

## THE AUSTRALIAN

### Legal shield for company directors gains support

ANNABEL HEPWORTH THE AUSTRALIAN 12:00AM JUNE 10, 2016



Company directors helping stricken companies could be protected

The push for a new legal shield for company directors who could otherwise be personally liable for insolvent trading when they try to resuscitate stricken companies has received a potential fillip as a bipartisan approach emerges.

As business hits back at Labor's anti-business rhetoric, Labor said it would be guided by Treasury on the calls for a "safe harbour" shield for directors.

"Labor is committed to ensuring that start-ups are operating in an environment that will help them to succeed," a party spokeswoman said. "The Treasury has released a discussion paper on the proposed changes to insolvency laws. Labor will await the outcomes of this consultation and then proceed based on the best advice of Treasury."

The comments come as the nation's most powerful company directors and insolvency practitioners are split over key aspects of the reform.

The reforms were proposed in Malcolm Turnbull's \$1.1 billion innovation statement.

Amid warnings the insolvent trading laws made angel investors and directors reluctant to get involved in start-ups, the Coalition has committed to introducing a “safe harbour” for directors if they appoint a restructuring expert to develop a turnaround plan for a company.

In a discussion paper released before the election was called, Treasury has proposed two models to do this.

The Australian Institute of Company Directors favours “model B” that provides a “safe harbour carve-out”, rather than defence, and puts the burden of proof on the liquidator to show a director had breached their duty to prevent insolvent trading.

But it wants the model to go further by extending the safe harbour to directors who, knowing the solvency of a company is doubtful, let the company rack up debt to sell viable parts of the business or valuable assets.

“There can be important benefits to securing business or asset sales outside of formal insolvency in that enterprise value can better be preserved and a fire sale discount would be avoided,” the AICD has told Treasury in a recent submission. “That directors acting reasonably to preserve value, jobs and returns would not be afforded protection is unsound. This should be rectified.”

The Governance Institute has also backed the model favoured by the company directors. It has told Treasury that while the model seems more “pro-director” by making it harder to sue for insolvent trading, “we believe that this is justifiable if the government wishes to shift the focus of corporate boards from protecting themselves against personal liability to concentrating on good faith efforts to attempt to save viable businesses”.

But the Australian Restructuring Insolvency and Turnaround Association disagrees. In a submission to Treasury obtained by *The Australian*, the group has declared it prefers “model A”, saying it “better balances creditors’ reasonable rights and opportunities for proper investigation of errant directors with greater scope for responsible business risk taking, innovation and entrepreneurialism and, most importantly, to save otherwise viable business.”

Worrells Solvency + Forensic Accountants has told Treasury it does not support the model favoured by the company directors, warning it “could be

exploited by directors who could contrive or fabricate an argument in hindsight to justify prior behaviours.”



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