



RESULTS  
LEGAL

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# NEW TOOLS AND TRAPS

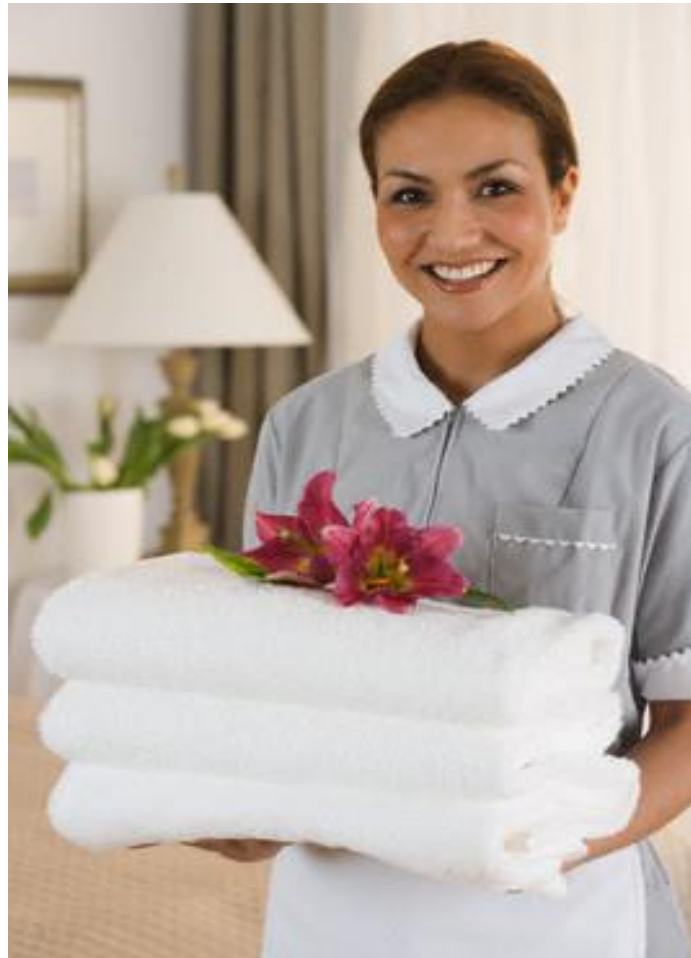
Presented by Karl Hill – Managing Director



# Topics to be covered

1. Purpose
2. Shortening of bankruptcy period
3. Safe harbour
4. Ipso facto
5. Challenging and holding external administrators accountable
6. Voting position for third party creditors
7. Soapbox

# Housekeeping



***Insolvency Law Reform Act***

**and**

***Treasury Laws Amendment  
(Enterprise Incentives No.2) Act***

# Purpose of the reforms



# Purpose

## *Insolvency Law Reform Act*

- Reforming the registration and disciplining of external administrators.
- Regulating external administrations consistently and in a way that gives greater control to creditors.

