National Innovation and Science Agenda

Improving Corporate Insolvency Law

King & Wood Mallesons submission

Level 61
Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
Australia

T +61 2 9296 2000
F +61 2 9296 3999

www.kwm.com

28 April 2017

To Mr James Mason
Financial System Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Mr Mason

National Innovation and Science Agenda – Improving Corporate Insolvency Law – King & Wood Mallesons submission

Thank you for the opportunity to lodge a submission on the draft legislation to amend the *Corporations Act 2001(Cwlth)* to provide for a "safe harbour" for insolvent trading and a stay on enforcing "ipso facto" clauses (**Draft Legislation**), together with the supporting draft Explanatory Memorandum and outline of proposed regulations.

This document sets out our comments on those documents in respect of the proposed Ipso Facto reform. It should be read in conjunction with our previous submission dated 27 May 2016 entitled 'Let's optimise the opportunity for reform' (**Optimising the Reforms**). Optimising the Reforms was our specific response to the Treasury proposals paper released in April 2016 entitled 'Improving bankruptcy and insolvency laws'.

Overall, and consistent with our comments in Optimising the Reforms, King & Wood Mallesons remains supportive of the proposed reforms. We consider that the proposed reforms will serve to facilitate innovation, enhance the corporate restructuring culture in Australia and reduce the stigma associated with corporate insolvency.

General comment: status of the reform process

As a general comment, the proposed Safe Harbour reforms have reached an advanced stage where all affected stakeholders have had adequate opportunities to consider their position and to consult with Treasury. To assist in finalising the form of the legislation, we made a number of drafting suggestions in relation to Safe Harbour. We remain confident that the draft legislation is close to being ready for enactment and have put forward our drafting suggestions for that purpose.

In our view, the proposed Ipso Facto reforms have not reached the same stage of progression. When compared to the Safe Harbour reforms, there remains far greater scope for the Ipso Facto reforms to cause unintended outcomes in the market if enacted in their current form.

We remain supportive of Ipso Facto reform in concept. The proposed approach has a number of positive features, in particular limiting the application of the reform to the core Australian restructuring procedures of voluntary administration and companies proposing creditors' schemes of arrangement.

In the interests of progressing the Ipso Facto reform process, our submission points to some aspects that require further consideration before the Ipso Facto reforms are enacted. We have made conceptual comments intended to assist Treasury in re-drafting aspects of the draft legislation before consulting further with industry in advance of any enactment of legislation.

A.

+ PROPOSED INTRODUCTION OF A "SAFE HARBOUR" FOR INSOLVENT TRADING

+ PART A: PROPOSED INTRODUCTION OF A "SAFE HARBOUR" FOR INSOLVENT TRADING

We offer the following comments regarding draft section 588GA of the Corporations Act, proposed to be inserted by operation of Part 1 of the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017*.

Overall, we respectfully submit that the proposal is an excellent and effective response to the difficulties that have arisen by operation of the current "Insolvent Trading" regime.

Most significantly, the current regime exposes Australian directors to personal liability where debts are incurred by their company at a time when the company is insolvent. The only way directors can escape liability is to place the company into voluntary administration. Administration is the only "safe harbour" currently available to directors, even if reasonable measures might be possible (and might be more properly or fully explored, if the directors were not burdened by the distraction of potential personal liability) to restructure the company or its business, or to otherwise take action, to produce a more favourable outcome for stakeholders.

Therefore, the current "insolvent trading" law has worked as a distraction from the broader (fiduciary) duties of directors to manage their company in a way that best meets the objects of the company and the interests of its stakeholders.

Critically, by providing directors with a clear and flexible mandate to explore such restructuring options, free from personal exposure, the proposed reform will re-establish the interests of the company (inclusive of all of its stakeholders) as the first priority for directors.

The significance of the proposed reform, in terms of its practical impact, cannot be over-stated. The current regime imposes, in effect, a strict duty on directors to place an insolvent company into administration. That means that, in time of financial distress (even if not necessarily amounting to "insolvency") the focus of attention of directors naturally turns to whether or not the company is insolvent and whether administrators should be appointed.

Directors acting in accordance with that strict duty, placing the company into administration, could hardly be criticised, even if measures existed which might have improved the ultimate outcome for stakeholders. In light of uncertainty around the meaning of "insolvency" under Australian law, this has meant that directors could not be criticised for placing a company into administration if the company was in financial distress, even if actual insolvency had not yet strictly arisen.

The proposed reform re-sets the balance, in our view correctly, between directors' insolvent trading exposure, on the one hand, and their general (fiduciary) duties on the other. Under the proposed regime, upon the onset of financial distress, the directors will have to ask themselves – "what are the options available to optimise the situation?"; rather than – "do we have to place the company into administration?" The theoretical question of "insolvency" becomes less significant than the broader question of how do the directors "… *exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise …*" in the circumstances (section 180, Corporations Act). In effect, the "safe harbour" of voluntary administration is removed because precipitous appointment of administrators, without first exploring other options, might not amount to reasonable care and diligence.

Having said that by way context, we have a few specific comments regarding the proposed legislation and Explanatory Memorandum in the following areas:

- **Whose interest should the directors be seeking to optimise?**
- **What debts will the protection relate to?**
- **Onus of proof.**
- **Interaction between the "safe harbour" and general directors' duties.**

Whose interest should the directors be seeking to optimise?

The proposed "safe harbour" is defined, in draft section 588GA(1)(a), by reference to a course of action that is reasonably likely "… *to lead to a better outcome for the company and the company's creditors*".

The interests of a company and its creditors are quite different and, in our opinion, it is likely to cause confusion to require a qualifying "course of action" to contemplate improvement of the outcome for **both** the company **and** its creditors.

The interests of creditors and the interests of the company may conflict and having a requirement that the course of action be reasonably likely to lead to a better outcome for the company and the company's creditors may render safe harbour of limited utility / availability. For example, a common restructuring option is a debt for equity swap. Obviously, the effect of such a swap is that existing equity is extinguished or diluted. Therefore, the swap may not result in a better outcome to shareholders than an immediate winding up but it would definitely result in a better outcome to creditors. Arguably, this sort of transaction would be ineligible for safe harbour on the current formulation. We think that the effectiveness of this reform will be undermined if this conflict is not resolved in the safe harbour reform.

In our opinion it is only the outcome for the company which should be the focus of attention because that would align the "safe harbour" with the duties on directors generally.

