

# NAVIGATE YOUR WAY TO A SAFE HARBOUR

**TMA BEST PRACTISE GUIDELINES**





# TMA BEST PRACTICE GUIDELINES

---

Based on AICD surveys, the personal liability risk in relation to insolvent trading is very important to directors in times of financial distress. Recently, the Government has moved to soften the prospect of personal liability by introducing Safe Harbour reforms. But it is all very well and good knowing that there is a Safe Harbour but how does a director navigate it?

Financial distress is not something planned for or desired. It is the exception, not the rule. To ease that angst, the Turnaround Management Association of Australia (TMA) has developed Best Practice Guidelines for both directors and advisors in relation to navigating Safe Harbour.

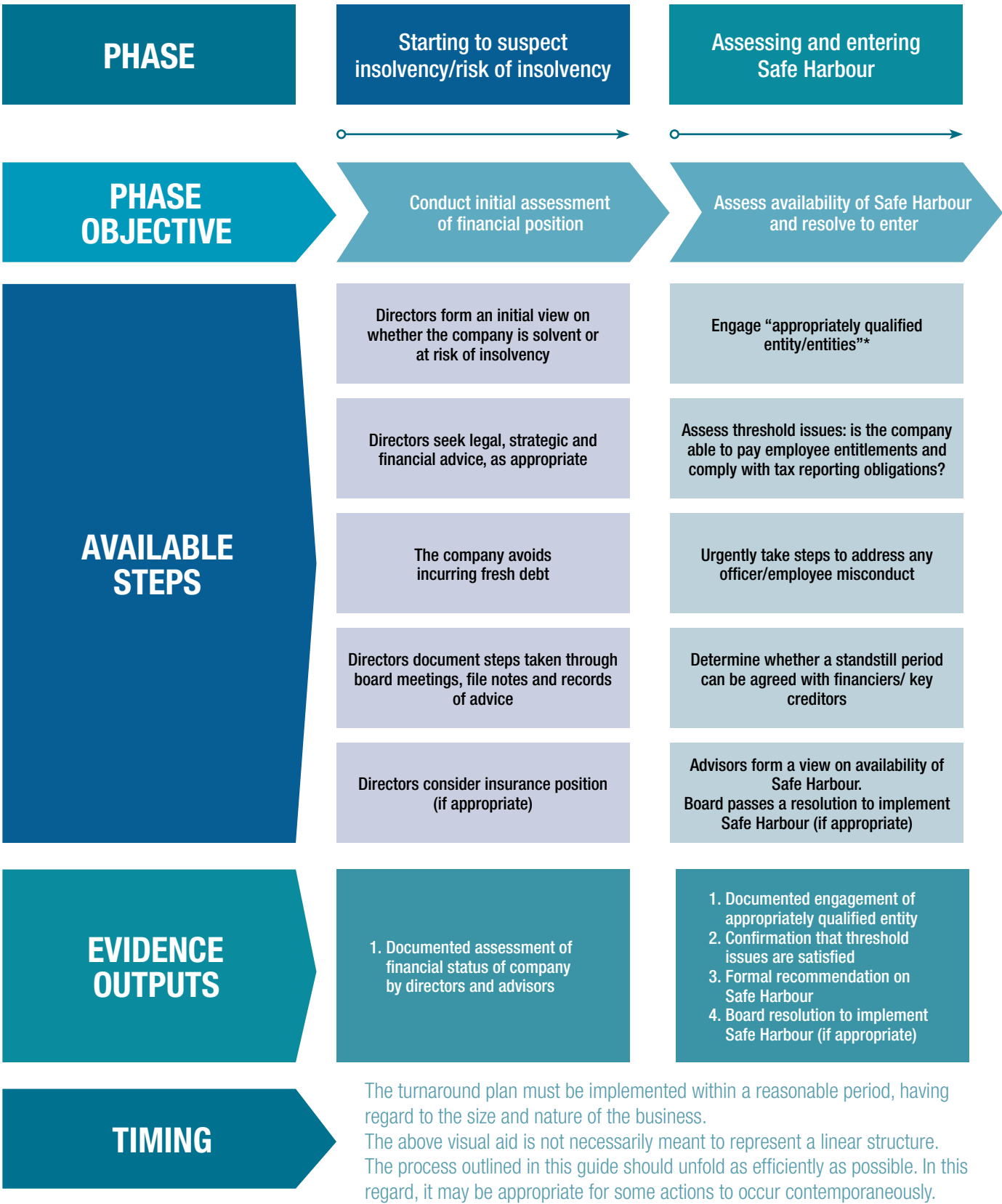
The guidelines are based on current best practice for workouts. They have been drawn from internationally accepted principles, Australian case law, detailed consideration of the new legislation and input from top tier accounting, investment banks and law firms.

