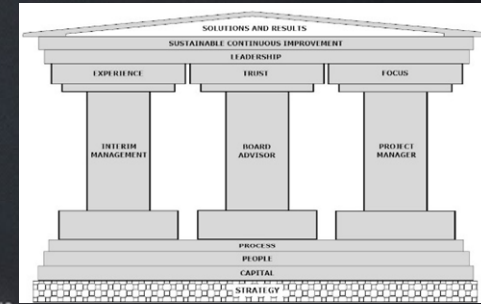
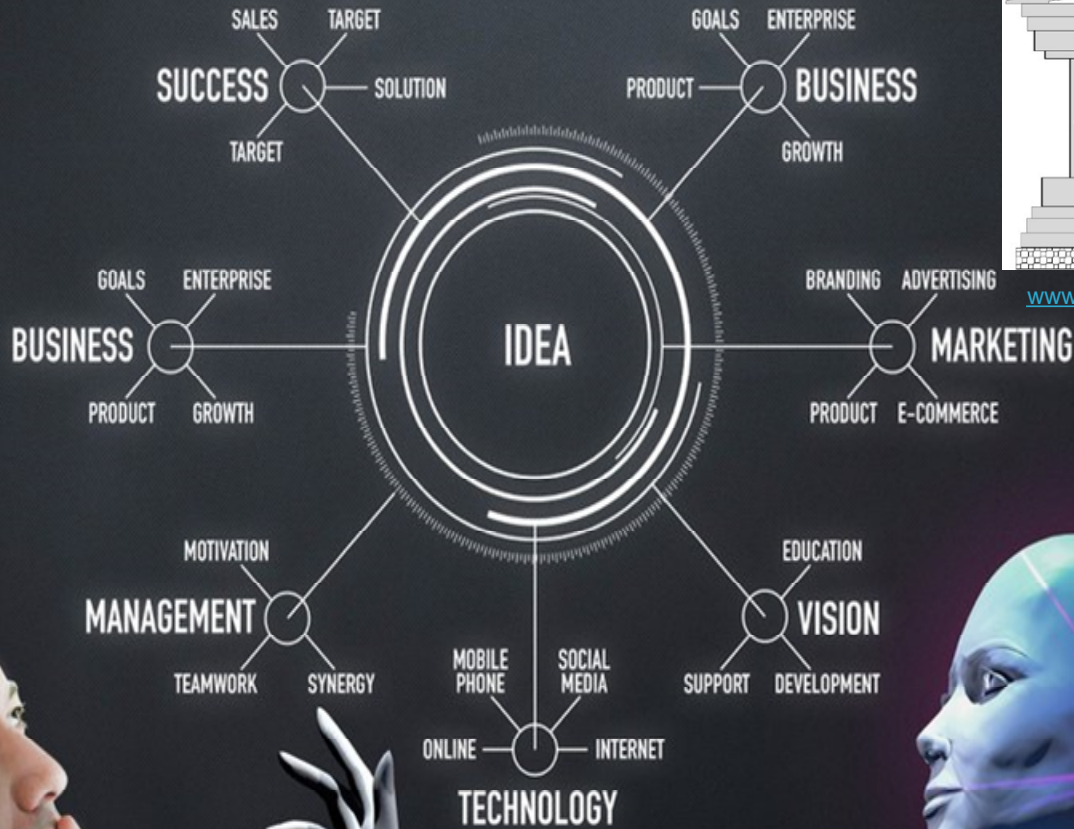