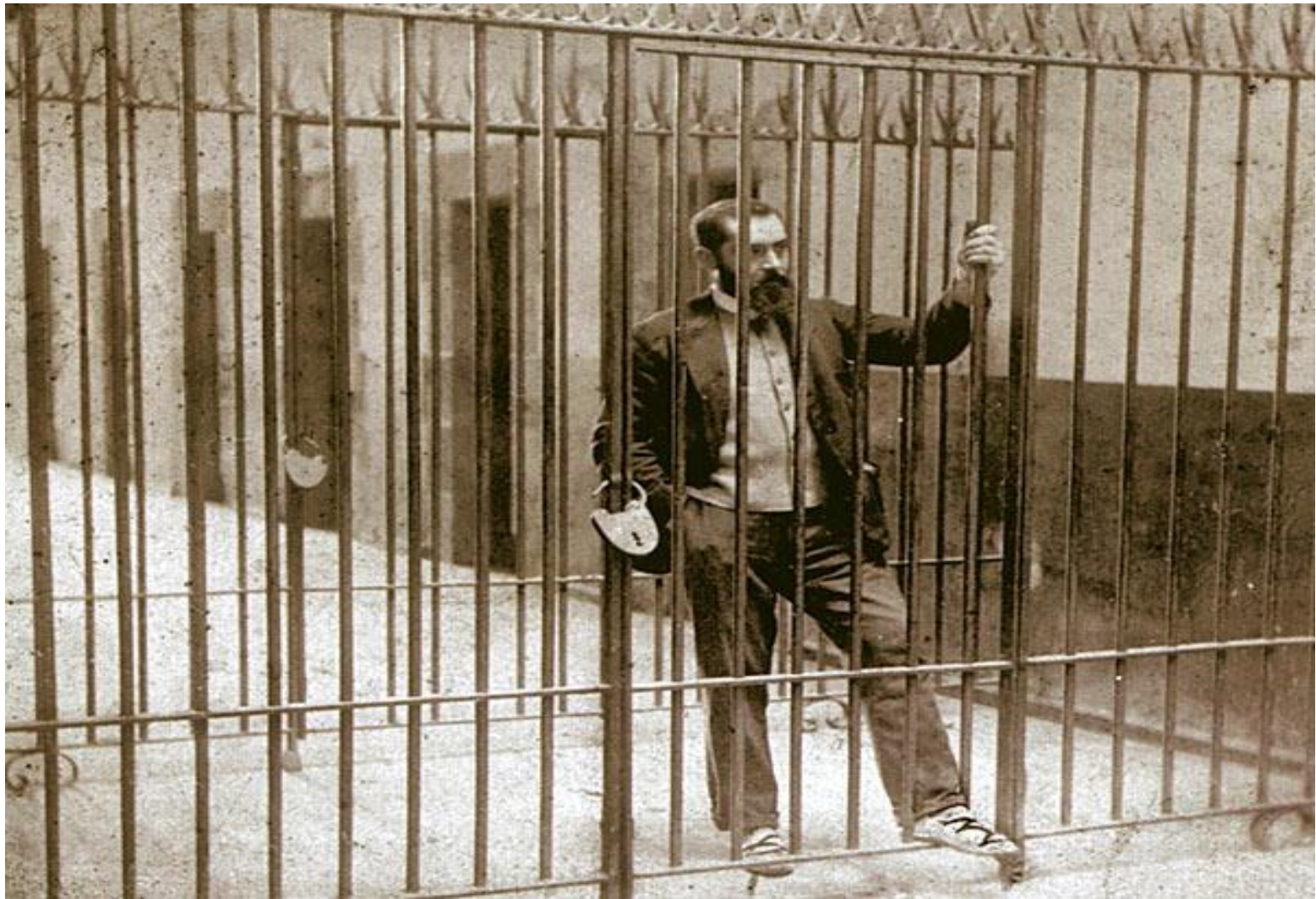
# Purpose

## *Treasury Laws Act*

Encouraging businesses to avoid insolvency by taking certain steps to improve their position when in financial difficulty rather than immediately entering administration.



# Shortening the bankruptcy period





[www.TodaysPhoto.org](http://www.TodaysPhoto.org)  
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# Insolvent trading

Liable for insolvent trading if:

1. a director at the time when the company incurs a debt;
2. the company must be insolvent at the time;
3. there must be reasonable grounds for suspecting that the company is insolvent; and
4. either:
  - (a) aware that there are grounds are so suspecting; or
  - (b) a reasonable person in a like position would be so aware.

*This will drive cultural change amongst company directors by encouraging them to **keep control of their company, engage early with possible insolvency and take reasonable risks to facilitate the company's recovery** instead of simply placing the company prematurely into voluntary administration or liquidation.*

*Explanatory memorandum – TLA (2017 EI No.2) Act*

# Safe harbour defence

Section 588G(2) does not apply if:

1. at a particular time after the person starts to suspect the company may become or be insolvent, the person starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the company; and
2. the debt (subject to the insolvent trading claim) is incurred directly or indirectly in connection with such course of action.

