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SAFE HARBOUR TO LAW TO SAVE COMPANIES

The much talked about "Safe Harbour" laws (Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017) has passed the Senate and received Royal Assent on 18 September 2017, providing a Safe Harbour for company directors from personal civil liability for insolvent trading as well as introducing a stay on a counterparty's ability to enforce an ipso facto clause.

Under the new laws, directors of companies in financial distress will be able to rely on the Safe Harbour protection if they start developing one or more courses of action that are 'reasonably likely' to lead to a 'better outcome' for the company than the immediate appointment of an Administrator or Liquidator.

The Safe Harbour from insolvent trading liability has the following features as outlined by the Australian Restructuring Insolvency & Turnaround Association (ARITA):

- The protection provided by the Safe Harbour is limited to civil liability under the insolvent trading provisions. Directors must continue to comply with all their other legal obligations and duties.
- Continuous disclosure requirements, if applicable, continue to apply.
- The Safe Harbour protection is only available while directors:
 - develop or take a course of action that, at the time, was reasonably likely to lead to a better outcome for the company than immediate administration or liquidation (the course of action that is developed must be implemented within a reasonable period)
 - ensure that the company complies with its obligation to pay its employees (including their superannuation), and
 - ensure that the company meets its tax reporting obligations.
- The Safe Harbour only extends to debts incurred directly or indirectly in connection with the course of action or its development.
- Whether a course of action is reasonably likely to lead to a better outcome is assessed as at the time the decision is made, not with the benefit of hindsight.
- It provides a list of indicative factors to be considered in determining whether a course of action was reasonably likely to lead to a better outcome.

- These factors are whether the person has:
 - kept themselves informed about the company's financial position
 - taken steps to prevent misconduct by officers and employees of the company
 - taken appropriate steps to ensure the company maintained appropriate financial records
 - obtained appropriate advice from an appropriately qualified adviser, and
 - been taking appropriate steps to develop or implement a plan to restructure the company to improve its financial position.
- If the restructuring plan were to fail and the company entered liquidation, the Safe Harbour would only be open if the directors comply with certain formal obligations during the liquidation, such as completing a RATA and providing books and records. Failure to do so will mean the Safe Harbour will be deemed not to have existed.
- A director that fails to provide access to books and records to a liquidator or administrator will be prevented from being able to rely on those materials as evidence of having complied with the Safe Harbour requirements – but the liquidator or administrator must ensure they advise the directors of this consequence when making the request.
- The benefits of Safe Harbour can also extend to a holding company where the directors of the subsidiary had the benefit of Safe Harbour and the holding company was taking reasonable steps to ensure that that was the case.
- The evidentiary burden lies with the director that is claiming the benefit of the Safe Harbour. However, it will be up to the liquidator to show, on the balance of probabilities, that the course of action taken was one not reasonably likely to lead to a better outcome.

To ensure the directors are adequately protected and they get the best and legal turnaround solution directors should obtain advice from appropriately qualified professionals who holds appropriate registrations such as a registered liquidator/turnaround specialist and have them form part of the turnaround team to provide the advice necessary for 'Safe Harbour' protection.

As ever we welcome all your enquiries and are happy to address any questions you or your clients may have.



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