24 July 2026

Reducing barriers to business dynamism
Productivity Commission
LB2 Collins Street
East Melbourne VIC 8003

**By email: BusinessDynamismInquiry@pc.gov.au**

Dear Commissioners,

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- **Submission to the Productivity Commission**
- **Reducing barriers to business dynamism in Australia**
- **Turnaround Management Association Australia**

## 1 Introduction

The Turnaround Management Association Australia Limited (**TMA Australia**) welcomes the opportunity to make a submission to the Productivity Commission's inquiry into reducing barriers to business dynamism in Australia.

TMA Australia is Australia's premier membership association for professionals in turnaround, restructuring and corporate renewal. It has a diverse membership including insolvency practitioners, lawyers, accountants, bankers/financiers, private capital, directors, CEOs, management consultants and restructuring specialists.

TMA Australia's emphasis is on early intervention and the preservation of viable enterprises – which is key to business dynamism.

## 2 Executive Summary

The Commission has identified the design and operation of Australia's insolvency system, the balance struck by insolvent trading and safe harbour laws, regulatory and administrative burdens, and the role of the Australian Taxation Office (**ATO**) as a major creditor as matters within the inquiry's scope.

An effective restructuring and insolvency system is an essential component of a dynamic economy. It should:

- encourage directors to recognise and address financial distress early;
- facilitate the preservation of viable businesses, productive capacity, employment and enterprise value;
- allow capital, labour and other resources to be redeployed promptly where a business is no longer viable;
- provide predictable and fair outcomes for creditors and other stakeholders;
- deter misconduct, illegal phoenix activity and deliberate non-compliance; and
- achieve those objectives at a cost proportionate to the size and complexity of the business concerned.

Australia's restructuring framework for larger and more complex businesses is not fundamentally broken. Schemes of arrangement, voluntary administration and deeds of company arrangement, informal workouts supported by the insolvent trading safe harbour, receivership and distressed mergers and acquisitions can, and do, produce sophisticated and value-preserving outcomes. Those processes should be improved through targeted reforms, but they should not be destabilised or deprived of safeguards that are appropriate in large and contested matters.

TMA Australia's central submission is that **proportionality and early intervention should be the organising principles for reform**. TMA Australia recommends that the Australian Government:

(a) **Promote earlier intervention** through safe harbour reform, director education and referral pathways.

(b) **Reform the ATO's role in restructuring**, including model-creditor standards and the interaction of director penalty, garnishee and statutory indemnity regimes with genuine turnaround efforts.

(c) **Improve rescue tools for larger and complex business,** including by implementing targeted reforms to schemes of arrangement and consult on a formal rescue finance regime.

(d) **Facilitate distressed business transfers while preserving integrity**, including expedited regulatory approvals and clear anti-phoenix guidance.

(e) **Create a proportionate framework for SMEs and owner-managed businesses**, including better coordination of corporate and personal distress.

(f) **Improve system data, public-interest enforcement and legislative coherence,** including a comprehensive review.

This submission builds on and should be read with TMA Australia's submissions concerning schemes of arrangement and safe harbour and the broader recommendations subsequently made by the Parliamentary Joint Committee on Corporations and Financial Services.

## 3 Business dynamism and TMA Australia's 2026 member survey

### *3.1 Methodology*

TMA Australia conducted an indicative member survey concerning business dynamism and Australia's restructuring and insolvency system (**2026 Survey**). Up to 21 respondents participated, with 20 respondents completing the demographic questions and most substantive questions. These respondents represent the insolvency and restructuring practices of many of Australia's largest insolvency firms, accounting firms and legal firms.

### *3.2 Principal themes*

The survey produced five principal themes.

(a) First, early intervention is the most important requirement. This is particularly linked to safe harbour utilisation.

(b) Second, the framework generally works more effectively for larger and sufficiently funded matters than for small or low-asset matters, but the insolvency regime needs to be easier to use.

(c) Third, rescue finance, regulatory approvals and the ATO materially affect whether value can be preserved.

(d) Fourth, cost and procedural complexity disproportionately inhibit SME rescue.

