Safe Harbour

COVID-19 response: Critical for directors of all businesses

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Introduction to Safe Harbour

COVID-19 market disruption

Due to the considerable uncertainty associated with the rapidly developing COVID-19 situation, Safe Harbour is a concept which needs to be front of mind for directors of all Australian companies, as the financial consequences of this global event unfold.

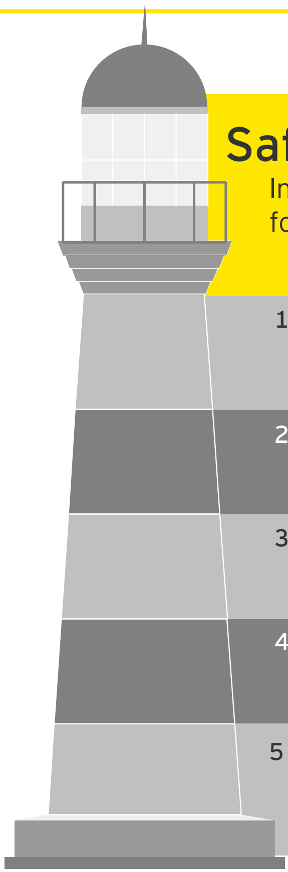
Aim of Safe Harbour

The aim of the Safe Harbour is to facilitate company restructuring outside of a formal insolvency process, where doing so would achieve a better outcome for the company than immediately appointing an administrator or liquidator.

In addition to the financial distress facing many companies, boards of directors are likely to be facing significant personal distress and uncertainty arising from the effects of the COVID-19 pandemic on their businesses.

Safe Harbour provides protection to directors from personal liability relating to any future insolvent trading claims, provided certain conditions are met (see opposite).

The Safe Harbour protections require directors to act early by seeking appropriate advice. Any restructuring plan adopted by directors must be reasonably likely to lead to a better outcome for the company than an immediate insolvency. EY Corporate Restructuring professionals can play an important role in advising the directors about their turnaround or recovery plans.



Safe Harbour – key elements

In order to be able to rely on Safe Harbour the following key elements must be met:

1. The company must continue to meet obligations for the payment of employee entitlements and reporting of taxes
2. The turnaround must be reasonably likely to lead to a better outcome than an immediate insolvency appointment
3. Directors must continue to discharge their directors duties and maintain appropriate financial records
4. Directors must continue to comply with their other legal duties including continuous disclosure obligations
5. The company should seek professional advice from an **appropriately qualified entity, such as EY,** to develop and implement a restructuring plan

EY key recommendations

Act early

It is in the best interests of directors and companies to act early if signs of distress are evident.

Understand the issues

Understand the key operational, legal, financial and commercial issues to be addressed.

Get proper advice

This will constitute a combination of both situational experience and sector experience / knowledge.

Safe Harbour – key elements and considerations

Safe Harbour protection allows directors to maintain control of the restructuring process whilst minimising personal exposure.

Benefits for Directors:

- Protects directors from personal liability for debts incurred by an insolvent company if they develop a restructuring plan and take a course of action that is reasonably likely to lead to a better outcome for the company.
- Gives directors space to allow them to turn the company around without the need to manage the conflict which arises between personal interest and directors' duties.
- In a stressed scenario, the directors retain control but equally have the framework to call in the right advisors.

Other considerations:

- During Safe Harbour, directors must continue to comply with all their obligations under the law, including their directors' duties and any continuous disclosure obligations.
- The Safe Harbour for company directors and holding companies imposes an evidentiary burden on company directors to provide reasonable evidence that they have been acting under the Safe Harbour.
- The development and deployment of a turnaround plan will need constant monitoring and adjustment to ensure that it remains appropriate and will achieve its purpose of leading to a better outcome for the company.

Early intervention

COVID-19 is anticipated to have significant and far-reaching supply and demand ramifications for all businesses, and in many cases we should expect financial distress to result. Safe Harbour laws passed by the Federal Government in 2017 provide directors of financially distressed businesses a 'Safe Harbour' to turnaround their businesses free from the risk of personal liability of insolvent trading.

Key triggers we are seeing with clients

- Supply chain disruption
- Major changes to consumer sentiment as a result of panic
- Changes to consumer behaviour applying different pressures on businesses
- Immediate cash flow impact
- Going concern and solvency issues
- Uncertainty on achievability of forecasts
- Loss of key suppliers and/or customers
- Covenant breaches
- Restrictions in liquidity availability due to uncertainty
- Regulatory impositions / increase in regulatory burden
- Changes in funding sources and critical funding requirements/discussions
- Increased stakeholder scrutiny

Key contact details

Adam Nikitins
Partner – Restructuring
EY Australia
Tel: +61 403 348 220
Adam.Nikitins@au.ey.com

Stewart McCallum
Partner – Restructuring
EY Australia
Tel: +61 432 325 616
Stewart.McCallum@au.ey.com

Justin Walsh
Partner – Restructuring
EY Australia
Tel: +61 401 997 918
Justin.Walsh@au.ey.com

Henry Kazar
Partner – Restructuring
EY Australia
Tel: +61 412 130 105
Henry.Kazar@au.ey.com

Sam Freeman
Partner – Restructuring
EY Australia
Tel: +61 412 726 726
Sam.Freeman@au.ey.com

Colby O'Brien
Director – Restructuring
EY Australia
Tel: +61 430 246 117
Colby.O'Brien@au.ey.com

Alex Harper
Director – Restructuring
EY Australia
Tel: +61 408 718 666
Alex.Harper@au.ey.com

Scott McKinnon
Director – Restructuring
EY Australia
Tel: +61 417 581 033
Scott.McKinnon@au.ey.com

Lachlan Abbott
Director – Restructuring
EY Australia
Tel: +61 431 072 086
Lachlan.Abbott@au.ey.com