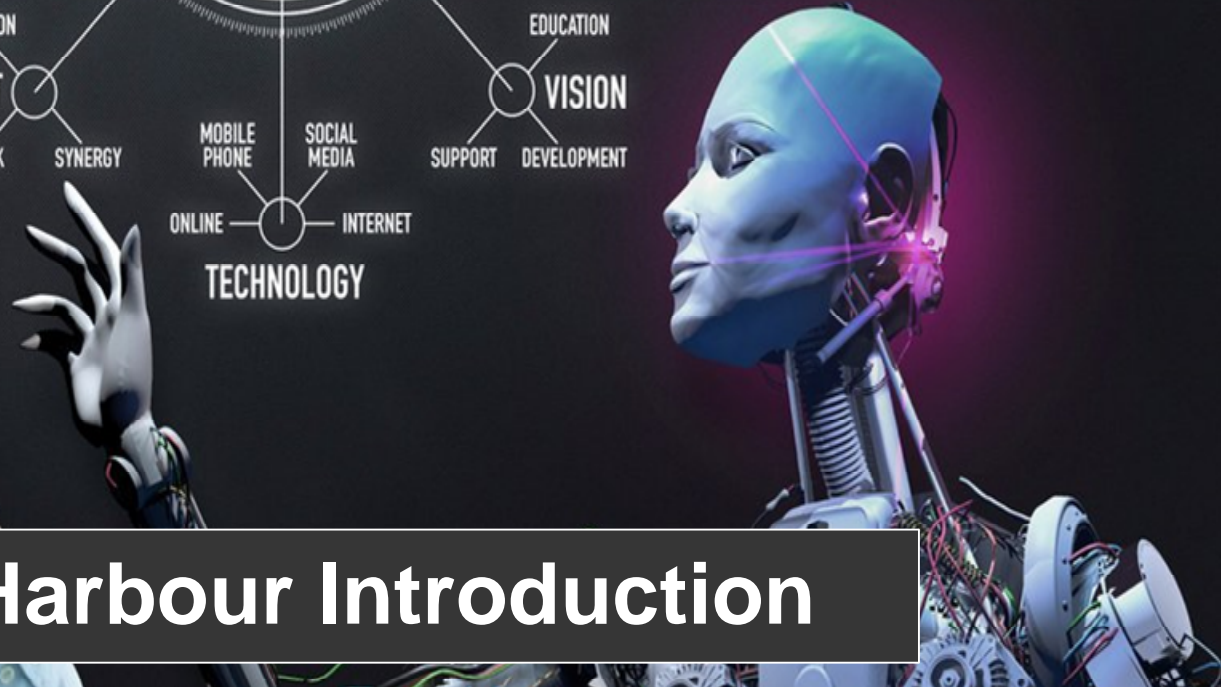


