



# AUASB Board Meeting Summary Paper

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**AGENDA ITEM NO.**        **7.3.1**

**Meeting Date:**            12 September 2018

**Subject:**                    Response by AUASB Technical Group to Safe Harbour Issue

**Date Prepared:**            30 August 2018

**Prepared by:**              Tim Austin

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**Action Required**

**For Information Purposes Only**

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## Agenda Item Objectives

1. The objective of this agenda item is to:
  - (a) **Discuss** with the AUASB, possible directions for a publication;
  - (b) **Outline** options that have been considered by the AUASB Technical Group (ATG); and
  - (c) **Seek responses** to questions 1-3 included in this Board Meeting Summary Paper.

## Background

2. As part of *Other Business* at the April 2018 AUASB Meeting, an AUASB Member brought to the attention of the AUASB the recently effective 'safe harbour' provisions of the *Corporations Act 2001*. The ATG was requested to consider whether there are any assurance implications for the AUASB as a result of this legislative change and report back to the AUASB.
3. In considering the assurance implications the ATG:
  - (a) reviewed the legislative changes to the relevant sections of the *Corporations Act 2001*;
  - (b) reviewed materials published regarding the changes; and
  - (c) conducted limited outreach with specific practitioners.

An overview of the legislative changes have been prepared and included as Appendix A to this paper.
4. The view of the ATG is that, although the legislation was drafted with restructuring and turnaround experts in mind (and with their input), there are some aspects of the 'safe harbour' legislation in which an assurance engagement could add value.

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5. Alongside the assessment of the assurance implications of ‘safe harbour’, the ATG also considered possible assurance implications of other current events such as remediation requirements of the Banking Royal Commission and voluntary disclosures recommended by the Task Force on Climate-related Financial Disclosures (TCFD).
6. The view of the ATG is that other assurance or related-services engagements may add value for stakeholders in meeting the requirements of ‘safe harbour’ legislation, remediation requirements of the Banking Royal Commission or TCFD disclosures, and that the suite of standards available could be communicated to stakeholders through a publication(s) by the AUASB.

#### Questions

1. Does the AUASB see merit in creating a document(s) to be used by stakeholders to understand the possible value-add of other assurance and related-services engagements in different scenarios?

#### What is the issue and can it be addressed through standard-setting activities?

7. The first step undertaken by the ATG in determining whether a publication is needed was considering: is there an issue; is there a public-interest benefit in addressing it; can it best be addressed through standard-setting activities; and does it align with the AUASB Strategy.
  - **Issue** – Possible assurance or related-service activities emerging from events such as the introduction of ‘safe harbour’ legislation and the Banking Royal Commission. Stakeholders may lack knowledge of the other assurance or related-services engagements available under the suite of AUASB standards which could add value to them.
  - **Public-interest** – Would stakeholders benefit from other assurance or related-services engagements? Boards, regulators and other stakeholders can benefit from the enhanced credibility achieved through these engagements. For example, ‘safe harbour’ legislation is not prescriptive as to what directors need to do to be able to rely on ‘safe harbour’. Rather, directors are expected to undertake activities to put themselves in a position to make an informed decision about whether the business can be turned around.
  - **Standard-setting activity** – Under section 227B(1)(c) of the *Australian Securities and Investments Commission Act 2001*, the AUASB may formulate guidance on auditing and assurance matters. The exact form and location of publication to be discussed below.
  - **AUASB Strategy** – Objective 7 – Develop guidance and education initiatives, or promote development by others, to enhance consistent application of auditing and assurance standards and guidance.

#### Questions

2. Does the AUASB agree with the ATG’s assessment of the issue and that it is best addressed through standard-setting activities?

## **What is the form of a possible publication?**

8. After outlining the issue that needs to be addressed, the next step was to consider the form of a possible publication. The issue does not relate to a gap in the suite of AUASB standard and accordingly does not require an amendment of an existing standard or the issuance of a new standard. Based on this assessment an informal (FAQs, Bulletins) or Framework (Framework, Guidance Statement) publication may be the best response.
9. As other possible assurance or related-services activities have arisen, the ATG has considered whether a principles-based approach, which can be used across activities, or a targeted approach for each activity is appropriate.
10. Each option has been outlined and discussed below in paragraphs 11-18.