(e) Fifth, personal liability and public enforcement settings can work against genuine rescue.

We revisit each of these themes in the details of our submission set out below.

### *3.3 Business dynamism and Australia's insolvency system*

Business dynamism is not measured only by the number of new businesses entering the market. It also depends on whether viable businesses can adapt, restructure, transfer ownership and attract new capital, and whether non-viable businesses can exit efficiently without unnecessarily destroying productive assets, knowledge, employment and customer or supplier relationships.

The restructuring system should therefore distinguish as early as possible between:

(a) a viable enterprise with a financial, capital-structure, ownership, operational or temporary liquidity problem; and

(b) a business that is no longer economically viable and whose resources should be redeployed.

Delay, uncertainty and excessive cost are harmful in either case. They can destroy the value of a viable business before a restructuring is implemented, while allowing a non-viable business to continue accumulating losses. TMA Australia's earlier safe harbour submission drew on 55 case studies supplied by 20 stakeholders across 10 sectors. Almost all of the relevant businesses survived in substantially intact form, more than 85% of outcomes were implemented through informal arrangements and only a limited number required formal procedures. TMA Australia acknowledged the adviser-sourced and qualitative nature of that sample, but it demonstrated how early planning can preserve value and how safe harbour and formal restructuring procedures can operate as complementary tools.

The 2026 Survey is consistent with that experience. Informal workouts, safe harbour, schemes, distressed M&A and pre-positioned restructurings were all rated materially more effective at preserving value.

## 4 Early intervention - Safe harbour

### *4.1 Retain and strengthen safe harbour*

Safe harbour is an important early-intervention mechanism. It reduces the risk that directors will place a company into formal insolvency prematurely merely to manage personal insolvent-trading exposure.

TMA Australia's 2026 Survey supports retaining and improving the regime:

(a) approximately 63% rated safe harbour effective or very effective when asked directly about its operation;

(b) approximately 74% rated safe harbour engagements effective or very effective as a pathway for preserving value;

(c) a majority (65%) said that they had rarely or not seen safe harbour being misused or leading to poorer outcomes, whereas 35% had said that they had sometimes seen it being misused or leading to poorer outcomes;

(d) no respondent said misuse occurred often; and

(e) improving safe harbour and reforming insolvent trading were among the leading reforms identified.

TMA Australia's earlier case studies similarly showed that safe harbour can provide directors and advisers with time to assess the company's position, stabilise operations, negotiate with lenders and creditors, obtain capital, sell assets and prepare a formal process where consensual implementation is not possible.

Whilst there are some members concerned about isolated reports of misuse, it remains a highly used regime, particularly in larger businesses.

### *4.2 The principal problem is late engagement*

The 2026 Survey's most important safe harbour finding is that the principal barrier is not lender resistance or creditor hostility. It is that directors seek advice too late.  Although, further work is required to consider the reasons directors seek advice late (which may partly be due to perceived issues with lenders and creditors).

No respondent said directors typically sought advice early, before liquidity distress became acute. 30% said advice was generally sought once covenant breaches or tax or payment arrears emerged, and 45% said timing varied significantly.

TMA Australia considers that implementing the Safe Harbour Review recommendations will substantially assist in promoting earlier engagement (in addition to the other reforms set out below).

4.3 *Implement the Safe Harbour Review recommendations*

The recommendations of the independent Safe Harbour Review should be implemented. This position is consistent with the Parliamentary Joint Committee recommendations.

ASIC's revised Regulatory Guide 217, issued in December 2024, is a useful step in improving guidance, but regulatory guidance cannot substitute for necessary legislative amendment.

4.4 *Improve director education and referral pathways*

The 2026 Survey indicates that legal reform alone is unlikely to materially improve early engagement. Investment needs to be made in a coordinated early-intervention program, directed at directors, accountants, lenders and other advisers. ASIC's regulatory guide 217 has been a positive development, but clearly further work is required to assist boards in seeking advice early. TMA Australia will continue to work in this space, providing education opportunities for a broad range of advisers, investors and directors.