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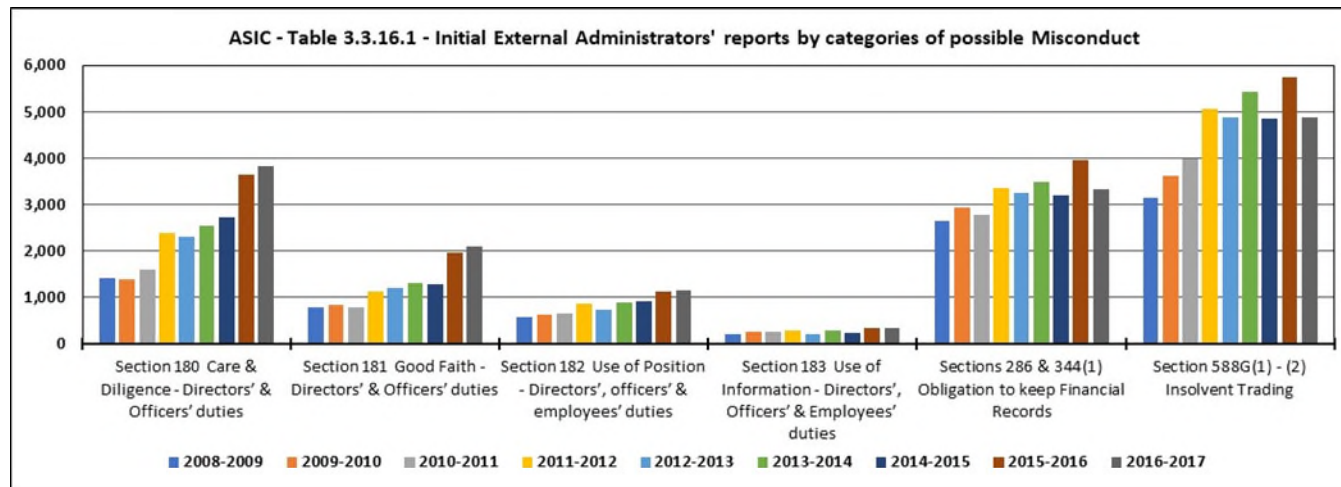
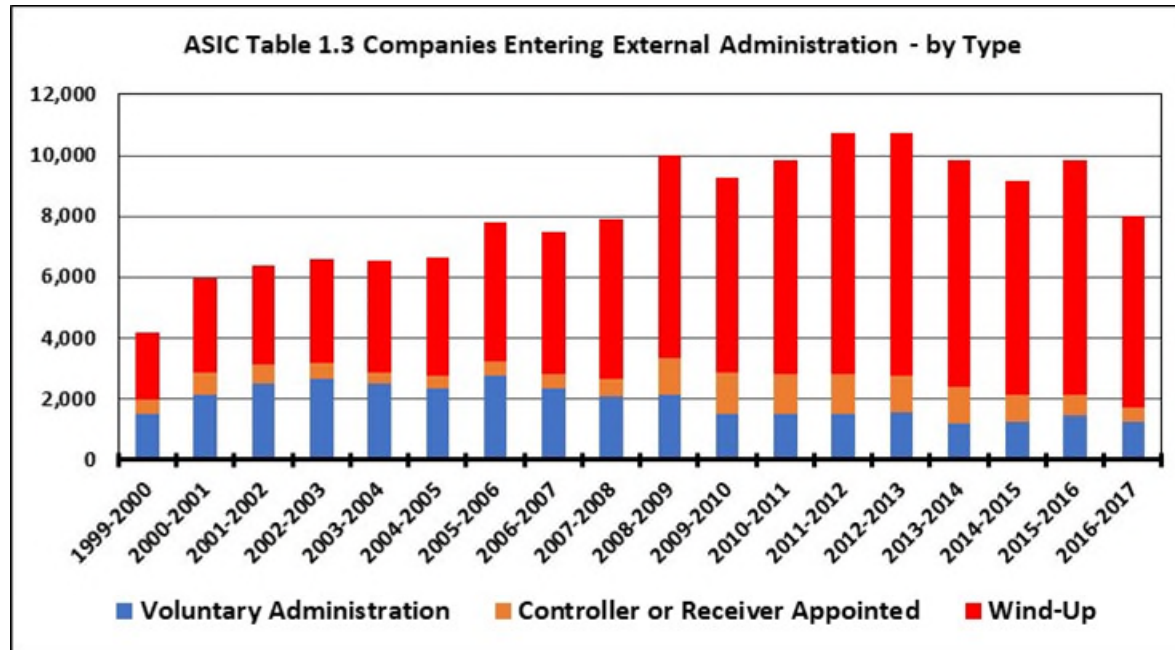
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Safe Harbour Introduction