### ***A principles-based approach***

#### *Overview*

11. To respond to the potential assurance or related-services activities, including ‘safe harbour’, in a timely and effective manner, the ATG proposes a principles-based approach supported by examples based on ‘safe harbour’ and other activities.
12. A principles-based approach could outline the other assurance and related-services options available under the framework of standards. The purpose being to draw attention to the potential value add of these engagements for stakeholders and to demonstrate that these engagements can be applied over a wide-range of subject matters, offering differing levels of assurance.
13. The ATG proposes that a table/decision tree drawn from the *Categorisation of Underlying Subject Matters* table in Appendix 4 of the *AUASB Framework for Assurance Engagements* be prepared. Additional columns could be added to the table/decision tree to assist stakeholders – such as relevant standards and the levels of assurance under those standards. A table has been prepared for illustrative purposes and included as Agenda Paper 7.3.2.
14. To enhance the usefulness of the table/decision tree, “real-life examples” could be included. These examples would be based on emerging issues where other assurance and related-service engagement could add value for stakeholders. For example, a practitioner could be engaged to undertake a compliance engagement to ensure that appropriate records are kept to meet ‘safe harbour’ requirements.
15. As the need arises additional examples can be added to the document such as the remediation activities as a result of the Banking Royal Commission.

#### *How would it work?*

16. As outlined above, this possible publication could be done as either an informal publication or a framework pronouncement. The recommendation of the ATG is as an addendum to the *AUASB Framework for Assurance Engagement*.
17. Additional detailed materials in the form of FAQ’S could be published and refer to the addendum if more specific guidance is needed by stakeholders for certain topics.

### ***Targeted Document***

#### *Overview*

18. Rather than a principles-based approach, an FAQ could be published for each topic and outline the potential value add of other assurance and related-services engagements. The ATG is of the view

that preparing an FAQ every time a new assurance issue arises would be ineffective in meeting the needs of stakeholders in a timely manner and would inefficient.

**AUASB Technical Group Recommendations**

19. The ATG recommends that a principles-based publication focusing on the value add available to stakeholders through other assurance and related-services engagements be further explored by the AUASB. The benefits of a principles-based approach are:
- (a) Timeliness – a principles-based publication which only requires examples to be updated means that the AUASB is responsive to stakeholder needs as new situations arise;
  - (b) Usefulness – a principles-based publication is useful to stakeholders in understanding the other assurance and related-services engagements available to them, the value these engagements can add and in which circumstances they can be applied; and
  - (c) Use of AUASB time – a principles-based publication which only requires examples to be updated means that the ATG and the AUASB are not undertaking complete re-writes of publications each time a new issue comes to the attention of the AUASB.

**Questions**

3. Does the AUASB agree with the ATG’s recommendation that a principles-based publication should be further considered by the AUASB?

**Material Presented**

- Agenda Item 7.3.1 AUASB Board Meeting Summary Paper
- Agenda Item 7.3.2 AUASB Framework for Assurance Engagements Extract

**Action Required**

No.	Action Item	Deliverable	Responsibility	Due Date	Status
1.	Consider whether to further explore a publication	Respond to questions 1 and 2	AUASB	12 September 2018	In-progress

## ATTACHMENT A

20. In September 2017, the *Treasury Laws Amendments (2017 Enterprise Incentives No.2) Act 2017* was assented by the Parliament of Australia. The Act introduced two key changes to the *Corporations Act 2001*:
- (a) 'Safe harbour' provisions which protect directors, in certain situations, from personal civil liability for insolvent trading; and
  - (b) A stay on enforcing 'ipso facto' termination rights which allows a contract to be terminated solely due to the fact than insolvency event has occurred.

### *Safe harbour provisions*

21. The 'safe harbour' provisions, inserted as s588GA, provide directors with relief from s588G(2) of the *Corporations Act 2001* in which a director can be personally liable for debts incurred by a company trading whilst there are reasonable grounds to suspect the company was either insolvent or would become insolvent.
22. The relief will only apply in certain circumstances and is subject to directors meeting a number of compliance requirements including tax reporting and employee entitlements. A director under s588GA will not be civilly liable for insolvent trading if they start developing one or more courses of action that are reasonably likely to lead to a better outcome for the company and that the debts being incurred are incurred directly or indirectly in connection with any such course of action.
23. In determining whether a course of action is reasonably likely to lead to a better outcome, regard may be had to whether the director:
- (a) is properly informing himself or herself of the company's financial position; or
  - (b) is taking appropriate steps to prevent any misconduct by officers or employees of the company that could adversely affect the company's ability to pay all its debts; or
  - (c) is taking appropriate steps to ensure that the company is keeping appropriate financial records consistent with the size and nature of the company; or
  - (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.
24. The 'safe harbour' legislation also introduces provisions limiting the enforcement of 'ipso facto' clauses, this effectively stays the enforcement of provisions of a contract that allow a contract to be terminated solely due to the fact that an insolvency event has occurred.