4.5 *Prevent safe harbour from becoming a contractual default trigger*

Increasingly, a company's financing and other commercial agreements may include review, default or enforcement rights triggered by the company or its directors invoking, considering or obtaining advice about safe harbour.

Such provisions undermine the policy of early intervention and deter directors from early engagement with safe harbour.

The Corporations Act should restrict enforcement of a contractual right arising solely because:

(a) directors are considering or relying on safe harbour;

(b) the company has appointed a turnaround or restructuring adviser;

(c) the board has commenced a restructuring review; or

(d) the company has confidentially approached stakeholders about a proposed restructuring.

The restriction should not affect rights arising from substantive events such as non-payment, breach of financial covenants, misrepresentation or deterioration in creditworthiness.

TMA Australia raised this issue in 2021, and the Safe Harbour Review also considered extending ipso facto principles or making safe-harbour-specific defaults unenforceable, while preserving substantive contractual defaults.

4.6 *Improve data without creating a public register*

Safe harbour is deliberately confidential. A public register would stigmatise companies, deter its use and potentially trigger loss of stakeholder confidence.

Better data can nevertheless be collected retrospectively and on an anonymised basis. A voluntary administrator or liquidator could be required to state in a confidential statistical return:

(a) whether the directors asserted that safe harbour applied;

(b) the approximate period concerned;

(c) the broad nature of the restructuring steps;

(d) whether the restructuring remained informal or led to a formal process; and

(e) whether the business continued, was sold or ceased.

ASIC should publish aggregated information without identifying individual companies.

*4.7 ATO Rights under 588FGA*

Section 588FGA of the Corporations Act sits uneasily with, and can materially undermine, the policy underpinning safe harbour. Although section 588GA of the Corporations Act protects a director from insolvent trading liability for debts incurred while pursuing a course reasonably likely to lead to a better outcome for the company, section 588FGA may nevertheless make that director personally liable to indemnify the ATO if specified tax or superannuation payments made during that period are later set aside as voidable transactions. The defences in section 588FGB are principally directed to an expectation of solvency or steps taken to prevent the payment—neither of which readily assists a director who, while properly relying on safe harbour, authorises payment to the ATO as part of an orderly restructuring. This creates a perverse incentive to defer payments to the ATO or appoint an external administrator prematurely, contrary to safe harbour's objective of encouraging responsible efforts to preserve enterprise value.

*4.8 Consider broader insolvent-trading reform through the comprehensive review*

TMA Australia has previously raised whether Australia should ultimately replace or supplement its insolvent-trading regime with a wrongful-trading or business-judgment-based model more directly focused on director conduct and avoidable loss.

That is a substantial policy question. It should be addressed through the comprehensive review and not through an isolated amendment that weakens safe harbour before a coherent replacement has been developed.

## 5 The role of the ATO

*5.1 The ATO is a systemically important restructuring stakeholder*

The ATO is a creditor of most companies and is often, in relation to SMEs particularly, the majority creditor by value. Its vote may therefore determine whether a restructuring plan is accepted. The ATO's current guidance acknowledges that its vote is often decisive. It states that the ATO will generally support a plan where it produces a higher payment within a reasonable period than winding up and does not raise public-interest concerns. It also invites early provision of draft plans and supporting information.

Separately, the ATO's director penalty, garnishee and statutory indemnity regimes can materially constrain corporate turnarounds. Director penalty notices expose directors personally for unpaid PAYG withholding, GST and superannuation guarantee liabilities, which may push boards towards an immediate formal appointment rather than allow time for a potentially value-preserving restructuring. Garnishee notices can divert bank balances and customer receivables directly to the ATO, removing liquidity needed to continue trading and implement a turnaround. Further, (as noted above in relation to safe harbour) section 588FGA of the *Corporations Act 2001* may require directors to indemnify the Commissioner where tax payments are later recovered as unfair preferences. Although these powers protect public revenue and deter the misuse of withheld amounts, their cumulative and sometimes abrupt operation gives the ATO leverage unavailable to ordinary unsecured creditors, can destabilise otherwise viable restructurings and may undermine safe-harbour incentives by increasing directors' personal exposure precisely when they are being encouraged to pursue a better outcome than immediate administration or liquidation.

