6.5% of debt agreement debtors entered a business-related debt agreement, while around 16% of all new debtors entered a business-related personal insolvency.[8]

A point to bear in mind is that the statistical prevalence of bankruptcies and debt agreements is unlikely to remain static following substantial, concurrent reforms to both procedures (as is currently contemplated). We note that the forthcoming Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 ('Debt Agreement Reform Bill') – currently the subject of a separate Senate Committee inquiry – proposes to double the debt agreement access threshold which applies to a debtor's property (currently set at $111,675.20).

It stands to reason that a reduction in the default bankruptcy period (to one year) could see a decline in the popularity of debt agreements when the two procedures are compared and assessed by financially distressed debtors and/or their advisors (though such a trend may be offset if the debt agreement access threshold mentioned above is raised by the passing of the Debt Agreement Reform Bill in its current form).

When considering the possibility that a reduction in the default period for bankruptcy may provide disincentives for the uptake of debt agreements, it is worth noting that the PC Report identified that debt agreements are devoid of many of the restrictions imposed upon bankrupts (those restrictions in bankruptcy being the very things that a reduction in the default period is intended to ameliorate).

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[6] Ibid, p 332.
[7] AFSA personal insolvency statistics at https://www.afsa.gov.au/statistics/personal-insolvency-statistics-0.
[8] AFSA business and non-business statistics at https://www.afsa.gov.au/statistics/commentary. Focussing on the minority of business-related personal administrations, statistics for both these quarters also suggest that bankruptcy, as a procedure, accounts for around 78% to 80% of these business-related personal insolvencies.

In terms of the uptake or popularity of these alternative procedures, it is difficult to predict with certainty the impact of the concurrent implementation of these two sets of personal insolvency law reform measures.

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2 Consequences of discharged bankrupts defaulting on extended income contribution obligations

As stated in our previous submission, ARITA supports the extension of income contribution obligations for a minimum period of two years following any automatic discharge after one year. We note that the PC Report recommended this measure and stated that '[b]y upholding the current time frame for the collection of contributions, bankruptcy would not become an 'easy option' for debtors.'[9] ARITA also supports the Bill's extension of income contribution obligations for five or eight years if a bankruptcy is extended for non-compliance.

Upon a review of the Bill, one point which bears consideration is the consequence for a discharged bankrupt who defaults in payment of these extended income contribution obligations (or fails to provide the necessary information to the trustee as required by the Act). Any such default within the bankruptcy period could sustain an objection to discharge. However, post-discharge there is no mechanism in the Bill to deliver an expedient return to bankruptcy for the defaulting, former bankrupt.

Plainly, an unpaid debt arising from the extended income contribution obligations could sustain an action by the trustee to obtain a judgment debt against the discharged bankrupt which would, in turn, sustain a bankruptcy notice, creditor's petition and sequestration order for a second bankruptcy. We acknowledge that the prospect of a second bankruptcy will be a considerable incentive for most discharged bankrupts to continue to meet their obligations.

We also recognise and acknowledge that the following measures would still be open to a trustee seeking to enforce the ongoing income contribution obligations following an automatic, one-year discharge:

- Ongoing availability of the supervised account regime (Part VI, Div 4B, Subdiv HA of the Act);
- Ongoing availability of the 'garnishee' notice regime (Part VI, Div 4B, Subdiv I, s 133ZL of the Act: Official Receiver Notice to require third person to make payment);
- The force of s 139U of the Act which obliges a bankrupt (which would include a discharged bankrupt pursuant to amendments to s 139K) to provide evidence and information of income to the trustee (penalty of 6 months imprisonment);

[9] Ibid, p 342.

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- Section 139Z which will facilitate an income assessment by a trustee in circumstances where a former bankrupt does not provide information about likely derived income (or claims to not be likely to derive income) for a contribution assessment period, but the trustee has reasonable grounds for belief to the contrary. Section 139Z(2) would allow the trustee in these circumstances to rely on income-producing activities that occurred during the course of the bankruptcy (prior to discharge) for the purposes of making an assessment.

However, given the significance of the extended income contribution obligations in the context of the introduction of a default one-year bankruptcy period, we query whether this 'post-discharge' debt obligation should merely have the same character and consequences as any other 'new' debt incurred by a former bankrupt. In terms of community expectations, it might be said that the extended income contribution obligations are perceived as a *quid pro quo* (or a 'social contract') for the law bestowing a discharge to a bankrupt after just one year.

Therefore, as stated in our previous submission, it should be considered (or reconsidered) whether a default by a former bankrupt in:

- payment of the extended income contribution obligations; or
- providing relevant information to the trustee as to likely or actual income (ss 139U or 265 of the Act),

should constitute an 'act of bankruptcy' for the purposes of s 40 of the Act.

In the scenario of a defaulting former bankrupt, such an 'act of bankruptcy' would directly ground a creditor's petition under s 43 of the Act and avoid the costs which would otherwise be expended – to the detriment of creditors in the first bankruptcy – in establishing a customary 'act of bankruptcy' to bring about the second bankruptcy.

Such an amendment to s 40(1) of the Act could incorporate a safeguard in the form of non-compliance with a 'notice to remedy default' (served by the trustee) as a precondition to an 'act of bankruptcy' being committed under the provision.

Giving notice to a discharged bankrupt

One further amendment which might be considered is a provision which will provide certainty as to what constitutes the valid service (or 'giving') of a notice to a discharged bankrupt as contemplated by several provisions in the income contribution regime (eg, ss 139ZI and 139ZIC of the Act). The income contribution regime would be strengthened by avoiding the potential difficulties with giving notices to discharged bankrupts who may not provide the trustee with current contact details or later claim non-receipt of the notice (eg, due to travel).