In our submission it would not significantly change the effect of the proposed reform to remove any confusion by deleting the words "and the company's creditors" from sub-section 588GA(1)(a), and also from sub-sections 588GA(1)(b)(ii) and 588GA(2). This is because, since as far back as the High Court decision in *Walker v Wimborne* (1976) 137 CLR 1, it has been clear that, in discharging their duties owed to a company, directors must have regard to the interests of shareholders and creditors and, in circumstances of financial distress, the interests of creditors become more significant (cf the extra-curial views expressed by Justice Hayne, "Directors' Duties and a Company's Creditors" (2014) 382 MULR 795). Subsequently, in *Spies v R 201* CLR 603 the High Court made it clear that this does not mean that directors owe a separate duty to the company's creditors, even in times of financial distress.

Following from that authority, the modern law of directors' duties recognises a "company" as a mixed bag of stakeholders – employees, shareholders, secured lenders, contractors, trade creditors, landlords … and even the public at large. During the life-cycle of any particular corporation, the significance of any stakeholder or stakeholder group is likely to change. Also, depending on the value of the assets of a company, from time to time, the particular stakeholder with the greatest interest in the marginal impact of management decisions will change.

A simple example can demonstrate this. Take a mining company that, at a point in time, has $10 million owing to its secured lender and $500,000 in unsecured creditors, including employees. At that point in time, the assets of the company are worth $12 million; the relevant commodity price has been in steady decline and profitability is marginal.

At the point in time of the above "snap shot", it is the shareholders who are still most directly impacted by the decisions of the management of the company which have marginal impact on asset value. If, however, asset value was lower, say $10.5 million, it is the unsecured creditors who are most directly impacted. At asset value less than $10 million, the secured lender is the stakeholder most vitally interested.

The point arising from this is that at any point in the life-cycle of a company, the particular stakeholder most directly impacted by director decision-making will change and accordingly, the particular focus of directors' duties owed to the company will change. In our opinion, the "safe harbour" should reflect, as closely as possible, the general duties of directors in this regard. As the law continues to develop, in relation to the precise scope and focus of directors' duties in specific circumstances, the "safe harbour" should also develop to reflect those duties, such that a "course of action" sufficient to activate the protection afforded by section 588GA(1) will have to contemplate a better outcome for "the company", whatever bundle of stakeholders that might mean in those specific circumstances.

We believe that a formulation which puts the focus on the interests of, or outcome for, the company, as opposed to the company and its creditors, would allow the case law to develop in such a way that directors have reasonable protection from personal liability when they are genuinely seeking to improve the overall outcome (as compared to an immediate winding up), even though (in some cases) the outcome might not be improved (and might even be worsened) for specific stakeholders (such as the pre-arrangement shareholders in the case of a debt for equity swap; or fresh trade creditors who advance credit to the company while it is working towards a "pre-pack" deed of company arrangement).

If the focus of attention of directors is the outcome for the company, rather than a specific sub-set of stakeholders, there will no doubt be room for argument in some cases as to whether there was, overall, a better outcome; but, in our submission, it will usually be obvious if directors have "done the right thing" – personal liability should only arise if they have done nothing or clearly "done the wrong thing" in the circumstances.

What debts will the protection relate to?

Proposed section 588GA(1)(b) limits the "safe harbour" protection to those debts which are "incurred in connection with" the proposed remedial course of action.

One of the greatest difficulties that has been caused by the current "insolvent trading" regime is that directors are, upon breach, made liable for all debts incurred by the company. This includes normal trade debts, incurred in the ordinary course of the company's business while a restructure plan is formulated and subsequently when the restructure plan is being implemented.

In almost all attempted turnarounds and restructures there is a period of time during which directors seek expert advice and conduct a strategic review of the company's business with a view to devising a restructure or turnaround plan. For complex businesses, this period may extend over many months. The company will typically continue to trade during this period and will be incurring debts. However, on its current drafting, the 588GA(1) safe harbour would not be available to protect the directors from liability in respect of such debts because the directors have not yet, during that advice / strategic review period, devised a course of action which is reasonably likely to lead to a better outcome for the company and the company's creditors. Directors should be encouraged to seek advice and to conduct a strategic review before recommending and embarking upon any restructure plan. Indeed, the current drafting of 588GA(2) recognises this. Therefore, we recommend that the "safe harbour" also extended to protect directors during this initial advice / review period while a course of action is devised. Once a course of action has been devised and the directors are in the process of "taking" that course of action, it is not entirely clear on the current drafting of 588GA(1)(b) that ordinary trade debts would be protected by the "safe harbour". Once the conditions in section 588GA(1)(a) are satisfied, directors ought to be protected in relation to debts incurred in the ordinary course of business while the course of action to restructure the company is being pursued, as well as any debt incurred specifically in furtherance of or "in connection with" the restructuring action. Therefore, the words "in connection with that course of action" in proposed section 588GA(1)(b) may potentially undermine the utility of the "safe harbour". We agree that there should be some sort of nexus between the debts incurred by directors and the course of action pursued (to ensure that directors exercise prudence when incurring debts and that the "safe harbour" does not operate as a "blank cheque"). However, we recommend that the Explanatory Statement clarify that "a course of action" may include a "trade on" component and, in such circumstances, it is intended by Parliament that debts incurred in the ordinary course of business in such circumstances would satisfy the nexus requirements of 588GA(1)(b).

Onus of Proof

Sub-clause 588GA(3) of the proposed reform expressly places the burden of proof on the person (ie the director) who wishes to rely on sub-clause 588GA(1). That means that the director will be required to establish, on the balance of probabilities, each element of sub-clause (1), including:

(a) that the director suspected that the company was or may become insolvent;

(b) that a course of action was commenced; and

(c) that the course of action was reasonably likely to lead to a better outcome.

A director will carry this burden of proof in the presumed context of the company, notwithstanding the "course of action", having gone into liquidation.

There should not, in most cases, be any difficulty in establishing points (a) to (b). Point (b) will be made out by reference to board minutes or other records showing that, at a particular point in time, a decision was made to try something to address a perceived solvency issue.

Presumably, as to point (c), evidence will be led from independent experts who opine that, at the time the "course of action" was commenced, a better outcome was likely as a result.

Those prosecuting a case against directors (presumably a liquidator or a creditor with liquidator consent) will lead opposing expert evidence to the effect that the "course of action" would not have been reasonably likely to result in a better outcome.

A "better outcome" in proposed section 588GA(1) is defined to mean a better outcome than would be (or would have been) the case had the relevant "course of action" not been taken and, instead, the company proceeded to formal insolvency proceedings.

The court deciding the "insolvent trading" claim against the director will need to form a view on whether the director has established, on a balance of probabilities, that a better outcome was reasonably likely. Whether the liquidation is in fact promising a better return to creditors than would have been the case without the "course of action" will be a relevant consideration. Otherwise, the Court will just have to form a view based on the competing expert opinions. It seems to us, however, that the director will have the protection of the section unless the Court forms the view that no reasonable person at the time could have concluded that the proposed "course of action was likely (or "reasonably likely") to result in a better outcome.