The ATO must protect revenue and take firm action against fraud, deliberate non-compliance and illegal phoenix activity. At the same time, its voting, enforcement and payment-arrangement decisions can materially affect whether a viable business is rehabilitated or pushed into a value-destructive formal insolvency.

*5.2 2026 Survey findings concerning the ATO*

The survey results are mixed but material:

(a) 42% considered the ATO over-protected;

(b) 37% identified the position of the ATO or secured creditors as a barrier to rescue finance; and

(c) improving the ATO's conduct as creditor featured prominently in respondents' reform priorities.

The survey also demonstrates the significance of director penalty notices. 75% identified them as a personal-liability issue commonly affecting business restructuring.

5.3 *ATO as educator*

The ATO will often see tax arrears and payment distress before many other stakeholders. Accordingly, it can perform an important referral and education role - not to individual firms or practitioners, but rather as a general guide to the availability of restructuring advice, safe harbour, director penalty notices, payment arrangements, and small business restructuring.

The 2026 Survey's support for earlier referral pathways from accountants, lenders and the ATO indicates that members regard this as an important opportunity.

5.4 *TMA Australia recommendation*

TMA Australia supports clearer clarification of the priority and rights of the ATO, so that directors, companies and creditors alike can better understand their exposure to ATO debts and liabilities.

Government should review how director penalty notices, garnishee notices, security requirements, statutory demands and other enforcement measures interact with genuine restructuring efforts. The objective should not be a blanket moratorium on tax enforcement. Rather, it should seek to ensure that enforcement is coordinated, the likely effect on a company's value is considered, and where appropriate, sufficient runway is provided for the company's turnaround or restructure.

The Parliamentary Joint Committee recommended that the ATO consult on, adopt and publish model-creditor guidelines consistent with its model-litigant obligations. TMA Australia endorses this recommendation.

For the avoidance of doubt, nothing in this submission supports indefinite tax forbearance, concealment of liabilities, or continued operations of businesses that are not viable or directors who are serially non-compliant.

## 6 Rescue tools: Schemes of Arrangement and rescue finance

6.1 *Schemes of Arrangement*

(a) *Preserve what works*

Schemes of arrangement are an important part of Australia's large-company restructuring architecture. They are commonly used to implement financial restructurings after extensive negotiations between a company and its financial creditors.

TMA Australia's 2021 submission described schemes as familiar, predictable and fair, and as capable of restructuring financial liabilities without unnecessarily disrupting the company's underlying business, employees, customers and suppliers. TMA Australia cautioned against assuming that the relatively limited number of schemes demonstrated suppressed demand or a defect in the process.

The 2026 Survey supports that assessment, with schemes being among the highest-rated restructuring pathways.

The court-supervised nature of a scheme is a strength. Court oversight, disclosure, class voting and the court's fairness jurisdiction are appropriate where a restructuring affects substantial value and diverse stakeholder interests.

Reform should therefore improve the flexibility, speed and accessibility of schemes without turning them into a general external administration process.

(b) *Introduce cross-class cram-down*

Australia should introduce a cross-class cram-down mechanism based broadly on the United Kingdom restructuring plan framework.

A court should be permitted to approve a restructuring notwithstanding the dissent of one or more classes where appropriate safeguards are satisfied, including that:

(i) members of the dissenting class would be no worse off than under the relevant alternative;

(ii) at least one class with a genuine economic interest in the company has approved the proposal;

(iii) the proposal does not unfairly discriminate between stakeholders; and

(iv) the court is satisfied that the proposal is fair.

Cross-class cram-down would reduce the ability of a strategically constituted or out-of-the-money class to prevent an otherwise value-maximising restructuring. It would also improve Australia's competitiveness as a restructuring jurisdiction.

TMA Australia's 2021 submission recommended an Australian cross-class cram-down modelled on Part 26A of the *UK Companies Act*, including the ability to bind dissenting creditor and shareholder classes.

