



Safe Harbour

Protecting businesses
through the COVID-19 crisis

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18 March 2020



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What is Safe Harbour?

Safe Harbour is specifically designed to preserve good businesses, and to protect them through difficult times.

The 'Safe Harbour' legislation (section 588GA of the Corporations Act) provides a framework for corporate restructuring outside formal insolvency. It protects company directors from personal liability for insolvent trading if the company is undertaking a legitimate restructure.

The use of Safe Harbour is expected to increase as a consequence of the COVID-19 pandemic as a key strategic initiative to preserve businesses and employment. It is a much preferred outcome to insolvency, but is only available to companies and their directors who act quickly when facing into financial decline. Directors who take action too late face falling foul of the qualifying criteria for Safe Harbour, meaning that Voluntary Administration or Liquidation may become their only options.

Successfully navigating a client into Safe Harbour, ensuring that the directors and the company meet the various qualifying criteria, and the construction of a sufficiently robust and detailed restructuring plan requires expert knowledge and experience, as well as technical proficiency in the application of Australia's corporate turnaround and insolvency laws.

"Entering the Harbour"

A number of conditions need to be satisfied in order to qualify for Safe Harbour protection, the most significant of which is that one or more courses of action needs to be **reasonably likely** to lead to a **better outcome** for the company and its creditors (than the appointment of an administrator or liquidator to the company).

Furthermore, the Safe Harbour is only open to directors who are acting honestly and diligently and who have taken appropriate steps to ensure the company has:

- Paid entitlements of its employees by the time they fall due;
- Kept appropriate financial records consistent with the size and nature of the company; and
- Kept and maintained necessary tax reporting obligations – including returns, notices, statements, applications or other documents as required by taxation laws.

Key Terms

“Docking in the Harbour”

“Reasonably likely”

The legislation does not define what is “reasonably likely”.

In our view, reasonably likely reflects an objective assessment of whether there is more than a fanciful chance that one or more courses of action will lead to a better outcome than the immediate appointment of an administrator, or liquidator, of the company.

Whether the courses of action are reasonably likely to lead to a better outcome is assessed as at the time the decision is made, not with the benefit of hindsight.

A “Better outcome”

The Corporations Act has defined ‘better outcome’ as an outcome that is better for the company (and its creditors) than the immediate appointment of an administrator, or liquidator.

The safe harbour protection applies from the time the director starts to develop the courses of action that are reasonably likely to provide a better outcome for the company than an immediate liquidation or administration. Safe harbour is not intended to be a mechanism for a company to trade past the point it is viable.

Once the directors conclude that the course of action is no longer reasonably likely and therefore is not likely to deliver a better outcome than insolvency, the ‘better outcome’ test will no longer be satisfied and the protection of the harbour ceases.

If eligible for the Harbour, directors must continue to take an early and proactive approach to ensure that the courses of action are reasonably likely to lead to a better outcome including:

- Engaging **appropriate advice**;
- Developing a **turnaround plan**;
- Assessing whether each debt is incurred directly or indirectly “in connection with the courses of action”;
- Determining whether a standstill period can be agreed between internal and external stakeholders; and
- Taking steps to maintain appropriate financial records.

Appropriate advice

The general expectations of an appropriate advisor include:

- Expertise in the operational, management, financial and legal aspects of restructuring;
- Tertiary qualifications in turnaround;
- Demonstrable turnaround/restructuring experience; and
- Compliance with the code of ethics and professional development requirements of the persons relevant accrediting organisation.



The KPMG Framework for Safe Harbour

01 Suspect insolvency	02 Entering the Harbour	03 Planning a better outcome	04 Implementation and Monitoring	05 Exiting the Harbour
Objectives				
Preliminary assessment	Positive steps to develop a course of action	Course of action developed	Implement course of action and monitor performance	Assess success/failure of course of action
Actions				
<ol style="list-style-type: none"> 1 Assess the Directors suspicions and review records, forecasts, employee liabilities and taxes 2 Conduct a Rapid Safe Harbour Diagnostic 3 Engage an appropriate advisor 4 Plan and document steps taken 5 Engage with "other advisors" 	<ol style="list-style-type: none"> 1 Complete the records, forecasts, employee liabilities and taxes assessment 2 Review and advise on governance processes 3 Guidance on ongoing financial reporting 4 Advice pertaining to engagement with all stakeholders 5 Assessment of the company's plan/commence turnaround planning 	<ol style="list-style-type: none"> 1 Objective assessment of the company's options 2 Roadmap of the actions timetable 3 Adoption of plan for internal and external stakeholders 4 Establish governance for execution of the plan 5 Validate upside scenario 	<ol style="list-style-type: none"> 1 Guidance on project management 2 Guidance on reporting 3 Guidance on governance 	Assess whether the company is solvent or whether a formal insolvency appointment or solvent wind down is required
Documentation				
<ul style="list-style-type: none"> - Initial view of financial records - High level plan - Engagement terms - Rapid Opportunity Diagnostic 	<ul style="list-style-type: none"> - Assessment of financial position - Governance program - View on safe harbour 	<ul style="list-style-type: none"> - Better outcome assessment - Go/ "No Go" assessment - Company resolution to implement - Quick wins 	<ul style="list-style-type: none"> - Progress reports - Steering committee meetings - Updated forecast financial model 	<ul style="list-style-type: none"> - N/A
At all times				
Advising the Directors that at all times:				
<ul style="list-style-type: none"> - the books and records must be intact, financials up to date and governance, fiduciary and reporting obligations adhered to; and - The elements of the turnaround plan are monitored and the plan is adjusted to meet any changed circumstances. 				

Key takeaways

Whilst entering the Safe Harbour is a question of adherence to S588GA of the Corporations Act, undertaking a turnaround can be hard to do. Directors should ensure they:

- Understand the company's position;
- Seek advice early from appropriate advisors;
- Document decisions and plan outcomes; and
- Continually review and re-assess any course/ courses of action implemented.

Retaining the services of a restructuring professional who not only understands the Safe Harbour legislation but more importantly is practised in restructuring is key. KPMG's restructuring advisers are experts in helping companies during times of financial distress.



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March 2020. 479569796DTL