Paragraph 1.18 of the proposed Explanatory Memorandum suggests that directors will carry the onus of proof only in relation to element (b) above; and that the liquidator will carry the burden of establishing that the course of action was not reasonable in the circumstances.

We do not think that paragraph 1.18 accurately reflects the evidentiary requirements of the proposed legislation, as summarised above. In fact, the proposed legislation does not require directors to take a course of action which was "reasonable in the circumstances"; what is required is a course of action that is "reasonably likely to lead to a better outcome".

We suggest that paragraph 1.18 of the Explanatory Memorandum be redrafted, or deleted.

There are some other references in the Explanatory Memorandum, such as in paragraph 1.34, where the "safe harbour" is characterised as the adoption of a course of action which is "reasonable". That is not what proposed section 588GA(1) requires; rather, it requires a course of action which is reasonably likely to result in a better outcome.

The Explanatory Memorandum provides further detail of the proposed onus of proof requirements at paragraphs 1.41 to 1.43. Again, we do not think the overall explanation set out in those paragraphs accurately describes the proposed legislation. This is due to the references, in paragraphs 1.42 and 1.43 to a "reasonable course of action", which is not a requirement of the proposed legislation. The question which will come before a court deciding an insolvent trading claim is not whether the course of action was reasonable; rather, it will be whether the course of action was, at the time it was commenced (and thereafter) reasonably likely to result in a better outcome than an immediate formal insolvency process. We think that the Explanatory Memorandum ought to accurately reflect that requirement.

The Explanatory Memorandum also refers to the protection of the safe harbour ceasing upon it becoming clear that the company cannot be "viable" in the long term (refer to paragraphs 1.28 and 1.37). We note that "viability" is not a component of the current formulation of section 588GA which requires a course of action that is "reasonably likely to lead to a better outcome for the company and the company's creditors." While the return of the company to long term viability will likely constitute a "better outcome for the company and the company's creditors" a "better outcome" may also be achieved without long term viability (eg. a trade sale of the business or some assets of the company or a liquidation of the company which results in a better return to creditors than an immediate winding up of the company). In this respect the Explanatory Memorandum ought to more closely mirror the current formulation of 588GA and we think that the use of the concept of "viability" ought to be avoided in the Explanatory Memorandum.

Interaction between the "safe harbour" and general directors' duties

Paragraph 1.40 of the proposed Explanatory Memorandum provides as follows:

> *1.40 Where a director takes on debt from new creditors and they do not believe they can repay the debt in accordance with its terms this would be ostensibly a breach of the general director's duties as well as being dishonest. As such, a director would not be protected in relation to incurring debts of this nature.*

We submit that this paragraph should be excluded from the Explanatory Memorandum.

We believe that paragraph 1.40 is likely to cause confusion and, ultimately, to undermine the purpose and benefit of the proposed reform.

We understand, and applaud, the objective of providing directors with a mandate (in fact, a duty, as outlined above) to explore options for producing "better outcomes" than would result from immediate formal insolvency processes. However, "better outcomes" does not mean, necessarily, outcomes which result in a 100% return to stakeholders. It is possible that a perfectly reasonable and sensible "course of action" will still result in some loss to stakeholders, albeit less loss than would have arisen from an earlier formal insolvency process.

Take, for example, a company in respect of which there is clear evidence of insolvency. An immediate winding up is likely to result in a return to shareholders of nothing and to unsecured creditors of, say, 40-50 cents in the dollar. It is possible that a "course of action" could be adopted which required a delay in insolvency process but which is predicted (by independent experts engaged by the company) to return up to 90 cents in the dollar to unsecured creditors. In the meantime, the company would continue trading and incurring fresh trade debt (and repaying earlier trade debt) in the ordinary course of its business.

Clearly, directors in the above situation would have the protection intended by the proposed reform. However, paragraph 1.40 of the Explanatory Memorandum creates confusion as to what is the correct course.

In our submission, the ultimate effect of the proposed reform is that the sentiment expressed in paragraph 1.40 would, in fact, no longer be true. Section 588GA(1) and the general law as to directors' duties (such as section 180) would have to be read together such that, if a course of action is reasonably likely to result in an overall better outcome for the company, then it will be very difficult (maybe impossible, but one can never predict with certainty) to argue that the directors exercised their powers otherwise than within reasonable care and diligence. Put another way, the purpose of seeking to achieve a "better outcome for the company" would almost certainly be regarded as a "proper purpose" under the business judgment rule in section 180(2).

We do not believe it is necessary for the Explanatory Memorandum to say anything more than what is set out in paragraph 1.39

B.

+ PROPOSED “IPSO FACTO” REFORMS

+ PART B – PROPOSED "IPSO FACTO" REFORMS

Purpose

The proposed Ipso Facto reforms are an incursion into parties' freedom of contract. Accordingly, in assessing the Ipso Facto reform, it is important that:

- its purpose is made clear in the legislation and explanatory materials;
- its scope is kept as confined as possible to achieve its purpose;
- arbitrary outcomes which are not consistent with the legislative purpose are avoided wherever possible; and
- the legislation and explanatory materials make clear the situations in which contractual rights will be unenforceable.

At its core, we understand the intended legislative purpose of the Ipso Facto reforms is to allow breathing space for companies whilst they restructure, focusing on restricting counterparties' rights to terminate or modify contracts as a result of the company entering specific restructuring procedures.

Structure

The legislature has chosen to pursue a "broad brush" approach where the reform is drafted generally, but is subject to specific exceptions.

In Optimising the Reforms, we cautioned against the "broad brush" approach and recommended a more selective and targeted approach following further consultation and investigation of the systemic policy issues which Ipso Facto reform raises.[1] That said, we appreciate that the legislature wishes to press on with reform and has built into the Draft Legislation a series of protections intended to limit the application of the Ipso Facto stay to manage policy objectives. Those protections can be summarised as follows:

- **Applicable restructuring procedures:** limiting the applicable restructuring procedures to voluntary administration and companies proposing schemes of arrangement to avoid insolvent winding up. We discuss this further in Applicable restructuring procedures below.
- **Exceptions approach:** identifying a number of exceptions ("carve outs") to the application of the Ipso Facto stay which will include (i) specific categories of contracts to be listed in the *Corporations Regulations 2001* (Cwlth);[2] (ii) a new Ministerial discretion to extend the exceptions categories over time;[3] (iii) a named exception for rights that "*manage financial risk … associated with a financial product*" provided it is "*commercially necessary for the provision of financial products of that kind*"[4] and (iv) judicial review of challenges and objections on a case-by-case basis.[5] We discuss this further in "Exceptions approch" below.