This could be achieved by introducing the notion of a statutory 'registered address' for a discharged bankrupt, or by supporting the discharged bankrupt's obligation to notify the trustee of a change in contact details (s 80 of the Act) by making it clear how and when a notice sent to the last notified address (including an overseas address) will constitute effective service under the Act.

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3 Technical comments on other aspects of the Bill

If the default period of bankruptcy is to be reduced to one year, we support the other following aspects of the Bill:

- Amendments to ensure consistency in the administration of existing (unmet) debts where there is a subsequent bankruptcy;
- Continuing obligations of former bankrupts to notify the trustee in bankruptcy of a change in contact details during the period in which there is an income contribution obligation;
- Extending the obligations of bankrupts under s 265 of the Act to make disclosure of relevant matters to a trustee throughout the period they are obliged to make income contributions;
- Extending the obligations of bankrupts under s 277A of the Act to keep and produce books during the period in which there is an income contribution obligation;
- Commencement of the amendments in Schedule 1 to the Bill occurring six months after Royal Assent in order to allow trustees time to prepare any objections to discharge.

Appendix A
ARITA submission to The Treasury (NISA Reforms) 27 May 2016

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AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

27 May 2016

The Manager
Corporations and Schemes Unit
Financial Systems Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: insolvency@treasury.gov.au

Dear James

Improving bankruptcy and insolvency laws – Proposals Paper April 2016

The Australian Restructuring, Insolvency & Turnaround Association (ARITA) is grateful for the opportunity to provide feedback on the Government's Proposals Paper on Improving bankruptcy and insolvency laws as part of the National Science and Innovation Agenda reforms announced by the Prime Minister last year.

Two of the three proposed reforms – a safe harbour for directors and a limitation on the operation of ipso facto clauses – are key ARITA policy positions that were adopted in the final report of the Productivity Commission's Inquiry into Business Setup, Transfer and Closure through our advocacy.

While we believe that some important challenges must be resolved in the drafting, the intent of the provisions in the Proposals Paper appears to align with ARITA's published policy positions.

ARITA remains concerned that many of our interconnected policy recommendations – as adopted by the Productivity Commission – such as pre-positioned sales and streamlined SME liquidations, still need to be addressed to create a true business rescue culture in Australia.

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

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1 Reducing the default bankruptcy period

1.1 Misconduct

Recommendation 1.1: ARITA acknowledges the proposal to reduce the default bankruptcy period but notes that mechanisms are required to protect the integrity of the regime.

While we acknowledge the basis of the Government's decision to reduce the default bankruptcy period to one year, ARITA's members who practice in bankruptcy have mixed views as to whether it will achieve the desired objectives.

We do however note the views and recommendations in the report of the Productivity Commission's Inquiry into Business Setup, Transfer and Closure[1] partly based on international experience and research, that a reduction in the bankruptcy period does have beneficial outcomes for the economy and entrepreneurial culture. This supports the Government's intention in these reforms being implemented.

As the Productivity Commission's Report acknowledges, if the default period is reduced, it is important that mechanisms are retained or added that provide protection for abuse. For example, we recommend that the right of trustees to object to the discharge of a bankrupt be strengthened and continue to allow a trustee to extend the period of bankruptcy for up to eight years.[2]

The grounds for filing an objection to discharge, as detailed in section 149D of the *Bankruptcy Act 1966* (the Bankruptcy Act), are extensive and we do not believe that these need to be changed. However we believe that the following grounds could be added:

- if the discharge would prejudice the administration of the estate, and
- if the trustee has determined that the bankrupt will have on-going obligations after bankruptcy and more time is required to assess the bankrupt's capacity and willingness to comply with those obligations.

As noted in the Proposals Paper, the reduced bankruptcy period may lead to practical challenges for trustees in gathering sufficient evidence to support filing of an objection within the reduced one-year period. On this basis, we believe that the standard of evidence to support an objection should reflect this fact.

In addition to the standard of evidence required, we believe that a provision should be made for a trustee to file an objection on an interim basis, for a limited period, where more time is required to substantiate a permanent objection. A lesser standard of evidence in support of an interim objection would be required. This interim objection would then need to be followed

1 Productivity Commission 2015, Business Set-up, Transfer and Closure, Final Report 75, Canberra. At pp 334-342. As to Ireland (p 337-338), it has since the Report implemented its reduction in the bankruptcy period to one year, with a three year income contribution regime.
2 Consistent with recommendation 12.1 of the Report.

by a further permanent objection to discharge within that interim period or else the objection lapses.

1.2 Ongoing obligations for bankrupts

Recommendation 1.2: ARITA believes that the majority of current obligations placed on bankrupts should continue to apply for a minimum of three years, including the obligation to pay income contributions. Any failure to comply with the obligations could be an act of bankruptcy, or alternatively allow the discharge of the bankrupt to be reversed.

1.2.1 Requirement to assist Trustee

In order to balance the benefits of a reduced bankruptcy period, we support proposal 1.2.1 to change the Bankruptcy Act to ensure the obligations on a bankrupt to assist in the administration of their estate remain even after they have been discharged in order to allow for the proper administration of the bankruptcy by the trustee. To some extent the law requires this at present: s 152. For example, a former bankrupt can be summonsed for their public examination under s 81 of the Bankruptcy Act.[3]

In addition to the general requirement pursuant to section 152 of the Bankruptcy Act to 'give such assistance as the trustee reasonably requires', we believe that the majority of the specific obligations currently placed on a bankrupt should be ongoing for the a minimum of three years, subject to any extension of the bankruptcy period due to an objection. These include:

- complying with all requests made by the trustee
- supplying all books, bank statements and other documents that the trustee requests
- advising the trustee of a change in address
- advising the trustee if their income increases from that already disclosed
- returning a completed statement of income form each year if asked to do so by the trustee
- advising the trustee immediately if the bankrupt forgot to disclose any assets or creditors in their Statement of Affairs
- fully and truthfully disclose to the trustee all property and its value, and
- not disposing of any property vested in the trustee.