*(c) Remove the headcount test*

The requirement for approval by a majority in number of creditors present and voting should be removed, while retaining the requirement, subject to the proposed cross-class cram-down mechanism, for approval by creditors representing at least 75% in value in each relevant class.

The headcount test can produce arbitrary results, particularly where debt is widely held, traded or divided among multiple entities. It can give creditors with little economic exposure disproportionate influence over the outcome of a restructuring.

The value test, together with the court's fairness jurisdiction and the proposed cross-class safeguards, provides a more meaningful measure of support. TMA Australia supported removal of the headcount test in its 2021 submission.

*(d) Resolve class and jurisdictional issues earlier*

Scheme parties should be encouraged or required to identify class-composition, jurisdictional and other threshold issues before the first court hearing.

Australia should adopt a practice statement or equivalent procedural framework under which:

(i) creditors receive early notice of the proposed classes and the basis on which they have been constituted;

(ii) objecting creditors must identify class or jurisdictional objections promptly;

(iii) the court can make binding class determinations at the first hearing; and

(iv) issues determined at the first hearing are not reopened at the second hearing without a material change in circumstances or another exceptional reason.

This would reduce the risk that parties incur the cost of meetings and a second hearing only to discover that the scheme is affected by a threshold defect.

*(e) Streamline ASIC review*

The ordinary period for ASIC's review of scheme materials should be reduced to one week, with an ability for ASIC to require additional time where a scheme raises genuine complexity, disclosure or integrity concerns.

The process should also establish:

(i) a standard electronic filing package;

(ii) clear expectations concerning the information to be provided;

(iii) early identification of regulatory concerns;

(iv) a designated ASIC contact for urgent restructuring matters; and

(v) service standards for routine and urgent schemes.

TMA Australia recommended a one-week ordinary review period in its earlier submission.

*(f) Additional targeted reforms*

Reforms should also:

(i) permit foreign companies with a sufficient connection to Australia to use the Australian scheme jurisdiction;

(ii) establish a public, searchable ASIC repository of scheme explanatory statements, orders and implementation documents;

(iii) facilitate electronic meetings, voting and court filing;

(iv) simplify procedural requirements to remove duplication of protections already provided by the court and ASIC; and

(v) ensure that schemes and restructuring plans can operate effectively in respect of corporate groups and cross-border debt structures.

TMA Australia's 2021 submission supported extending the scheme jurisdiction to foreign companies with a sufficient Australian connection.

*(g) Queries in relation to automatic moratoriums for schemes*

TMA Australia's earlier submission explained that schemes generally proceed without a broad statutory moratorium and that introducing one could alarm trade creditors, disrupt ordinary operations and effectively create a new debtor-in-possession regime, without addressing the associated governance, funding, disclosure and creditor-protection questions.

That does not preclude consideration of a separate, optional and court-supervised pre-insolvency standstill. The 2026 Survey shows some support for moratorium or standstill options before formal insolvency. However, that question should be addressed as part of a coherent review of pre-insolvency restructuring, rescue finance and creditor safeguards, rather than by attaching a broad moratorium to every scheme.

*6.2 Develop a formal rescue-finance framework*

Rescue finance is not wholly unavailable in Australia. In the 2026 Survey, 45% considered it available or very available, 45% were neutral and 10% considered it unavailable. The problem is therefore not simply the absence of capital. It is the risk, price, priority and execution environment in which that capital must be deployed.

Approximately 68% agreed or strongly agreed that a formal priority regime for rescue finance would improve restructuring outcomes.

TMA Australia advocates for consideration of a formal rescue-finance regime that could permit priority for qualifying new money where:

(a) the finance is necessary to preserve or enhance value;

(b) the company has a credible restructuring plan;

(c) existing secured creditors consent or are adequately protected;

(d) material conflicts and related-party interests are disclosed;

(e) the terms are independently assessed;

(f) the priority is approved by a court, creditors or an independent practitioner; and

(g) the finance is subject to ongoing reporting and use restrictions.

A formal rescue financing regime (particularly that allowed priming of existing debt in limited, supervised scenarios) would also encourage complex cross border restructuring to be undertaken in Australia (rather than, for example, the United States).