Applicable restructuring procedures

We support the focus on specific restructuring procedures where the Ipso Facto stay will operate. This is consistent with the legislative purpose outlined above.

Following the Harmer Report, reforms enacted in the antecedent corporations legislation in 1993, it is fair to say that **voluntary administration** and **schemes of arrangement** have functioned as the core restructuring procedures used in Australia.

More specifically, the specific restructuring procedures have the following characteristics which make them appropriate procedures to which the Ipso Facto stay should apply:

1 Optimising the Reforms: Ipso Facto Reform/Preliminary Comments/Comparisons to Safe Harbour/paragraph (f).
2 Draft Legislation, sections 415D(4)(b)(i); 451E(4)(b)(i). Noting the draft list of exceptions released with the Draft Legislation, which we understand is intended to form the basis of specific amendments to the *Corporations Regulations 2001* (Cwlth).
3 Draft Legislation, sections 415D(4)(b)(ii); 415D(4)(d); 415D(5); 451E(4)(b)(ii); 451E(4)(d); 451E(5).
4 Draft Legislation, sections 415D(4)(c); 451E(4)(c).
5 Draft Legislation, sections 415E, 451F.

Characteristic	Comment
Restructuring purpose	There is a long line of successful restructurings implemented using both procedures. The object of Part 5.3A, which gives effect to voluntary administration, is to maximise the chances of the company or as much as possible of its business continuing in existence. Only if that is not possible does the objective shift to achieving a superior return for creditors and members than would result from an immediate winding up of the company.[6] The object of the scheme of arrangement procedure is expressly rehabilitative, in that it is to implement a compromise or arrangement between a company and its creditors or members. The draft Explanatory Memorandum makes it clear that the proposed Ipso Facto stay only applies to schemes of arrangement which are aimed at avoiding insolvent liquidation.[7]
Collective characteristics	Voluntary administration is a collective procedure. The administrator is an officer, with broader duties to act in the best interests of the company and all of the company's creditors[8] and control over the company's business, property and affairs.[9] Schemes of arrangement possess collective characteristics, particularly where they are proposed expressly for the purposes of the company avoiding being wound up in insolvency. In particular, we note that: ▪ Companies proposing creditors' schemes of arrangement remain subject to the control of their directors and officers. Particularly when their solvency is at risk, directors have duties to act in the best interests of the company, which extends to having regard to the interests of the company's creditors when making decisions. ▪ Inherent in the scheme of arrangement procedure are common law considerations in schemes of class and fairness which, combined with court oversight and ASIC supervision, serve to protect the interests of creditors and other parties whose rights are being compromised or affected by the scheme.
Duration of the procedure	Voluntary administrations are limited in duration by a combination of statute,[10] and Court oversight.[11] The creditors' scheme of arrangement procedure is a Court-based procedure which is subject to case management and Court and ASIC oversight. In our view, those factors limit the duration of the procedure.[12]

We note our comments in Optimising the Reforms, in which we outlined in table form our comments on the application of the Ipso Facto stay to administration, schemes of arrangement, receivership or other controller appointment and deeds of company arrangement (**DOCAs**).[13]

Our view remains that if the "broad brush" approach to Ipso Facto reform is pursued, its application should be limited to specific restructuring procedures which possess the three characteristics noted in the table above. Other forms of insolvency procedure are either:

- terminal insolvency procedures which are not solely directed at restructuring or corporate rehabilitation (eg, liquidation);
- not collective in nature, are more in the nature of private enforcement rights or may result in piecemeal appointment over the company's assets or business (eg, controller appointments); or
- which do not have a limited duration (eg, DOCAs).

In our submission, those procedures themselves do not warrant additional protections in the form of the Ipso Facto stay outside of specific Court orders made in a particular situation to restrain or otherwise qualify the exercise by a counterparty of its contractual rights (ie, injunctive relief).

6 *Corporations Act 2001* (Cwlth), section 435A.
7 Draft Legislation, section 415D(3), where there is an express requirement that the company's application under section 411(1) states that it is being made for the purpose of avoiding being wound up in insolvency.
8 *Corporations Act 2001* (Cwlth), section 9 definition of "*officer*"; sections 180 and 181.
9 Corporations Act 2001 (Cwlth) section 437A(1)(a).
10 *Corporations Act 2001* (Cwlth), section 439A(5)(b). The convening period is 20 Business Days and 25 Business Days over the Christmas and Easter periods. The second meeting of creditors can also be adjourned for up to 45 Business Days but not longer: *Corporations Regulations 2001* (Cwlth), r 5.6.18(2).
11 Extensions of the convening period require a Court order under section 439A(6), which is a discretionary order. Extensions are common for more complex administrations, but are not infinite in duration.
12 Please note our comment in section 6.2 in relation to Draft Legislation section 415D(2)(b)(ii) which in our view does not have a proper function.
13 See the table at Optimising the Reforms: Ipso Facto Reform/Responses to Proposal Paper queries/Anti-avoidance (section 3.2.1)/Second Query 3.2.b.

DOCAs

In relation to DOCAs specifically, the existing moratoria which apply during voluntary administration do not apply without a court order under section 444F extending their application. In effect, the onus of proof is reversed between voluntary administration and the DOCA procedure, by requiring deed administrators to apply for an extension of specific moratoria if required for the DOCA they are administering.

The Draft Legislation would apply this approach to the Ipso Facto stay by means of the "extension order".[14] In practice, it would be necessary for the deed administrator to make that "extension order" application within 7 days after the voluntary administration ends. We repeat our comments made in Optimising the Reform where we endorsed this approach.[15]

Exceptions approach

The "broad brush" approach necessitates exceptions where the scope of the Ipso Facto stay conflicts with existing Commonwealth legislation and Government policy. The Draft Legislation confers power for subordinate legislation and Ministerial declaration to clarify this interaction. To ensure certainty and clarity for parties entering into these contracts, agreements or arrangements as to whether their rights are subject to the Ipso Facto stay, we make the following recommendations for future amendments to the Draft Legislation:

- **Clarify the interaction between the Ipso Facto stay and Specified Law of the Commonwealth.** Parliament has enacted specific legislation, for example the *Payment Systems and Netting Act 1998* (Cwlth) (**Netting Act**) and the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cwlth) (together, the **Specified Law**) which regulates or protects certain types of contracts, agreements or arrangements. In the enacting Acts for the Specified Law, Parliament has considered and expressed the intention that such Specified Law prevail over other Acts, to the extent of any inconsistency. The submissions of the International Swaps and Derivatives Association, Inc. and the Australian and New Zealand members of the Aviation Working Group's Cape Town Convention National Contact Group dated 24 April 2017 set out the policy reasons why Parliament elected to give the Specified Law primacy. We endorse the comments made in those submissions.