Ensuring compliance with the ongoing obligations is necessary to maintain the integrity of the bankruptcy regime. Even if there are other alternatives to encourage compliance, the ultimate consequence of non-compliance should be a return to bankruptcy. We believe that

3 *Official Receiver v Todd* (1986) 14 FCR 177; [1986] FCA 463.

there are two alternatives in this regard, that non-compliance is either an act of bankruptcy or a grounds for reversing the discharge from bankruptcy.

Non-compliance could be added to the various acts of bankruptcy in s 40 of the Bankruptcy Act, and this could ultimately result in another bankruptcy. The commission of an act of bankruptcy permits bankruptcy proceedings to be commenced but also usually determines the date of commencement of any new bankruptcy, although we believe that any such mechanism should somehow connect the 'new' bankruptcy with the previous bankruptcy and effectively be a continuation of the previous administration.

Otherwise there may be a situation whereby there are no or limited creditors in the second estate (if the bankrupt had incurred no debts subsequent to discharge) and any benefits arising from the second estate not flowing to the existing pool of creditors (for example, through ongoing income contributions).

Alternatively, this non-compliance could be grounds to have the discharge of the bankrupt reversed and the period of bankruptcy extended as if an objection to discharge had been lodged. This option may be administratively more effective in ensuring the continuation of the original estate and that any future benefits are made available to the existing pool of creditors.

In either situation, consideration will need to be given to how any transactions in the intervening period are dealt with.

We note the Law Council's submission suggests extending automatic disqualification from managing a corporation (section 206B of the *Corporations Act 2001*) to people who have outstanding notices to provide information to a trustee in bankruptcy where those notices have been outstanding for more than one month.

ASIC could add those persons to the disqualified persons register on receipt of evidence from the trustee of the outstanding notice. The trustee could have an obligation to advise ASIC that the notice has been satisfied and ASIC will remove the person from the disqualified persons register. The person may refer the notice from the trustee to the Inspector-General in Bankruptcy for review.

We agree with this proposal, but would extend it to non-compliance with any obligation that a bankrupt is required to comply with in the post-discharge period.

1.2.2 Income contributions

ARITA strongly believes that the separation of the obligation to pay income contributions from the default bankruptcy period, and the continuance of that obligation for three years, subject to any extension for misconduct, is a necessary adjunct to the reduced default term.

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Income contributions provide a substantial source of funds for trustees and creditors.[4]

We also highlight that income contributions are only assessed based on after-tax income exceeding an indexed threshold and only half of any income over the threshold is payable to the estate.

However, there needs to be a mechanism to enforce the contributions after discharge, for the remaining two-year period. Non-payment can be a matter which results in the consequences detailed above at 1.2.1. The amount not paid can be a debt recoverable in a court of competent jurisdiction, and there may be some process of recording that default on the National Personal Insolvency Index (NPII).

1.3 Restrictions

Recommendation 1.3: ARITA supports proposal 1.3.1a to reduce credit restrictions under the Act to one year, subject to any extension for misconduct.

1.3.1 Access to credit

Access of a former bankrupt to credit is important to encourage entrepreneurial endeavours and reduce the associated stigma of bankruptcy. ARITA supports proposal 1.3.1a to reduce credit restrictions under the Bankruptcy Act to one year, subject to any extension for misconduct.

We believe that it is appropriate to reduce the period for personal insolvency information in credit reports[5] and suggest that the retention period should simply be two years from the date of discharge which addresses the needs for any longer period of disclosure due to any extension of the period of bankruptcy.

We accept that while the retention of the permanent record of bankruptcy in the NPII may not meet the objective of a fresh start, encourage and facilitate further entrepreneurial endeavours and reduce the associated stigma, it is important that the fact of the bankruptcy remain on permanent record. Bankruptcy has a significant legal impact on the bankrupt and other parties, and a record of its occurrence should not be removed.

1.3.2 Overseas travel

ARITA supports the reduction of the overseas travel restriction to one year, subject to any extension for misconduct but we consider that the bankrupt should still have to notify the

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4 AFSA selected statistics:

- Table 13: Monies administered by the Official Trustee under Parts IV and XI of the Bankruptcy Act
- Table 14: Monies administered by registered trustees in administrations under Parts IV and XI of the Bankruptcy Act

5 See s 20X Privacy Act 1988.

trustee of the travel if it is within the further two-year period. This supports our other recommendation at 1.2.1.

1.3.3 Licences and industry associations

ARITA supports the Government working with relevant professional, industry and licensing associations with a view aligning restrictions with the reduced period of bankruptcy, where appropriate. In that respect, from our brief research into the wording of these restrictions, some refer to the period of bankruptcy and others refer to three years.

For example, as to the latter, s 56AC of the *Queensland Building and Construction Commission Act* 1991 refers to a person excluded from holding a building licence as an individual who 'takes advantage of the laws of bankruptcy or becomes bankrupt (relevant bankruptcy event), and 3 years have not elapsed since the relevant bankruptcy event happened.'

