

1 October 2021

Manager
Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

Email: SafeHarbourReview@treasury.gov.au

Dear Sir/Madam,

**Review of the insolvent trading safe harbour:
TMA Australia Submissions on the Consultation Paper**

The Turnaround Management Association of Australia (the **TMA**) welcomes the opportunity to provide submissions in response to the consultation paper *Review of the insolvent trading safe harbour* dated 3 September 2021 issued by The Treasury of the Government of the Commonwealth of Australia (the **Consultation Paper**).

The TMA is a community of professionals dedicated to turnaround and corporate renewal, with a diverse membership group consisting of many disciplines committed to stabilising and revitalising corporate value.

TMA members have had been involved in many safe harbour assignments since the safe harbour was introduced. It is this deep practical experience that informs this submission on the insolvent trading safe harbour. Consistent with our engagement with Treasury since the onset of COVID-19, the TMA has put significant work and thought into our response to facilitate a meaningful assessment of the use and operation of the safe harbour as a restructuring tool in Australia.

The core TMA team that has worked on the submission are as follows:

- Cameron Belyea, TMA Australia Director (Partner, Clayton Utz)
- Jason Preston, TMA Australia Director (Chairman, McGrathNicol)
- Richard Hughes (Partner, Deloitte)
- Maria O'Brien TMA Australia President (Partner, Baker McKenzie)

The TMA also warmly thanks Cayli Bloch of Clayton Utz and Subin Cho of Baker McKenzie for their significant assistance in considering the matters raised by the Consultation Paper and preparing the TMA's submissions.

Sincerely,



Maria O'Brien
TMA Australia President
Tel: +61 402 127 738
TMAAustraliaPresident@turnaround.org.au
Turnaround Management Association Australia
www.turnaround.org.au



REVIEW OF THE INSOLVENT TRADING SAFE HARBOUR

TMA Submissions

1 October 2021

1. Introduction

1.1 Introduction

The Turnaround Management Association of Australia (the **TMA**) welcomes the opportunity to provide submissions in response to the consultation paper *Review of the insolvent trading safe harbour* dated 3 September 2021 (the **Consultation Paper**) issued by The Treasury of the Government of the Commonwealth of Australia (the **Government**).

1.2 About the TMA

The TMA is the premier professional community dedicated to turnaround management and corporate renewal. TMA is a non-profit association governed by a national board and State and NextGen Committees in Queensland, New South Wales, Victoria and Western Australia.

TMA's local membership (close to 800 members) includes major trading banks, investment banks, private equity firms, hedge funds, finance, law, accounting & management consulting firms, together with chief restructuring officers; principally those who are actively engaged in financial and operational restructuring or provide ancillary professional advice. TMA forms part of a global network of Turnaround Management Associations with some 8,000 members spread through the Americas, Europe, Africa and Australasia.

We thank you for taking the time to read this submission and would be happy to share our knowledge and experience in turnaround, restructure and insolvency advocacy with your office, or any other stakeholder you may nominate, to help ensure better outcomes for businesses.

1.3 Acknowledgement

The TMA and the authors of these submissions acknowledge the assistance and feedback of the various TMA members who have contributed to the discussion of the issues surveyed in these submissions. Any errors or omissions are attributable to the relevant authors.

1.4 Views expressed in these submissions

The views expressed in these submissions represent the views of its authors, but do not necessarily reflect the views of all members of the TMA. In preparing these submissions the authors have sought and considered the views of TMA members, and sought to reflect a considered position that on the key questions best reflects the majority views of the broader TMA membership.

However, as can be expected for a "broad church" such as the TMA, contrary views have been expressed to us on a number of the points made herein.

1.5 Intellectual property

The contents of these submissions remain the intellectual property of the relevant authors and/or the TMA as applicable. These submissions may be reproduced but should not be used or reproduced without attribution to the TMA.

1.6 Disclaimer

The contents of these submissions are for reference purposes only and may not be current as at the date of these submissions. The submissions provide a summary only of the subject matter covered, without the assumption of a duty of care by the TMA, its members or any of the contributing authors. The submissions do not constitute legal advice and should not be relied upon as such.

2. TMA Approach to Consultation Paper

2.1 Approach and Key Findings

TMA made extensive submissions in support of the introduction of the Safe Harbour (**SH**) reforms, the propositions within which are adopted here. The TMA continues to support these reforms which, as discussed below, have been effective in saving enterprises and/or saving the business of those enterprises (thereby saving jobs, preserving social infrastructures in communities and maintaining all the downstream relationships that come of continuing businesses). TMA understands that other associations and key stakeholders will also lodge submissions in support of the SH reforms.

We will not re-argue those propositions in this paper. Neither will we resubmit our reasoning that restructuring reform needs to be holistic in nature.¹ Instead, this paper seeks to provide qualitative information around the relative success of SH reform to facilitate various restructurings and to use the qualitative responses of our members to answer the review questions outlined below. We suggest some improvements and further reform in the following parts of this paper, though again encourage the legislature to undertake a holistic approach to corporate revival of ailing enterprises.

2.2 Methodology

We have drawn the conclusions that follow from fifty five [55] case studies based on lived experiences of a sample selection of twenty [20] TMA stakeholders.² Other TMA stakeholders and members will have additional

¹ Refer -TMA Submission dated 17 September 2021 "Helping Companies Restructure By Improving Schemes of Arrangement" (**TMA Schemes Submission**).

² Allegro Funds, MA Financial Group (formerly Moelis), Houlihan Lokey, Faraday Associates, Vantage Capital, Wexted Advisors, R-Cubed, Carl Gunther, Clayton Utz, Herbert Smith Freehills, Ashurst, Corrs Chambers Westgarth, Hamilton Locke, Baker McKenzie, FTI, McGrathNicol, KordaMentha, Deloitte and KPMG. The authors did not have sufficient time to survey all member firms, with apologies to those not here featured.

reflections from which further conclusions can be drawn. Indeed, a number of the contributors to the below case studies will be submitting their own submissions in favour of the maintenance of SH.

Our studies span ten [10] sectors.³ For analytical purposes, we have included examples of enterprises that used SH and those that did not. Some of our sample companies undertook operational turnaround as well as deploying capital restructuring strategies, some also implementing some form of workout arrangement.⁴ A limited number of the enterprises under examination ended up in liquidation, though our contributors consider that **every** one of the [48] case examples with an acknowledged SH ended up achieving *better outcomes* than expected via an unplanned insolvency process.

Our methodology derives from advisors to SH situations.

The data we present obviously biases towards situations in which directors have understood the need, or been encouraged by influencing stakeholders (typically senior creditors) to speak with advisors. The data nevertheless remains relevant given most boards facing distressed trading circumstances will engage with lawyers, accountants, financial, business and capital advisors. These are the intermediaries who commonly recommend engagement of AQEs (appropriately qualified entities).

Intermediaries may not have the specialist experience to provide AQE advice in distressed circumstances, but instead act as influencing agent in ensuring proper skillsets are brought before the board to assess the cause of the special situation facing the company, to test systems, rebuild proper forward sensitivity models, reconnect with stakeholders (internal and external), use trusted relationships with capital, assist in the preparation of turnaround plans, monitor and report against these and modify as necessary and support the panoply of work that goes into successfully saving distressed enterprises. That is the role of the AQE team, often a team formed of financial, capital, legal and operational advisory capabilities, with a depth of experience in dealing with distressed entities (formal and informal).

2.3 Observations⁵

In almost all examples, the pre-SH business survived, and continues to trade in mostly intact form. More than 85% of the examples resolved

³ Refer Table 1 in the Appendix.

⁴ Although these labels are used for convenience of description rather than as absolute definitions, we here use *turnaround* to reference operational, brand, market positioning and other business improvement strategies. We use *restructuring* to essentially cover capital initiatives, ranging from debt for equity swaps, financial resets, covenant re-writes, capital raising, refinancing, new issues of debt instruments, merger + acquisition and non-core asset divestments (amongst others). We use *workouts* to encompass the resolution of shareholder disputes, contractual resets and non-financial changes or repositioning of the enterprise in the market.

⁵ Each of our 55 case examples are summarised in Appendix A to this submission. The Appendix sets up a number of representations of this information in successive tables.

distressed conditions (some dire) by way of informal bilateral and multilateral contractual re-arrangements with creditors and other stakeholders. Those arrangements typically required further capital injections to be made into the business. The remaining 15% of outcomes required the utilisation of formal (mostly voluntary administration (VA), some receivership) processes to access statutory moratoriums and/or compositions. Only two [2] of the fifty five [55] cases report as sole liquidations (two further examples used liquidation as an end mechanism after completion of the SH engagement). Notably, **every** example, including the liquidation outcomes, report as achieving *better outcomes* than would have been expected in alternative, unplanned, processes.

Our contributors consider that about half of the informal arrangements the subject of our worked examples would have required unplanned or limited planned formal processes if SH had not been in place (and we can draw from pre-SH experiences to say that some enterprises that underwent formal processes may well have avoided such processes (if SH had been in place at the relevant time)).⁶

Put another way, if not for SH, our contributors consider that by the time of their engagement, more than [20] of the examples that ended up as informally negotiated business continuation success stories would have had no option but to proceed through a VA process (which, may well have ended up with similar outcomes but with a higher agency cost associated with the process in the form of external administration costs).

In relation to those that underwent formal procedures,⁷ feedback suggests that the *better outcome* success of the process came from pre-planning steps preceding appointments.⁸

We draw these conclusions from the case examples:

- SH is effective in providing time and space for directors pre-planning successful turnaround, restructuring and workout strategies;
- SH can run for a short period, though typically extends over many months (the larger enterprises requiring perhaps in excess of 12 month periods, with many iterations of the plan);
- successful enterprise saving initiatives highly bias, in our sample set, to informal rather than formal processes. The favoured formal process is VA, sometimes supported by receivership;

⁶ *Henry Walker Eltin* is a commonly cited example. There are many others though this is not the place to publicly identify them.