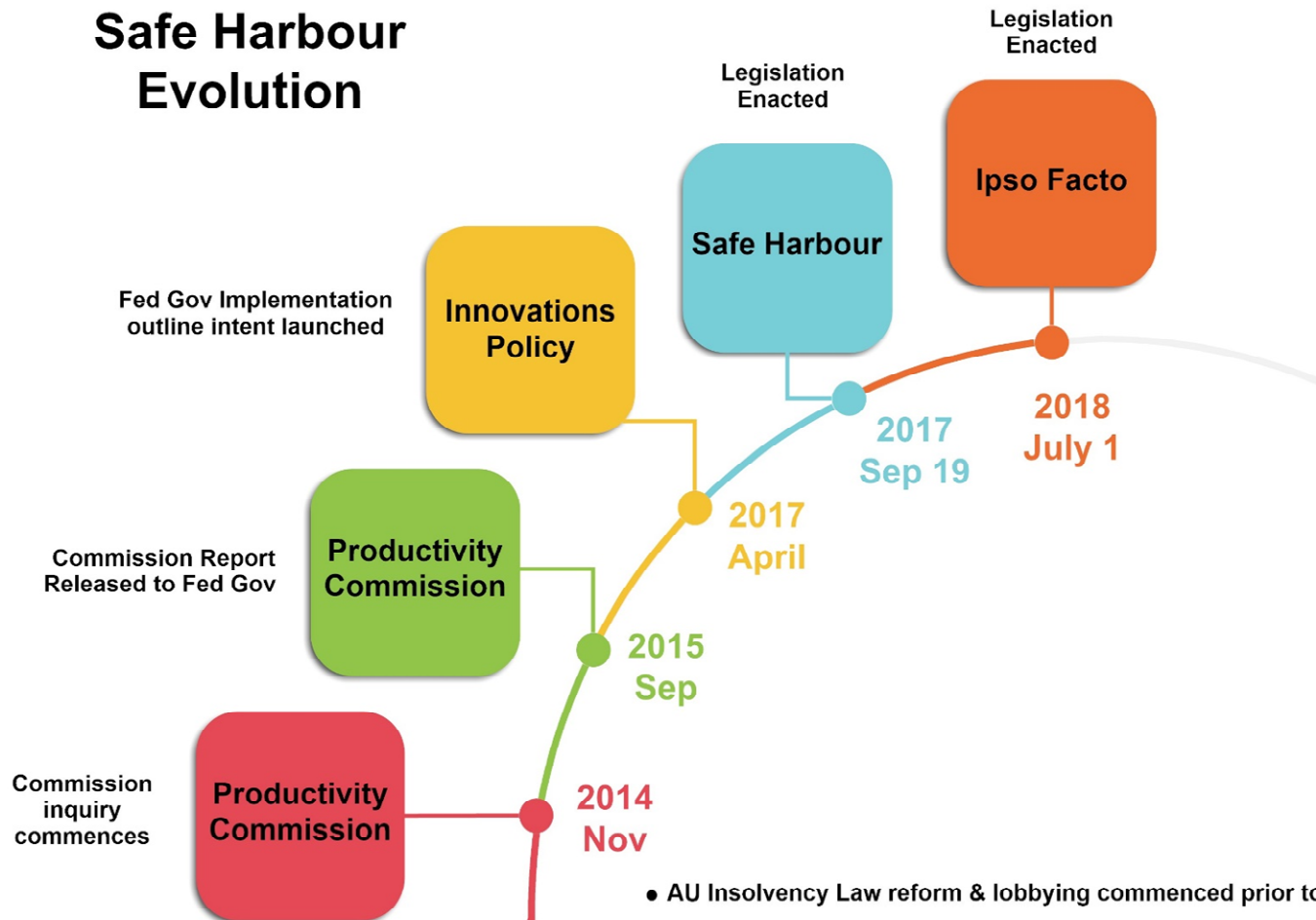
Historical Insolvency Trends

<https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/>



Legislation Evolution

Safe Harbour Evolution



Federal Treasurer requested Productivity Commission inquiry into barriers to business entries, exits & identify options to reduce barriers.

- AU Insolvency Law reform & lobbying commenced prior to 2009.
- AU Insolvency & Director liability legislation has been toughest in the world.
- Director risk exposure encouraged premature Voluntary Administration.

Director Responsibilities

- Corporations Act Section 95A - A person (including a company) is insolvent if they are not solvent.
 - A company is only solvent if it is able to pay its debts as and when they become due and payable.
- A Director has a Duty to prevent a company incurring debts when:
 - The Company is insolvent
 - There is reasonable grounds to suspect the company is or will be insolvent.
- Director(s) can be held personally liable for unpaid debts incurred in breach of this Duty S588G(2).

Legislation now provides a “safe harbour” defence to a breach of this Duty to prevent insolvent trading civil liability (provided requirements are met)

- *Provides exceptions for civil liabilities.*
- *Provides protection defence for insolvent trading claims from Liquidator.*