## 7 Proportional framework for SMEs

*7.1 Different problems require different levels of process*

The procedural and professional costs associated with court supervision, disclosure, creditor classification, valuation evidence, contested hearings and specialist advice may be justified in a large restructuring involving substantial enterprise value and competing stakeholder interests. However, the same expenses can make early restructuring inaccessible for a small business.

The 2026 Survey strongly supports treating cost as a central reform issue. To assist small business restructure, Australia should develop:

(a) a genuinely simple and inexpensive small-business restructuring mechanism;

(b) graduated requirements based on size, complexity and risk;

(c) expanded and streamlined low-asset liquidation procedures; and

(d) access to the full restructuring framework where circumstances warrant it.

*7.2 Build on the small business restructuring process*

ASIC's 2025 review provides evidence that the small business restructuring process can produce positive outcomes:

(a) 87% of plans sent to creditors during the review period were approved;

(b) 92% of the 1,260 finalised plans were fulfilled;

(c) approximately 93% of companies with fulfilled plans remained registered at the end of April 2025; and

(d) more than $101 million had been paid to unsecured creditors.

As ASIC cautioned, continued registration does not necessarily mean continued trading, and there is insufficient data at present to assess longer term viability.

The Government should improve the existing process rather than introduce another overlapping procedure. Some of the possible reforms are considered below.

*7.3 Establish a single small-business distress front door*

Small-business owners should not be expected to diagnose which statutory regime applies before obtaining meaningful assistance.

There is merit to a digital and advisory "front door" through which a small business can be triaged into one or more of the following:

(a) an informal workout;

(b) an ATO or other creditor payment arrangement;

(c) safe harbour advice;

(d) small business restructuring;

(e) voluntary administration;

(f) simplified or ordinary liquidation;

(g) personal insolvency advice for directors or guarantors; or

(h) referral for investigation where misconduct or phoenix activity is suspected.

The service should provide plain-language guidance, standard financial-information templates and referral to appropriately qualified advisers. It should build on existing services rather than create an entirely new bureaucracy.

This responds directly to the survey findings concerning late advice, director education and earlier referral pathways.

7.4 *Coordinate corporate and personal financial distress*

For many owner-managed businesses, the distinction between corporate and personal insolvency is artificial in practice. Business debts may be supported by:

(a) director guarantees;

(b) mortgages over the family home;

(c) director penalty notices;

(d) loans from directors or family members;

(e) trust and partnership structures;

(f) personal tax liabilities; and

(g) equipment or premises owned outside the trading company.

A corporate restructuring that leaves the proprietor facing immediate personal enforcement may not produce durable rehabilitation, and also increases the likelihood that proactive engagement on the corporate front will be delayed (as it may trigger personal liability).

The comprehensive review should examine coordinated treatment of corporate and personal financial distress for owner-managed enterprises. Relevant options include:

(a) aligned information requirements;

(b) aligned voting and proposal timetables;

(c) improved compromise options for business-related personal debts;

(d) coordinated treatment of personal guarantees;

(e) better ASIC and AFSA coordination; and

(f) a mechanism allowing related corporate and personal proposals to be considered together while remaining legally distinct.

7.5 *Reform simplified liquidation*

The simplified liquidation process should be reviewed alongside small business restructuring. It should be materially faster and less expensive than an ordinary liquidation, not merely an ordinary liquidation with a limited number of modified requirements.

Reform should consider:

(a) a short-form statutory report;

(b) risk-based investigation requirements;

(c) simplified creditor communications and approvals;

(d) streamlined disclaimer or transfer of low-value assets;

(e) standardised treatment of minor employee and tax claims;

(f) electronic proofs, voting and distributions; and

(g) automatic escalation to ordinary liquidation where complexity or suspected misconduct emerges.

7.6 *Publicly fund public-interest investigations*

Practitioners should not be expected to perform substantial unfunded work in assetless estates where the principal benefit is enforcement of the law or protection of the public.