⁷ *Speedcast* being one - the need to impose moratoriums leading to a very expensive, and successful, Chapter 11 exercise.

⁸ Preparing for necessary court orders, ensuring funding lines were available to maintain the business during post-appointment turnaround and restructure events, ensuring key stakeholders had negotiated restructuring support agreements and were satisfied with valuation and other information exchanges etc.

- some advisors seem (respectfully, wrongly) to narrowly construe the pre-requisites for entry into SH and some boards appear to take the view (albeit we think incorrectly), that SH is a disclosable event (either under listing rules or under financing covenants) - thus, some [3] examples indicate situations in which the enterprise directors qualified for SH, yet "did not enter" SH;
- pleasingly, contributors uniformly consider that enterprises the subject of these case studies (and perhaps more broadly from anecdotal experience) are signing off on SH as a "whole of business" strategy rather than, for example, as a 'tick a box' or 'checklist' approach as was feared;
- while the risk of director liability in a failing company is perhaps more perceived than real, it is, nonetheless, a powerful incentive in the minds of professional boards - directors without 'skin in the game' - as to whether to expose themselves to risk of losing good reputations in trading on distressed enterprises. While boards do not necessarily immediately appoint voluntary administrators when in a crisis, robust and confident actions become harder to justify in the face of fiduciary risk - see, generally, *Bell* and more recently the long cost and stress occasioned to *Arrium* directors for decisions taken by that company prior to VA. SH is a good step towards maintaining the engagement of this form of non-executive director in distressed conditions, though, as [3] case examples show, is still not a complete answer to concerns from members of this independent governing class;
- a more common problem is the one facing the investor nominee director - because of the structure of funds, the General Partner managing the fund cannot expose themselves to litigation risk when investing into a distressed situation (which, because of the potential reward profile, is precisely the sort of investment funds should be investing into). This is perhaps exacerbated by uncertainties and insolvency carve outs within Director & Officer insurance policies. In one case example, it was the litigation risk associated with a distressed company that led to a formal appointment over a riskier informal workout. We suggest some legislative adjustments below to make SH an objective rather than subjective test.

We do offer this rider - the past 18 months have been unprecedented, not simply in terms of the public sector response to the pandemic but more generally in terms of market liquidity. That liquidity will not be in the market forever, so some of the *better outcomes* achieved outside a formal process will probably require statutory moratorium support in the future.⁹

⁹ In relation to which see the TMA's detailed submissions in the TMA Schemes Submission.

This suggests more VAs, or schemes, to execute strategies developed under SH protection in the lead up to such appointments.

Expressed differently, SH does not abrogate VAs; it provides the time support needed by the directors to plan a turnaround strategy which may well be executed inside or outside a formal process. The market, more specifically, liquidity in the market and the support of a company's trades (and other creditors) to suspend action, dictates whether the plan implements informally or under the protection of a statutory moratorium.

In conclusion, the TMA sincerely believes Safe Harbour is working, the attached case examples pleasingly establishing a number of Safe Harbour led success stories.

3. Responses to Treasury's Questions

QUESTION	TMA RESPONSE
1. Are the safe harbour provisions working effectively?	<p>Yes, mostly, in these respects:</p> <ul style="list-style-type: none"> • Awareness - directors in companies facing liquidity pressures are taking advice on eligibility criteria for SH, then, as a formal SH or as part of the ordinary business planning of the company, ensuring employee entitlements are met and financial and tax records are maintained (and fraud risk reduced) as plans adapt to changing circumstances. • Engagement with experience - the case mix we present tends to suggest that AQEs are being engaged across a range of both small and medium sized enterprises (SME) and large entities experiencing distress. • Outcomes - the case studies speak for themselves. Every outcome reported in this dataset was better than the alternative (unplanned VA or other formal insolvency process). Planning, once more, is key to setting up successful outcomes. Obviously, other reforms might be made to enabling processes (eg: schemes) and attracting new capital into the restructuring (a discussion for another day). <p>We suggest some potential reform at [A13] below for consideration.</p>
2. What impact has the availability of the safe harbour had on the conduct of directors?	<p>Positive - in [52] of the case studies, directors actively engaged with SH concepts,¹⁰ to save companies, utilising a combination of turnaround, restructuring and workout steps to rescue the ailing company.</p>

¹⁰ [48] formally and [4] according to the facts even if no formal resolution was passed.

QUESTION	TMA RESPONSE
	<p>Of the remaining case examples, [2] were assessed as not being insolvent or likely to become insolvent, so the steps involved in the (solvent) turnaround strategy formed part of the usual business judgments of the board.</p> <p>Pleasingly, by considering SH principles, the boards involved (a) showed an active understanding of the broader stakeholder interests when undertaking a turnaround; (b) took advice from an AQE (or experienced person in the s187 <i>Corporations Act 2001</i> (Cth) (Corporations Act) context); and (c) ensured business and financial records, tax filings and satisfaction of outstanding employee entitlements lay at the forefront of these business judgments.</p> <p>The [1] "unsuccessful" SH appears to have been a result of a creditor determining to act in a 'zero-sum' manner (and, so it would seem, gaining a lesser return on its debt than would have been the case on the alternative restructuring plan). This situation provides a useful case lesson for senior debt holders seeking to act in a unilateral manner.</p>
<p>3. What impact has the availability of the safe harbour had on the interests of creditors and employees?</p>	<p>Each of the case examples, except [2], involved employees receiving full satisfaction of entitlements (it is unclear what return would have been achieved in a non-SH led restructuring). In a number of the examples, senior debt took losses (or accepted equity in lieu of debt) for the benefit of achieving full returns to employees and, in a number of these examples, full return to unsecured creditors.</p> <p>TMA observes that both VA and informal arrangements are progressively seeing the interests of smaller unsecured creditors (and, almost always, employees) favoured in continuing business outcomes. This may partially be driven by the de-leveraging benefits senior creditors can achieve from remaining exposed to a post-restructured trading entity, but also, perhaps, to a recognition that small trade creditors should not suffer value destruction in trade-on situations.</p> <p>While this recognition is not unique to SH situations, by encouraging boards to early engagement with AQEs to assess the cause of distress in an entity and to develop turnaround plans, there is more prospect of the AQE identifying trade-on outcomes earlier in the life cycle of the enterprise.</p> <p>Contrast this situation with the one that usually faces a voluntary administrator appointed by directors once they have run out of other options (stretching of creditors; divestment of assets; reducing capex and opex to the point that plant and systems become obsolete or inefficient; destruction of trust</p>

QUESTION	TMA RESPONSE
	<p>when information is not shared or is communicated in a misleading way; loss of key workforce members etc). By this time, the voluntary administrator has fewer levers available to recreate a sustainable business.</p> <p>What SH does is enable AQEs to come into the piece earlier, to redirect the focus of directors, to recreate trusted external stakeholder relationships, tap available capital, plan-up improvements in the business, restore belief in the brand and strategy (including within the workforce) and bolster the confidence of directors to work with management on a plan and its various iterations.</p>
<p>4. How has the safe harbour impacted on, or interacted with, the underlying prohibition on insolvent trading?</p>	<p>Positively. In the referenced examples, SH was the enabler for directors to commit to turnaround plans, without which a number of these saving exercises would not have completed (either because the project would not have begun or because the directors would not have been bold enough to stay with the plan to completion). Some of these plans have run for extended periods, many more than 12 months. It is difficult to keep directors 'without skin in the game' focused on the time and stress commitment of a plan over an extended period.</p>
<p>5. What was your experience with the COVID-19 insolvent trading moratorium, and has that impacted your view or experience of the safe harbour provisions?</p>	<p>According to the case examples, only [19] cases utilising SH over the past 18 months derived from COVID-19 induced trading circumstances. The remainder of cases utilised SH to deal with the usual range of other problems that might otherwise cripple a business (typically, over-leverage, market changes, poor financial management, antiquated processes and other operational under-performance, brand and strategy refresh needs).</p> <p>On COVID-19 impacted businesses, one of the authors to this paper provides comment this way - the moratorium removed immediate failure fear from half a dozen engagements. That relief was replaced, in short order, by a sense of almost invulnerability that needed to be tempered by keeping the relevant entity to the relevant plan.</p> <p>Moderation came in the form of focusing on the better outcome test in s588GA of the Corporations Act, which remained (without a better outcome, it is difficult to see how the directors could continue to discharge the broader statutory duties in ss180 - 184 of the Corporations Act).</p> <p>As with so much else, this was an education process around the need for directors to make decisions (including non-decisions that amount to a course of conduct) on enterprise-first grounds.</p>

QUESTION	TMA RESPONSE
6. Are you aware of any instances where safe harbour has been misused?	No.
7. Are the pre-conditions to accessing safe harbour appropriate?	<p>Yes, though as per A13 below, TMA suggests a slight edit to the requirements to make clear that entry into SH is not a subjective decision of directors but an objective conclusion to be drawn from the circumstances. This requires an examination of the full factual matrix, one such part being the subjective mind of the directors. Otherwise, the [48] cases in which SH was enlivened in fact, but not as a substantive determination, may well become normative.¹¹</p> <p>Some of our contributors have remarked on s588GA(4) disqualifications (tax compliance and satisfaction of employee entitlements). Some advisors have taken unduly technical views as concerns satisfaction of the pre-requisites,¹² while the strict nature of the disqualification can capture even inadvertent non-compliance.¹³ Plainly, this is not the intent of the SH defence. The defence should perhaps be tightened up to make clear that by inserting in s588(4)(b)(i) and (ii) the words:</p> <p style="text-align: center;"><i>is not capable of relief under section 1318(1) of the Corporations Act</i></p> <p>The addition enables the defence to operate where a director has acted honestly and could bring an application under that provision (whether or not the application is made - ie. the SH defence remains available for directors acting honestly</p>

¹¹ We were told that in some situations (not the subject of the case examples) the requirement to have met employee entitlements precludes entry of many entities into SH. As none of the case examples faced this problem, we cannot really say if this represents an emerging problem (and note the complexity of the issue given superannuation entitlements rather than payroll is the focus of the reference).