TMA members (there are over 700 members in Australia alone and approx. 9,000 international members) are available to guide a company through a Safe Harbour whether individually or as part of a team. Go to the TMA website [www.turnaround.org.au](http://www.turnaround.org.au) for more details.

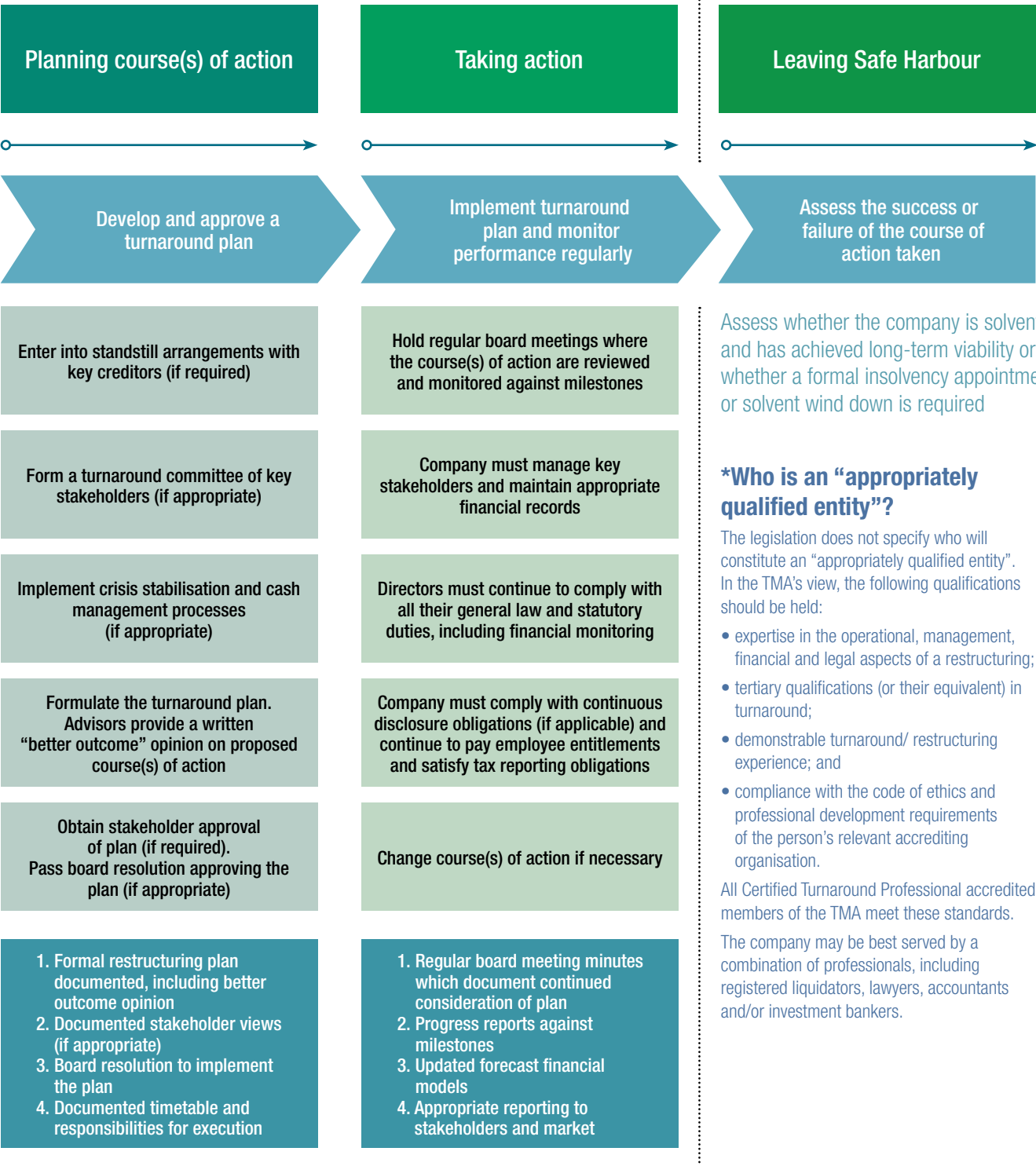
We commend the guidelines to you.