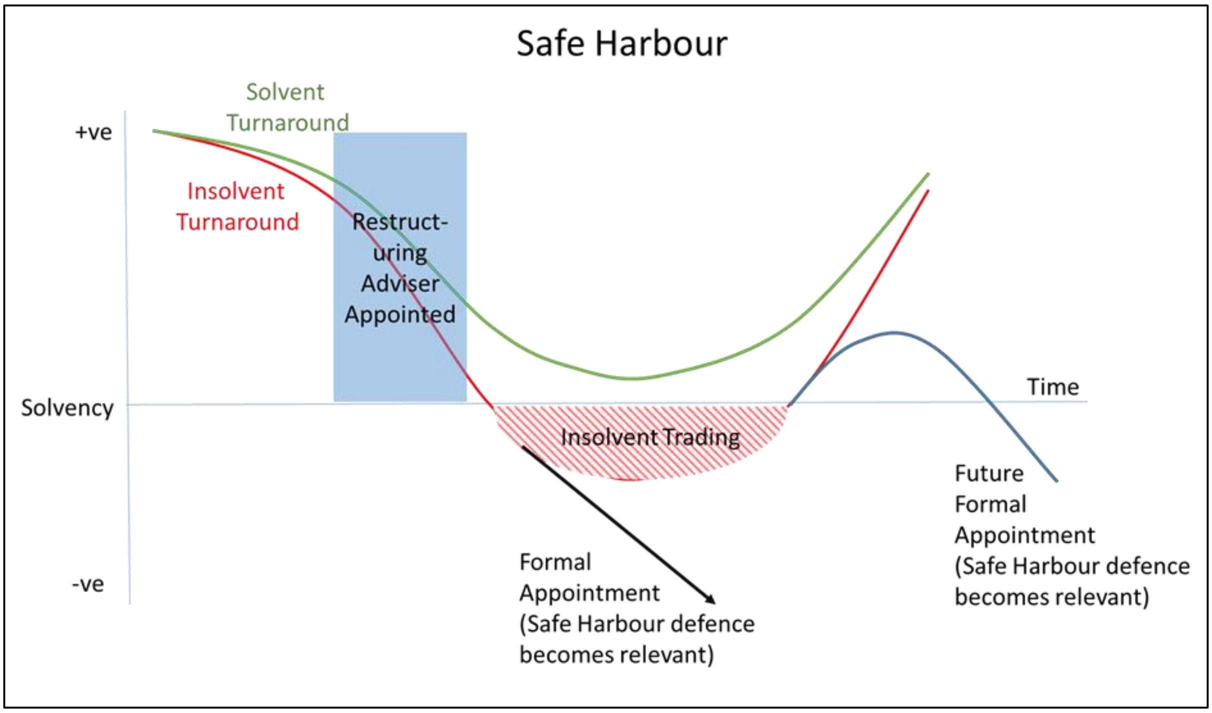
As to the former, s 206B(3) of the *Corporations Act 2001* (Corporations Act) refers simply to a person being under restriction as an 'undischarged bankrupt'.

2 Safe Harbour

2.1 Background

ARITA has been a long-time advocate for a safe harbour defence to encourage directors to seek appropriate professional advice in order to increase the options available to companies in financial distress, while still providing protection for the interests of creditors.

This diagram depicts how ARITA believes a safe harbour defence should operate in terms of the financial distress timeline.



Both safe harbour models detailed in the Proposals Paper make reference to returning the company to solvency. We do not believe that a safe harbour defence needs to be solely based on the aim of returning the company to solvency and we discuss this issue further below.

2.2 Safe Harbour Model A

Recommendation 2.2: ARITA supports the proposed safe harbour Model A with some modifications.

Model A from the Proposals Paper

It would be a defence to s588G if, at the time when the debt was incurred, a reasonable director would have an expectation, based on advice provided by an appropriately experienced, qualified and informed restructuring adviser, that the company can be returned to solvency within a reasonable period of time, and the director is taking reasonable steps to ensure it does so.

The defence would apply where the company appoints a restructuring adviser who:

a) is provided with appropriate books and records within a reasonable period of their appointment to enable them to form a view as to the viability of the business, and

b) is and remains of the opinion that the company can avoid insolvent liquidation and is likely to be able to be returned to solvency within a reasonable period of time.

The restructuring adviser would be required to exercise their powers and discharge their duties in good faith in the best interests of the company and to inform ASIC of any misconduct they identify.

ARITA's policy positions

ARITA's Policy Positions paper issued in February 2015, details a safe harbour based on a business judgement rule with the following elements, that directors:

- make a business judgement in good faith for a proper purpose
- after informing themselves about the subject matter of their judgement to the extent they reasonably believe to be appropriate
- rationally believe that the judgement is in the best interests of the company (and its shareholders)
- have taken all proper steps to ensure that the financial information of the company necessary for the provision of restructuring advice is accurate, or is ensuring that all resources necessary in the circumstances to remedy any material deficiencies in that information are being diligently deployed

- were informed with restructuring advice from an appropriately experienced and qualified professional engaged or employed by the company, with access to all pertinent financial information, as to the feasibility of and means for ensuring that the company remains solvent, or that it is returned to a state of solvency within a reasonable period of time
- it was the director's business judgement that the interests of the company's body of creditors as a whole, as well as members, were best served by pursuing restructuring, and
- the director took all reasonable steps to ensure that the company diligently pursued the restructuring.

We see many of the elements of ARITA's safe harbour defence in Model A, with the exception of the requirement to consider the interests of the company's body of creditors as a whole, as well as members. We maintain that this is an important element. In this regard, we refer you to the decision in The Bell Group case.[6]

As noted in our Policy Positions paper, directors should not be permitted to view the restructuring moratorium provisions as a relaxation or reduction of their responsibilities. If anything, their responsibilities should be seen as being heightened during this period by the business judgement rule requiring positive and beneficial governance thresholds to be met before the rule can be relied upon.