¹² Contributors have noted that some (probably non-qualified advisors) have suggested the defence is no longer available if, **during** any payroll period cash balances fall below employee entitlement obligations falling due on the next payroll payment date. This may be the case if the company incurs a debt when it has run out of options to replenish cash funds, but not necessarily otherwise. Another contributor advised in a situation in which a company was and could continue to meet employee entitlements as these fell due (including sick leave, holiday and other leave as these were taken) but was not in a position to meet retrenchment costs of the posited alternative liquidation; according to our contributor, it took some time for the board to understand that the relevant employee entitlements required to be met were those "as they fell due" not those that might arise in a liquidation (it seems some of the directors had taken legal advice from someone who was not "AQE"). Usually, AQEs with proper experience can resolve these sorts of definitional issues.

¹³ Posit this example - employee entitlements are often payable under a myriad of industrial instruments. In recent years, audit compliance has identified a number of non-compliant payments by a number of Australia's largest employers. While cases of intentional underpayment may well arise in ailing companies, it is not the intent of SH for the defence to disqualify because of an *inadvertent* failure of systems or clerical, administrative or oversight errors inside an organisation. A similar observation applies in relation to enterprises operating across complex tax environments where compliance responsibility often sits with junior staff. Systems are meant to spot errors, though no system is infallible, nor are people. Mistakes happen. These should not operate as disqualifications.

QUESTION	TMA RESPONSE
	irrespective of whether or not a finding is made concerning negligence default or other relevant s1318 breach). At all times, the legislation should, it is respectfully submitted be consistent with duties obligations and expectations under Chapter 2D of the Corporations Act.
8. Does the law provide sufficient certainty to enable its effective use?	Yes - all circumstances differ and many decisions are made according to the scale of the venture (the solvency decisions of directors within a conglomerate with derivative and complex contractual obligations will be very different to the considerations of a smaller retailer with landlord problems associated with temporary lockdowns). ¹⁴
9. Is clarification required around the role of advisers, including who qualifies as advisers, and what is required of them?	<p>No - all situations differ. AQEs with insolvency experience were involved in at least [42] of the examples given. Other times, the AQE comprised one or more of turnaround professionals, lawyers, capital market advisors or, occasionally, skillsets within the company involved. TMA encourages ASIC to monitor the broader market to see if non-qualified parties are misleading directors into improper phoenix situations. TMA has not seen this happen and suspects it may be more prevalent at the micro enterprise end of the market. This will probably not become visible until after the run off of COVID-subsidies.</p> <p>Directors must be left to choose skillsets that address their particular circumstances. Many times, they will come to rely on an AQE with insolvency or restructuring experience, other times, they will not.</p> <p>Advisors will work out their roles with appointors - the company will have its own advisers, who will differ from the directors' advisers (collectively or singularly). The parties should be left to define the scope of each engagement according to their specific needs.</p>
10. Is there sufficient awareness of the safe harbour, including among small and medium enterprises?	Difficult to say and probably a question better answered by AICD and industry bodies representing users. From the perspective of the TMA and based on the worked case examples, SH does seem to have imprinted itself as a concept in the minds of directors across a spectrum of SMEs as well as large and mega companies.
11. In relation to potential qualified advisers, what barriers or conflicts (if any) limit your engagement with	The question covers a gamut of enterprises - directors who are overly entrepreneurial are often reluctant to take advice early. Those without personal exposure to the success or failure of an enterprise and who are overly mindful of personal reputation (or in the case of fund nominee directors, the

¹⁴ Strictly, the AQE provides "advice" rather than a guarantee as to the satisfaction of SH requirements. It is for the directors to be satisfied as to these matters, based on that advice.

QUESTION	TMA RESPONSE
<p>companies seeking safe harbour advice?</p>	<p>enabling instrument under which investor money is deployed into a situation) can take too much advice and be overly conservative.</p> <p>Thankfully, the case examples provide enough of a database from which to observe that the greater body of enterprises are governed by directors with a willingness to take advice, an intelligence to structure successful turnaround plans and the grit to stay with the plan through to success (or wisdom to reset plans as needed).</p> <p>In due course, stories of successful turnarounds will sufficiently permeate the collective thinking of those who sit on boards as to encourage the engagement of AQEs early in the distress cycle of the enterprise (or even war planning the possibility of business downturn).</p> <p>There also appear to be three emerging practices likely to create structural barriers against SH in due course:</p> <ul style="list-style-type: none"> • At least [3] examples report directors unwilling to formally resolve on SH because of reporting concerns (either to listed entities or to lenders pursuant to contracts) - the first is, essentially, an education problem in that some directors, possibly also advisors, are mischaracterising SH as some formal process requiring a formal resolution to "enter" SH. As the law reads, SH is or is not engaged by satisfaction of the criteria, not by whether or not the directors understand that the relevant defence has activated. As a result, reporting obligations turn less on the "entry" of SH and more on the materiality of information in the market under the usual continuous disclosure obligations and whether that information needs to be corrected (for example around changes to a disclosed business plan, market guidance or some other similar market information). The suggestion in A13 below may help alleviate this concern. • Further to A13 below, a SH based on a defence to s588G sits awkwardly in relation to broader directorial duties within Ch 2D of the Corporations Act. Anecdotally, fund nominee directors and some professional directors (without personal stake in the companies they represent) find it hard to justify exposing reputations and ultimate appointors to claims that may or may not be defensible under s588GA. In this regard, directors are required to make decisions ex-ante yet those decisions are examined on a post-hoc basis. The defence within s588GA, as used by TMA members, sensibly

QUESTION	TMA RESPONSE
	<p>encourages directors to maintain contemporaneous records of decision making and available information on which to draw inspiration for decisions. Nonetheless, a defence based exception to insolvent trading risk is not as strong as an extension of broader "business judgment" rule, which shifts the onus from the directors justifying a position to an external authority establishing the decision making fell below community expectations around the proper discharge of duties. As has been raised by the TMA previously, it might be timely to explore with the community whether insolvent trading rules ought be replaced with wrongful trading rules, which focus on the propriety of the decision according to community expectations. The TMA would welcome the opportunity to participate in any relevant holistic reform agenda.</p> <ul style="list-style-type: none"> • Feedback from our contributors suggested an emerging practice of including as review events within credit instruments provisions to the effect that SH entry shall trigger creditor enforcement or other rights - this is neither helpful nor particularly measurable if no formal resolution is passed to enter SH. It should be enough that a company is under an obligation to its credit counterparties to report solvency or liquidity problems. There is no cause to require directors to disclose whether or not the SH has been activated (indeed, having regard to our previous comments, it is not always possible for directors to even be aware of such matters). While the legislature is (understandably) generally reluctant to interfere in free contracting between parties, it would not be difficult to expand ipso facto restrictions to include circumstances giving rise to statutory defences. That at least removes the chance of SH becoming a termination trigger point. It is then left to the parties to decide if the circumstances that give rise to SH protection (notably insolvency in its actual or apprehended form) should trigger review or reporting events. Presumably they will, which seems to be a sensible way for financiers to understand the situation they may well be asked to support at some point in time. <p>Banks and other senior creditors should continue, as intermediaries, to encourage distressed entities to engage AQEs to properly utilise SH as part of turnaround planning.</p>

QUESTION	TMA RESPONSE
12. Are there any other accessibility issues impacting its use?	See the edits proposed in A13 below.
13. Are there any improvements or qualifications you would like to see made to the safe harbour provisions and/or the underlying prohibition on insolvent trading?	<p data-bbox="770 589 1441 651">Yes, s588GA(1)(a) of the Corporations Act could be amended to read:</p> <p data-bbox="866 663 1433 831"><i>at a particular time after the person starts to suspect the company may become or be insolvent, the person starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company; and</i></p> <p data-bbox="770 864 1441 1099">This edit removes the subjective element of an entry into SH and reintroduces the objective nature of the defence (which is also consistent with s588GA). This makes it clear that qualification for SH is not something the board need to specifically adopt by resolution but is a circumstance that exists for addressing by way of the turnaround plan with the help of an AQE.</p> <p data-bbox="770 1111 1007 1137">And, more generally -</p> <ul data-bbox="770 1149 1441 2013" style="list-style-type: none"> <li data-bbox="770 1149 1441 1496">• Processes - there are five different regimes in Australia for dealing with distressed companies: schemes; VA and the DOCA or Creditors' Trust; various forms of liquidation; small business restructuring and SH protected non-formal arrangements). Moratoriums, qualification, composition, trading (including personal liability) and distribution rules between each differ, which adds confusion for users (directors, creditors) - TMA would like to see a holistic investigation of these systems as part of a new Harmer-like review. <li data-bbox="770 1507 1441 2013">• Incentives - there is some literature to suggest that creditor favoured systems restrict capital into restructurings and discourage the risk taking associated with each of the [50] worked examples within this submission of corporate rescues. While these matters need to be considered as part of the holistic reform investigation mentioned above, TMA would encourage Treasury to explore models associated with the priming of rescue financing, better cross-group composition rules (e.g. using schemes of arrangement), clearer moratorium triggers, potential relief from conflict rules when dealing with pre-planning around formal appointments, some mirroring between the cleansing requirements under international (esp. New York) instruments and those written under UK or Australian law instruments,

QUESTION	TMA RESPONSE
	<p>addressing issues between service agents associated with international financing instruments and addressing questions of value in dealing with s444GA applications.</p> <ul style="list-style-type: none"> • 'Insolvent trading' might be replaced with 'wrongful trading' to ensure that director misconduct or activity inconsistent with serving the best interests of the enterprise is the new focus of post liquidation recovery action. This reform would also bring consistency to the Australian condition as compared with the United Kingdom and Singapore. It would make the SH redundant because directors' actions would then come to be assessed under propriety rather than presumption rules.