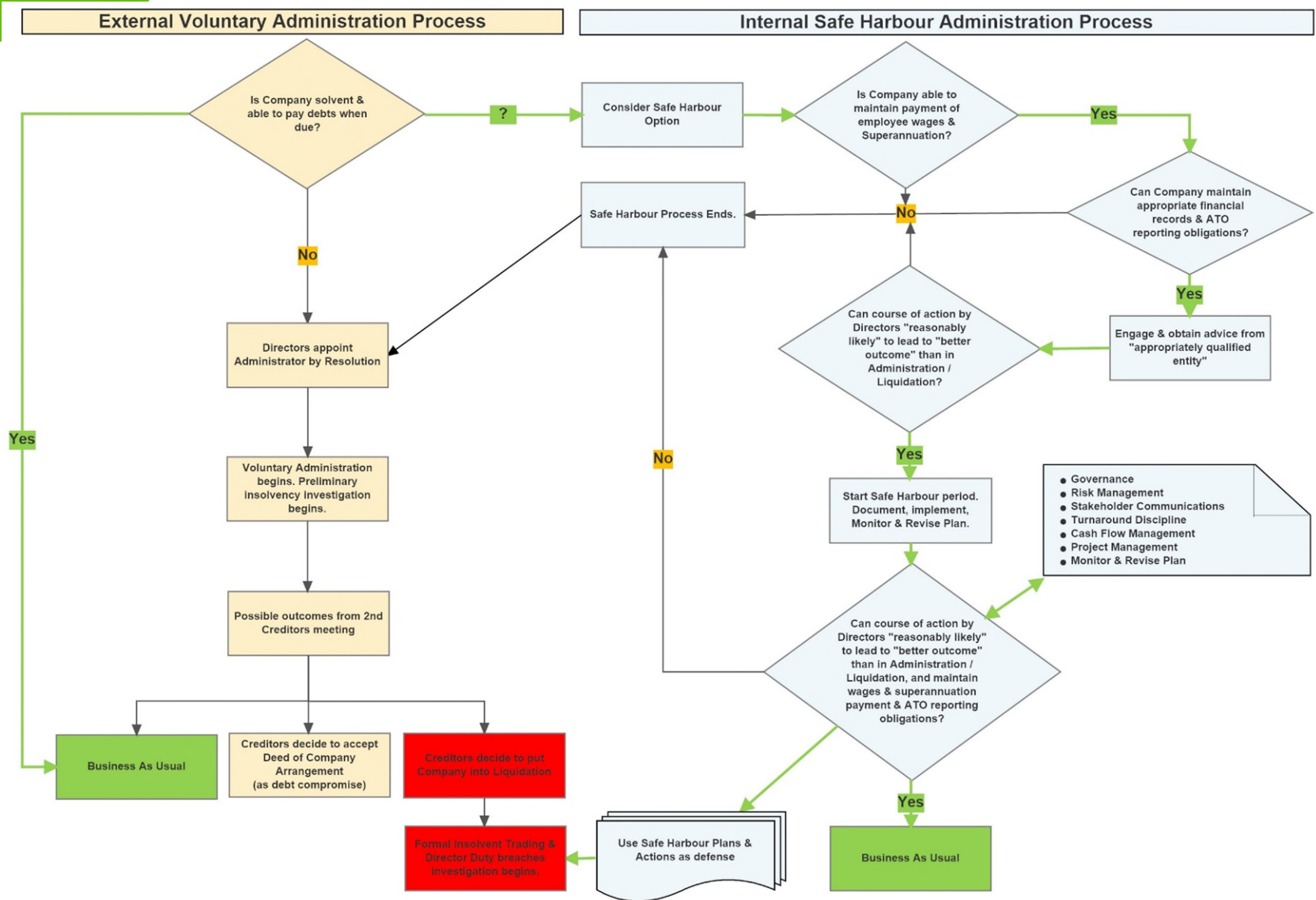
Essential Requirements

- During the “safe harbour” period there must be “substantial compliance” with:
 - Payment of employee wages and superannuation.
 - Maintain ATO tax reporting obligations (BAS / GST) – (but not payment).
 - Engage and obtain advice from “appropriately qualified entity” (fit for purpose).
- During any subsequent Administration, Receivership or Liquidation:
 - Must comply with statutory obligations to provide reports and (financial) books and records, to allow for inspection.

How does Safe Harbour Work?

- If a Company is on course for Insolvency, Directors now have a **safe harbour** to work in a company turnaround.
- The course of action taken by the Directors must be **reasonably likely** to lead to a **better outcome** for the company than in Administration / Liquidation.
 - For a course of action to pass the “better outcome” test will depend on the company’s circumstances.

How does Safe Harbour Work?



Safe Harbour Period

Starts when :

- Director declares and starts a course of action that is **reasonably likely** to lead to **better outcome** (for the company) than immediate Administration or Liquidation.

Ends when:

- Director stops taking the course of action, or
- Course of action is reasonably likely not to lead to a better outcome
- Director fails to take a course of action within a reasonable time
- Company goes into Administration or Liquidation.

