Vantage Performance Public Submission:

Inquiry into Corporate Insolvency Australia

30 November 2022

Vantage Performance, who are we?

Vantage Performance is a domestic firm focused on Turnaround Capital and Growth. We have been operating for 17 years and in that time, have been awarded 15 turnaround awards by our peers. Amongst our senior leadership team, we bring more than 80 years' experience in building stronger more resilient businesses, by restructuring and turning around financially struggling companies. Vantage is one of the most active safe harbour experts nationally.

Please see our website for more information: www.vantageperformance.com.au

The experience of our Executive Directors is summarised in the Appendix to this document.

Additionally, we note Macaire Bromley, Executive Director and submission author, has also authored a comprehensive guide on "Safe harbour: a best practice guide for directors", in partnership with *Practical Law Insolvency and Restructuring*, which can be accessed here: Safe harbour: a best practice guide for directors | Practical Law (thomsonreuters.com)

Submission – public

This document comprises Vantage Performance's response to request for feedback and comments on: Inquiry into Corporate Insolvency Australia.

Closing date for submissions: 30 November 2022

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The current Government has launched an inquiry into Australia's insolvency laws.

The Terms of Reference include review of "other potential areas for reform, such as the Insolvent Trading Safe Harbour" (TOR para 3(c)). This submission materially focuses on TOR para 3(c). It also addresses TOR para 1(a) and 4.

TOR para 3(c), Insolvent Trading Safe Harbour

As required by section 588HA of the Corporations Act, Treasury has already caused an independent review of the Insolvent Trading Safe Harbour ("**Review**") to be conducted. That Review was completed under the former Government and the Response was published on 24 March 2022.

Former Government's response to the Review of the Insolvent Trading Safe Harbour is extracted below, and by way of submission, annotated with our comments. In addition, we submit our Submission (hyperlink provided – a separate copy will also be attached) to the earlier Review, which we repeat as if set out in full.

Recommendation	Government response	Vantage comments
Recommendation 1 The Review recommends that section 588GA(1)(a) of the *Corporations Act 2001* (Act) be amended to include a reference to a person starting to suspect the company is in financial distress (in addition, and as an alternative to, a person starting to suspect that the	The Government **agrees** to this recommendation. Establishing solvency and insolvency under section 95A of the Act requires complex analysis which can be challenging for directors to engage with. The Government agrees that the concept of financial distress may be more easily understood by directors.	Agree – in our view, the change is not technically necessary but practically, we agree it would not be unhelpful and could be helpful. If a director has concerns about the company's financial position and solvency, any requirement perceived or real for directors to establish insolvency (or a suspicion of insolvency) is counterproductive to them taking advice. The intent of the safe harbour legislation is to foster responsible directors trying to improve the outcome for the company including to protect or

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company may become or be insolvent).		enhance the return so far as possible to stakeholders and save jobs. We agree with the Review Panel, the concept of financial distress is likely to be more easily understood by directors. Additionally it's our 17 years' experience in turnaround, the earlier a director takes and follows advice, the greater the prospects of saving the company and preserving or improving the position of stakeholders. This is a simple amendment – in the current economic environment, the Government should progress this change without delay.
Recommendation 2 The Review recommends that the safe harbour protections extend to the obligations of directors under section 596AC, and that section 588GA be amended to refer to subsections 596AC(1) and (3).	The Government **notes** this recommendation. Section 596AC relates to agreements or transactions that avoid employee entitlements. The Government will undertake further consultation before considering whether to implement this recommendation.	Agree. We note the parliament amended section 588GA to apply to transactions that may otherwise be subject to 588GAB(1) and (2) and 588GAC(1) and (2). Such exempt transactions may also include the transfer of employee entitlements that would be the subject of section 596AC.
Recommendation 3 The Review recommends that section 588GA(1)(b) be amended to specifically refer to debts incurred in the ordinary course of business.	The Government **agrees** to this recommendation. The Government considers that this amendment would assist in facilitating directors' understanding that debts incurred 'directly or indirectly in connection' with a course of action extend to debts incurred in the ordinary course of business.	Agree with the proposal for clarification on the condition we have properly understood it to extend and not limit the current meaning of debt. That is, Vantage agrees to text that adds to the existing text in an inclusive manner as follows: "the debt is incurred, or the disposition is made, directly or indirectly in connection with any such course of action including without limit debts incurred, or dispositions made, in the ordinary course of business".