  Where Parliament has considered and formed the view that the Specified Law prevail, we submit that the Ipso Facto stay confirm that:

  > *"If there is any inconsistency between this Act and one of the following Acts (the other Act), the other Act prevails to the extent of the inconsistency:*
  >
  > *(a) the Payment Systems and Netting Act 1998;*
  >
  > *(b) the International Interests in Mobile Equipment (Cape Town Convention) Act 2013."*

  The approach we have suggested is consistent with that taken in other relevant Commonwealth legislation, including for example, the *Personal Property Securities Act 2009* (Cwlth)[16] and the Netting Act.

  We further submit that consequential amendments be made to the Netting Act definition of "*specified provisions*" to include the Ipso Facto stays (namely Draft Legislation sections 415D and 451E). The Netting Act already specifically provides that the Netting Act protections apply "*despite any other law (including the specified provisions)*". As stated in the Explanatory Memorandum to the *Financial System Legislation Amendment (Resilience and Collateral Protection) Bill 2016* (Cwlth), the "*specified provisions definition is an inclusive list of the provisions of other laws over which the PSN Act prevails and is inserted for transparency and ease of reference*". We submit that this would clarify the long term Government policy that the critically important protections provided under the Netting Act prevail over other legislation, including the Ipso Facto reforms.

- **Militate against any arbitrary outcomes of the Ipso Facto stays on the contracts, agreements and arrangements that are regulated or protected by Specified Law.** We are pleased to see the following included in the proposed regulations for the purposes of sections 415D(4)(b)(i) and 451E(4)(b)(i):

  - certain financial contracts such as agreements under the Netting Act, arrangements entered into under an ISDA Master Agreement, repurchase agreements, forward contracts, commodity contracts, swaps, rated securitisations and structured financings that include 'flip clauses', master netting agreements, securitisation arrangements involving special purpose vehicles and covered bond transactions;
  - securities settlement facilities;
  - Real Time Gross Settlement arrangements;
  - rights of set off;
  - flawed asset arrangements;
  - replacement of trustees;
  - flexible priority arrangements;
  - securities underwriting agreements; and
  - lease contracts in respect of aircraft objects in aviation transactions.

  However, we note that while certain of the above are contracts, agreements or arrangements protected or regulated under Specified Law, not all of the contracts, agreements or arrangements regulated or

14 Draft Legislation, section 451E(2) and (3).
15 See the table at Optimising the Reforms: Ipso Facto Reform/Responses to Proposal Paper queries/Anti-avoidance (section 3.2.1)/Second Query 3.2.b/Fourth row: Deeds of Company Arrangement.
16 See *Personal Property Securities Act 2009* (Cwlth) section 256.

protected under Specified Law are explicitly referred to in the proposed regulations. We submit that the regulations should be clarified to extend to all contracts, agreements or arrangements protected or regulated under Specified Law. This would maintain the Government policy in respect of Specified Law and in our view, would militate against any arbitrary outcomes of the Ipso Facto stays on different contracts, agreements and arrangements regulated or protected under the Specified Law and potential structuring bias as a result.

For example, we submit that the regulations to the amending Act should at least exclude from the scope of the Ipso Facto stays contracts, agreements and arrangements related to approved RTGS systems, approved netting arrangements, close-out netting contracts and market netting contracts (including the transactions and security related to those contracts, agreements and arrangements). The Netting Act also protects, for example, the security granted in respect of close-out netting contracts and market netting contracts. The enforcement of this security is protected under, and subject to existing safeguards under, the Netting Act. We submit that it is critical that these systems, arrangements and contracts, and the associated transactions and security structures be excluded from the scope of the stay. This is also important to ensure that, for example, the operators of approved RTGS (real time gross settlement) systems, such as Australia's high value payment system (the Reserve Bank Information and Transfer System) are still able to exercise rights under Ipso Facto clauses.

- **Clarify the kinds of contracts, agreements and arrangements contemplated by Draft Legislation sections 415D(4)(c) and 451E(4)(c).** The draft Explanatory Memorandum indicates the exception in sections 415D(4)(c) and 451E(4)(c) contemplates, at a minimum, "swaps".[17] We understand that the Government's policy intention is to remove the range of contracts, agreements and arrangements which are protected under the Netting Act from the scope of the stay. To achieve this policy intention, we submit that this be clarified as set out above or in clarifying the exception set out in sections 415D(4)(c) and 451E(4)(c). Of course, for the reasons set out above, we would also support excluding contracts, agreements and arrangements related to approved RTGS systems, approved netting arrangements, close-out netting contracts and market netting contracts (including the transactions and security related to those contracts, agreements and arrangements) in sections 415D(4) and 451E(4).

  As currently drafted, sections 415D(4)(c) and 451E(4)(c) impose a high and vague threshold to establish that an Ipso Facto right is not subject to a stay: that the ipso facto right is "*commercially necessary*". The draft Explanatory Memorandum elaborates that the Ipso Facto right would need to be "*essential for the function of the relevant contract*" or "*the product would only ever be available or appropriate if an ipso facto right is enforceable*".[18] Contrary to what appears to be the intention as set out in the draft Explanatory Memorandum and regulations, the terms "*commercially necessary*" and "*manages financial risk*" lack sufficient certainty to exclude the range of financial market transactions from the application of the stay. We submit that it would be difficult to confirm, when the contract, agreement or arrangement is entered into, whether this can be established. We do not expect businesses and their legal advisers would be able to apply this test in practice with any certainty. Clarity and certainty are key.

- **Include in the regulations certain other contracts, agreements or arrangements necessary for the proper functioning of commercial arrangements.** For the reasons set out in Optimising the Reforms, we submit that the following should also be included in the proposed regulations for the purposes of sections 415D(4)(b)(i) and 451E(4)(b)(i):
  - source code access rights under escrow agreements; and
  - any rights of the operator (including rights to suspend participation) of financial markets, clearing systems, settlement systems and payment systems (irrespective of the licensing status of the market or system or the approvals those systems have obtained).

  In our view, consideration should also be given as to whether the regulations should include publicly offered securities issued by Australian banks or other institutions in offshore markets, for example bonds or debentures. The Ipso Facto stay has the potential to prevent enforcement based on events of default that are typical and long accepted in international capital markets. To so qualify those rights may have adverse effects or costs to Australian companies seeking to access that capital.

17 Explanatory Memorandum paragraphs [2.26], [2.44].
18 Explanatory Memorandum paragraphs [2.26], [2.44].

We expect that other examples may emerge in this consultation period depending on feedback from industry. However, in framing the regulations, we emphasise the need for the carve outs to be underpinned by clear policy reasons so as to avoid arbitrary outcomes in the effect of the Ipso Facto stay and potentially, structuring arbitrage.