In situations where the obligations for the safe harbour protections are not met, the insolvent trading criteria should, in our view, be made easier for a liquidator to prove in order to be able to obtain compensation for the affected creditors. In this regard, we refer you our further discussion at section 4 of this submission.

Requirement to return to solvency

We hold concerns that the requirement to return the company to solvency is not the appropriate test. Rather, a restructuring that takes place during the safe harbour period may actually involve the sale of all or part of the business for proper value to an unrelated third party, with the original company remaining insolvent after the sale occurs.

However, as a result of the sale being undertaken outside of, and in advance of, a formal insolvency appointment, a better price is able to be achieved for the business and the creditors of the original company are much better off. This is in line with ARITA's policy on pre-positioned sales which was also a recommendation in the Productivity Commission's 2015 report into Business Set-up, Transfer and Closure (Productivity Commission Report 75)[7].

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[6] *Westpac Banking Corporation v the Bell Group Ltd (in liq)* (No 3) [2012] WASCA 157.

[7] Productivity Commission 2015, Business Set-up, Transfer and Closure, Final Report 75, Canberra.

We suggest that the appropriate test should instead be that the director took reasonable steps to minimise a significant risk of loss to the creditors of the company.

2.2.1 The restructuring adviser

ARITA agrees that the restructuring adviser would need to be an appropriately experienced and qualified individual, who is an accredited member of an organisation approved by the Minister, with its own:

- disciplinary framework
- educational framework, and
- ethical standards.

Each of the above are essential elements of what defines a professional association, which is defined by Professions Australia to be

> 'a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others. It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community.'[8]

We do believe that the education framework should include topics which are specifically relevant to the restructuring work typically undertaken with a distressed business, as well as a comprehensive knowledge of insolvency law and an ability to ascertain financial viability.

To maintain the integrity of the safe harbour framework, we believe that a restructuring adviser should be a registered professional who is subject to regulatory oversight.

We strongly believe that that only professionals who have obtained the qualification of ARITA Professional Membership or are a registered liquidator should be able to oversee this process given their innate high level understanding of insolvency law that is required to facilitate the restructuring of the company or its business and ensure directors appropriately discharge their duties. Persons without this level of qualification may place creditors and other stakeholders in an otherwise worse position.

We provide this matrix which sets out the relevant professional bodies and what we consider to be their ability to meet the criteria set out in the Proposals Paper. We have also considered Continuing Professional Development requirements as we believe that the

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8 http://www.professions.com.au/about-us/what-is-a-professional

requirement to maintain ongoing education is a fundamental requirement for such an adviser.

Restructuring adviser matrix

Affiliation	Professional body status	General ethics requirements	Insolvency specific professional standards	Professional conduct oversight and complaints	Post Grad insolvency/ turnaround specific education required for membership	Insolvency/ turnaround CPD requirements	Insolvency/ turnaround CPD education offered?
ARITA[9]	Yes	Yes	Yes	Yes	Yes [10]	Yes (40 hours per annum)	Yes – structured and topical CPD offered nationally
Registered Liquidator	Government	No	No	Yes (regulator)	Under Insolvency Law Reform Act	Yes	No
CAANZ	Yes	Yes	APES 330 only	Yes	No	Limited [11]	No
CPA	Yes	Yes	APES 330 only	Yes	No	Limited [12]	1 course [13]
Law Societies	Yes	Yes	No	Yes	No	No	Some
Turnaround Management Association (TMA)	No	Limited	No	No	No [14]	No	Yes

We note that the *Insolvency Law Reform Act 2016* (ILRA), provides for different classes of registration for registered liquidators: s 20-35. Consistent with the current sub-class for receivers, we suggest that an additional sub-class could be established for restructuring advisers. Such a sub-class would enable professionals who meet the registration criteria to be considered by an appropriately convened committee.

The ILRA also provides for the qualification, experience, knowledge and abilities required for registration to be prescribed in the Insolvency Practice Rules (IPRs) and we suggest that this is the appropriate forum to set out the registration requirements, including the approved membership organisations.

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9 ARITA Professional Members include accountants from both CAANZ and CPA as well as lawyers who hold Law Society membership.

10 ARITA education requirements for admittance as a Professional Member are two subjects from a possible three post-graduate level insolvency and restructuring subjects. Each subject is studied via distance education and takes 12 weeks to complete (study of 6-8 hours per week required).

11 CAANZ requires a minimum 20 hours of CPD per year and a total of 120 hours for a three-year period. Holders of statutory registration must complete 40% of their CPD in the specialist field.

12 CPA require a minimum 20 hours of CPD per year and a total of 120 hours for a three-year time period. Registered liquidators must complete 50% of their CPD in the specific field.

13 Five self-study modules of an intermediate level.

14 TMA education requirements are three, three-day modules on restructuring topics. Completion of the education requirements is not required to become a TMA member.

We understand that the ILRA will also expand persons eligible to become a registered liquidator to include solicitors. The IPRs will provide clarification on qualifications that will be required for registration.

Independence of the restructuring adviser

We have considered the independence of the restructuring adviser. We see that a company is most likely to turn to its existing advisers' firm, particularly where it is a multidisciplinary practice, for assistance in times of distress. If the firm has registered restructuring advisers, we do not see why they could not take the appointment.

The restructuring adviser is engaged by the company to act for the company. This is different to the fiduciary role taken by a registered liquidator in a liquidation or voluntary administration where they are acting for all of the creditors and have strict independence requirements.

