

21 April 2017

Mr James Mason
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: insolvency@treasury.gov.au

Dear Mr Mason

Safe harbour for insolvent trading and stay on enforcing rights Draft bills and explanatory memorandum

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility to develop and implement governance frameworks in public listed, unlisted and private companies, as well as in the not-for-profit (NFP) and public sectors. As such, they provide advice to directors on a range of matters. They are involved in corporate administration and compliance with the Corporations Act (the Act) and we have drawn on their expertise in this submission.

Governance Institute lodged a submission on the Improving bankruptcy and insolvency laws proposal paper on 27 May 2016.

We welcome the opportunity to comment on the draft bills and explanatory memorandum providing for Safe harbour for insolvent trading and stay on enforcing rights.

1 Safe harbour for insolvent trading

Support for Model B

Governance Institute is on the public record as noting that the Act should be amended to include provision for a 'safe harbour' to allow companies and their directors to explore restructuring options, in good faith and acting reasonably and responsibly, without liability for insolvent trading. We are of the view that providing the opportunity for directors acting in good faith to seek and rely on professional advice in relation to a work-out will generate better outcomes for all stakeholders, including creditors who are more likely to be paid as the business is returned to viability.

Governance Institute is pleased to note that the Government has chosen to adopt Model B as the preferred model over Model A. We support the introduction of Model B as the safe harbour for directors within which they may attempt to return the company to profitability. We commend the adoption of the words 'better outcome for the company' as opposed to the previous reference to returning the company to solvency as we consider that in some instances the best outcome for the company and its creditors will be a sale of business assets followed by a winding up of the company.

As noted in our previous submission, we **recommend** that the reference to 'debt' in section 588GA (1) (b) of the draft amendments be replaced with the word 'debts'. This will ensure that the focus of the provisions will be on debts as a whole, rather than on a 'debt by debt' analysis. Governance Institute considers that it would be impracticable to require the directors to satisfy themselves that each and every debt incurred is essential to achieve a better outcome for the company and its creditors. Such a requirement would serve to further distract the board and management into undertaking a forensic analysis of every potential debt while they should be focused on managing the restructuring effort.

Governance Institute supports the inclusion of section 588GA (2) of the draft amendments which provides legislative guidance to enable directors and advisors to work out whether a course of action is reasonably likely to lead to a better outcome for the company and its creditors.

We also suggest that it is worth considering if a statutory definition of 'debt' or 'debt incurred' should be included in the Corporations Act.

2 Ipso facto clauses

Governance Institute supports the stay provisions in part 2 of the Exposure Draft.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Steve Burrell', written in a cursive style.

Steve Burrell
Chief Executive