THE RESTRUCTURING CONTINUUM

Part 2 | All aboard! A safe harbour is your destination.

The Australian safe harbour legislation came into effect in September 2017. The objective of safe harbour is to promote entrepreneurialism and foster a turnaround culture to save businesses, rather than allow them to fail.

It provides directors with comfort from personal liability for insolvent trading if they satisfy the safe harbour criteria. In the lead up to the implementation of the legislation, there was much discussion from all corners about how the legislation would be utilised and who would utilise it. In truth, no one really knew with any great certainty or accuracy.

This remains the case, as there have not been many notable matters where details have been made publicly available and we attribute this to the current position that entities who enter safe harbour:

1. Do not have to notify ASIC;
2. Do not appear to be required to make automatic disclosure pursuant to ASX Continuous Disclosure reporting requirements, although continuous disclosure obligations always apply; and
3. Are not forthcoming in disclosing they have safe harbour protection, via their existing communication channels with stakeholders.

Eligibility

There are various eligibility requirements and safe harbour is generally only available to the company if:

- It keeps proper books and records;
- It provides for employee entitlements to be paid in full, on time (including superannuation);
- Its tax reporting is up-to-date;
- It has obtained advice from an 'appropriately qualified' restructuring advisor; and
- There is a documented plan which demonstrates that the safe harbour turnaround plan is likely to result in a better outcome than an external administration, and whether the stakeholders included could reasonably rely on that result.

So, is it being used?

From our experience and discussions with other professionals, we know that companies are utilising the safe harbour legislation, but there is limited information on who, how and the outcome of these situations. It is probably safe to say that safe harbour mandates represent a small percentage of a traditional insolvency and restructuring firm's engagements.

Safe harbour practices are not a foreign concept to some directors, particularly those of larger or listed corporations or those backed by private equity or debt funds. These directors are usually more sophisticated and are not reluctant to engage with advisors who are well versed in technical and commercial nuances surrounding corporate restructures. The fact is, practitioners have been advising boards and companies on the precepts of safe harbour since time immemorial, it is just that now there is a more formal regime around it, which may or may not be used.

When will we see some guidance?

As with all new legislation, we will only receive clarity around how the safe harbour legislation can be utilised to its fullest, once there is a legal precedent in relation to directors who have relied on the legislation and the company was subsequently placed into external administration. It will then be reliant on the appointed liquidator to investigate (and subsequently the Court) to retrospectively determine if the company satisfied the conditions to enter safe harbour and, therefore, offered the protection granted by the regime.

What is the reality?

Opting to continue to run a business whilst in safe harbour is not as easy as it seems. Simply put, few cases meet the criteria of safe harbour. This is particularly relevant in the non-listed SME space where the majority of companies that come to a practitioner for advice are likely to fail the tax lodgement and employee entitlement tests.

Directors of SME companies who are a lot more personally invested, particularly when they are the founder/shareholder, can be reluctant to take a step back and look at their situation objectively and it can be a case of save the business at any cost. Whereas, non-executive directors of listed companies are likely to be less emotionally invested and willing to seek advice particularly if they are vulnerable to personal liability.

How we can help

We recommend early intervention and advice from a qualified professional before matters escalate to a point that a restructure outside a formal process is no longer an option. Our team specialises in safe harbour advisor roles and are adept at navigating the regulatory hurdles involved with this course of action. With a focus on preserving value in a business, we can help assess the status quo and work with key stakeholders to formulate and implement a restructure plan that aims to provide a better outcome for all involved.

Should you wish to discuss how FTI Consulting can help you navigate the safe harbour please contact one of our experts detailed below.

Coming up next

Stay tuned for part 3 in this year's restructuring series on Deeds of Company Arrangement.

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