The independence requirements in the ARITA Code of Professional Practice, for example, do not apply to receiverships, as this is a contractual appointment between the secured creditor and the receiver. We would not envisage that they would extend to a restructuring adviser.

We do however agree that the restructuring adviser must not be an officer of the company or related entity, or a relative of an officer of the company or related entity. We see that such roles and relationships would create an inherent conflict with the duty to the company.

Unregulated insolvency advisers (pre-insolvency advisers)

In recent years there has been a proliferation of unregulated insolvency advisers (also called pre-insolvency advisers). These businesses undertake prominent advertising (radio, online, billboard, etc.) and claim to offer advice to directors on how to protect themselves in an insolvency. These advisers are not registered liquidators and are often not members of any professional body or even qualified as accountants or lawyers.

Many of these advisers give advice to directors of distressed businesses to avoid their legal obligations coming into insolvency, providing guidance that includes methods of asset stripping, destruction of books and records or advice on how to reduce the extent of investigations any future liquidator may be able to undertake. These unregulated advisers undermine the integrity of the insolvency regime.

ARITA is concerned that the creation of the role of 'restructuring adviser' will attract the interest of this group. If suitable regulation, registration, qualification and oversight is not placed around the role, the safe harbour provisions are likely to rapidly become subject to abuse. We note that the Law Council's submission also supports this view.

Further, to build a better culture of business restructuring in Australia, ARITA is strongly of the view that more needs to be done to outlaw unregulated insolvency advisers and to actively prosecute directors who follow their advice.

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Viability

ARITA believes that viability, or potential viability, is a different measure than solvency and a test for viability by the restructuring adviser should not be dependent on solvency.

ARITA's response to the Draft Productivity Commission Report into Business Set-up, Transfer and Closure of May 2015 noted that ARITA believes that, like insolvency, there are a number of factors which must be considered when considering viability.[15] These would include, but not be limited to:

- that there is a business to rescue or restructure as a going concern
- that the business is sustainable for its purpose
- that it has current and/or future profitability, and
- has access to future capital requirements.

A once-off event may make a viable business insolvent, or different business units within one company may be viable despite an overall insolvent position, or a business may be viable if operated by an owner with the necessary capital to maintain/inject into the business.

The factors that should be taken into account when considering viability are extensive and may be unique to the specific circumstances. An appropriately qualified and experienced restructuring adviser should be able to use their discretion to determined viability, however it would be reasonable to expect that some guidance was provided.

Obligations and protections

ARITA agrees with the following obligations and protections suggested in the Proposals Paper, that the adviser be:

- appointed by the company, not the directors, and thus owe any duties to the company
- required to exercise their powers and duties in good faith in the best interests of the company
- not be civilly liable to third parties for an erroneous opinion provided that it was honestly and reasonably held
- unable to be appointed in any subsequent insolvency of the company (or any company which bought the original company's business) without the leave of the Court, and
- specifically carved out of the expanded definition of director contained in the Corporations Act.

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15 Being submission DR 53 referred to at 14.1 of the Productivity Commission Report 75.

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We do not believe that it would be appropriate for a restructuring adviser to have a specific obligation to inform ASIC of any misconduct they identify. We believe that any such obligation would be a deterrent to the engagement of restructuring advisers and not encourage the directors to seek early advice.

In addition to the above, we note that International Ethics Standards Board for Accountants (IESBA) is currently working with the Australian Accounting Professional and Ethical Standards Board (APESB) to implement a requirement for accountants to refer breaches of the law, subject to certain safeguards, to relevant authorities. A restructuring adviser, if covered by the Accounting Professional and Ethical Standards, would be subject to this obligation without having to impose a specific obligation.

ARITA supports the proposal in McGrathNicol's submission that payments made to restructuring advisers (or security taken to for such payments) should not be capable of claw back under the unfair preference regime in section 588FA of the Corporations Act. We believe that is important that such protection should not extend to protection for uncommercial transactions.

2.2.2 Other features of safe harbour

We highlight that any law reform needs to offer protection from any unintended consequences in relation to a breach of directors' duties, such as those imposed by sections 180 - 184 of the Corporations Act, by virtue of the directors' valid reliance on the safe harbour defence and attempts at restructuring. We refer to the submissions of the Law Council of Australia to the Productivity Commission's Inquiry into Business Set-up, Transfer and Closure which addresses the issues that may arise from the court judgments in The Bell Group.[16]

We agree with the Law Council that any safe harbour provision needs to be carefully drafted.

We agree that any requirement to inform ASIC or the ASX (beyond the existing continuous disclosure requirements) could undermine the ability of the director to explore the restructuring or turnaround of the company outside of a formal appointment. Any public disclosure of financial distress may lead to the same (or more) issues than are currently experienced when appointing a voluntary administrator.

In particular, creditors would not have the same guarantee for payment of debts incurred by the company that they have in a voluntary administration (where the administrator is personally liable for payment – s 443A, Corporations Act*)* and they may be reluctant to continue to deal with the company. They may also more forcefully attempt to recover any debts owed.

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16 *Westpac Banking Corporation v the Bell Group Ltd (in liq)* (No 3) [2012] WASCA 157; see footnote 4. Submissions 14 and 36

2.2.3 Where safe harbour is not available

ARITA agrees with the proposed circumstances where safe harbour would not be available and supports any limits which encourage directors and the company to comply with their duties and obligations. We also support any limits which discourage the inappropriate dealing with assets, particularly unlawful phoenixing of businesses without true value being made available to creditors.

