

Directors' safe harbour for restructuring

Corporate Breakfast Seminar Series

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Safe harbour from insolvent trading

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- Background to reforms
- What is a 'safe harbour'?
 - A safe haven from insolvent trading liability while the safe harbour applies

■ When is it available?

- Starts where a director starts developing one or more courses of action which are reasonably likely to lead to a better outcome than the immediate administration or liquidation of the company
- Ends when a director stops taking the course of action or the course of action stops being reasonably likely to lead to a better outcome for the company
- Ends if, after starting to develop a course of action, the director fails to take a course of action within a reasonable period after that time

■ Factors the court can consider

- Have the directors been taking appropriate steps to develop or implement a plan to restructure the company to improve its financial position?
- Have the directors obtained advice from an 'appropriately qualified' entity?
- Did the directors keep themselves informed about the company's financial position?

■ Factors the court can consider

- Have the directors taken appropriate steps to ensure the company maintained appropriate financial records?
- Have the directors taken steps to prevent misconduct by officers and employees of the company?

- Other requirements – ‘substantial compliance’ with
 - payment of employees wages and super
 - Tax reporting obligations
 - obligations to provide report as to the company’s affairs or to provide books and records

Safe Harbour

Richard Hughes

Deloitte.



Safe Harbour

Richard Hughes

14 November 2017

Implementing a safe harbour restructure

Implementing a safe harbour restructure

- Codification of best practice
- Sets guard rails to work through a restructure
- A hindsight test
- Any restructuring plan in this environment requires “sober optimism”
- Documents required:
 - Current position
 - Restructuring plan and projected position:
 - Liquidity/cash flow
 - The “gap”
 - Core viability
 - Stakeholder support/plan
 - Contingencies/plan B
 - Why it’s a “better outcome”
 - Ongoing assessment of position

The 3 phases of a Safe Harbour restructure

Where are we now?

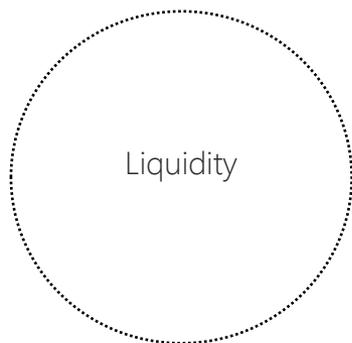
Where do we need to get to? What is our "better outcome"?

What is the plan to get there?

How do we execute the plan & lead the business to successful recovery?



Understanding the current position



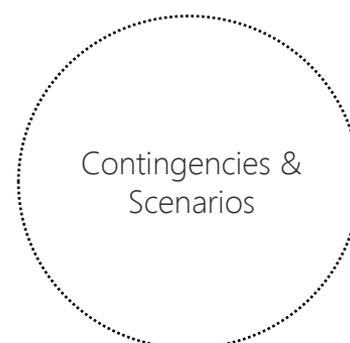
Do we have sufficient cash or liquidity lines to continue to operate long enough to develop and implement a turnaround plan?



What is a reliable short and medium trading outlook? Is the trajectory obviously terminal or redeemable? Is there a viable core?



Where do key stakeholders currently stand, what are their options & what will it take to have their initial support to buy time to develop a turnaround the business?

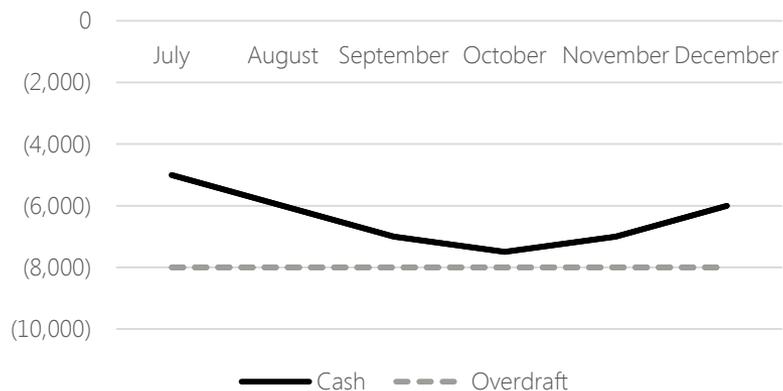


If the company entered voluntary administration today, what would the outcome be for key stakeholders?