Key Requirements for Defence

Factors relevant in assessing if course of action is **reasonably likely** to lead to a **better outcome**, provide best practice and support a safe harbour defence:

- Comply with “Essential Requirements”.
- Document, implement, monitor and revise the Plan (regularly).
- Director(s) to keep informed on company financial position.
- Directors continue to comply with Duties of a Director.
- Maintain appropriate financial records.
- Director(s) to prevent misconduct by D&O’s / employees which may affect ability to pay debts.

- Avoid / caution incurring fresh Debt.

- Comply with general laws.
- Continuous disclosure obligations under Corporations Act and/or ASX Listing rules.

Failure to take these steps increases risk of being denied safe harbour protection.

Safe Harbour Exclusions

- Does not deal with Personal Liabilities of a Director.

Safe Harbour does not:

- Deal with Personal Guarantees.
- Cover breaches of Director Duties.
- Void any other legal obligations.
- Cover Director Misconduct.
- Cover Loan Covenants.

- Prevent, constrain or influence creditor behaviour.
- Change the process of Voluntary Administration.
- Change or influence the assessment of preferential payments or clawbacks

“Ipso Facto” clause changes

WHAT ARE IPSO FACTO CLAUSES?

- Contractual provision that allows a party to terminate or modify contract on occurrence of a specified insolvency event.

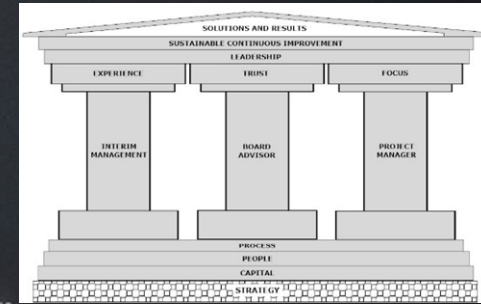
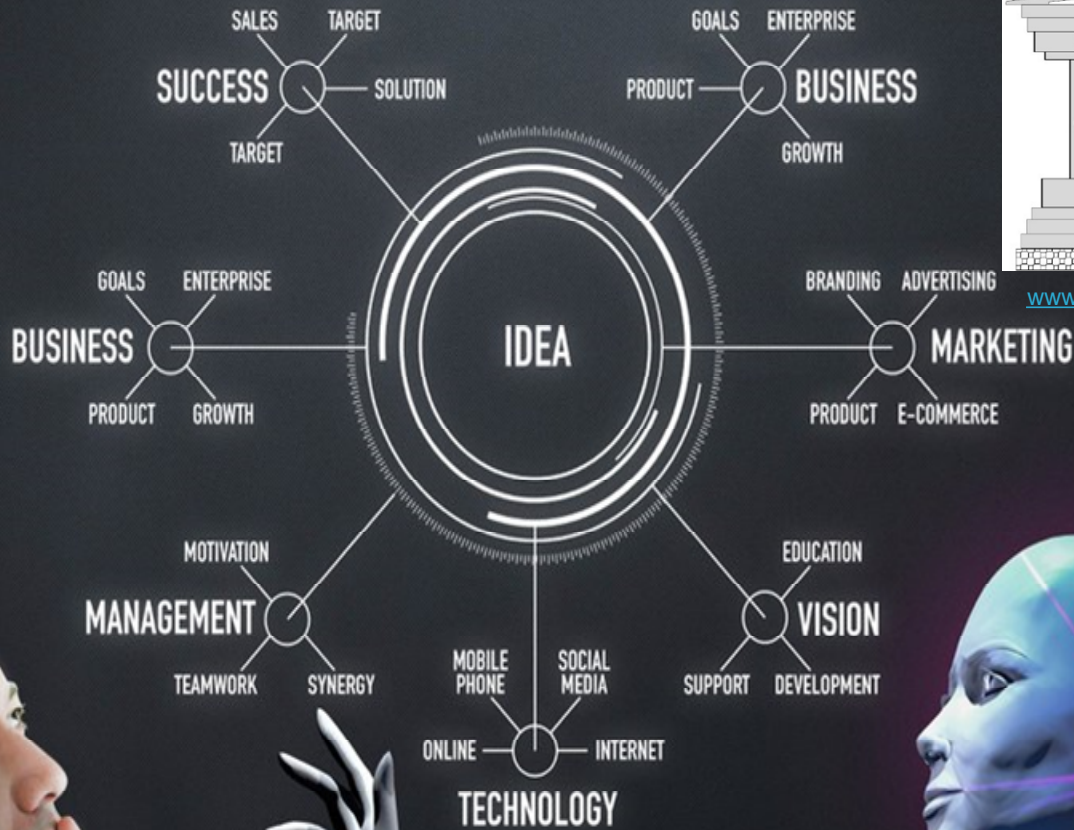
PURPOSE OF NEW IPSO FACTO REGIME