However, we are not confident that ASIC has sufficient resources, time or focus to undertake this role unless a straight forward criterion for ineligibility is set that does not require discretion in any determination by ASIC. We instead prefer that this is an issue determined by the Court.

We also have concerns about safe harbour not being available where significant employee entitlements that accrue during the safe harbour period are not paid. We note that there is no requirement for an employer to pay accrued employee entitlements, unless for example the employee requests to take leave. Those entitlements accrue until such time as the employee wishes to use them, or their employment is terminated – they are not moneys that the company can pay as they accrue.

If the restructuring were to be unsuccessful, and liquidation were to occur, all employees would generally be terminated and accrued entitlements would become due, but they are not due until that time.

We refer you further to our discussion at 4.2 regarding the incurring of debts for the purposes of insolvent trading actions.

2.3 Safe Harbour Model B

Recommendation 2.3: ARITA supports the safe harbour defence proposed in Model A and does not support the carve out proposed in Model B

Model B from the Proposals Paper

Section 588[G][17] does not apply:

(a) if the debt was incurred as part of reasonable steps to maintain or return the company to solvency within a reasonable period of time, and

(b) the person held the honest and reasonable belief that incurring the debt was in the best interests of the company and its creditors as a whole, and

(c) incurring the debt does not materially increase the risk of serious loss to creditors.

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[17] We note that the reference in Model B in the Proposals Paper was simply to s588 rather than s588G. We believe that this was an oversight and have corrected the reference in our submission.

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As noted above, ARITA supports the safe harbour defence proposed in Model A and does not support the carve out proposed in Model B.

ARITA has also consulted widely with other relevant professional bodies in preparing our submission and we note that a number of those tend to favour Model B or hybrids thereof, recognising that it is, potentially, more supportive of directors. We believe that, for example, Law Council and Australian Institute of Company Directors are of this view.

While we are respectful of their position, as ARITA represents those most likely to be undertaking the work of restructuring advisers and, indeed, as those who will be required to manage a business should it actually move into a formal appointment, we believe Model A provides a solution that better balances creditors' reasonable rights and opportunities for proper investigation of errant directors with greater scope for responsible business risk taking, innovation and entrepreneurialism and, most importantly, to save otherwise viable businesses.

From our considered viewpoint, a hybrid Model B is workable and would be acceptable to ARITA, however, Model A delivers a better public policy balance.

We comment on what amendments we would suggest for Model B below.

We observe that the burden of proof already lies with the liquidator to prove insolvent trading. Once proved, the burden of proof to resist a claim should rest with the director. It does not seem reasonable to require a liquidator to establish that the company traded while insolvent and then also establish that the director had breached a limb of the carve out.

Amendments to Model B

We do not agree that directors should have the protection from insolvent trading unless they engage a suitably qualified restructuring adviser. We strongly believe that without a statutory requirement to engage such a regulated professional the provision would be open to abuse. If the government chooses to proceed with Model B, we recommend that the same requirements for a restructuring adviser that are proposed in Model A, including our comments at 2.2.1 above, are incorporated into Model B.

Noting that the terms are also applicable to Model A, we support the inclusion of the indicia of 'reasonable steps' and 'reasonable time'. However, we are of the view that to ensure certainty these should properly appear in the legislation or regulations, even if otherwise explained in the Explanatory Memorandum which accompanies any legislation.

We are of the view that the following commentary previously discussed in relation to Model A should equally apply to Model B:

- protection against unintended consequences discussed at 2.2.2 in relation to a breach of directors' duties, such as those imposed by sections 180 - 184 of the Corporations Act, by virtue of the directors' valid reliance on the safe harbour defence and attempts at restructuring
- no mandatory requirement to disclose the appointment of a restructuring adviser discussed at 2.2.2, and

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- any restrictions on the availability of safe harbour discussed above at 2.2.3.

3 Ipso Facto

3.1 Background

ARITA agrees that any term of a contract or agreement which terminates or amends that or any other contract or agreement (or any term of any contract or agreement), by reason only that an 'insolvency event' has occurred should be void, subject to necessary exclusions.

3.2 The ipso facto model

Recommendation 3.2: ARITA supports the implementation of a limitation of the operation of ipso facto clauses.

We believe that a provision as such as Proposal 3.2 would extend to other instances, such as the acceleration of payments or the imposition of new arrangements for payment, or a requirement to provide additional security for payment.

In relation to 3.2b, we query as to what circumstance the retrospective operation is proposed to apply. We would support retrospective operation if it were to apply to ipso facto clauses in existing contracts or agreements in relation to new insolvency administrations which begin after the commencement of the change in the law. However, we would not support retrospective operation to insolvency administrations which began prior to the commencement of any legislation.

ARITA has concerns regarding the insolvency events included in the ipso facto proposal and suggests that:

- The list should be expanded to include liquidations (including provisional liquidation) as many liquidations have businesses which require this protection, consistent with the obligation of the liquidator to carry on the business of the company with a view to its sale: s 477(1)(a) of the Corporations Act.
- The application to receivers and controllers should be limited to managing controllers over the whole or substantially the whole of the company's assets, where a business is being managed, and not to appointments simply involving the sale of an asset.
- A company entering a Deed of Company Arrangement should be removed from the list as any issues regarding ongoing contracts should be resolved during the voluntary administration period and any moratorium should not be extended to a period when an independent external administrator is not in control of the company.

  We further note that the Deed Administrator generally has no liability for debts incurred during the Deed and thus the counterparties to the contracts do not have any protection regarding payment. However, we instead say that the prior insolvency event should not be able to be relied on as a grounds for termination or alteration of a contract subsequent to the conclusion of a formal appointment. The counterparty would instead have to rely on another ground if they wish to take action in respect of the contract.