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		It is important that any change not inadvertently exclude costs incurred to develop and then implement the courses of action, even if there was an argument they were not technically ordinary course of business costs. The amendment as set out by Vantage above is a simple amendment – in the current economic environment, the Government should progress such change without delay.
Recommendation 4 The Review recommends that a plain English 'best practice guide' to safe harbour be developed by Treasury in consultation with key industry groups. The Review recommends that this guide set out general eligibility criteria for appropriately qualified advisers.	The Government **agrees** to this recommendation. The Government recognises the benefits that a best practice guide to safe harbour would have for directors and advisers. The Government considers that a best practice guide should be developed in consultation with key industry bodies, noting that the Australian Securities and Investments Commission (ASIC) would be the appropriate agency to release such guidance. The Government notes the Review's specific guidance suggestion below.	Agree. However, Vantage notes: • this will likely take time; • the very helpful explanatory memorandum to s588GA (**EM**), which already exists and yet appears to be underutilised due possibly to a lack of awareness; • that the updates recommended in the final recommendation (see below) not be delayed but progressed in the interim as a more urgent matter. Vantage further notes that the Review Panel received considered submissions from several industry bodies and knowledgeable industry participants, such as Vantage Performance. We support the Government in instructing ASIC and ASIC in preparing the practice guide having regard to the EM, the submissions and the Review findings. In particular, we note two key areas that in our view are significant to general eligibility criteria for appropriately qualified advisers,the functioning of the section and the

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		orderly external administration of companies (where such appointmnts are subsequently made): 1. Independence of the advisor, and subsequent external administrator, if appointed; and 2. Not unduly limiting those persons who may provide advice. We expand on each below: ***Independence – important to address*** The parliament has provided powerful carve outs from potential liability for directors and holding companies via s588GA with respect to insolvent trading and anti-phoenixing obligations, where certain requirements are met. A voluntary administrator is obligated to form a (preliminary) opinion on these matters including if pursuing them in liquidation is likely to provide a better return to creditors as against a proposed Deed of Company Arrangement (DOCA). A DOCA proposal may be submitted by a related party including a director, and may be one of the courses of action that was developed prior to the appointment of the voluntary administrator, in order to lead to the better outcome. A liquidator, in addition to forming an opinion, has the power to pursue the directors and other parties for such breaches.

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		A safe harbour advisor who is subsequently appointed voluntary administrator or liquidator cannot resolve the actual and perceived conflict that arises, in relation their advice as to the existence of safe harbour and whether certain courses of action which that person advised upon and which may include a proposal to restructure the company via the very DOCA the subject of creditors' vote (relative to liquidation), provides the better outcome. We note the courts have approved the appointment of special purpose liquidators to manage conflicts of interests. Whilst this may, subject to the court's discretion, be a solution for liquidations, implementing such a system in a voluntary administration for the special purpose appointee to express opinions upon 1. Solvency, 2. The veracity of the safe harbour advice, and 3. If the proposed DOCA is more likely to give a better outcome than a winding up, would complicate a regime designed to aid a formal restructure. It involves additional cost and potentially length to a process intended to be as short as possible. The secondary conflict that arises, is where the safe harbour adviser stands to earn greater fees from a voluntary administration than the safe harbour advice, there is an inherent conflict in forming an independant conclusion on the courses of action that a company may pursue to achieve the better outcome.

