



McGrathNicol

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# Safe Harbour

McGrathNicol works with your business to help directors understand and adopt safe harbour protection.

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# Safe Harbour protection for directors

The 'Safe Harbour' provisions in the Corporations Act provide directors with protection from personal liability for debts incurred whilst they undertake a course of action that is reasonably likely to lead to a 'better outcome' for the company, than an immediate appointment of an administrator or liquidator.

Safe Harbour is designed to encourage directors of companies with an uncertain financial position to attempt a turnaround plan.

The provisions focus on the behaviour and actions being taken by directors at the time debts are being incurred. They are designed to be easy for directors to access; but there are hurdles to clear. Set out below are the key points regarding eligibility for Safe Harbour, what action needs to be taken by directors, and the range of external help directors are expected to engage with. The practical application of Safe Harbour requires, in all scenarios, a proactive, documented and managed plan - 'hope' is not a strategy when it comes to a turnaround plan outside of insolvency.

## Which directors have access to Safe Harbour?

Safe Harbour is not available to a director if the company is failing to:

- pay the entitlements of its employees by the time they fall due; and
- give all returns and notices as required by taxation laws.

Any failure must amount to less than substantial non-compliance or two or more failures during the 12 month period ending when the debt was incurred. If eligible, in working out whether a course of action is reasonably likely to lead to a better outcome for the company than an immediate insolvency, regard may be had to whether the director is:

### A

Properly informing themselves of the company's financial position.



### B

Taking appropriate steps to prevent any misconduct by officers and employees of the company that could impact the ability to pay all its debts.



### C

Taking appropriate steps to ensure the company is keeping appropriate financial records for the size and nature of the company.



### D

Obtaining advice from an appropriately qualified entity such as a turnaround expert.



### E

Developing or implementing a plan for restructuring the company to improve its financial position.



# What does a Safe Harbour / turnaround process look like?

	Actions	Evidence / outputs
<b>01.</b> <b>Starting to suspect insolvency</b>	<ul style="list-style-type: none"> <li>▪ Conduct initial assessment of financial position</li> <li>▪ Directors form an initial view on whether the company is solvent</li> <li>▪ Directors seek advice as required</li> <li>▪ The company avoids incurring new debts</li> <li>▪ Directors document steps being taken</li> <li>▪ Directors consider insurance position</li> </ul>	<ul style="list-style-type: none"> <li>▪ Documented assessment of financial status by directors and advisors</li> </ul>
<b>02.</b> <b>Assess availability of 'Safe Harbour'</b>	<ul style="list-style-type: none"> <li>▪ Engage 'appropriately qualified entities'</li> <li>▪ Assess eligibility criteria</li> <li>▪ Consider standstill agreements with financiers and creditors</li> <li>▪ Advisors form a view on availability of Safe Harbour which is then documented by directors</li> </ul>	<ul style="list-style-type: none"> <li>▪ Documented engagement of appropriately qualified entity</li> <li>▪ Documented decision of Safe Harbour availability and board approval</li> </ul>
<b>03.</b> <b>Plan course(s) of action</b>	<ul style="list-style-type: none"> <li>▪ Develop and approve a turnaround plan</li> <li>▪ Enter into standstill agreements (if required)</li> <li>▪ Implement business stabilisation and cash management</li> <li>▪ Formulate turnaround plan - advisors to provide 'better outcome' opinion</li> <li>▪ Obtain stakeholder approval</li> </ul>	<ul style="list-style-type: none"> <li>▪ Formal restructuring plan documented with 'better outcome' opinion</li> <li>▪ Documented timetable and responsibilities</li> </ul>
<b>04.</b> <b>Take action</b>	<ul style="list-style-type: none"> <li>▪ Implement turnaround plan and monitor performance</li> <li>▪ Regular meetings to monitor progress</li> <li>▪ Manage stakeholders and maintain financial records</li> <li>▪ Continue compliance with all directors' duties and continuous disclosure obligations (if applicable)</li> <li>▪ Continue to satisfy eligibility criteria</li> <li>▪ Change course as required</li> </ul>	<ul style="list-style-type: none"> <li>▪ Regular, minuted meetings</li> <li>▪ Update financial forecasts</li> <li>▪ Reporting to stakeholders</li> </ul>
<b>05.</b> <b>Reassess</b>	<ul style="list-style-type: none"> <li>▪ Assess the success or failure of the course of action taken</li> <li>▪ Assess whether the company is solvent or whether formal insolvency appointment is required</li> <li>▪ Safe Harbour protection ceases when the turnaround plan stops being likely to lead to a better outcome</li> </ul>	<ul style="list-style-type: none"> <li>▪ Regular board meeting minutes documenting continued consideration of plan</li> <li>▪ Progress reports against milestones</li> <li>▪ Update forecast financial models</li> </ul>

Timing: The turnaround plan must be implemented within a reasonable period, having regard to the size and nature of the business.

# Navigating Safe Harbour

## What is a 'better outcome'?

A better outcome is one where the company is reasonably likely to be better off than the immediate appointment of an administrator or liquidator. The Safe Harbour protection applies from the time the director starts to take a course of action after beginning to suspect that the company may become insolvent.

Safe Harbour is not intended to be a mechanism for a company to trade past the point where it is viable. Once it becomes clear that the company cannot be viable in the long term, the 'better outcome' test will no longer be satisfied and the protection of Safe Harbour will cease.

## Who can provide 'appropriate advice'?

The range of parties directors are able to engage to provide advice to qualify for Safe Harbour protection is deliberately broad to accommodate the wide range of businesses and scenarios that may arise. For example, a mid-size business may only require advisors with an ability to assess solvency, prepare financial forecasts, and with operational expertise.

Larger corporates may require C-suite executives with appropriate turnaround experience together with a team of restructuring experts such as lawyers, accountants and investment bankers. In our view, an appropriate advisor must (i) have in-depth turnaround experience, (ii) have the expertise to assess a company's solvency, (iii) be independent of all stakeholders and (iv) be bound by a code of ethics from a regulatory body.

## Recent credentials

### ZINC MINER

Operations had suffered sustained losses due to production delays, rising all in sustaining costs and a falling commodity price. The directors sought Safe Harbour protection while a sale and recapitalisation process was pursued.

### LIVE EXPORT BUSINESS

The company had breached numerous financial covenants due to financial underperformance. The directors sought Safe Harbour protection while a turnaround plan was designed and implemented which included negotiation of standstill agreements, sale and lease back of key assets and a potential sale transaction.

### FAMILY OWNED WINERY

The business was "asset rich but cash poor" resulting in liquidity stress. The directors sought Safe Harbour protection while long term payment arrangements with creditors were negotiated, a capital raise undertaken and non-core assets were sold.

### AGED CARE PROVIDER

The directors sought Safe Harbour protection and requested our assistance to undertake a strategic review of the group, set turnaround initiatives, raise finance against property assets, sell non-core facilities and lead liaison with government.

### HEALTHCARE PROJECT

A hospital with circa 500 beds facing deteriorating financial performance, covenant breaches and significant new competition. We were engaged by the board as Safe Harbour advisors to provide turnaround advice and develop a plan before cash resources were exhausted. The new, competing hospital has since opened and our client's turnaround measures have been successfully implemented

### SOLAR FARM PROJECT

A solar farm that was under construction and facing potential revenue shortfalls. We reviewed the Safe Harbour eligibility and considered the short-term cash flow and longer term operating forecasts in order to provide a better outcome opinion. We provided an ongoing monitoring role revising cash flow forecasts and performance against the turnaround plan.