In addition to the ipso facto proposal, we also support the introduction of a specific provision enabling a Scheme of Arrangement, subject to court approval, to have a stand-alone moratorium against creditor claims.

We note however, that this should be integrated with consideration of issues such as whether a registered insolvency practitioner is appointed and liability for amounts that become payable during the moratorium period. Without the introduction of a moratorium against creditor claims it would still be necessary to appoint an external administrator prior to a Scheme of Arrangement to provide such protection.[18]

3.2.1 Anti-avoidance

In addition to the anti-avoidance measures detailed in the Proposal Paper, ARITA suggests including a statutory provision enabling an external administrator to apply to the court for an order restricting the termination of a contract where they believe a supplier is undermining or avoiding the intent of the proposed ipso facto restriction and the termination of the contract is not in the best interests of the creditors of the company as a whole.

Any such measure should include protection where contracts contain ‘termination for convenience’ clauses which may be relied upon purely to avoid the operation of the ipso facto provisions. ARITA understands that such clauses are common in mining contracts and are effectively open termination clauses which do not require an event or circumstance to occur to allow termination.

With the introduction of safe harbour and the appointment of a restructuring adviser, we see that this is likely to be incorporated into contracts as an event of default. Therefore, we agree with Henry Davis York’s submission that a counterparty to a contract should be prohibited from retrospectively relying on the appointment of a restructuring adviser as a termination event, once a formal insolvency regime has commenced or in the case of a scheme of arrangement, an application has been filed with the court.

3.2.2 Exclusions

ARITA recognises, and agrees with, the need to specifically exclude certain ‘prescribed financial contracts’ from the operation of the ipso facto proposal.

We are not subject matter experts in relation to such contracts and are unable to provide specific comment on what contracts or classes of contracts should be specifically included. However, we comment that we believe that any ipso facto restriction should not prevent a

[18] This recommendation is in accordance with ARITA’s Policy Position Paper of February 2015 and recommendation 14.6 of the Productivity Commission Report 75.

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secured creditor from taking advantage of their right to appoint a controller if currently allowed to do so under the law (for example in the decision period in a voluntary administration under section 441A).

We suggest that any exclusions appear in the regulations, or similar, so that there is flexibility to amend this list as required.

3.2.3 Appeal

In addition to the power to apply to the court regarding anti-avoidance provisions, ARITA agree that affected counterparties should have a similar power to apply to the court to appeal against the operation of the ipso facto restriction. We agree with the Law Council that the appeal should be limited to the operation of the ipso facto clause and not the terms of the contract generally.

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4 Other issues

In addition to the specific matters raised in the Proposals Paper, ARITA also notes the following matters which we believe are important factors to be considered in implementation of the proposed reforms.

4.1 Productivity Commission recommendations

The Productivity Commission's report on the Inquiry into Business Setup, Transfer and Closure made a number of interconnected recommendations from ARITA's policies that still need to be addressed to create a true business rescue culture in Australia.

This table summarises the proposals recommended in the Productivities Commission's Report and the current status of the recommendations.

Productivity Commission 2015 proposals	Status
Safe harbour	Announced
Ipso facto	Announced
Streamlined SME liquidations	Awaited
Public interest administration fund	Awaited
Pre-positioned sales	Awaited
Voluntary Administration – one month for a company to show its viability	Awaited
Scheme of arrangement moratorium	Awaited
Receiver's duty to unsecured creditors	Awaited
Review of the Fair Entitlements Guarantee (FEG)	Awaited
Director identity number	Awaited
One-year bankruptcy	Announced
Bankruptcy contributions to continue after bankruptcy	Proposed

ARITA awaits the Government's response to the Report and again highlights the interdependence of many of these proposed reforms.

4.2 Underlying obligations in s 588G

We believe that consideration should be given to streamlining or easing the burden of proof upon a liquidator for a s 588G insolvent trading action where the safe harbour defence is not available. That is, where the requirements of safe harbour protection are not met, it should be less onerous than it is currently for a liquidator to take action for insolvent trading. This might be achieved by the following:

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- Streamlining or easing the burden of satisfying the existing elements of a claim under s 588G, for example, as to proof of insolvency and reasonable grounds to suspect insolvency.
- Deeming certain obligations and debts which accrue during (or are attributable to) the safe harbour period (but which may not be 'incurred' during the safe harbour period) to be 'debts incurred' for the purposes of s 588G.

  One example might be employee entitlements which arise under contracts entered into prior to the safe harbour period. Certain employee entitlements may accrue and be partly attributable to a period of service which spans the safe harbour period, but not be 'incurred' or payable during that period.

  We note that s 588G(1A) already deems certain actions of a company to be 'debts incurred' for the purposes of s 588G. This provision might be expanded to address moral hazard concerns relating to the Fair Entitlements Guarantee or to 'catch' other obligations which a company incurs or undertakes during the safe harbour period but which may not fall within the concept of a 'debt' incurred (such as retailer gift cards).
- A general expansion of the reach of s 588G to a class or category of obligations beyond that of 'debts' incurred (though we believe that directors should not be held responsible for failing to prevent all provable claims which might arise during the safe harbour period).

4.3 Australian Financial Services Licence

The advice provided by a restructuring adviser may fall within the current requirements for holding an Australian Financial Services Licence (AFSL). Registered liquidators are currently not required to hold an AFSL for undertaking formal insolvency administrations. We believe that a specific exemption should also apply to restructuring advisers on the basis that if they were a sub-class of registered liquidator, they would already be subject to regulation and oversight by ASIC.

We have also raised this issue with ASIC.