Appendices

Appendix A - Series of population breakdowns, represented in graphic form:

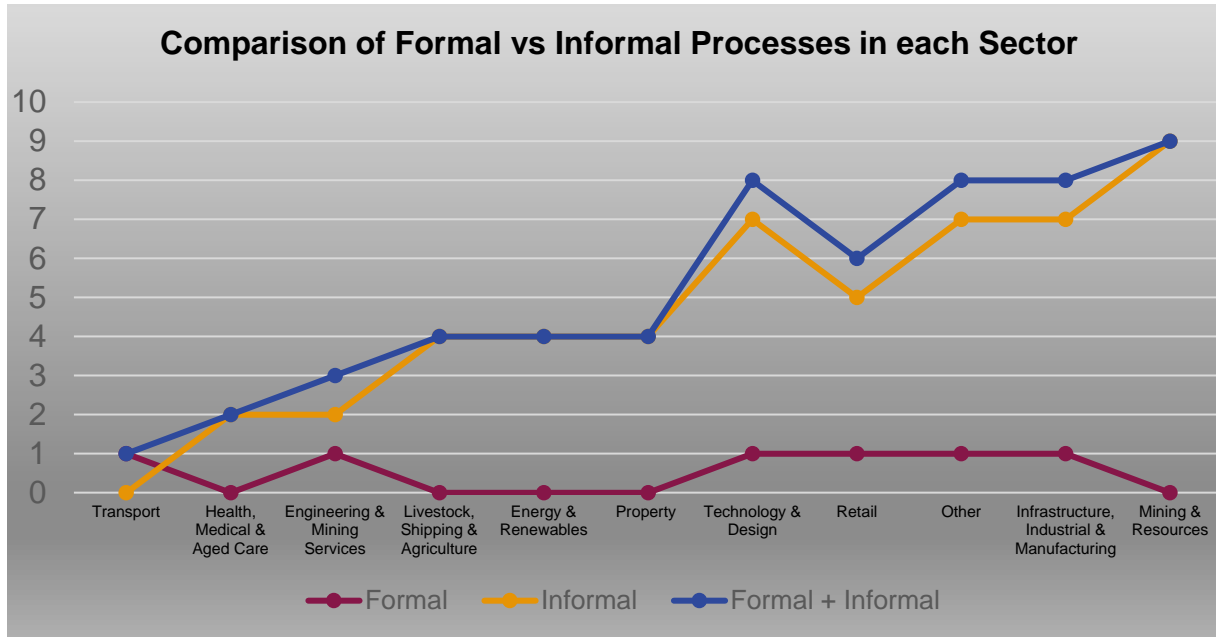
- Graph 1 - Sector Case Example Comparison
- Graph 2 - Comparison of Formal vs Informal Processes in each Sector
- Graph 3 - Continuing Business vs Liquidation Outcome in each Sector

Appendix B - Detailed Case Example Analysis

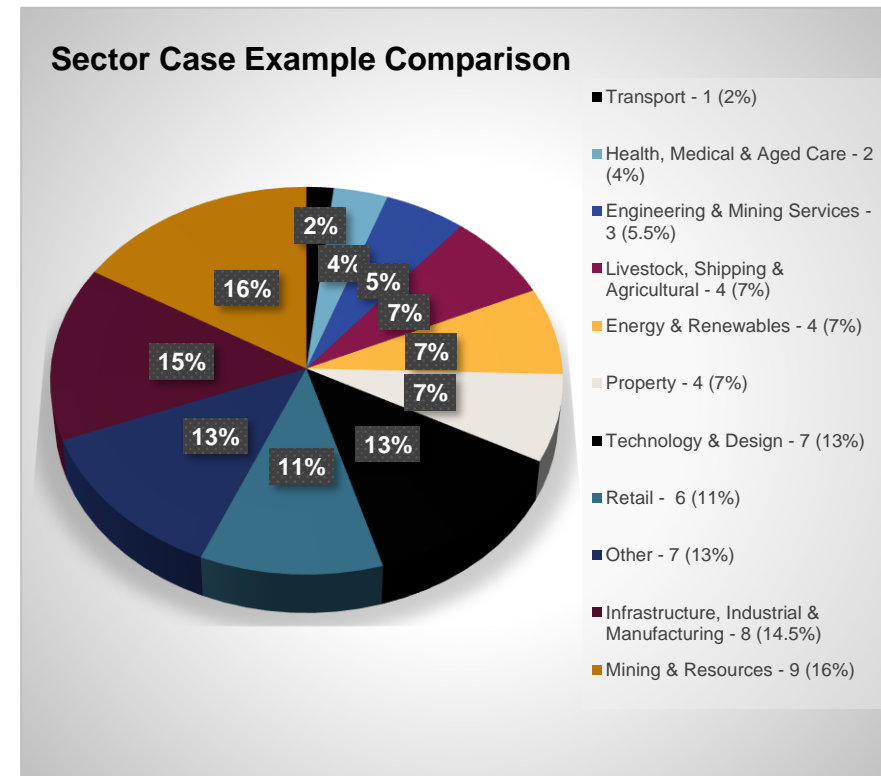
Appendix C - Series of population breakdowns, represented in graphic form:

- Graph 1 - High Correlation between Informal Arrangements and Continuing Business Outcomes
- Graph 2 - Relationship between enterprise obtaining AQE Advice and surviving as a Continuing Business

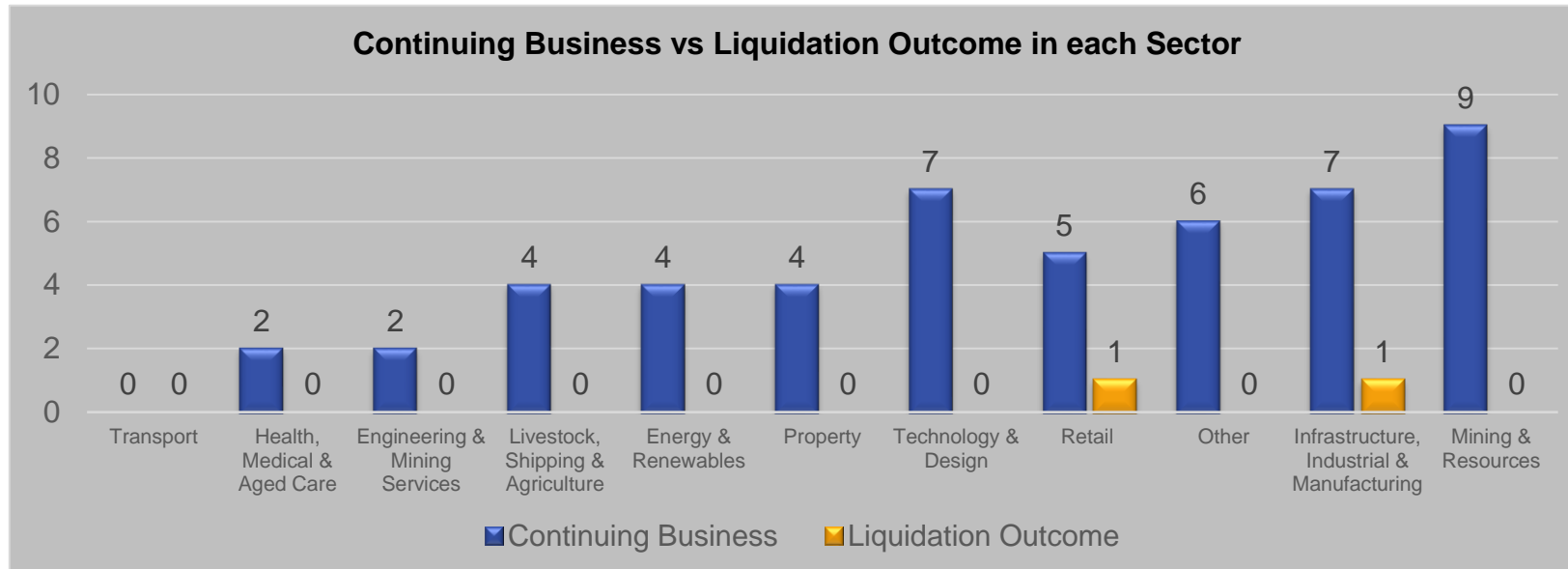
Appendix A



Graph 2



Graph 1



Graph 3

Note: None of the Liquidation Outcome scenarios resulted in creditors being paid in full.

Appendix B - Detailed Case Example Analysis

Sector	Summary/Outline	Was a SH used?	Case examples involving AQE	Scale of Enterprise ¹	Formal or informal process ²	Covid caused distress	Continuing business or Liquidation outcome	Duration of Safe Harbour	Methods used to restore liquidity or solvency and comments on better (or worse) outcomes
Industrial	<p>The Australian subsidiary of a global conglomerate was impacted by delays and cost overruns on a project to complete a major industrial processing plan. Anticipated cashflow from offtakers to the project could not be accessed (because the plant had not achieved practical completion and so could not complete commissioning or ramp up). At the same time, the offshore parent experienced cashflow problems in its global business. Liquidity pressure created structural risks around its leasing and other operating obligations, exacerbated as international banks locked down on financial support from the global parent and sought additional security support.</p> <p>Cashflow projections identified near-term dates for cash depletion, which would have meant a stand-down of a considerable workforce and prevented commissioning of</p>	Yes (multiple iterations)	Yes (multiple firms providing different skillsets)	Mega	Informal	No	Continuing	12+ months	<ul style="list-style-type: none"> - Improved liquidity from offtakers and deferred delivery obligations - negotiated new monthly cash transfers with offshore parent matched to 4 weekly and adjustable 13 weekly cashflows (constructed by CFO, regularly tested and improved by AQE) - SH requirements tested (esp. around the large workforce) on a weekly or multi-weekly basis - renegotiated payment terms (extensions) with existing creditors and moved to a cash on delivery system with new supplies - moved into claim/cross-claim dispute with EPC contractor - tested parent financing capacity and adjusted plan multiple times to fit changed raising initiatives - investigated special situations financing

¹ Data sets are given in ranges to protect transaction identity. Post restructuring EVs are broken into these brackets \$10m - \$50m, \$50m - \$100m, \$100m - \$500m and \$500m+, with respective labels: *Small, Medium, Large, Mega*.