Key implications

Existing Ipso Facto legislation

In Optimising the Reforms, we noted that preclusions on Ipso Facto terminations are not new to Australian law. We identified three examples in existing legislation which have been in force for decades. Specifically, they relate to:

- **essential services supply,** under which the exercise of contractual rights by suppliers of essential services to companies in insolvency procedures are restricted;[19]
- **bankruptcy provisions,** under which provisions in contracts for the sale of property, leases of property, hire purchase agreements, licences or PPSA security agreements are deemed void to the extent they contain bankruptcy triggers for termination, repossession or modifications as a result of bankruptcy events;[20] and
- **existing voluntary administration moratoriums,** under which the contractual and proprietary rights of creditors under certain types of contracts are subject to stays which apply for the duration of the voluntary administration.[21]

Expanding on the outline in Optimising the Reforms, we note section 15C(2) of the *Banking Act 1959* (Cwlth) which restricts the exercise of contractual rights by counterparties to contracts with Authorised Deposit Taking Institutions (**ADIs**) if the ADI becomes subject to the control of a statutory manager. In that situation, section 15C(2) provides that the fact that the statutory manager is in control of the ADI's business does not allow a party to the contract to deny any obligations, accelerate any debt, close out any transaction relating to the contract or enforce any security under that contract.

For the purposes of this document, we term the four examples of existing Ipso Facto legislation the "**Existing Provisions**".

Comparison of the Existing Provisions to the Draft Legislation

In Optimising the Reforms, we noted that each of the Existing Provisions were enacted some time ago.[22] We suggested that before embarking on further Ipso Facto reform, the success of the Existing Provisions in achieving their legislative objectives should be further reviewed, and that the Draft Legislation be adjusted accordingly. We note that in a number of respects the Draft Legislation has taken a different approach to the Existing Provisions and that it remains unclear what lessons have been learned from the Existing Provisions in determining that new approach.

Under the Draft Legislation, once a company enters either voluntary administration or proposes a scheme, it will be necessary for counterparties to contracts with that company to conduct a three-stage analysis to evaluate whether the Ipso Facto stay applies to the exercise of rights under those contracts:

First, whether the Ipso Facto stay applies to the specific contract in question. In each of the Existing Provisions, the legislature has specified the types of contracts affected by the legislative restrictions. That differs from the approach taken in the Draft Legislation, which consistent with the "broad brush" approach has not specified the types of contracts affected by the Ipso Facto stay. Accordingly, under the Draft Legislation, it would be necessary for contract counterparties to assess whether the legislation applies to the contract at issue with reference to the exceptions provided from time-to-time. Furthermore, we recommend that the legislation clarify whether the Ipso Facto stay applies to contracts, arrangements or agreements governed by foreign law.[23]

Second, if the Ipso Facto stay applies then what types of rights are not enforceable. The types of rights which are affected by the Existing Provisions vary between the provisions. In each situation the legislature has been prescriptive regarding the effect of the legislation on contractual rights (ie, the affected rights are specified). For example, an essential services supplier cannot refuse to comply with a request for a supply of essential services solely for the reason that the company has unpaid invoices due to that supplier. The *Bankruptcy Act 1966* (Cwlth) provisions are broader, and extend to rights of termination of the contract, modifications to the operation of the contract and repossession rights of property governed by the contract (all of which are deemed to be void). The moratoriums under Part 5.3A of the *Corporations Act 2001* (Cwlth) which apply to, among other things, security interests and leases preclude the exercise of proprietary rights and enforcement actions during the voluntary administration (other than in specified exceptions). Section 15C(2) of the *Banking Act 1959* (Cwlth) lists the rights that cannot be exercised.

By comparison, the Draft Legislation has taken a less prescriptive approach to identifying the rights. It references only "*a right … [existing / arising] merely because*" the company is subject to an applicable restructuring procedure. Taken at face value this is extremely broad and could affect any right under an affected contract.

The examples given in draft sections 415D(1) and 451E(1) reference rights to terminate contracts and rights of acceleration of payments. The draft Explanatory Memorandum references at various sections "*termination", "modification", "cancel", "vary",*

19 *Corporations Act 2001* (Cwlth), section 600F(1).
20 *Bankruptcy Act 1966* (Cwlth), section 301(1).
21 *Corporations Act 2001* (Cwlth), Part 5.3A Division 6 (sections 440A to 440JA inclusive) and Part 5.3A Division 7 (sections 441 to 441J inclusive).
22 Section 600F(1) of the *Corporations Act 2001* (Cwlth) has been in effect since 23 June 1993, section 301(1) of the *Bankruptcy Act 1966* (Cwlth) has been in effect since 1 June 1966, the majority of the sections in Part 5.3A Division 6 (sections 440A to 440JA inclusive) and Part 5.3A Division 7 (sections 441 to 441J inclusive) have been in effect since 23 June 1993 and section 15C(2) of the *Banking Act 1959* (Cwlth) has been in effect since 1 July 1998.
23 We note that Parliament has specified in the *Banking Act 1959* (Cwlth) section 15C(1) that the ipso facto stay in section 15C(2) applies to contracts where the proper law is Australian law and law of a foreign country.

"amend".[24] It is unclear whether the legislation intends to limit the affected rights in this way or whether it is intended to have broader application.

In our view, the draft Explanatory Memorandum provides limited assistance in interpreting the types of rights affected by the underlying legislative provisions. We recommend that the extent of rights affected by the Ipso Facto stay are specified in future drafts of the legislation. In particular, we would point to the following rights which require clarification:

- **Termination rights triggered on "insolvency":** termination rights which trigger on a company's "insolvency" where the company is in voluntary administration or has proposed a scheme of arrangement may not be subject to the Ipso Facto stay, given that reliance on the "insolvency" of the company is not addressed in the Draft Legislation.
- **DOCA termination:** termination rights which trigger on execution by the company of a DOCA may also not be subject to the Ipso Facto stay. We note that:
  - Once the company's creditors have resolved that the company enter into a DOCA, it passes out of voluntary administration and into the DOCA procedure which is not subject to the Ipso Facto stay.
  - The example used in the draft section 451E(1) states that "*a right ... is … not enforceable … merely because the company is under administration*". However, it is not clear that the resolution that the company enter into a DOCA is also subject to the protection of the Ipso Facto stay.
  - As currently drafted, the Ipso Facto stay would merely defer the timing of exercise of termination rights from the appointment of administrators to the execution of the DOCA. Unless the fact of a company entering into a DOCA is confirmed as being subject to the Ipso Facto stay, "spring back" termination rights of counterparties could potentially frustrate restructures supported by the majority of the company's creditors.[25]
- **Creditors' voting rights are not affected by the Ipso Facto stay.** Creditors who are able to exercise termination rights following voluntary administration or the company proposing a scheme are entitled to vote the full face value of their debt. To the extent that creditors are subject to the Ipso Facto stay, they may not be able to vote for the full amount of their claim – their claims may be contingent on the exercise of termination rights subject to the Ipso Facto stay. Future drafts of the legislation should clarify that the Ipso Facto stay does not affect the adjudication of creditors' claims.