An expanded Assetless Administration Fund or Public Interest Administration Fund should support:

(a) investigation of suspected illegal phoenix activity;

(b) preservation of books and digital records;

(c) examinations of directors and facilitators;

(d) recovery action with reasonable public-interest prospects;

(e) reporting and referrals to regulators; and

(f) urgent steps to protect assets.

The Parliamentary Joint Committee recommended review of the Assetless Administration Fund, consideration of a Public Interest Administration Fund and consideration of a public liquidator model.

Relatedly, Government should also consider an ASIC-led public liquidator or official receiver model, similar to that as exists in the United Kingdom. Such a public appointed liquidator could undertake no-funds liquidations and investigations to consider misconduct, phoenix activity and broader public interest concerns.

*7.7 Avoid rigid fee caps*

Transparency and cost discipline are important, but rigid statutory fee caps may discourage competent practitioners from accepting matters involving:

(a) poor or missing records;

(b) employee claims;

(c) tax disputes;

(d) trust assets;

(e) related-party transactions; or

(f) suspected misconduct.

TMA Australia considers a better approach is to standardised scope and fee disclosure, provide for indicative fee ranges and creditor approval where work is materially outside the scope. It could also include public reporting of median costs and outcomes and a simplified approach for routine work.

## 8 Facilitate distressed business transfers

*8.1 General aim*

A dynamic economy should permit viable businesses to transfer to new owners before value dissipates.

The 2026 Survey found that 55% of respondents considered it difficult to transfer or sell a distressed but viable business. The most significant barriers included lack of funding to trade on, insufficient time before appointment, loss of key employees, licensing or regulatory approvals, termination of contracts and reputational damage.

A number of those barriers could be addressed by safe harbour reform, rescue financing reform (see comments above) and clarification of the anti-phoenixing rules. Additionally, distressed M&A could be substantially assisted by streamlining regulatory approvals. In particular, if reviews could occur concurrently and with designated “distressed business” contacts with ACCC, FIRB and other relevant licensing authorities.

These measures should not weaken substantive competition, national-interest, prudential or licensing tests. Their purpose is to permit those tests to be applied within the compressed timetable of a distressed transaction.

*8.2 Improve the anti-phoenixing regime*

TMA Australia supports strong action against illegal phoenix activity. Reform must, however, distinguish deliberate creditor avoidance from legitimate business rescue and properly priced sales.

The 2026 Survey indicates uncertainty about whether the present regime strikes that balance, with 53% considering the laws had little practical impact.

The most commonly supported improvements were:

(a) more targeted enforcement — 42%;

(b) clearer guidance on legitimate restructures (including distressed business transfers) — 37%;

(c) stronger director identification and tracking — 37%;

(d) more funding for investigations — 37%;

(e) better regulator data sharing — 32%;

(f) improved remedies against facilitators — 32%; and

(g) better protection for good-faith restructures — 26%.

The emphasis should therefore be on intelligence, enforcement and clear guidance, rather than adding further broadly framed offences or transaction risks that increase the cost of legitimate rescue.

8.3 *ACCC*

Although the mergers framework is expressly excluded from the scope of the Commission's inquiry, the interaction between the ACCC's new merger regime and distressed-business transactions is highly relevant to business dynamism in Australia. The issue is important both practically and conceptually. From a practical perspective, the cost of mandatory notification and the time required for the ACCC's consideration can be fatal to a distressed business, where liquidity is limited, enterprise value is rapidly deteriorating and the opportunity to complete a transaction may be short-lived. From a policy perspective, there may also be tension between the objectives of the merger regime and those of Australia's restructuring laws. The ACCC's statutory focus is principally on preserving competition, whereas Part 5.3A of the Corporations Act seeks, where possible, to preserve the company's business or otherwise achieve a better outcome for creditors than an immediate winding up. In practice, that objective may also support the preservation of employment, supplier relationships, productive assets and economic activity. In some cases, these objectives may point in different directions—for example, where a sale to a competitor is the only transaction capable of preserving all or a substantial part of the business. The TMA therefore supports greater coordination between the administration regime and the application of the *Competition and Consumer Act 2010* (Cth), including an appropriately expedited and commercially realistic pathway for genuinely distressed transactions.