Liquidity

Do we have sufficient cash or liquidity lines to continue to operate long enough to develop and implement a turnaround plan?

Monthly Cash Forecast



Monthly Cash Forecast



Robust preparation and reporting process

Robust & transparent assumptions

Shocks & downside scenarios have been assessed

Proactive central command & control

Management signed-off and own it

Stakeholders

Where do key stakeholders currently stand, what are their options & what will it take to have their initial support to buy time to develop a turnaround the business?

Directors

- Personal liability concerns
- Reputational concerns
- Will seek to reinforce credibility

Managers

- Critical to drive outcomes and stabilise the business
- Could be part of the problem and may be defensive

Staff

- Good ones may leave
- Will assess long-term prospects; incentives may be under water
- Unions may be involved

Customers

- Performance / continuity concerns; may move to rivals
- May seek to exploit distress through pricing pressure / negotiating better terms

Suppliers/ Trade insurers

- Response will depend on history and scale of dependency
- TCI's may cut exposure first and ask questions later

Competitors

- May become aggressive in marketplace
- May cherry-pick assets / staff / customers
- May consider takeover

Government

- ATO may take early action
- Regulator may intervene
- Early communication is critical

Lenders – senior

- Prospects for full recovery of loans
- Usually sensitive to wider stakeholder / reputational issues

Secondary capital (equity/debt)

- Seek to exploit situation for profit; can be hostile / ruthless
- Agenda not aligned with other stakeholders – may frustrate a consensual process

Shareholders

- Expectations on value of business
- Competing interests in stressed situations

Develop and implement the plan



What is the gap?

What is the gap between where the business is performing today and where it needs to be to have the support of its key stakeholders – suppliers, financiers & investors?

Develop a plan to close the gap

Develop a realistic plan to stabilise and then sufficiently improve core profitability and /or the balance sheet to close the gap and meet the "Safe Harbour" improved financial position test

Get stakeholder support for the plan

Develop a position on the "ask" of key stakeholders, a negotiation strategy, communication plan and legal framework to "lock in" stakeholder support.

Implement the plan

A board approved restructure plan needs to be supported by a CEO led well structured implementation plan with clear milestones, accountability and aligned management incentives.

Components of a Turnaround Plan

A strategic and operational plan to turnaround a business needs to turn into actionable tactics across the P&L, balance sheet and leadership capability

Revenue	Pricing	Sales Force Effectiveness	Product offering	Trade Spend effectiveness			
Operating Margin	COGS – Fast & Smart Levers	Strategic & Rapid Sourcing	Discretionary Spend Management	SG&A Reduction	Sales Transformation	Overhead Restructure & Shared Service	Functional Service Delivery
Asset Efficiency & Liquidity	Active Cash Management and cash management tools	Trade Working Capital Management	Cash Conversion Process	Fixed Asset Review	Capital performance plan		
Capital Structure	Debt Restructuring	Secure Interim Funding	Establish Appropriate Capital Structure	Equity Raising			
Business Vision & Strategy	Strategic Planning	Business Portfolio Restructure	Scenario Analyses	Granular Market Selection			
Business Model	Focus on profitable core	Customer profitability	Product profitability	Channel profitability and cost to serve			
Operating Model	Business and BU Model Redesign	Rapid Organisation Restructure	Cost Reduction	Management Operating System	Value Chain Restructure	Supply Chain incl S&OP	Outsourcing
Functions Strategies & Plans	Integrated Performance Management	Financial controls	Business Planning	Management & Board Reporting			
Stakeholder Management	Stakeholder Planning						
Leadership & Management	CRO Program	Organisational Assessment	Hiring and Firing	Leadership coaching			
Capacity to Execute	Change Readiness	Meeting Effectiveness	Governance Model (incl PMO)	Managing the Change	Benefit Tracking		
Interim Management	CRO	Interim Management					

Leadership & governance



Obtain appropriate advice

The type of advice sought will depend on the commercial situation, but in the first instance retaining qualified legal and financial advice is relevant to "Safe Harbour" defence.

