NAVIGATING THE SAFE HARBOUR – TO DISCLOSE OR NOT TO DISCLOSE?

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The Safe Harbour reforms that became law on 19 September 2017 aim to create a better environment for the effective corporate rescue of distressed companies. By removing the perceived fear of insolvent trading from directors when they are working to bring about a better outcome for the company than the immediate appointment of an administrator or liquidator, the Federal Government has sought to ensure that directors of distressed companies will be encouraged to keep control of their company, engage early when faced with possible insolvency, and take reasonable risks to facilitate the company's recovery, instead of simply placing the company prematurely into voluntary administration or liquidation.

In this Legal Insight, we focus on the Safe Harbour reforms and its implications on the continuous disclosure obligations of a public company.

As we explain in more detail below, the explanatory memorandum accompanying the Safe Harbours laws made it clear that a public company's continuous disclosure obligations are not affected and continue to apply. To date, the ASX has not released any guidance on the interaction between the Safe Harbour laws and the continuous disclosure obligations. We understand that potential guidelines may be released by the ASX in 2018. Ahead of the release of these formal guidelines, we have set out our views on how a public company should approach their disclosure obligations when seeking to invoke the protection of the new Safe Harbour regime.

CONTINUOUS DISCLOSURE OBLIGATIONS

The Safe Harbour reforms do not require a company to set out in its public documents any words after its name to indicate that it has entered Safe Harbour unlike a company in administration, liquidation or to which receivers have been appointed. The Federal Government, however, has made it clear that the Safe Harbour reforms do not affect any obligation of a public company (or any of its officers) to comply with any continuous disclosure obligations under the law, including section 674 of the Corporations Act, or any continuous disclosure rules imposed by a market operator such as the ASX. Such obligations of continuous disclosure require public companies to immediately notify the ASX of any information that would be expected to have a material effect on the price or value of the company's securities (price sensitive information).

If reliance on Safe Harbour is considered to be price sensitive information, the mere disclosure to the public that the directors will be relying on the benefit of Safe Harbour may lead to a similar or more value destructive outcome for that company than simply appointing a voluntary administrator to the company. It is not hard to see that enterprise value may be destroyed by such an announcement, with creditors less likely to have an appetite to continue dealing with the company and more likely to be forceful in their attempts to recover outstanding debts. Such a response may even be expected from trade and unsecured creditors, as liability for further debts incurred

by the company during the restructure will not shift from the company to an appointee (such as an administrator or liquidator) until such time as the company enters voluntary administration or liquidation.

The problem is further complicated by the fact that for directors to invoke Safe Harbour they must have first formed the suspicion that the company may become insolvent or likely to become insolvent. If such a suspicion is reached by the directors, the suspicion and the basis up which the suspicion was reached may be price sensitive information that is subject to continuous disclosure obligations.

NO GUIDANCE FROM THE ASX

There has been no guidance from the ASX as to whether reliance by directors on Safe Harbour is price sensitive information that will be subject to the continuous disclosure obligations. For example, the ASX may consider there to be a practical difference for the purposes of continuous disclosure of price sensitive information where directors have formed a suspicion that a company may become insolvent, or a suspicion that the company is insolvent. It may even be the case that the ASX will treat the former suspicion as one of the exceptions to the disclosure requirements (ASX listing rule 3.1), namely that the information is (without limitation):

- information of supposition and insufficiently definite for it to be price sensitive; or
- information that is confidential and the ASX has not formed the view that the information has ceased to be confidential; or
- information that a reasonable person would not expect to be disclosed.

We understand that the ASX may look to release formal guidance on Safe Harbour and disclosure in 2018 which should hopefully give clarity to public companies faced with the decision of whether to disclose entry into Safe Harbour.

TO DISCLOSE OR NOT TO DISCLOSE?

Some practitioners have suggested that directors seeking to rely on Safe Harbour should not necessarily have to disclose this to the market. The Safe Harbour legislation has not specified that companies seeking to rely on Safe Harbour have to formally pass board resolutions to "enter the harbour". So instead the directors could, hypothetically, just undertake the steps required to fall within Safe Harbour such as developing and then implementing a particular course of action that they believe will lead to a better outcome without formally resolving that they are in fact in Safe Harbour. In such circumstances, it may be less clear that a disclosure to the public would be necessary until a formal restructuring deal has been agreed (based on ASX listing rule 3.1 as set out above). However, such a strategy is a risky one given the potential for class action against the company and its directors if things do not go to plan. There is also an increased risk if board resolutions are not passed that the directors may not be able to substantiate that they were indeed within Safe Harbour and therefore not in breach of insolvent trading laws should the company be liquidated and the existence of Safe Harbour challenged - the onus to prove that the requirements of Safe Harbour have been satisfied fall on the directors and not having detailed resolutions may make meeting this onus more challenging.

While each company's circumstances will need to be considered and specific advice sought, our general view is that in the absence of guidance from the ASX, directors should exercise caution in their approach to Safe Harbour and the continuous disclosure obligations as they may remain exposed to personal liability if they do not disclose to the market that they are relying on Safe Harbour. From recent ASX announcements, it appears that at least one ASX listed company has already determined that the appropriate course of action in their circumstances was to disclose the fact that the company and its directors have sought to invoke the protection of Safe Harbour. However, whether this becomes the preferred course of action is yet to be seen.

VIDEO SUMMATION - BUSINESS BYTES

Sydney special counsel, Zina Edwards, explains the new Safe Harbour provisions and how they operate in respect of financially distressed companies.

