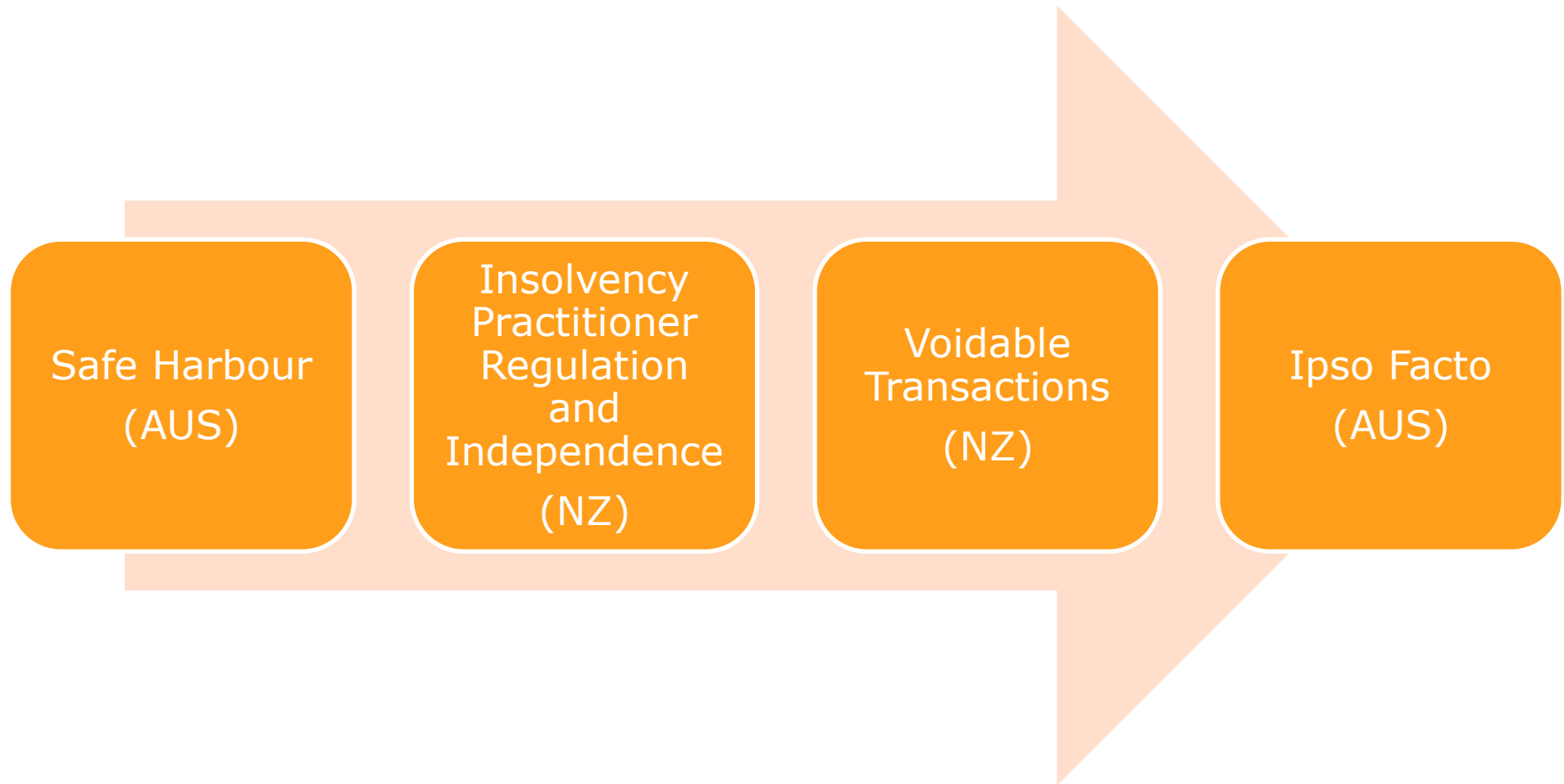




Insolvency law reform in Australia and New Zealand – who's ahead?