Takes action to prevent misconduct that adversely impacts ability to pay all debt

Ensuring competent CEO and CFO leadership with an exec team informed on plan and boundaries of operating assumptions. Legal advice to the board and executive articulating "Safe harbour" boundaries and the alignment to key plan assumptions.

Takes steps to keep appropriate records

Timely normal monthly financial and board reporting "is ticket to play" and needs to be supplemented by regular cash flow / liquidity forecasting and reporting along with turnaround initiative tracking.

Continue assessing turnaround outcomes against base case original financial position

Regular and formalised meeting of board delegates, CEO, CFO & restructuring advisory team mandated to assesses and advise the board on restructure progress and confirmation of projected outcomes superior to the original base case.

Execution of a plan

Creating a 'bankable' transformation plan requires rigour, focus and clear ownership



One Source of Truth

All inflight and potential initiatives pulled together



Go Back to the Well if Required

Further diagnostic, idea generation, and benchmarking to find more opportunities



Ownership

Allocate owners and sponsors to drive detailed planning



Baseline and CFO Rule Book

Program baseline and initiative valuation rules agreed with CFO and business upfront



Prioritisation and Focus

Rate ease vs. value to decide what initiatives to pursue or stop, and to direct initiative validation effort



Detailed Planning

- Develop implementation milestones, refined valuation and benefits timing
- Monitor operational metric movements to prove change



Size the Prize

- High level estimate of benefits and costs to implement each initiative
- Hypothesis driven valuation
- Apply confidence weighting to pipeline



Validation

Firm up initiative business cases, i.e. benefits calculation, underlying operational drivers and metrics, key assumptions, and implementation costs and timing



Sign-Off

Sponsors, owners and CFO agree that the plan can be delivered and they will drive implementation

Corporate and Commercial considerations

Reece Walker

- Will protect a director *only* from personal liability arising from contravention of s588G

- All other duties imposed on directors under the Corporations Act still apply:
 - s180 – care and diligence (although note ‘business judgment rule’)
 - s181 – exercise powers in good faith
 - s182 – use of position to gain an advantage or cause detriment
 - s183 – use of information to gain an advantage or cause detriment

- Will not derogate from the company’s duties in respect of continuous disclosure (LR 3.1 and s674)

- Listing Rule 3.1 'Once an entity becomes aware of any information that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately provide that information to ASX'

- LR3.1 exemption
 - Confidential AND
 - Reasonable person would not expect the information to be disclosed AND
 - One or more applies
 - Breach of law to disclose the information
 - Information concerns an incomplete proposal or negotiation [? But is this the 'information']
 - Information comprises matters of supposition or is insufficiently definite to warrant disclosure
 - Information is generated for internal management purposes
 - Information is a trade secret

- Several submissions identified interplay between safe harbour and continuous disclosure issues
- Explanatory Memorandum to the Bill expressly states that safe harbour will not affect any obligations under continuous disclosure
- Market reaction to safe harbour disclosure may make it more difficult for listed companies to successfully negotiate informal restructuring arrangements
- 'Run on the company could be worse than the storm seeking to avoid'

- What might be required to disclose:
 - financial position and performance of the company
 - what the company is doing to address these
- May highlight and expose weakness in disclosure practices to date
- Query as to when information is crystallised and how to manage fact finding
- Tension between requirement to suspect the company may become insolvent and the fact such suspicion may be price sensitive information

- Should trading halts or suspension be considered? Does not avoid disclosure requirement but may limit exposure.
- Solvency declarations and disclosure in financial reports should also be considered ahead of time
- The next wave of class actions?
- Useful for ASX to update guidance (Guidance Note 8?) but not a 'defence'

- Examples of class actions based upon continuous disclosure/misleading and deceptive claims:
- Other examples of ASIC actions based on duty of care and increased use of 'stepping stones' approach, including *James Hardie*, *Centro* etc

Bellamy's

Billabong

Brambles

QBE

Sirtex

Slater & Gordon

Spotless

Treasury Wine Estates

Vocation

Woolworths

- Insider trading + Securities Trading Policy
- Related party restructuring – timing and approvals
- Recapitalisation exercises – ASX focus on periodic and continuous disclosure, Ch 1 and 2 requirements

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