Third, if the Ipso Facto stay applies, for how long. Sections 415D(2) and section 451E(2) purport to limit the period of the Ipso Facto stay. We note that the applicable restructuring procedures are themselves limited in duration (see our comments in Applicable restructuring procedures above) and accordingly, a company can only be said to be the subject of the applicable restructuring procedure for that period. We assume there is a specific policy objective which is sought to be achieved by the limitation and recommend that this be clarified. The approach in the Draft Legislation is to be contrasted with the Existing Provisions which do not limit the period of the stay.

Financing and secured lending

Effect on the availability and pricing of credit

In Optimising the Reforms, we referred specifically to the prospective effect of an Ipso Facto stay on financing arrangements. To recap, we made the following observation:

> *"if Ipso Facto reform was to curtail the rights of financiers to enforce their express contractual rights in this way, it would be a very significant change to the financing arrangements commonly used to supply credit in Australia. We caution against this approach given the risk that such a reform would pose to the availability and pricing of credit."*[26]

These risks have not been resolved in the Draft Legislation. In fact, there has been limited discussion of the effect that the Draft Legislation would have on financing arrangements, specifically on secured financing arrangements. Our comments in this section are confined to draft section 451E of the Draft Legislation, specifically in relation to the Ipso Facto stay which is intended to apply to companies under administration.

We make the following comments:

- **Secured lending in Australia:** It is a commonly-held view that Australia is currently one of the most attractive jurisdictions in the world to advance secured lending to companies, particularly to companies that are in urgent need of finance as part of an attempt to restructure. The certainty that secured lenders have in this market in terms of their enforcement rights is an important aid to the availability of credit for companies, both distressed and non-distressed.
- **Secured lender rights:** A key tenet of secured lending is the right to accelerate repayment and enforce security where defaults have occurred. Transaction documentation in financing arrangements commonly specify a number of different types of defaults including Ipso Facto triggers on the appointment of administrators to borrower or guarantor companies.
- **Alternative triggers:** As noted above, the Draft Legislation is expressed to limit the Ipso Facto stay to contractual rights arising "*merely because*" the company has appointed administrators (in addition to the scheme application trigger). Taken at face value, that leaves secured financiers in the position of being unable to accelerate or enforce their security in reliance on the insolvency event, but free to rely on other defaults that may have occurred such as the company being insolvent or in breach of covenants.

24 Draft Explanatory Memorandum, [2.3], [2.6], [2.8], [2.17], [2.18], [2.20].
25 The anti-avoidance wording proposed in section 3.2.1 of the Treasury April 2016 proposals paper would have addressed this risk if included in the Draft Legislation. However, we note that anti-avoidance provisions can add significant uncertainty and can be difficult to apply in practice.
26 Optimising the Reforms: Ipso Facto Reform/Responses to Proposal Paper queries/The Ipso Facto model (section 3.2)/Query 3.2.a.

- **Implications:** Unless the position of secured financiers post-administration is clarified in future Draft Legislation, we expect that the introduction of the Ipso Facto stay could:
  - Create unnecessary uncertainty in the enforcement rights of secured lenders where companies are restructuring through voluntary administration, by encouraging lenders to rely on other defaults to ground enforcement. Where the existence of those other defaults relies on more complex legal analysis or subjective facts, there is a greater prospect of disputes arising in relation to secured lender enforcement rights.
  - In administration, the reliance by lenders on non-insolvency defaults risks arbitrary and unfair results arising in the exercise of lender enforcement rights. Timing factors and other uncertainties can affect the rights of lenders and other creditors in an arbitrary fashion. To illustrate, we have outlined the impact of the Ipso Facto stay on secured working capital facilities where administrators are appointed to the borrower or a guarantor - see boxed text below.
  - Render obsolete the carve out to the existing moratoria which apply to secured lending during administration. Section 440B(1) of the *Corporations Act 2001* (Cwlth) provides restrictions on the exercise of third party property rights during administration. Those moratoria are well understood in the Australian economy and have long been accepted by the market as providing valuable breathing space to companies in voluntary administration. Section 441A of the *Corporations Act 2001* (Cwlth) provides a carve out from those moratoria for secured lenders which hold a security interest over the whole or substantially the whole of the company's property, permitting enforcement over that property if commenced during the 13 Business Day decision period. Under the proposed Ipso Facto stay, whether a secured lender can rely on section 441A to enforce becomes solely reliant on whether the lender has the benefit of a non-Ipso Facto default during that 13 Business Day period.[27] This is an arbitrary method of determining the relative rights of secured lenders and other creditors. We have supplemented the worked example in the boxed text below to illustrate this issue as well.
- A related issue is the effect of the Ipso Facto stay on the common secured creditor right to appoint controllers to a company in voluntary administration. In relation to controllers, we make the following comments:
  - Currently, it is common for secured lenders to either rely on section 441A of the *Corporations Act 2001* (Cwlth) to appoint a controller to a company in administration, within the 13 Business Day decision period, or to obtain a standing consent from the administrator under section 440B(2) of the *Corporations Act 2001* (Cwlth) to enable enforcement after the expiry of the decision period.
  - As currently drafted, the Ipso Facto stay would extend to the appointment of a controller to a company in administration, given that this would be a "*right*" which is not enforceable merely because the company is under administration within the meaning of draft section 451E(1). Where the 13 Business Day decision period runs from the appointment of administrators but the right to appoint receivers because of the appointment of administrators is subject to the Ipso Facto stay, the 13 Business Day decision period appears arbitrary.
  - However, as currently drafted, the appointment of controllers is not the subject of the Ipso Facto protection, ie to the extent there is a controller appointment, counterparties may exercise rights in respect of the controller appointment. Secured creditors may not exercise appointment rights on the expectation that this may create rights for other counterparties that are not subject to the Ipso Facto stay.
  - The future role of controllers in Australia has been the subject of some debate in recent times. We note the Productivity Commission Report into "*Business Set-up, Transfer and Closure*" made a number of comments in relation to the functions of receivership, recommending an independent review of receivership to report by 30 June 2017. The recommended inquiry was to focus on the utility of the procedure to protect the value of the secured property as a means of enabling secured creditors to manage individual loans and to consider the impact of the receivers' actions on the "*overall wellbeing or insolvency of the company*".[28] Those discussions follow reforms in 2003 in England and Wales, where the appointment of receivers and administrative receivers was precluded in the administration of most types of companies.[29]
  - It is unclear the direction that future reform of controller appointments could take, and in particular whether Australia will follow the lead of England and Wales in limiting the application of the remedy in favour of collective procedures such as administration. For present purposes, we note that it remains unclear whether the reform and legislative agenda extends to restricting controller appointments. This appears to require further consultation.