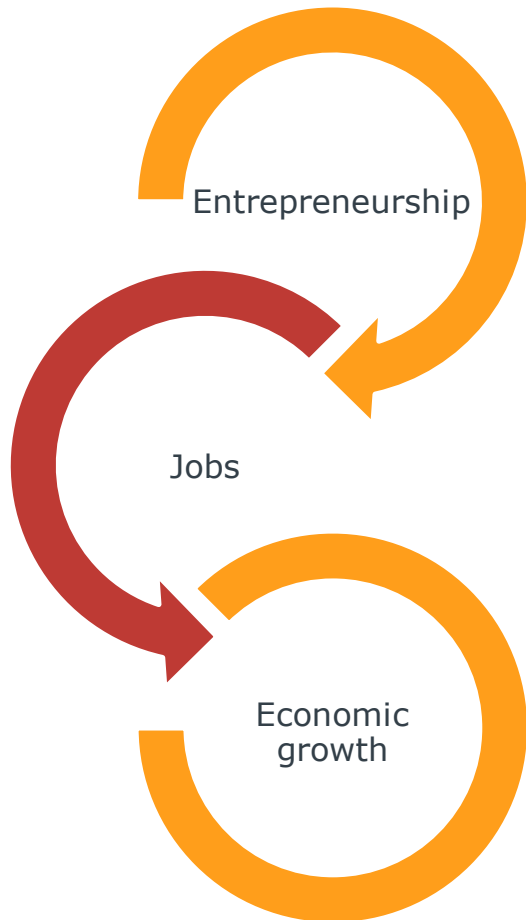
1 SEPTEMBER 2017

Roadmap




Australia's National Science and Innovation Agenda

TREASURY LAWS AMENDMENT (2017 ENTERPRISE INCENTIVES NO 2) BILL 2017 (CTH)



Australian Government



NATIONAL INNOVATION & SCIENCE AGENDA

WELCOME TO THE IDEAS BOOM

innovation.gov.au

1 **Safe Harbour**

- Avoid early appointment of administrators
- Reduce "personal liability" barrier to restructuring for directors

2 **Ipsos Facto**

- Enable businesses to continue to trade in order to recover from insolvency events

Safe Harbour - Key concepts

INTRODUCTION OF A NEW SECTION 588GA – CARVE OUT FROM INSOLVENT TRADING LIABILITY

- 1 Requirement**

Develop and implement a **course of action** that is reasonably likely to lead to a **better outcome** for the company than the immediate **appointment of an administrator or liquidator**
- 2 Threshold Issues**

Payment of **employee entitlements** (including superannuation) and **taxes**
- 3 Carve out structure**

Directors bear an "**evidential burden**" only
- 4 Indicia of Safe Harbour**

Directors should: **monitor financial position**, maintain appropriate **financial records**, prevent **misconduct**, seek **advice** and develop and implement a **restructuring plan**
- 5 Limitations of Safe Harbour**

Directors must still **comply with their other general law duties**, including duties to provide books and records to any subsequently appointed insolvency practitioner

Navigating Safe Harbour

LIKELY IMPACT OF REFORMS



XYZ Mining Limited

LISTED IRON ORE MINER - SEVERAL THOUSAND EMPLOYEES, A COMPLEX BUSINESS STRUCTURE AND HUNDREDS OF MILLIONS OF DOLLARS IN ASSETS.

- Rapidly deteriorating financial position - ill-advised historical asset purchases followed by falls in the iron ore price; concerns over solvency
- Board seeks professional advice from a well-regarded turnaround firm with substantial experience in dealing with large and complex restructures to conduct a business review and help develop a course of action
- Advised to negotiate with its creditors and avoid administration for the time being - that this will be reasonably likely to lead to a better outcome for the company than immediate administration or liquidation because this will avoid a "fire sale"
- The board resolves to do so, but negotiations take longer than expected due to the uncertainty in the market
- Expecting prices to stabilise, and on advice from their advisers that the course of action being pursued is still reasonably likely to lead to a better outcome than immediately appointing an administrator, the company resolves to continue to trade
- The iron ore price continues to fall; negotiations with the company's principal lender break down. Adviser says renegotiated credit likely to be prohibitively expensive
- The board reconsiders whether the current course of action is still reasonably likely to lead to a better outcome for the company. Board determines that it is not
- The board immediately appoints a voluntary administrator

NZ Insolvency Practitioner Regulation and Independence

How did we get to where we are today?

1

Current Statutory Duties

- The Companies Act 1993 reflected the free market attitude of the government at that time. An IP is qualified as long as they are at least 18 years old, are not an undischarged bankrupt, have not been certified under mental health legislation and do not fall within other, narrowly defined, disqualifications.
- Insolvency Practitioners Bill 2010 – proposal for ‘negative licencing’ going nowhere.

2

RITANZ Self Regulation

- Came into force 1 January 2016
- Minimum entry and ongoing qualifications requirements
- Complaints and discipline regime underpinned by a code of professional conduct
- Now has close to 100 Accredited Insolvency Practitioners

3

Insolvency Working Group

- Report No.1 July 2016 addressed IP regulation and voluntary liquidations
- Key recommendations accepted by Cabinet include
 - Introduction of a co-regulation model for IP’s
 - Changes to improve High Court supervision of liquidators
 - Changes to voluntary liquidations
 - Searchable identification numbers for directors

Practitioner Regulation and Independence – Discussion points

1

Key impacts on formal appointments?