- Limits counterparties ability to terminate contracts or rights (on restructuring or insolvency event).
- Enhance likelihood company will be able to continue to trade in order to recover from an insolvency event,
 - and to allow Voluntary Administration regime to operate as originally intended.
- Applies to new contracts from 1 July 2018.
- Note: Some enforceability exemptions and exclusions apply.

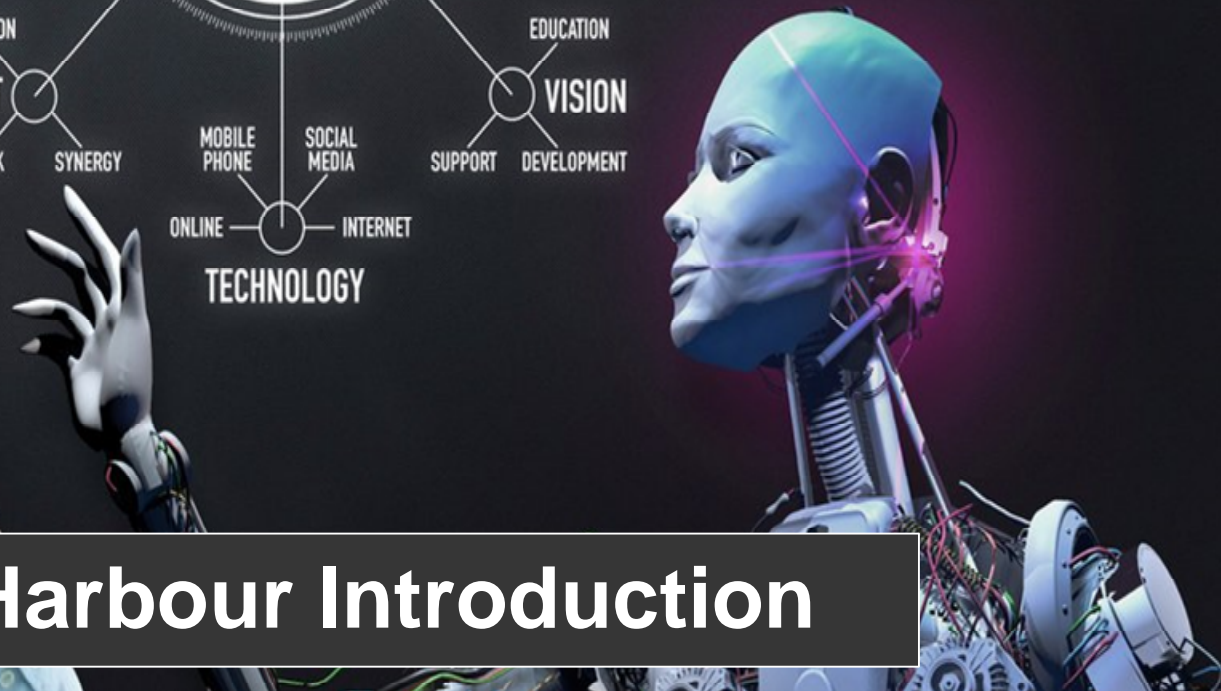
Some Alignment Challenges Ahead

- How will ASX companies manage their Continuous Disclosure obligations and media campaigns, when in Safe Harbour?
- ATO position not clear, has separate legislation:
 - Can assert Director Penalty Notices for non-payment of GST, and
 - Can issue garnishee orders (on companies bank accounts), and
 - Has improved information on new One Touch Payroll reporting on PAYG-I status.
- State authorities with own legislation, eg.:
 - Building authorities which approve / cancel builders license based on “events”.
- State Governments with own legislation, eg:
 - Director liabilities for non-payment of payroll tax (applies for some states).
- Insurance Companies – D&O Insurance
 - Insurance companies – response not defined
- Director community risk appetite and response – fight or flight?

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Safe Harbour Introduction