## 9 Regulatory complexity

### *9.1 Undertake a comprehensive independent review*

Australia's insolvency laws have developed through successive amendments responding to particular problems. The result is a fragmented system. TMA Australia's 2021 safe harbour submission identified multiple distress regimes with materially different rules and called for a holistic, Harmer-style review. The Parliamentary Joint Committee subsequently recommended a comprehensive and independent review encompassing both corporate and personal insolvency, beginning with the purposes and principles of insolvency law.

That review should be conducted by a multidisciplinary expert panel and should examine both policy objectives and legislative architecture.

The comprehensive review should map corporate and personal restructuring and insolvency pathways and identify opportunities to:

(a) adopt consistent definitions;

(b) harmonise commencement tests;

(c) standardise notices and creditor communications;

(d) coordinate moratoria and enforcement rules;

(e) reduce duplication in reporting;

(f) facilitate transition between informal restructuring, safe harbour, small business restructuring, voluntary administration and liquidation; and

(g) remove processes that do not perform a distinct economic function.

9.2 *Do not defer immediate reforms*

A comprehensive review should not become a reason to postpone reforms that are:

(a) well developed;

(b) supported by substantial prior consultation;

(c) capable of implementation without prejudging the wider review; and

(d) likely to produce immediate economic benefits.

The scheme reforms outlined above and implementation of the Safe Harbour Review recommendations fall into that category.

9.3 *Trust asset administrations*

As a separate structural concern, Australia's insolvency regimes do not easily co-exist with the Australia's rich trust usage (including bare trusts, discretionary trusts and unit trusts). Trusts are used regularly in private and SME structures, and are an integral part of Australia's business tapestry.

A clear statutory framework for administrations, liquidations and receiverships involving trust assets should be established. Reform should minimise the need for routine Court applications and confirm an insolvency practitioner's powers to control and realise trust assets. It should preserve appropriate priority for trust creditors and allow for reasonable remuneration for the relevant controllers of the trust property (and provide that the application of the proceeds of trust property to pay such remuneration is not a breach of trust purposes).

9.4 *Circulating assets issues*

The current statutory priority regime under the Corporations Act can create tension between the objectives of business rescue and employee protection. A number of restructurings require access to working capital that is ultimately generated from circulating assets (inventory, receivables and cash) to trade on a business (either in administration or as security for a pre-appointment rescue finance). The Fair Entitlement Guarantee should remain a scheme of last resort and robust safeguards should continue to prevent misuse. However, Government should consider whether aspects of the current framework inadvertently favour formal insolvency outcomes over business rescue. Carefully calibrated reforms (including appropriate protections for employees, independent oversight and, where necessary, court approval) could better align employee-protection objectives with the preservation of viable businesses, jobs, supplier relationships and enterprise value.

## 10 Conclusion

Australia's restructuring and insolvency system should support both rehabilitation and efficient exit. It should give directors and stakeholders a realistic opportunity to rescue a viable enterprise while ensuring that non-viable businesses are brought to an orderly conclusion and misconduct is addressed.

The 2026 Survey results point to clear weaknesses in the current regime. Advice is obtained too late. Cost is a significant barrier. Small-business distress is inseparable from personal guarantees, director penalty notices and personal financial exposure. Rescue finance and distressed sales are impeded by timing, priority and regulatory issues.

For larger and more complex businesses, Australia should preserve a sophisticated restructuring system while improving flexibility, speed and access to cross-class solutions and rescue finance.

For small businesses, the priority should be accessibility: lower fixed cost, simpler entry, better triage, coordinated treatment of corporate and personal distress and public funding for public-interest work.

Finally, reform should move away from isolated amendments and towards a coherent, evidence-based and proportionate framework that supports early intervention, preserves viable enterprises and facilitates efficient redeployment of resources.

**Attachments**

1. TMA Australia, **Helping Companies Restructure by Improving Schemes of Arrangement**, submission dated 17 September 2021.
2. TMA Australia, **Review of the Insolvent Trading Safe Harbour**, submission dated October 2021.
3. TMA Australia, **2026 Productivity Commission Member Survey Results**.