
Safe Harbour Overview

The safe harbour provisions of section 588GA of the *Corporations Act 2001* (“the Act”) provide directors with a form of defense to potential breaches to the insolvent trading provisions of the Act when attempting to restructure their company outside of formal insolvency.

Getting started

In order to be eligible to rely on the safe harbour provisions, certain criteria must be met.

1. All employee entitlements, including superannuation must be paid to up to date. The Company must also be able to continue to pay employee entitlements by the time they fall due.
2. All tax reporting obligations must be up to date, however, it is not necessary that the associated liability be paid. The company must continue to meet its tax reporting obligations.
3. The company’s books and records must be in order and reflect the true financial position and performance of the company.

Company’s financial position

If the above factors are met, directors should take steps to inform themselves of the company’s financial position and performance in order to determine the current state of play. This may be done internally or by engaging an independent expert to undertake an internal business review.

It is essential that a board of directors document the steps taken to inform themselves about the true state of the company’s financial position.

Implement a restructuring plan

Once the company’s financial position is determined, directors are required to develop and implement a restructuring plan. The plan must outline the steps the directors expects to undertake during the restructure and how it is likely that the restructuring plan will lead to a better outcome for the company when compared to the immediate appointment of a voluntary administrator or liquidator. The directors’ restructuring plan should be monitored and adjusted as the restructure takes place.

It is important to get expert help in developing and monitoring a restructuring plan from a suitable qualified professional.

How long does safe harbour protect director so for?

There is no strict time limit to safe harbour, however, there are certain trigger points which will prevent a safe harbour plan from continuing to protect directors.

1. Directors and/or the company stops taking the course of action under the restructure.
2. The company stops being able to pay all of its employee entitlements and / or stops reporting its tax obligations on time.
3. The director fails to implement the safe harbour plan within a reasonable period of time of it being developed.
4. The course of action under the restructure stops being reasonably likely to lead to a better outcome for the company.
5. The company enters voluntary administration or liquidation.

For further information on safe harbour provisions contact us: slaventorline.com.au