² For example - Voluntary Administration (and/or Deed of Company Arrangement/Creditors Trust Deed), Receivership, Chapter 11 (US Bankruptcy Act), Scheme of Arrangement.

	<p>the plant (and ramp up towards cashflow independence from the global parent). Cash support from the parent was expected to remain problematic until its offshore syndicated lenders resolved to continue support for the group entities (which was expected to, and did, involve almost 12 months of negotiation).</p> <p>The directors wished to undertake a series of turnaround (operational), workouts (lease and offtaker renegotiations) and capital restructure (re-classifying debts by agreeing arrangements with trade creditors, financiers and parent entities). The board ensured SH qualifications were satisfied, also engaging financial and legal advisors to support conclusions drawn by directors around operational improvement, cashflow and capital management planning.</p> <p>After a lengthy period, the parent entity was able to initiate a large M+A transaction that led to the injection of sufficient cash to resolve mid term liquidity constraints within the Australian entities.</p>								<p>- undertook a mega (completed) partial cornerstone investor transaction which led to new liquidity into the companies</p> <p>- progressing to system ramp up and production to gain cashflow control from Australian operations</p> <p>The company continues to trade and move the plant through commissioning to ramp up. The plant promise to be one of world's largest processing operation for this form of product.</p>
Mining	Cashflow came under pressure because of payment defaults by offtakers, complicated JV structures (and defaults by JVP), commodity pricing deflation	Yes	Yes (multiple firms providing different skillsets)	Large	Informal	No	Continuing	6+ months	SH enabled the directors to adjust opex and defer capex, while continuing negotiations with both the defaulting offtaker (since paid) and JVP (since resolved).

	and some operational problems.								The company resolved its issues by way of an operational turnaround rather than a capital led restructuring outcome. Its directors needed SH to provide time to support the strategies developed with the AQE.
Financial Services - other	<p>ASX Business survival risk was triggered by default triggers claimed by a senior lender seeking to execute on a loan for own strategy.</p> <p>The company was forced to seek funding from the special situations market under threat of enforcement action by the lender. At the same time, it was forced to make significant operational changes to its business model to counter Covid caused changes in its forward book strategies.</p>	Yes	Yes (multiple firms providing different skillsets)	Medium	Informal	Partially	Continuing	4 months	<p>SH provided the board with four main tools (1) weekly analysis of its financial position across a complex structured finance group (2) information from which to make business efficiency changes in the business to improve operational performance and to reduce cash burn (3) time to negotiate with special situations lenders without deal-fail risk (enabling the directors to be price makers rather than takers in the negotiations) (4) space to consider alternate strategies if the refinancing was unsuccessful (to avoid an unplanned fire-sale via formal process).</p> <p>Refinancing was successful. The company has exited the SH and is growing.</p>
Energy and Renewables	<p>ASX business operating offshore assets was impacted by Covid crash in Brent-crude pricing of oil (principal sales), looming capex obligations under farm-in arrangements, safety concerns over staffing movement constraints on its workforce and some legacy disputes between shareholders and members of the board. Some of these issues contributed to unexpected defaults under NTA and cash support</p>	Yes	Yes	Medium	Informal	Yes	Continuing	6 months	<p>Board imposed weekly meeting reporting between the AQE and management and tested management by quadrant reporting across a range of operational, capital and contractual workout plans. Each of the plans were adjusted on a fortnightly, or as required, basis during the SH period.</p> <p>The company successfully exited SH, repaired its balance sheet, improved relations with shareholders and maintains an open relationship with its lenders.</p>

	<p>covenants in favour of the business lender.</p> <p>The directors formed plans to address shareholder disputes via management changes, terms of capital underwriting agreements and by negotiating contingent resets with the business lender (contingent on capital raising initiatives proceeding, which they did). The company then engaged in long running renegotiations with farm in partners to long-date capex obligations.</p> <p>Each of these initiatives were negotiated via information sharing with stakeholders (subject to disclosure rules) and after mapping through 13 month cashflow forecasts with appropriate sensitivity analysis.</p>								
Shipping	<p>Company was impacted by the withdrawal of customer support for its product (high value luxury yachts) during the initial Covid period and by cashflow pressures of its offshore PE owner.</p> <p>The company developed a plan to trade on, build prototype models 'on spec', negotiate funding from a new shareholder and to renegotiate equity with the PE.</p>	Yes	Yes (multiple firms providing different skillsets)	Small	Informal	Yes	Continuing	<3 months	Company was able to attract funding from the new shareholder. The prototype has since sold as customer demand soared shortly after the plan began.

Retail	<p>Long term retailer with heavy exposure to high cost, low profitability shops spread throughout Australia. Its product lines have been suffering losses for some time as it faced global pressures from (inferior) cheaper product and the impact of customer requirements (more internet shopping).</p> <p>Directors developed a mid term plan that required the support of landlords, lenders and a large investment into internet shopping capability as well as a renegotiation of supply chains. The company still needs to refresh brand. These strategies were expected to lead to business survival though, of course, could not be future proofed. The impact of Covid in terms of restricting access to its stores allowed the company to accelerate its non-store strategies and gave the company scope to agree terms with landlords to reduce unnecessary footprint.</p>	Yes	Yes (multiple firms providing different skillsets)	Small	Informal	Yes	Continuing	9 months	<p>SH provided directors the time needed to renegotiate with lenders, suppliers, landlords and to execute on a series of operational improvements and brand refresh strategies.</p> <p>Each of those strategies exposed the company to survival risk (if any of these negotiations had failed). SH provided the directors comfort that they could continue to negotiate the best possible result for the company without concerns around failure risk.</p> <p>The company is no longer in SH and is growing its business.</p>
Mining	<p>Australian subsidiary of a global group, its complex offtake and corporate group funding arrangements (coupled with liquidity pressure within offshore treasury group entities) placed considerable liquidity pressure on the Australian operations.</p> <p>The local management team developed robust cashflow</p>	No	No	Large	Informal	No	Continuing	n/a	<p>Management used the cashflow and sensitivity analysis to maintain liquidity from offshore treasury and maintained trading as a result.</p>

	<p>and sensitivity strategies and some contingency planning to extract sufficient funding from the parent to meet continuing Australian obligations.</p> <p>Strictly not a SH (in the sense that balance sheet solvency was strong and cashflow solvency was manageable, albeit with stretching like strategies more akin to use in restructuring or workout situations), the Australian management mirrored SH approaches in developing the turnaround plan.</p>								
Industrial / Waste Management	<p>An offshore PE owned industrial processing company experienced liquidity pressures as offshore funding was withdrawn (for unknown reasons), plant suffered unexpected and unfinanced breakdowns and the company found itself in dispute with key customers.</p> <p>The Board resolved on a multi-pronged plan to negotiate sale of non-core assets, to attract new asset based financing and to reset customer contracts. These initiatives led to a restart in funding support from the offshore PE fund (which is exploring options to sell down European assets in order to fund and maintain the Australian operations.</p>	Yes	No	Small	Informal	No	Continuing	3 months	SH provided the Australian board structured support to engage in aggressive financial negotiations with its parent entity. This has both unlocked cash support back into Australia, led to a change of strategy at the PE level (to maintain support into Australia) and provided space to renegotiate contractual terms with customers.

Mining	<p>ASX company with overseas assets suffered solvency risk when its principal lender withdrew BFS funding and called for existing loans to be repaid. The lender was reactive to a fall in commodity pricing in 2020.</p> <p>On the back of surging commodity prices, the company has ringbarked the security of the lender (by consent) to a particular asset, successfully raised capital on that asset and is divesting the remainder of its equity in the asset to another party. This enables the ASX company to raise capital (which it has done) on other assets, which it is now developing.</p>	Yes	No	Small	Informal	No	Continuing	9 months	<p>SH provided the Board the time necessary to negotiate arrangements with the lender, capital markets and overseas regulatory bodies to enable the transactions to proceed.</p>
Mining	<p>ASX company with a significantly over-leveraged balance sheet and fading reputation (broken promises) faced sudden, and unexpected collapse in commodity sale price for its product.</p> <p>It late engaged an AQE to try to renegotiate lender, offtaker, logistic supply contracts, each of which were in default and in dispute.</p>	Yes	Yes	Medium	Informal and Formal	No	Yes	2 weeks	<p>The Board took advice and managed to renegotiate arrangements with offtaker and logistics parties, contingent on concluding negotiations with lender (who refused to engage and termed out default notices and appointed receivers).</p> <p>While the SH did not prevent the company proceeding into a formal process, the 2 week period of the plan enabled the board to place its project on 'care + maintenance', to set the terms of renegotiated contracts (subsequently completed by VAs) and to start a process that led to the lender being paid out by a new party.</p> <p>The new party maintained the business and has influenced a new board to bring the project out of care + maintenance.</p>

Property	A property company in potential default of its senior lender obligations and is in something of a gridlock with its funding shareholders (who are in dispute with each other).	Not yet	-	\$100m+	Informal	No	Yes	-	<p>The Board are <i>considering</i> a SH in order to complete negotiations with the senior lender and to complete an existing capital raising to resolve some of the immediate liquidity problems.</p> <p>The SH will enable the directors to either crystallise the shareholder dispute or move the parties to resolution so as to unlock further capital into the business.</p>
Financial Services - other	Encountered solvency and cashflow problems as it had grown. Business suffered from a high overhead and capex, which drained cash from the business.	Yes	Yes	Large	Informal	No	Continuing		AQE engaged to work with management to refine cash flows and gain stakeholder (main funder) and regulatory support for the restructuring. The business was sold to global interests and meets similar business tests.
Entertainment - other	Licensor dispute costs placed pressure on the company's liquidity	Yes	Yes	Small	Informal	No	Continuing		<p>Shareholder agreed a debt for equity swap. AQE successfully renegotiated arrangements with landlords and the licensor to reduce cashflow depletions.</p> <p>The business used the time afforded to it by the SH to complete these transactions and to recapitalise the business.</p>
Renewable energy	Project experienced considerable delays and was in dispute with the EPC. Its revenues were impacted by regulator imposed curtailment.	Yes	Yes	Large	Informal	No	Continuing	12+ months	Directors sought SH as these issues arose and are successfully executing on a turnaround plan that involves the renegotiation of senior debt, injection of further equity and mediation of the EPC disputes.