2

Impact on Lenders?

3

What are the key differences in Australia?

4

The Channel 10 decision ?

Voidable Transactions – Current NZ Regime

1

Basic criteria

Currently applies to payments made when the debtor company was **insolvent**, in the period up to **two years prior** to the liquidation, that resulted in the creditor receiving **more than in a liquidation**.

2

Continuing business relationship

The statute requires that a CBR, such as a **running account**, be treated as a single transaction. A liquidator may **not** select the point of peak indebtedness.

3

Good faith defence

Supreme Court in *Allied Concrete* set up a broad “**good faith**” defence.

- **Prior value** is enough
- No knowledge of insolvency
- No intention or knowledge of preference

4

Current practice

Allied Concrete has led to a **drop in claims**. Creditors with no knowledge are protected. Claims **costs have increased** and certain types of creditors more at risk.

Voidable Transactions – Proposed NZ reform

1

Competing policy objectives

“The main challenge is to balance the need to protect the collective interests of all creditors with the need to provide commercial certainty to individual creditors who have received payments in good faith.”

2

Key reform proposals

- Repeal the 'gave value' test. Return to a defence only where a creditor in good faith, and without suspicion of insolvency, relies on the payment itself,
- Instead create certainty by reducing the period of vulnerability from two years to six months, where the debtor and the preferred creditor are unrelated parties, and
- Increase that period to four years where the company and the recipient are related parties.

3

Additional proposals include:

- Standardise the clawback period at four years for related parties
- add a defence for a secured creditor who can show that there was no preference at the time they received payment
- Impose a three year limitation period in which to bring claims (Court to extend)
- Simplify the continuing business relationship rule by removing the subjective element relating to the parties' intentions

Voidable Transactions – Discussion points

1

**Will it improve
NZ's regime?**

2

Impact on Lenders?

3

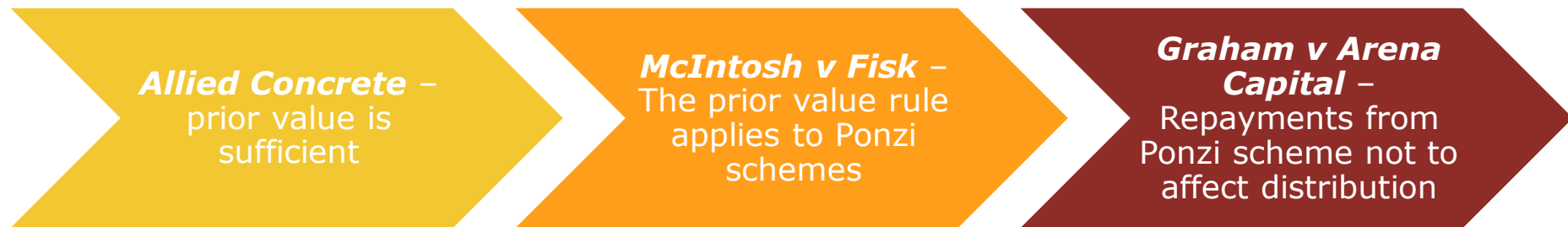
**How does the
Australian regime
compare?**

4

**Is reform needed
in Australia?**

Ponzi schemes – Recent NZ decisions

The Law is clear:



"an accident of timing as to when funds are withdrawn should not favour one defrauded investor over another. ... As the liquidators submit, the very purpose of the payments made to Mr McIntosh was to defraud other investors." Glazebrook J (the minority in the Supreme Court)

Ipsos Facto - Key concepts

1

Stay applies when

- a company enters **voluntary administration**, a **controller** is appointed to all or substantially all of the assets, the company announces/applies for/ enters into a **scheme of arrangement** (together, the **Prescribed Events**)

2

Categories of rights subject to stay

- express rights that arise by reason of the relevant **occurrence of a Prescribed Event** or the company's **financial position**

3

Exclusions

- counterparty maintains the right to terminate for any **other breaches of contract**
- contractual rights may be enforced with the **consent** of the relevant appointee
- rights in post-appointment contracts

4

Court power

- there is a Court discretion to:
 - allow a right to be enforced "**in the interests of justice**"
 - impose stay where rights exercised or likely to be exercised because of **Prescribed Event** or company's **financial position**

5

Timing

- broadly, the stay applies for the **duration of the Prescribed Event**, unless extended by the Court

Navigating Ipso facto


LIKELY IMPACT OF REFORMS



Who is Ahead – The Wash Up?

INSOLVENCY LAW REFORM





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