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		The issue is avoided if the legislation is amended to deal with the conflict expressly. See also D-Q11 (pg 46) of our Vantage Submission. ***Narrowing the Advisor Pool – important to reject such proposal*** Vantage expressly repeats as if set out in full here B6 (pg 13-14) and D-Q9 (pg 40-44) of our Vantage Submission. Further, Vantage submits in relation to the preparation of any security statement (a commonly known industry tool which exemplifies a liquidation outcome by reference to a company's balance sheet): Vantage disagrees that only a registered liquidator is qualified to prepare such statement. • Any person with *appropriate experience* is fit to prepare such statement – such as Vantage Performance, a firm with deep experience in assisting distressed businesses including in an insolvency context. • Although the security statement is not a valuation, in some circumstances, a valuation for a particular asset(s) may be desirable or required - generally a registered liquidator is not a valuer and if a valuation is required, that would need to be referred by a liquidator to a valuer. That is, a registered liquidator does not automatically have the *appropriate expertise* for such element of a security statement.

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		• The expertise required to prepare a security statement includes an understanding of (i) relevant sections of the Corporations Act and the PPSR legislation, *which principles can be taught*, and (ii) industry intel on market standard returns generally experienced in a going concern context versus a fire sale context, as a percentage of book value, such intel being available to either a liquidator or a person who has relevant industry experience, such as Vantage, or as mentioned above a valuer.
		• There is good reason to not unduly narrow the pool of parties available to companies to assist them with safe harbour advice, particularly across the SME and mid-market, being a market in which Vantage Performance is extremely active including as safe harbour adviser, and where the stipulation to seek advice from a registered liquidator in addition to existing advisers who are actively experienced in the principles relating to the preparation of a security statement, may impose unecessary increased cost.
		• Moreover, such requirement may lead to unintended consequences, particularly in the SME and mid-market, for example:
		  ○ a company does not wish to approach an insolvency firm due to 'perception' and so will not seek advice at all;
		  ○ it is assumed that all that is required by way of advice is advice from a registered liquidator, worse merely a security statement, and the company will not seek appropriate turnaround advice but will operate with no such advice or

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		unduly limited advice or on the assumption that they can address the 'courses of action' element alone. • This has the very real prospect of seriously impeding the intended benefit of safe harbour protection as a framework to encourage early intervention and support the obtaining of advice to improve the company's financial position.
Recommendation 5 The Review recommends section 588GB be amended, to clarify that: • if books and records are in a director's possession and control (even if they are not the books and records 'of the company'), and • those books and records are not provided to the administrator or liquidator at the time of a formal appointment, then the director will also be prevented from producing those books and records to establish safe harbour in any relevant proceeding.	The Government **agrees** to this recommendation. The Government considers that this legislative change would make the section consistent with the director's obligations under other provisions of the Act which require a director to deliver all books in their possession that relate to the company.	Vantage disagrees with this recommendation. In practical terms, a director is incentivised to produce any key documents that establish the existence of a safe harbour to avoid any relevant claim, subject to legal and insurance advice, at the earliest opportunity. However, we do not agree that a director who does not produce all records that they keep as a director, ought be prevented from relying upon them in the event that relevant proceedings are commenced.
Recommendation 6 The Review recommends either the reference to the term	The Government **agrees** to this recommendation. Implementing the recommendation will avoid confusion given the Act's existing definition of 'restructuring' in	Agree, in light of the subsequent introduction of the SBRR. Vantage notes that a restructuring can be called a turnaround, a transformation, a rearrangement, an