Winery - other	Australian family owned business (more than 100 years old) with both national and global markets was asset rich but cash poor.	Yes	Yes	Small	Informal	No			SH continued for a lengthy period as long term payment arrangements with creditors were negotiated, a capital raising attempted and the sale of non-core assets pursued.
Engineering	Australian family owned company servicing the mid market. The unexpected departure of CFO led to underperformance and material forecast cash requirements.	Yes	Yes	Small	Informal	No	No		SH engaged to review and assess whether a higher outcome was possible as against an immediate insolvency. These actions led to a higher return to creditors as the business progressively scaled down and assets were disposed of to pay creditors.
Hospital	Hospital faced deteriorating financial performance, covenant breach and significant new competition impacting cashflow and placing liquidity pressure on the business.	Yes	Yes	Medium	Informal	Partially	Continuing		SH engaged to enable AQE to provide turnaround advice and develop a plan before cash resources were exhausted. The new, competing, hospital has since opened and the turnaround measures have been successfully implemented.
Livestock and Shipping business	Company was in default of multiple covenants under financing agreements due to financial underperformance.	Yes	Yes	Medium	Informal	Partially	Continuing		SH engaged while a turnaround plan was designed and implemented. Plan included negotiation of standstill arrangements, sale and lease back of key assets and potential sale transaction. The turnaround plan has been completed.
Infrastructure	Business was severely impacted by reduction of freight carriage on its infrastructure.	Yes	Yes	Mega	Informal	Yes	Continuing		Turnaround plan assessed various sensitivities around business performance and financial standing, provided options to meet future liquidity requirements and outlined

									restructuring plans. SH provided time to assess the situation, propose and complete a fund raising with principal shareholders.
Mining	Mining operation has sustained losses due to production delays, rising All In Sustaining Costs (AISC) and declining commodity pricing.	Yes	Yes	Medium	Informal	No	Continuing		SH enabled the company to undertake a turnaround plan and undertake a sale of non-core assets and recapitalisation of the remaining enterprise.
Retail	<p>A large 400+ employee company had accumulated heavy losses over several years of poor trading. Directors had developed a dual track turnaround plan to resize the business footprint (negotiating exits with certain landlords), to trade on the business and to secure ongoing finance facilities.</p> <p>The directors were concerned that if the plan did not deliver on promises, the financier would withdraw facilities, forcing the company into an insolvency situation.</p>	Yes	Yes	Large	Informal	Partially	Continuing		<p>SH enabled the Executive to lead negotiations with the financiers and landlords, providing information transfers to support the plan proposals. SH gave the directors confidence that a plan-fail would not expose them to personal liability.</p> <p>The plan was successfully delivered.</p>
Engineering	Group companies with almost 350 employees and 1700 contractors discovered material impairment provisions on customer contracts (poor financial controls had masked this problem). An immediate remediation program risked company survival.	Yes	Yes	Mega	Informal	No	Continuing		During the SH, the AQE assisted the finance director renegotiate arrangements with financiers, assist with capital restructuring repayment arrangements, close down poorly performing business units and focus on improving all aspects of the business from the Board through to construction site performance.

	Directors wished to undertake multi-pronged turnaround and restructuring strategies to stabilise cash while undertaking the remediation program. The directors were concerned that a project-fail would expose them to personal risk.									In addition to restoring its balance sheet, the company has generated positive cash, was able to refocus on (and build a strong book from) customers and to renegotiate arrangements with creditors to match cashflow.
Agribusiness	<p>Company's international business was severely affected by Covid, its supply chain, logistics and domestic sales falling away. As its product was perishable, inventory quickly became obsolete, forcing a series of crisis meetings to deal with sudden solvency risk (for a business that was considered very financially secure before the business disruption).</p> <p>The business developed a robust cashflow forecast, with sensitivities built into different timeframes for the reopening of markets. These timeframes demonstrated that solvency risk was real if reopening was delayed beyond particular points in time. The directors wished to carry on the business rather than taking safer options around appointing a formal process to initiate a sale of the business (which was considered to be value destroying given the nature of the business, which was built on maintaining personal supply contracts).</p>	Yes	Yes	Medium	Informal	No	Continuing	<6 months	<p>SH gave the Director confidence to manage the business through the crisis, including fast-tracking the implementation of an ERP system, and streamlining technology infrastructure. International brokered sales continued, and international freight was secured to enable domestic sales to resume as restrictions eased in 2020.</p> <p>The company has bounced back into profitability and successfully exited SH with continuing supply contracts, better international freight agreements, and better logistics (re-purposed over the lockdown period).</p>	

Infrastructure	<p>A large power station with long term low cost offtake obligations came under supply and costs pressure which caused the default of various cross-financing instruments. It needed to engage in debt reset negotiations with its financing syndicate, which took more than 12 months. In the face of defaulting finance instruments, directors were only willing to trade on under the protection of SH having been satisfied that to do so would (probably) lead to better outcomes than an insolvency process.</p> <p>Insolvency provisions within relevant documents would have made it very difficult to implement a restructuring via a formal process without the risk of material economic loss being incurred. Interestingly, a scheme of arrangement with an automatic moratorium may have enabled operational stability while capital structure issues were resolved. Those steps would only have been considered if the lender extensions had not been granted.</p>	Yes (various AQEs)	Yes	Mega	Informal	No	Continuing	12+ months	<p>SH has provided the directors time to negotiate arrangements with both the lender syndicate and the supplier, to negotiate alternate supplies and to open up repricing negotiations with suppliers. The SH will continue for some time.</p> <p>Lenders have extended facilities to provide further time for the company to continue business improvements and to consider other capital options.</p>
Technology	<p>Australian ASX entity filed at implementing an equity recapitalisation as Covid impacted consumer markets. The company experienced a rapid deterioration in end markets (exposed to tourism and oil & gas), with consequent crisis liquidity events. The company was</p>	Yes (various AQEs)	Yes	Large	Informal + Formal	Yes	Complete	12+ months	<p>The ASX entity was able to remain operating under its board by utilising SH as its subsidiary underwent an international process. SH provided operational stability for certain foreign entities and protected supply chains.</p>

	faced with pursuing an Australian restructuring process or an international process (with attractions around new funding, automatic moratoriums and stays on ipso facto like triggers included in contracts preceding Australian reforms around such triggers).								
Retail	Invested into a collection of retail businesses. While plans were developed to renegotiate footprints with out-of-the-money landlords, renegotiate supply chain arrangements and re-launch to customers, doing so came with a litigation risk that was unpalatable to the investor (as compared with a formal process).	Yes	Yes	Large	Formal	Yes	No	<1 month	The SH plan developed by an AQE was considered and the SH was continued over the testing period. After testing, the plan was assessed as carrying an unacceptable failure risk, hence the board could not be satisfied the 'better outcomes' test would be satisfied.
Resources	PE owned business faced a rapid decline matching the fall in the global price of exported product. The forward book became critical as the PE withdrew funding support. With solvency a large concern, directors (without 'skin in the game') were faced with a 'close or continue' decision. The Board wished to develop a turnaround plan and gained confidence this was the 'better outcome' once they had regard to the TMAA Best Practice Guideline around Safe Harbours.	Yes	Yes	Medium	Informal	Yes	Continuing		Having the confidence to build a turnaround plan with the assistance of the AQE, the Board were able to re-engage funding support from the PE. This funding support led to strong investment into growth of the front book. The strategies for growing new orders has been successful, the company now trading strongly, with increased profitability.