27 Under section 441A of the *Corporations Act 2001* (Cwlth), the 13 Business Day decision period commences on written notification to a secured creditor holding security over the whole or substantially the whole of the company's property of the appointment of administrators, which itself must be given within no later than 1 Business Day after the appointment of administrators under section 450A(3) of the *Corporations Act 2001* (Cwlth).

28 "*Business Set-up, Transfer and Closure*", Productivity Commission Inquiry Report No. 75, 30 September 2015, pages 412-415.

29 *Enterprise Act 2002* (UK) section 250.

Boxed section: illustrating the impact of the Ipso Facto stay using a secured working capital facilities example

- Certain forms of working capital facilities have periodic rollover dates during the term of the facility, where facilities mature and are redrawn unless there are specific drawstop events and it is common for those working capital facilities to be secured.
- If an administrator is appointed to the borrower or a guarantor, the Ipso Facto stay would preclude the lender from enforcing their security in reliance on the appointment of the administrator.
- At the next rollover date, the facilities would mature and fall due for payment, which constitutes a payment default unless the lender is obliged to allow the facilities to rollover.
- On the terms of the facility, the appointment of administrators would be a drawstop event which prevents the facilities from rolling over unless the lender specifically consents.
- The Ipso Facto stay would not operate to force the lender to consent to the rollover, given the stay on the company's right to additional credit under draft section 451E(6).
- In effect, the lender would be permitted to enforce their security interest given the resulting payment default, but would have been restricted from doing so until the next rollover date when the payment default occurred.
- The timing of the next rollover date would determine the ability of the secured lender to exercise their contractual right, which is an arbitrary outcome.
- That analysis applies to the rights of lenders holding security interests over the whole or substantially the whole of the company's property to enforce their security interest relying on the exception in section 441A of the *Corporations Act 2001* (Cwlth). Using the working capital facilities example, whether the lender could appoint a controller during the decision period would depend on whether the timing of the next rollover date or another drawstop event occurs during the decision period, which again is an arbitrary outcome.

Review of operation

Given the potential systemic policy effects identified above and drawing on the recent experience in the implementation of the *Personal Property Securities Act 2009* (Cwlth), if the Ipso Facto stay is enacted and commences operation on 1 January 2018, a review of the operation of the legislation could be beneficial following its commencement. Similar to the PPSA legislation, the intention of the review could be to identify any unintended, unforeseen and potentially significant changes within the economy and propose amendments to address those matters as required to address the requirements of the market and economy.

KING&WOOD MALLESONS
金杜律师事务所

+ KEY CONTACTS

Ken Astridge
Partner, Sydney
T + 61 2 9296 2146
E ken.astridge@au.kwm.com

Scott Bouvier
Partner, Sydney
T + 61 2 9296 2472
E scott.bouvier@au.kwm.com

Evie Bruce
Partner, Sydney
T + 6 1 2 9296 2106
E evie.bruce@au.kwm.com

Helena Busljeta
Special Counsel, Sydney
T + 61 2 9296 2541
E Helena.busljeta@au.kwm.com

John Canning
Partner, Sydney
T + 61 2 9296 2098
E john.canning@au.kwm.com

Rhys Casey
Partner, Brisbane
T + 61 7 3244 8062
E rhys.casey@au.kwm.com

Berkeley Cox
Managing Partner Banking & Finance and Projects & Real Estate, Brisbane
T +61 7 3244 8149
E berkeley.cox@au.kwm.com

Nicola Charlston
Partner, Melbourne
T + 6 1 3 9643 4366
E nichola.charlston@au.kwm.com

Jeff Clark
Partner, Melbourne
T + 61 3 9643 4088
E jeff.clark@au.kwm.com

Nathan Collins
Partner, Perth
T + 61 8 9269 7071
E nathan.collins@au.kwm.com

Emma Costello
Partner, Brisbane
T + 61 7 3244 8115
E emma.costello@au.kwm.com

David Cowling
Partner, Sydney
T + 61 2 9296 2259
E david.cowling@au.kwm.com

Scott Farrell
Partner, Sydney
T + 61 2 9296 2142
E scott.farrell@au.kwm.com

Shannon Finch
Partner, Sydney
T +61 2 9296 2497
E shannon.finch@au.kwm.com

Patrick Gunning
Partner, Sydney
T + 61 2 9296 2170
E patrick.gunning@au.kwm.com

Philip Harvey
Partner, Sydney
T + 61 2 9296 2484
E philip.harvey@au.kwm.com

Nigel Hunt
Partner, Perth
T + 61 8 9269 7080
E nigel.hunt@au.kwm.com

Samantha Kinsey
Partner, Melbourne
T + 61 3 9643 4155
E samantha.kinsey@au.kwm.com

Tim Klineberg
Partner, Sydney
T + 61 2 9296 2493
E tim.klineberg@au.kwm.com

Diana Nicholson
Partner, Melbourne
T + 61 3 9643 4229
E diana.nicholson@au.kwm.com

Philip Pan
Partner, Brisbane
T + 61 7 3244 8081
E philip.pan@au.kwm.com

John Stumbles
Consultant, Sydney
T + 61 2 9296 2333
E john.stumbles@au.kwm.com

Tony Troiani
Partner, Melbourne
T + 61 3 9643 4286
E tony.troiani@au.kwm.com

About King & Wood Mallesons

King & Wood Mallesons brings a fresh perspective to commercial thinking and client experience. Strategically positioned in the world's growth markets, more than 2,000 lawyers in 26 international offices are cutting through the challenges facing business, providing commercial solutions, and transforming the way legal services are delivered.

How do we do this? By asking the right questions, listening hard, and focusing not just on what you want, but how you want it. The aim is to help clients to recognise where they are, where they want to be, and where they could be. It's a simple partnership approach, built on a great experience and shared insights.

Combining vision, skill and understanding, we're breaking through barriers to deliver legal solutions that are innovative and often ground breaking. This approach is helping clients to navigate and adapt to a world that is rapidly changing and constantly on the move.

As the only firm in the world able to practise Australian, PRC, Hong Kong and English law, we're opening doors and unlocking opportunities for businesses looking to unleash their fullest potential. Our ability to connect emerging opportunities with market leading capability is pushing the frontiers of what can be achieved.