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'restructuring' in section 588GA(2) be replaced or the definition of restructuring in section 9 be updated to include a definition of that term for the purpose of section 588GA(2)(e).	section 9, which is defined by reference to restructuring under the small business restructuring regime.	arrangement, a reorganisation, to name a few, however all these terms are limited and likely to confuse. The intent is that directors have a plan to improve the financial position (as opposed to no plan or a plan that is not focussed on improving the financial position). As such, the better approach is to simply delete the word restructuring as follows: "is developing or implementing a plan for ~~restructuring~~ the company to improve its financial position"
Recommendation 7 The Review recommends that section 588GA(2)(d) be amended by replacing the reference to 'an appropriately qualified entity' with 'one or more appropriately qualified advisers'.	The Government **agrees** to this recommendation. The Government considers that this amendment would clarify that, in working out whether a course of action is reasonably likely to lead to a better outcome for the company, the key consideration is the receipt of appropriate advice, and not that the advice need come from only one adviser.	Vantage is of the view that the amendment is not necessary, however is not opposed to the amendment if considered to be necessary or helpful. Vantage notes and agrees with Government's view that the key consideration is the receipt of appropriate advice. That is, it is our experience that key to the success of a turnaround is the receipt of *appropriate* advice and that any amendment, if there is to be one, must be focused on that.
Recommendation 8 The Review recommends that section 588GA(2)(d) be amended to expressly state that regard may also be had as to whether the *company* is receiving advice from one or more appropriately qualified advisers who have been given sufficient information to provide appropriate advice.	The Government **agrees** to this recommendation. This amendment would expressly cover situations where the company, rather than a director, has sought the appropriate advice, reflecting the commercial reality as to who is likely to seek the advice.	Agree. Vantage notes that the sub-section is neither mandatory nor exhaustive, such that a director may under the current legislation ask the court to have regard to advice to the company. As such, the amendment is not necessary. However, an amendment that reflects the reality that both the person and the company will likely be the

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		recipients of relevant advice, and that regard may be had to both, makes the position plain. This is a simple amendment – to the extent it may be helpful to directors, in the current economic environment, the Government should progress this change without delay.
Recommendation 9 The Review recommends amending subsections 588GA(4)(a) and 588GA(4)(a)(i) to align the wording of those provisions with the wording of the employee entitlement safeguard in Regulation 5.3B.24.	The Government **agrees** to this recommendation. The Government agrees that achieving consistency in the reference to payment of employee entitlements with the wording used in the relevant small business restructuring regulation is desirable. The amendment would harmonise the terminology of the Act and the small business restructuring regulation without changing the intended operation of the provisions.	Agree. See our Vantage Submission. at B8 and D-Q7 and also Schedule below. This is a necessary and important amendment and the Government should progress this change without delay.
Recommendation 10 The Review recommends that a finite list of tax reporting obligations be included in subsection 588GA(4)(a)(ii).	The Government **notes** this recommendation. The Australian Taxation Office (ATO) assists businesses to ensure that their tax reporting obligations are met. The Government will consider the inclusion of tax reporting guidance for directors in the 'best practice guidance' referred to at Recommendation 4.	Vantage agrees with Recommendation 10 and disagrees with the former Government's response. See Vantage Submission at D-Q7 (pg 38) and also see Schedule below. Recommendation 10 is a necessary and important amendment and it is submitted that this should be adopted by Government and progressed without delay.
Recommendation 11 The Review recommends the deletion of subsection 588GA(4)(b)(ii).	The Government **agrees** to this recommendation. The recommended change would assist directors in determining their compliance with the safe harbour pre-conditions by removing the prescriptive reference to more than one failure in complying with the relevant	Agree. See our Vantage Submission at B8 and D-Q7 and also Schedule below. This is a necessary and important amendment and the Government should progress this change without delay.