Industrial	<p>Board has faced difficult trading conditions and has engaged AQEs to assist develop turnaround plans. These are the features assessed by the Board:</p> <ul style="list-style-type: none"> - explicit understanding of the threshold for a better outcome - testing of liquidity at each board meeting - testing whether each initiative has evidence of progress at each board meeting - assessing solvency and risks or sensitivities around solvency -attracting solutions that might provide better outcomes -providing information to lenders around those outcomes, with sufficient time given to the lenders to assess the proposals 	Yes	Yes	Mega	Informal	No	Continuing		This SH is ongoing.
Industrial	<p>PE owned and financed business was underperforming in parts of Australia due to unprofitable contracts with statutory authorities (overseas contracts were profitable). The PE fund loans were subordinated in the security</p>	Yes		Medium	Formal	No	No		SH enabled the directors to test the market for sale of the (profitable) overseas business. Funds were repatriated to Australia to payout senior lenders, and to finance a VA process. The VA renegotiated contracts with government or

	<p>stack to senior loans provided by Australian trading banks.</p> <p>Without alternate funding options, the directors developed a liquidation plan while under SH, which they then executed via an insolvency (VA) process.</p>								<p>liquidated business units where renegotiation was impossible.</p> <p>Employees received better outcomes than would have been the case in an unplanned insolvency process (and banks were repaid from proceeds realised on a non-distressed sale of the overseas assets).</p>
Mining Services	<p>Australian Joint Venture company owned and financed by two global petrochemical conglomerates suffered cashflow problems. Those problems stemmed from exposure to a large, unprofitable, contract (projects costs escalated because of market conditions without commensurate revenue adjustments).</p> <p>The directors attempted to renegotiate the contract, explored refinancing and recapitalisation plans and examined sale options (M+A) under the protection of SH.</p>	Yes	No	Small	Formal	No	No		<p>Ultimately the directors attempts to achieve better outcomes for creditors were unsuccessful (because the principal on the unprofitable contract refused to renegotiate revenue terms), leading to the appointment of VAs (and eventual liquidation of the JV company).</p> <p>The efforts of the directors did, however, lead to the creation of a database of interested buyers, utilised by the VA in sale of the business and assets (an unplanned VA would have led to value erosion in the assets, which would otherwise have been sold on a fire-sale basis).</p>
Property	<p>A former shipbuilding company, now holder of valuable (but non-income producing) industrial land. On a cashflow basis the company was insolvent; yet on a balance sheet basis, held assets well exceeding the obligations payable to senior lenders, redundancies and other debts.</p>	Yes	No	Large	Informal	No	No	6 months	<p>Directors were able to secure PIK funding to satisfy the banks, fund the litigation (which was successful) and fund a lengthy process to remediate, re-zone and sell the underlying land.</p> <p>These efforts realised \$100m, which sum may not have been possible if Receivers had sold the land on an 'as is' and un-remediated basis.</p>

	<p>Directors formed the view that the shipping business should close, underlying industrial land should be remediated and re-zoned and then sold to satisfy the various debt obligations and to remit surplus to shareholders. Directors also wished to pursue litigation which needed to be financed on a monthly basis.</p> <p>Lenders were threatening to appoint receivers.</p>								
Insurance - other	<p>ASX Company with 100 employees impacted by regulatory changes, experiencing a significant rise in policy lapse rates. This led to liquidity shortfalls.</p> <p>Company engaged AQE to assist negotiate an exit strategy with the head insurer. This was designed to maximise the potential return for shareholders and to protect policyholders during a transition period.</p> <p>Board stability over the life of any turnaround plan was unclear. Part of the plan involved obtaining commitments from directors to stay the course of the plan (or, as was the case, for some to withdraw and be replaced with new directors).</p>	Yes	Yes	Medium	Informal and Formal	No	Yes	12 months	<p>The AQE undertook a business review and provided an evaluation of options to the board. The plan subsequently adopted enabled negotiations and sale of trail commission on policyholder premiums, a stable wind down and exit of liabilities via a members voluntary administration process.</p> <p>Employee entitlements were preserved, most employees transferring to the purchaser entity. Creditors were satisfied.</p> <p>SH enabled a controlled and stable process and solvent wind down of the business. This is unlikely to have been possible through an uncontrolled process.</p> <p>An interesting observation is to note the willingness of some directors (notably those without substantial shares in the restructuring company) to stay and execute on a plan. SH accordingly provides more reason for directors to stay both the good and bad times within a company's life-cycle. Directors willing to do so in the tougher trading conditions of a</p>

									turnaround plan ought be commended for their commitment.
Finance	<p>ASX finance company facing Covid derived liquidity pressures.</p> <p>The board, with the help of an AQE, formed the view that the company could be restructured and recapitalised to maintain liquidity. This process would, however, require the support of ~15 lenders and counterparties, some of which had competing interests.</p>	Yes	Yes	Medium	Informal	Yes	Continuing	5 months	<p>The plan led to a refinancing of some lenders, debt for equity swaps for others, the raising of fresh capital and turnaround of business performance.</p> <p>All employees (100) kept jobs, unsecured creditors were paid in full, the balance sheet was deleveraged and the business continues as a trading entity.</p>
Manufacturing	<p>ASX company with more than 1,000 employees, overleveraged balance sheet and declining revenue (impacted by Covid). Senior debt and unsecured amounts owed to landlords and trade parties could not be adequately serviced from the reduced cashflow.</p> <p>AQE engaged to undertake a business review an evaluation, undertake a capital raise and assist in the renegotiation of debt facilities. The AQE was also to implement cost saving initiatives and negotiate compromises with key creditors.</p>	Yes	Yes	Medium	Informal	Yes, in part	Continuing	12 months	<p>The restructure has completed, the ASX entity continuing to trade. Most jobs were saved, noteholders converted debt to equity and unsecured (and secured) creditors continue to be paid in accordance with renegotiated. Equity has been preserved in diluted form.</p> <p>As an observation, it is highly unlikely that jobs would have been preserved, nor would equity have retained some value, if the company had drifted into VA. The restructure maintained an operating entity.</p> <p>The SH regime gave the board confidence to execute on and report against the plan and to provide board stability.</p>

Agricultural	<p>Company was overleveraged - senior and unsecured note facilities together exceeded A\$150m.</p> <p>The company explored M+A (takeover) options, which were expected to, and did, involve months of negotiations with debtholders. The company did so having regard to SH principles and continued to satisfy SH pre-requisites. No formal resolution was passed to enter into SH.</p>	No	No	Large	Informal	No	Continuing	12 months	The takeover was completed, new capital injected into the company, debts restructured (consensually). The company continues its existing business and is growing.
Industrial	<p>Experienced liquidity problems when customers unexpectedly reduced order volumes. With 200 employees jobs at stake, facing declining liquidity and high costs structure, the directors needed to consider whether to continue to trade.</p> <p>Directors wished to pursue a dual track process to renegotiate loans facilities (and to refinance these) while running a sale of business process in tandem.</p>	Yes		Large	Informal	Possibly	Continuing		With the benefit of the SH protection, the directors were successful in the dual track process - loans were refinanced and the business was sold, preserving all 200 jobs.
Technology	<p>The company received an adverse R&D tax ruling which jeopardized its business model and, in turn, its ability to continue as a going concern. The company appealed the tax ruling.</p>	Yes	Yes	Medium	Informal	No	Continuing	6+ months	The R&D appeal was successful. The company continues trading and continues to meet debt obligations as these fall due.

	The directors ensured all SH entry criteria were satisfied and formed a view that a better outcome could be achieved by pursuing an appeal against the adverse R&D ruling (and interesting situation in that the directors needed to take extensive advice on the 'reasonably likely' component of the SH test).								
Energy	Company's cashflow adversely impacted by project delays and regulatory-related issues. The company needed time to renegotiate arrangements with lenders, source new capital and finalise the readiness of the project.	Yes	Yes	Medium	Informal	No	Continuing	<12 months	With the protection of SH, directors have continued to execute on these strategies and are progressively resolving long term problems while continuing to satisfy debts as these fall due.
Retail	The company has been affected by lockdowns and the inability of its (retail) customers to attend sale promises. The directors continue to meet the SH pre-requisites though have not formally determined to enter SH.	No		Medium	Informal	Yes	Continuing		Directors continue to meet employee entitlements, satisfy other SH obligations and maintain a watch over cashflow. While not, per se, and example of the adoption of a formal SH, two important observations can be drawn (1) SH does not need to be formally entered into in order to provide the protection of 588GAA (2) the fact of SH protection seems to be relatively well known, such that directors are, in unusual trading situations, focusing on the entry criteria as an ordinary part of the business focus of the company and for active consideration by the board of directors.

Transport	<p>The company was suddenly and unexpectedly affected by lockdowns in travel associated with Covid. The directors continued to operate the business, taking solvency advice and while continuing to meet the SH criteria (in particular focusing on meeting ongoing employee entitlements).</p> <p>SH was not formally adopted and it is highly doubtful the company was ever trading while insolvent so s588G issues do not naturally arise for consideration.</p>	No		Mega	Formal	Yes	Continuing		It is notable that the SH pre-requisites were under active review by the Board, again emphasising that the approach to dealing with stakeholders and in maintaining integrity in the business is, and remains, part of the business judgments of directors in distressed circumstances.
Investment - other	<p>ASX company business was disrupted by Covid induced disruptions around the supply chain.</p> <p>Board engaged advisors to assist develop a stabilisation and contingency plan. The plan focused on improving values and revenue from under-performing business lines and reassessing creditor terms.</p>	Yes	Yes	Medium	Informal	Yes	Continuing	<3 months	Textbook example of SH, implemented in a timely and efficient manner, without the need for a long tail. Business and the directors regained confidence in the business and deal with the unexpected pressures wrought by Covid induced shutdowns. The business stabilised and continues to trade.
Retail	<p>ASX retailer with large leasehold footprint, impacted by a lack of foot traffic during Covid lockdowns.</p> <p>Board determined to enter SH in light of future insolvency risk should the restrictions lead to a sustained and ongoing decline in business.</p>	Yes	Yes	Medium	Informal	Yes	Continuing	<3 months (twice)	<p>SH was used twice to deal with different lockdown impacts on liquidity. SH provided the board with a level of comfort, enabling the continued trading of the business in conformity with the plan.</p> <p>Management were encouraged by the AQE (legal and financial advisors) to provide updated materials to enable</p>

	The Board engaged external parties to assist with negotiations with landlords, standing down of staff, store re-opening programs, further lockdowns, amending and extending secured lending facilities and negotiations with stakeholders.									the AQE to providing advice to the board. The board used that information to maintain trading rather than taking the alternate course (VA). The business remains trading.
Design	<p>Solid performing Australian business that had significant ATO liabilities, multiple failed payment plans and ongoing disputes with a former landlord. Uncertainty overflowing from 2019 market conditions (oversaturated market and ill-fated expansion of the business into SEA) created concerns.</p> <p>VA was under active consideration. The board, with the assistance of AQEs (legal and financial advisory), having ensured SH criteria were met, developed an alternative plan. The pillars of the plan involved engaging with the ATO, landlords and better trading terms with creditors.</p>	Yes	Yes	Small	Informal	No	Continuing	6+ months	<p>Adopting SH allowed the business to continue to trade rather than proceeding into VA. This enabled management to preserve personal relationships with suppliers and creditors and enabled the company to take advantage of increased appetite within Australia for its product (visual effects).</p> <p>This law reform enabled the preservation of a business that, but for SH, would have gone into VA with the sole director losing her retirement 'nest egg'. The business continues to trade and grow. The development of a SH plan with the help of the AQE identified a couple of simple key pillars <u>which were satisfied in due course. Following satisfaction, the company exited SH and continues to trade and grow.</u></p> <p>The AQE was able to simplify (in the minds of the directors at least) the process for recovery because of experience from previous engagements.</p>	
Renewables	SME business hamstrung through increased competition, higher cost base and delayed contract completion as a result of	No	Yes	Small	Informal	Yes	Continuing			Although the directors chose not to formally adopt SH (because of concerns this would become a disclosure event under facility instruments), on an objective

