

Law Council of Australia

Submission in Response to Productivity Commission Issues Paper - Business Set-up, Transfer and Closure

18 March 2015

1. Introduction

- 1 This Submission is made by the Insolvency & Reconstruction Law Committee of the Business Law Section of the Law Council of Australia (“the **Committee**”). It is made by way of supplementary submission to that of the Business Law Section (**BLS**) of the Law Council of Australia dated 20 February 2015.
- 2 Contact details for persons able to speak to the Submission appear in Section 4 below.

2. Summary

- 3 The Committee continues to support the concept of a “safe harbour” for directors from which they might seek expert assistance to facilitate restructuring of businesses in financial difficulties. It endorses the submission contained in the submission dated 20 February 2015.
- 4 The nature and extent of any safe harbour will require careful consideration to ensure an appropriate balance amongst stake holders is achieved. The Committee would welcome the opportunity to be involved in further consideration of the appropriate scope and design of such proposal.

3. Submission

- 5 In an Issues Paper dated December 2014 the Productivity Commission has been requested to inquire into barriers to business entries and exits, and to identify options for reducing such barriers where appropriate. Under the heading “Improving Insolvency Arrangements” the question has been raised “*Is the use of safe harbour provisions for firms seeking to restructure a feasible alternative?*”
- 6 In March 2010 the Committee, in conjunction with what was then known as the Insolvency Practitioners Association of Australia (now Australian Restructuring, Insolvency and Turnaround Association (ARITA)) and the Turnaround Management Association Australia (TMA) made a joint submission to the Treasury titled “A Safe Harbour for Reorganisation Attempts Outside of External Administration” (**Joint Submission**).
- 7 A copy of the Joint Submission is enclosed.

- 8 The Committee remains of the view that the policy rationale for a safe harbour mechanism, as set out in the Joint Submission, remains valid. It continues to support the introduction of such a mechanism in accordance with the Joint Submission.
- 9 Any development of a safe harbour mechanism may need to be considered in the context of a policy response to two other matters that continue to be subject of debate on pre-insolvency issues, namely:
- Whether there is a need to curtail/regulate (and if so to what extent) ipso facto clauses¹; and
 - Whether there is a need to regulate (and if so to what extent) pre-packaged formal insolvency arrangements.
- 10 The Committee would welcome the opportunity to provide further submissions on the policy rationale for the implementation of a safe harbour mechanism together with its scope and design.

4. Contact details

- 11 Questions regarding this Submission can be addressed to the following:

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¹ The reference to an *ipso facto* clause is to a contractual provision that provides for the termination of continuing contractual obligations upon a defined event (such as insolvency) or the acceleration of the time for payment of an obligation upon such event.