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	obligations to pay employees and meet tax lodgments. This will allow a wholly principles-based approach to ensuring compliance under subsection 588GA(4) given the retained requirement for 'substantial compliance' with those obligations. The Government will consider how to provide further clarity to assist stakeholders with the interpretation of substantial compliance, referred to below in the response to Recommendation 12.	
Recommendation 12 The Review recommends that a definition of substantial compliance be included in the Act, to assist stakeholders to interpret the requirements of subsection 588GA(4).	The Government **notes** this recommendation. The Government agrees with the Panel's view that substantial compliance should not be assessed against each individual obligation to pay employees and meet tax lodgments. The Government will progress reforms to clarify that substantial compliance only involves two assessments, firstly as to whether there is substantial compliance with obligations to pay employees as whole, and secondly, whether there is substantial compliance with obligations to meet tax lodgments as a whole.	Agree with Recommendation 12 and the proposal to progress suitable reforms. See our Vantage Submission at B8 and D-Q7 and also Schedule below. This is an important amendment and the Government should progress this change without delay.
Recommendation 13 The Review recommends that data on safe harbour utilisation be collected and reported upon, as part of the reports received from voluntary administrators and liquidators.	The Government **notes** this recommendation. These reports and associated data from administrators and liquidators are received and managed by ASIC. The Government has also progressed reforms to enhance the ability of regulators and the Registrar to collect business-related data to support law and policy as part of the Modernising Business Registers program.	Such data will only comprise a very limited portion of safe harbour assignments, being those where a company proceeds into voluntary administration and/or liquidation. In the large majority of cases, it is Vantage's experience to date that a company that utilises safe harbour protection does not enter voluntary administration or liquidation.

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		Accordingly, Vantage recommends that at regular periods, eg annually, ASIC survey industry participants for de-identified data of safe harbour engagements. Such data will enhance the quality and usefulness of any published statistics, beyond material obtained solely from voluntary administrator and liquidator reports.
Recommendation 14 The Review recommends that Treasury commission a holistic in-depth review of Australia's insolvency laws.	The Government **notes** this recommendation. The Government has an extensive agenda regarding measures to improve Australia's insolvency framework for both small and large businesses. On 1 January 2021, the Government introduced new insolvency processes suitable for small businesses, which are the most significant reforms to Australia's insolvency framework in 30 years. The Government also announced reforms to creditors' schemes of arrangement and conducted consultation on clarifying the treatment of corporate trusts in insolvency over the course of 2021.	Vantage notes that the current Government has adopted this recommendation.
Specific guidance suggestion In addition to Recommendation 4, the Review strongly supports an update being made to ASIC Regulatory Guide 217 to refer to the insolvent trading prohibition, and the safe harbour provisions, together with general guidance on the operation of the relevant provisions.	The Government **notes** this recommendation, which is directed towards ASIC.	Agree. This is an important update and in the current economic environment, the Government should progress this change with ASIC without delay.

Schedule to TOR para 3(c)

- The Review Panel recommended and former Government agreed, that amendments should be made to the employee/tax mandatory compliance element of the Safe Harbour. The amendments proposed will significantly improve the Safe Harbour, to provide for substantial compliance and remove the much misunderstood two-strikes rule. This change is intended to better reflect the intention of the legislature as expressed in the Explanatory Memorandum, that technical and trivial matters are to be excluded.[i] The new text will align with pre-existing like provisions in the Corporations Act.
- Based on the Gov Response, the proposed text of the new law will read as follows, and Vantage agrees to this amendment and submits that it should be made urgently without delay:

"(4) Subsection (1) does not apply in relation to a person and either a debt or a disposition if:

(a) the company has:

(i) paid the entitlements of its employees that are payable;

(ii) given returns, notices, statements, applications or other documents as required by taxation laws (within the meaning of the Income Tax Assessment Act 1997); and

(b) that failure:

(i) amounts to less than substantial compliance with the matter concerned;

- At page 65 of the Review Report, the Panel notes: *"In our view, simplifying the wording of the legislation would make it easier and less costly for directors to determine if they are complying with the pre-conditions. Directors' focus should be on the better outcome analysis rather than detailed analysis of technical compliance with the pre-conditions. … The Panel's view is that substantial compliance should be assessed broadly with regard to all employee entitlements or tax lodgments (as relevant), and not pick up technical, trivial or minor matters."*
- This is helpful guidance and reflects the legislature's original intent as follows:

The Explanatory Memorandum confirms:

a director will not be eligible for the Safe Harbour protection if the company is either ***serially*** *failing to meet its obligations, or there has been* ***a serious failure by the company to substantially meet*** *its obligations to pay employee entitlements or meet tax reporting obligations.[ii]*

[i] Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 (**EM**), [1.79].

