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Safe Harbour

Guiding you to a better outcome

Deloitte Financial Advisory Pty Ltd



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When times are tough, the Safe Harbour regime can help companies avoid value-destroying formal insolvency procedures.

Safe Harbour can protect directors from insolvent trading claims while they attempt a restructure.

What is Safe Harbour?

Safe Harbour provides directors who suspect their company may be insolvent with an option to develop a course of action to achieve a better outcome for the company. This is opposed to immediately entering administration or liquidation.

While this course of action (to achieve a better outcome) is being pursued the directors are “in Safe Harbour”. Subject to certain conditions, this means they are protected from personal liability for debts incurred whilst pursuing the strategy to achieve a better outcome.

Safe Harbour provides significant benefits to directors

Directors seeking to rescue a business in financial distress face two main risks:

01. Breaching their duties as a director, and
02. Becoming personally liable for debts of the company under the ‘insolvent trading’ provisions if the turnaround efforts fail.

Traditionally, the way to manage these risks was to appoint a liquidator or an administrator. However, these appointments often destroy significant value, and if employees, suppliers or other crucial stakeholders react badly to an administration, a business can be destroyed.

Now with the enactment of Safe Harbour directors have a choice. If they believe a turnaround is possible, they can seek a restructure outside of an administration or liquidation, significantly reducing these risks and preserving value.



Implementing a Safe Harbour restructure

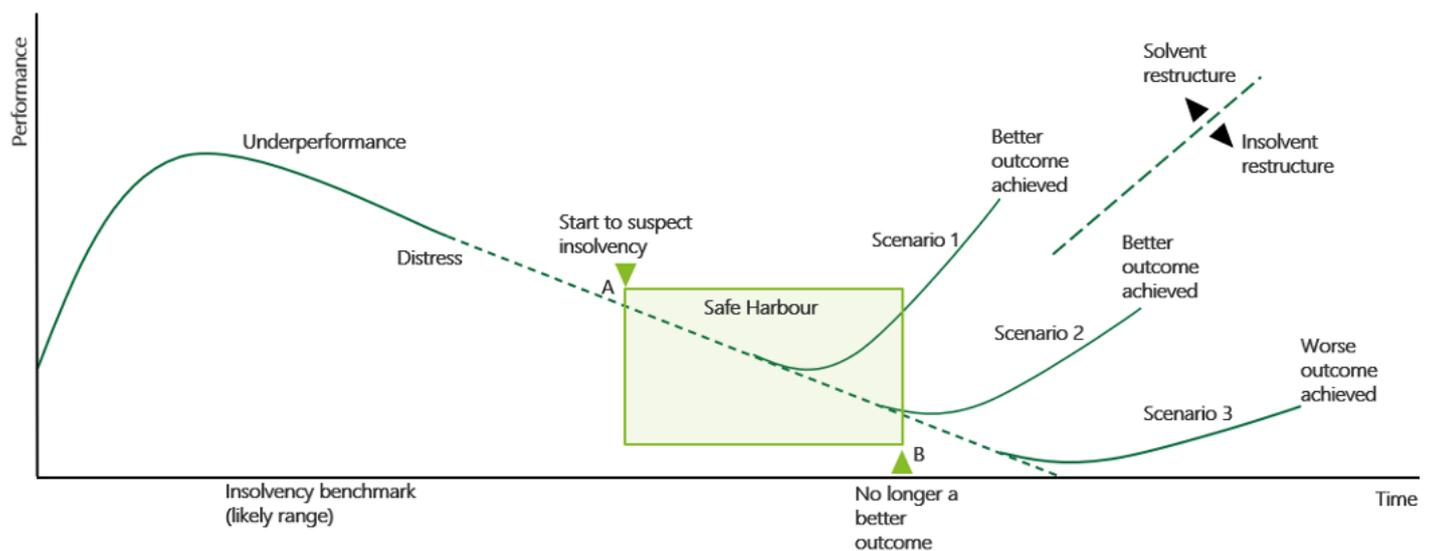
1 Directors suspect the company is insolvent or likely to become insolvent in the near future.

