WEXTED advisors
SPECIALISED | CORPORATE | STRUCTURING

Safe Harbour FAQs

Frequently asked questions and insights from our experience as Safe Harbour advisors

What is Safe Harbour?

Safe Harbour provides directors protection from personal liability for trading whilst insolvent. Safe Harbour applies to directors of companies that are developing a restructuring plan that is reasonably likely to provide a better outcome for the company relative to the immediate appointment of an administrator or liquidator.

Why was Safe Harbour introduced?

The Safe Harbour reforms seek to address a concern that the risk of personal liability for insolvent trading was causing directors to appoint external administrators prematurely, rather than to attempt a restructure of a viable business. The legislation seeks to strike a better balance between creditors' interests and encouraging directors to manage challenging financial situations in a responsible and commercial fashion. The intention of the Safe Harbour reforms is to encourage proactive restructuring and entrepreneurship, and avoid formal insolvency processes, which can be needlessly destroy value.

Am I eligible for Safe Harbour?

Directors can access protections under Safe Harbour if they can demonstrate that they were developing or implementing a course of action reasonably likely to lead to a better outcome for the company than voluntary administration or liquidation.
In determining whether the above applies, Courts will have regard to whether a director is taking appropriate steps to:

- inform themselves of the company's financial position;
- prevent misconduct by officers or employees;
- ensure the company is maintaining appropriate financial records;
- develop or implement a restructure plan; and
- obtain advice from an appropriate qualified entity.

Who is an appropriately qualified entity?

Key considerations when selecting an appropriately qualified entity include professional qualifications, independence, membership of an appropriate professional body and sufficient professional indemnity insurance to cover the advice being given.

In line with guidance from the Australian Restructuring and Insolvency Turnaround Association we believe an appropriately qualified entity should be someone who can credibly test the Better Outcome against the counterfactual scenario – the appointment of an administrator or a liquidator.

Liability limited by a scheme approved under Professional Standards Legislation

Wexted Unit Trust trading as Wexted Advisors ABN 46 346 904 995
Level 12, 28-34 O'Connell Street Sydney NSW 2000 | GPO Box 7091 Sydney NSW 2001
t (02) 9210 1700 | www.wexted.com | enquiries@wexted.com

Employee entitlements and tax thresholds

The Safe Harbour regime contains a number of checks and balances to protect the interests of employees and promote compliance with tax reporting requirements.
In order to benefit from Safe Harbour protections, directors must ensure that all employee entitlements have been paid to date; such as wages, superannuation, leave entitlements and retrenchment.

Directors must also ensure the company has lodged all tax reporting documents, including activity statements, tax returns, fringe benefit returns, etc. The threshold does not require tax liabilities to be paid to date.

What does a restructuring plan look like?

The directors should formulate and (importantly) document a plan that sets out a set of objectives that are comprehensive, milestone based, and time bound. Examples of these objectives might include some or all of:

- Selling a business unit or non-core assets;
- Pivoting business model or strategy;
- Raising additional capital to repay liabilities or fund future expenditure; and
- Working with key creditors towards compromises in the form of deferrals or compromises of debts.

The plan should be continually refined as it is implemented and tested against the counterfactual (administration or liquidation scenarios) to ensure it satisfies the Better Outcome test. The Better Outcome test is an objective, calculated measurement, undertaken by an 'Appropriately Qualified Entity', of the returns generated following the immediate appointment of an Administrator or Liquidator.

How long does Safe Harbour last?

Protections under Safe Harbour only commence from the time that the directors start developing one of more courses of action, and one of those courses of action is reasonably likely to lead to a better outcome for the company than the immediate appointment of an Administrator or Liquidator.
Safe Harbour protections will continue to apply to a director until:

- the person fails to take a course of action within a reasonable period;
- the person ceases to take any such course of action;
- when the course of action ceases to be reasonably likely to lead to a better outcome for the company; or
- if an Administrator or Liquidator is appointed.

Accordingly, Safe Harbour may be available to a director for significant lengths of time, particularly if a course of action spans many months or years.

Can the restructuring plan vary over time?

Yes, the restructuring plan can (and often, should) change over time as milestones are reached and objectives are further explored. Often a plan will pivot multiple times throughout a restructure as the situation evolves, new information comes to light, and options are known with more certainty.

Once I have developed a restructuring plan what else should I be doing?

Once eligibility is determined and a course of action is developed, directors should:

- Continually communicate with key stakeholders to ensure the business can continue to operate in a stable environment;
- Hold regular meetings at suitable intervals to monitor progress;
- Ensure continual compliance with all statutory obligations and eligibility requirements;
- Update objectives and deadlines as suitable; and
- Document everything.

Who is using Safe Harbour?

Our Safe Harbour clients are generally large private companies or small to mid-cap ASX listed companies. Some common themes amongst our Safe Harbour clients include:

- "Start-up" / technology: companies involved in the research and development of IT, medical or other early-stage technology products that are facing short-term cash shortfalls. Often the answer for these companies is to raise additional funds to invest in the continued research and development of their products;
- Exogenous events: companies impacted by situations beyond their control, such as drought or COVID-19. These companies will utilise a range of restructuring tools, most commonly the sale of non-core assets or business units and negotiating with secured creditors to restructure debt obligations;
- Regulatory change: companies impacted by changes in the regulatory landscape, for example businesses impacted by the findings of the Royal Commission into Banking and Financial Services. These businesses will look to sell non-core assets and pivot business strategy; and
- Changes in consumer demand: companies that are challenged by changes in consumer behaviour and are forced to pivot business strategy. Typically, these companies restructure operations and divest assets or business units that do not align with the future direction of the company.

How does Safe Harbour assist larger enterprises?

Safe Harbour gives larger companies breathing room and time to develop and execute a restructuring plan. We see Safe Harbour used as a framework to allow the restructuring plan to develop over time whilst keeping the board and senior management engaged. In certain circumstances it can be used to avoid directors acting prematurely to appoint external administrators, rather than to attempt a solvent restructure of a viable business.

What is the interaction between the Safe Harbour advisor and other advisors and stakeholders?

The Safe Harbour Advisor will collaborate with the company's other advisors and stakeholders, for example:

- Lawyers: to understand key contracts and financier agreements;
- Brokers: to raise capital or sell assets as a part of the restructuring plan; and
- Lenders (and their advisers): to negotiate the restructure of finance debts.

Is ASX disclosure necessary?

No.

On 9 March 2018 ASX released *Guidance Note 8 Continuous Disclosure: Listing Rules 3.1 – 3.1B* which states: "the fact that an entity's directors are relying on the insolvent trading safe harbour to develop a course of action that may lead to a better outcome for the entity than an insolvent administration, in and of itself, is not something that ASX would generally require an entity to disclose."

Individual courses of action that are implemented as part of a restructuring plan, however, may require disclosure, for example the sale of a non-core asset or refinancing a debt facility.

Are directors collectively protected?

Each director can rely on the Safe Harbour protections, so long as each director stays informed of the company's financial position and take steps to prevent misconduct by officers and employees.