[ii] Discussed further and cited as part of the Vantage Submission, D-Q7 (pg 36-37)

Vantage Submissions: TOR para 1(a) and 4

TOR 1(a): temporary COVID-19 pandemic insolvency measures, and other policy measures introduced in response to the pandemic that may have had an effect on such trends and practices

Vantage submits: please see D-Q5 (pg 34-35) of our Submission, which we repeat as if set out in full.

TOR 4: supporting business access to corporate turnaround capabilities to manage financial distress

Vantage submits: please see D-Q12 (including Q10) (pg 44-46) of our Submission, which we repeat as if set out in full.

By way of update, we note since 1 October 2021, and in particular since January 2022 to present, as one of the most active safe harbour experts nationally, we have experienced the following positive advancements:

- greater awareness amongst directors of the safe harbour protection, as compared to pre-2021
- greater number of advisors offering safe harbour advice, as compared to pre-2021
- broader use of safe harbour by directors, beyond severe financial distress but also in the context of capital raising or other circumstances where the company is not insolvent but there are concerns around the sufficiency of capital in the near to medium term, being prudent use of the safe harbour as an early intervention mechanism – compared to pre-2021 use.

Whilst use and awareness of the safe harbour protection is greater now than pre-2021, potentially due to the following:

- current economic times;
- the industry review of the effective use of safe harbour protection which itself raised awareness,

and that is extremely encouraging, we agree that continuing increased awareness and education remains important.

Appendix

Vantage Performance is led by founding CEO and Executive Director, Michael Fingland, supported by Macaire Bromley, Executive Director, NSW, Andrew Birch, Executive Director WA, and Kevin Higgins, Executive Director Qld.

Detailed profiles for each of our leaders can be located at https://www.vantageperformance.com.au/our-people/

Michael Fingland
Executive Director & CEO

Vantage Performance is led by Michael Fingland, CEO and Founding Director. Michael is a Chartered Accountant with over 20 years of experience in corporate restructuring and turnaround, both in Australia and the United Kingdom. He is a current member and former Director of the Turnaround Management Association and a Queensland Committee member of Australian Restructuring Insolvency and Turnaround Association.

Andrew Birch
Executive Director - WA

Vantage in Western Australia is led by Andrew Birch, Executive Director. Andrew is a chartered accountant and a graduate of the Australian Institute of Directors, Company Directors Course. He has been working in corporate recovery, corporate advisory, and corporate turnaround since 1994 in Australia, and prior to that for 3 years in the United Kingdom.

Macaire Bromley - NSW
Executive Director

Vantage in NSW is led by Macaire Bromley, Executive Director. Macaire is a former partner of a global law firm and former accountant, with over 20 years of experience in corporate restructurings and turnaround gained in Australia, the UK and the UAE. She is a graduate of the Australian Institute of Directors (AICD), Company Directors Course, she has co-authored director training and presented webinars for the AICD as a turnaround and safe harbour subject matter expert. Macaire is well regarded as being a forerunner and highly influential advocate of safe harbour law reform in Australia.

Kevin Higgins
Executive Director - QLD

Vantage in QLD is led by Kevin Higgins, Executive Director. Kevin, a CPA, brings more than 18 years of corporate restructuring experience to the firm. He has proven himself to be a proactive and successful Chief Restructuring Officer and interim CFO; having led start-up, turnaround and high growth organisations. Memberships include CPA, Turnaround Management Association of Australia and Australian Restructuring Insolvency and Turnaround Association.