The time taken between considering what should be done and going ahead with the course of action is not limitless.

Safe Harbour will only protect directors during “a reasonable period” between considering the various courses of action and implementing them.

To be eligible for Safe Harbour the directors of the company must ensure that:

- Employee entitlements including superannuation are paid up to date
- Taxation reporting obligations up to date
- Books and records are up to date
- There are systems in place to prevent misconduct



Illustrative example:

- Old rules: Potential personal liability under scenario 2 & 3 from point A
- New rules: Potential personal liability only scenario 3 from point B (assuming all Safe Harbour rules are followed)

2 Safe Harbour commences when a director implements a course of action that is reasonably likely to lead to a better outcome.

A better outcome is generally a measure of the outcome for the company's creditors at the conclusion of the course of action compared to the outcome they would have received if an Administrator or Liquidator was immediately appointed.

The concept is broad because the Government recognises it will vary on a case-by-case basis and that directors may be operating in a rapidly changing and uncertain environment.



The Corporations Act does offer some guidance to help indicate whether a course of action will reasonably likely lead to a better outcome including:

- That the directors have kept themselves informed about the company's financial position
- That the directors have ensured that the financial records are properly maintained
- That the directors are preventing misconduct amongst themselves and their employees
- That the directors are developing and implementing a plan to restructure the company to improve its financial position
- That the directors are continually assessing that plan against the outcome for an immediate liquidation or administration
- The directors are obtaining advice from an appropriately qualified advisor

3 Directors continue to pay employee entitlements, report taxes and comply with other duties.

The Safe Harbour provisions only apply under certain circumstances and requires compliance with tax reporting obligations and payment of employee entitlements, amongst other things.

The Safe Harbour protection does not exist if the company does not pay employee entitlements on time, comply with its obligations under taxation laws and provide books and records to a subsequently appointed external administrator (if applicable)

Not all debts incurred are covered by the protection. Only those which are incurred in relation (either directly or indirectly) to the developed course of action and during the period of that course of action being undertaken are covered.

4 If the course of action becomes not reasonably likely to succeed, Directors appoint a Voluntary Administrator/Liquidator.

Directors must continuously review and evaluate the course of action to ensure it continues to lead to a better outcome for the company than an immediate liquidation or administration.

If, at any point, the course of action is showing it will not likely lead to a better outcome, the Safe Harbour protection ends, and the directors should consider a formal insolvency process to protect themselves (e.g. voluntary administration).

Safe Harbour ends when:

- A director stops pursuing the course of action
- The course of action is no longer likely to lead to a better outcome or
- The course of action is not taken within a reasonable period after developing the plan

Our credentials

We have significant experience in guiding companies through a turnaround, from advice to implementation. Our team has been awarded "Turnaround of the Year" on several occasions for their work in this area.

Health care equipment manufacturer

As a result of a major ramp up in demand and production, the company began to grow and invest in capex with expansion both locally and in the US market. Issues with production and a major recall event impacted growth and crippled cash flows. We provided safe harbour advice that allowed the client to conduct restructuring activities including the raising of additional finance and implementing cost reduction initiatives.



ASX-listed entertainment provider

The business encountered financial difficulties as a result of a dispute and was at risk of becoming insolvent. It was exploring some restructuring options, including resolving the dispute and raising new capital. We provided safe harbour advice that allowed the client to conduct these negotiations with confidence. The ultimate result was that the dispute was resolved and capital raised. The business has been able to continue and is now looking to expand its offering post a successful restructure.

Independent trading and wealth management fintech business

Provision of Safe Harbour advice to an independent trading and wealth management fintech. The client was pursuing various restructuring plans which included a cost out program and a transaction with a competitor that would bring cost and revenue synergies. Our advice provided the client with the comfort, governance framework and time it needed to enable it to successfully execute its restructuring plan and return to a sustainable footing.



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