# TMA BEST PRACTICE GUIDELINES -



# NAVIGATING SAFE HARBOUR



Disclaimer: this content is provided on an “as is” basis for general information purposes only and is not intended to constitute or substitute legal or other professional advice. You must make your own assessment of the information contained in this guide and rely on it wholly at your own risk. You should not take any actions based on this guide without seeking legal advice. To the extent permitted by applicable law, all representations, warranties and other terms are excluded. This guide is tailored to the considerations that may be relevant in the medium to large enterprise sector, and in particular for entities with a turnover of more than \$10 million. Different considerations are likely to be more relevant to smaller enterprises.

# TMA BEST PRACTICE GUIDELINES -

## ASSESSMENT OF SOLVENCY

The directors must undertake an initial assessment of whether the company is insolvent or at risk of becoming insolvent. Time is of the essence in doing so.

The test for determining whether a company is solvent is whether the company is able to meet its debts as and when they fall due. This is a cash flow test rather than a balance sheet test.

Independent legal and financial advice are recommended at this stage.

The board should defer incurring any fresh debts or expenses and avoid renewing any leases at least until a decision on the appropriateness of Safe Harbour is reached in the following phase.

The steps taken for the solvency assessment should be carefully documented through board minutes, file notes and records of advice. This is important because Safe Harbour may be taken to apply as early as when the directors start deliberating on the course(s) of action.

Consideration should be given to disclosure and notification obligations under any relevant directors' and officers' insurance policies, if applicable.

## RESOLVING TO ENTER SAFE HARBOUR

If the board has determined that the company is insolvent (or at risk of insolvency), it must now decide on whether Safe Harbour is available or whether to invoke a formal insolvency process, such as voluntary administration.

If independent legal and financial advice has not yet been sought by the company, such advisors should now be formally engaged. The advice of an "appropriately qualified entity" is one of the matters on which the Court will look favourably when assessing whether Safe Harbour was properly available to the directors.

The board and advisors must consider whether the company can satisfy the conditions for Safe Harbour. In particular, Safe Harbour is not available if the company is unable to pay employee entitlements and/or comply with its tax reporting obligations.

The disposition of key stakeholders (and in particular financiers) towards standstill arrangements may need to be confirmed, to assess the possibility of action/ security enforcement which may adversely affect any Safe Harbour period.

Any concerns that misconduct by officers or employees of the company is occurring that could adversely affect the company's ability to pay all its debts should be urgently addressed concurrently with this assessment process.

The advisor(s) should, based on all available circumstances prevailing at the time, provide a view to the board as to whether Safe Harbour is available to the company.

The board should carefully consider whether Safe Harbour is available to the company and make an appropriate resolution having regard to the advice.