	<p>Covid. The business was trading to a potential insolvency event (ref flag was the potential for cashflow to impact on the ability to meet payroll).</p> <p>SH was considered at the board level- this led to a better understanding of the criteria for SH and the need to focus any plan on the ability to meet ongoing payroll (and entitlements) as well as trading back to an ability to meet debts as these fell due.</p>								<p>assessment, SH was effectively engaged (entry criteria was met, a plan developed with AQEs, solvency measures were restored).</p> <p>Serious consideration needed to be given to the interplay with SH and disclosure requirements under existing secured lending arrangements. In the end, the secured lender was supportive of the engagement of external advisors. It is interesting that the board determined to satisfy the entry requirements of SH and to follow the execution elements of SH but did not see a need to formally resolve to enter SH.</p>
Mining	<p>ASX company was under-performing production forecasts (mineral recoveries). The company required assistance in identifying cost saving and revenue improvement initiatives, which were subsequently embedded in the business plan and corporate financial model.</p> <p>Board retained AQE at both the listed and subsidiary level to assist in providing financial advice and in developing a plan for sale of the business for the highest possible price. This required the sale to be negotiated while the company had a continuing business.</p>	Yes	Yes	Medium	Informal	No	Continuing		<p>The AQE identified a number of cost saving/revenue improvements and suggested initiatives to achieve value.</p> <p>The AQE was tasked with business improvements project management and both short and long term cashflow modelling, to assist the company in its negotiations with financiers.</p> <p>The subsequent sale enabled all unsecured creditors (including employee entitlements) to be met. The subordinated creditor retains a royalty stream from ongoing operations.</p>
Architecture - Design	Privately owned group heavily focused on the aged care sector. Negative media led to	Yes	Yes	Medium	Informal	No	Continuing		The adoption of a turnaround plan enabled the company to achieve better outcomes than would have been

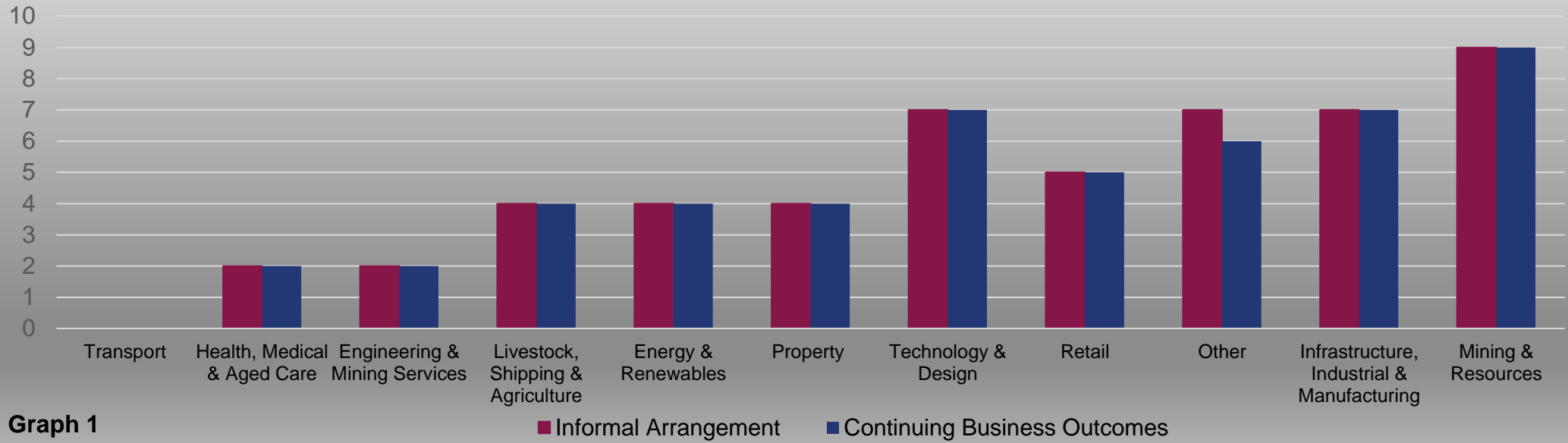
	<p>an unprecedented reduction in the Group's revenue and unforeseen financial losses.</p> <p>The board took advice from an AQE to enable it to satisfy SH eligibility criteria and to assist the company work through cost reduction and business improvement initiatives, with the aim of right-sizing the business.</p>								possible under a VA process. The board were able to restructure operations and return to profitability.
Medical	<p>ASX company engaged AQE to assess SH eligibility criteria, review financials of group companies, ensure financial records were complete and position to report compliance with s588GAA.</p>	Yes	Yes	Medium	Informal	No	Continuing		Board developed and executed on a restructuring plan that led to better outcomes than achievable in a VA.
Property	<p>The Group comprised three principal businesses - high end renovation company, smaller home renovations company and a consultancy arm. The Group experienced adverse operational performance and needed additional capital.</p> <p>AQEs engaged to evaluate the company turnaround plan and to provide restructuring options.</p>	No		Small		No			Following review of the Group's financial position and proposed turnaround plan, the AQE advised that the company did not need to formally enter SH.
Print and Distribution -	<p>This ASX entity was successfully restructured using interlocking schemes (both a members scheme and</p>	Yes	Yes	Large	Informal and Formal	No	Continuing		SH enabled the directors of companies within the Group to engage in restructuring initiatives that resulted in positive outcomes for stakeholders.

Design + Technology	<p>a creditors scheme), capital raising, debt compositions and swaps, operational turnaround strategies and safe harbour planning to avoid insolvency.</p> <p>The restructuring completed on 18 June 2021.</p>								Without SH, the group would not have been able to engage in the equity raising, Schemes or other turnaround steps to restore solvency in the Group.
Mining Services	<p>Contractor had strong (+\$100M) turnover, few tangible assets and a strong forward book. The company came under liquidity pressure because of risks associated with a long and large ongoing claim. The litigation was diverting company attention, creating cashflow pressure (high ongoing legal costs) and risk as the litigation outcome became more real.</p>	Yes	Yes	Large	Informal	No	Continuing		<p>SH advisor was able to create a restructure plan to run in parallel to the litigation. The AQE provided a new and unbiased perspective. This perspective gave the board sufficient information to initiate and conclude settlement negotiations.</p> <p>The company is now out of SH and successfully trading. If not for SH, it is unlikely the company would have engaged the AQE and it is unlikely the board would have considered the liquidity impact of the litigation on its business. It is highly likely that without a settlement of the litigation, there would have been a risk of an adverse outcome. It is probable such an outcome would have led to a VA, termination (or risk of termination) of the forward book and closure of the business.</p>
Retail	<p>Privately owned retailer with operations in a number of jurisdictions and (pre COVID) had run into a range of headwinds impacting both costs and revenue adversely.</p> <p>The directors were concerned about personal liability and invoked safe harbour in order</p>	Yes	Yes	Small	Informal	No	Continuing	2 months	Additional equity was obtained and the company continues to trade successfully.

	to effect a turnaround plan including to negotiate with their existing secured lender and obtain additional equity from existing shareholders.								
Technology	ASX technology company was loss making; invoking the safe harbour enabled directors to put into effect their plan to realise non-core assets, raise further equity and refinance the existing secured debt	Yes	Yes	Small	Informal	No	Continuing	6 months	Additional equity was raised enabling a successful trade.
Technology	<p>The company was a start-up and generating revenue. Its cash burn (expenses) exceeded revenue, which is not unusual in technology start-ups.</p> <p>Directors were concerned that cash would be consumed before the company could sufficiently increase revenue or achieve a sale of the business. The directors availed themselves of safe harbour and continued to trade.</p>	Yes	Yes	Small	Informal	No	Continuing		A sale of the business as a going concern was eventually achieved at a price well above what a likely liquidation would have obtained. All employees continued with their employment and creditors were either paid or absorbed in the transaction
Mining	Company had an event on site which halted production. Without production there was no revenue but holding costs were still being incurred. There was a plan to re-start the mine but it was	Yes	Yes	Large	Informal	No	Continuing	<6 months	<p>The directors availed themselves of safe harbour while the technical aspects of the mine re-start were attempted, and while a capital raise was undertaken.</p> <p>After several months the mine was re-started and the capital raise was</p>

	not certain the plan would work.								successful. The mine continues in operation 2 years later
Other - unknown	<p>A company failed in litigation and received a significant adverse judgement debt. The debt was due and payable and exceeded its assets.</p> <p>The directors believed there were reasonable prospects to negotiate an acceptable settlement as, for a range of reasons, the other party would not want to see them fail.</p>	Yes	Yes	Medium	Informal	No	Continuing		<p>The negotiations were expected to (and did) take some time to conclude as they involved a counter-party which operated in several jurisdictions and had a complex governance structure.</p> <p>The directors entered safe harbour while the negotiations were commenced and concluded. The negotiations were ultimately successful and the company was able to continue to trade.</p>

High Correlation between Informal Arrangements and Continuing Business Outcomes



Relationship between enterprise obtaining AQE Advice and surviving as a Continuing Business