# Period of defence

Starts at the time the person begins developing the “courses of action”.

# Period of defence

Ends at the earliest of the following terms:

1. if the person does not take any such course of action within a reasonable period, at the end of the reasonable period;
2. when the person ceases to take any such courses of action;
3. when such courses of action cease to be reasonably likely to lead to a better outcome for the company; or
4. upon the appointment of an administrator or liquidator.



**What is a “course of action”?**

**How do we tell whether “*a course of action is reasonably likely to lead to a better outcome for the company*”?**

1. Whether the person:
  - (a) is properly informing himself of the company's financial position;
  - (b) is taking appropriate steps to prevent any misconduct by officers or employees that could adversely affect the company's ability to pay all of its debts;
  - (c) is taking appropriate steps to ensure the company is keeping appropriate financial records;
  - (d) is obtaining advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; or
  - (e) is developing or implementing a plan for restructuring the company to improve its financial position.

# Better outcome for the company

Another interesting point is at a particular time after the person starts to suspect the company may become or be insolvent, the person starts developing one or more courses of action that are reasonably likely to lead to a better outcome for the **company**; and ...

# Exceptions to safe harbour defence

1. Failing to pay its employee entitlements when they fall due.
2. Not giving returns, notices, statements, applications or other documents as required by taxation laws.
3. Failing to comply with reporting and disclosure obligations under the *Corporations Act* (e.g. failure to lodge a RATA and deliver up books and records).



# IPSO FACTO

**Ipso facto:** *By the mere fact*

Osborn's Concise Law Dictionary



*‘..a provision that allows one party to terminate  
or modify the operation of a contract upon the  
occurrence of some specific event, regardless of  
otherwise continued performance of the  
counterparty.*

Explanatory memorandum

A party cannot rely on a **formal  
restructure** as an “event” to terminate or modify the operation of a contract.

# “Formal restructure” includes:

- the company entering into administration;
- a managing controller being appointed over all or substantially all of the company’s property; or
- the company undertaking a compromise or arrangement under section 411 of the *Corporations Act 2001* for the purpose of avoiding being wound up.

# STAY

A right cannot be enforced against a company for:

1. the reason that the company is under administration;
2. the company's financial position, if the company is under administration.

# Period of the stay

# Exceptions

1. Administrator or liquidator consents in writing.
2. Court order.

# Obligation to make new advance of money or credit

If rights of Creditor cannot be enforced because of the ipso facto provision,  
any right of Customer for a **new advance of money or credit** cannot be enforced.







# Practical considerations

- Is there a positive obligation to supply?
- Extended payment terms.
- Positive obligation to provide future credit?

# Challenging and holding external administrators accountable





# **Power to request information, report or document**

# Must comply unless:

1. not relevant to external administration;
2. would be a breach of external administrator's duties; or
3. otherwise not reasonable to comply



**Power to request a meeting at any  
time**

# Power for creditors to give directions

# **ASIC may appoint reviewing liquidator**

# Strengthened voting position for creditors

[image of director friendly]

# Outcome determined by related entity

If:

1. The votes of related creditors were disregarded, the outcome on the vote would be different; and
2. The vote brings about an outcome which:
  - (a) is contrary to the interests of creditors; or
  - (b) has prejudiced the interests of the creditors who voted in a contrary manner;

The court may make orders including:

1. setting aside the resolution passed;
2. directing that the related creditors are not entitled to vote on the proposal.







# SUMMARY

1. Shorten bankruptcy period.
2. Safe harbour.
3. Ipso facto.
4. Removal of external administrator.
5. Request for information and documents.
6. Requesting a meeting.
7. Power to give directions.
8. Appointment of reviewing administrator.
9. Strength in voting position.



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SPECIALISED APPROACH TO...**

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