## TURNAROUND PLANNING

Once the board has resolved that Safe Harbour is available, standstill arrangements with key lenders and other creditors may need to be pursued to give the company time to develop and implement a turnaround plan.

If appropriate, crisis stabilisation, including aggressive cash management, should also begin immediately.

Communication with financiers is usually critical in turnaround situations. Serious consideration should be given to communicating with key financiers and continued engagement with them during the period of Safe Harbour.

The turnaround plan should be formulated and it should address operational, strategic and financial issues. The turnaround plan may comprise of one or more courses of action, depending on what is reasonably likely to lead to a better outcome for the company. The plan should contain a clear set of steps required to implement the proposed course(s) of action and a timetable of milestones that are capable of objective assessment.

Advisors should be prepared to provide a "better outcome" opinion on the turnaround plan. This means taking a view on whether the plan is objectively likely to produce a better outcome for the company than the immediate appointment of a liquidator or administrator. The assessment of the better outcome will require careful legal and financial analysis of the individual circumstances and options.

The turnaround plan should be formally adopted by board resolution, if the board is satisfied that the plan is viable and is reasonably likely to produce the requisite "better outcome" for the company.

# NAVIGATING SAFE HARBOUR

## IMPLEMENTATION AND MONITORING

The turnaround should be implemented within a reasonable period and otherwise in accordance with its timetable.

A formal agreement may need to be entered into with financiers to replace any standstill arrangements.

Generally, management should strive to instil sense of urgency and performance-orientation in staff to effect the turnaround plan. Changes to management should be made as necessary, to support the turnaround. Financial controls should remain tight.

The board must carefully monitor the implementation and performance of the turnaround plan against key milestones. Employee entitlements and tax obligations must continue to be met. Relevant financial information should be regularly considered.

All board meetings should be appropriately minuted and board packs containing the relevant advice, progress reports and financial information should be circulated and filed with the minutes. Directors should continue to seek advice from their appointed advisors. In addition, a "restructuring officer" who can act as a special adviser to the chairman of the board may be appointed for efficient project management of the turnaround plan.

Key stakeholders should be kept informed of the progress of the turnaround plan.

The board must continue to comply with general law directors duties. Compliance with any applicable continuous disclosure obligations under the Corporations Act and/or ASX Listing Rules must also be maintained.

The turnaround plan should be viewed as a living document. It should be varied, as required, to achieve the requisite "better outcome". If, at any time, having regard to the prevailing circumstances and the its advice, the board considers that the turnaround plan is no longer viable or the conditions for Safe Harbour can no longer be met, the company must reconsider its options, including proceeding to voluntary administration/liquidation.

## LEAVING SAFE HARBOUR

Once the plan has been fully implemented (including any necessary variations), the board should re-assess the financial position of the company with the assistance of advisors.

If the workout during the Safe Harbour period has been successful and long-term viability of the company has been achieved, the company should work to institutionalise relevant improvements.

If the company is solvent, but is still underperforming it may be appropriate to consult further with turnaround professionals and consider options such as a solvent wind down or a business/asset sale.

If the company has remained insolvent or become insolvent the board will likely need to make the appropriate resolution to invoke a formal insolvency process.

If the appointment of a voluntary administrator or liquidator follows the Safe Harbour, it is critical that directors comply with their duties to assist the relevant insolvency practitioner(s) and provide books and records as required by the Corporations Act.

Failure to do so may result in Safe Harbour protection from insolvent trading liability becoming unavailable to directors.

Disclaimer: this content is provided on an "as is" basis for general information purposes only and is not intended to constitute or substitute legal or other professional advice. You must make your own assessment of the information contained in this guide and rely on it wholly at your own risk. You should not take any actions based on this guide without seeking legal advice. To the extent permitted by applicable law, all representations, warranties and other terms are excluded. This guide is tailored to the considerations that may be relevant in the medium to large enterprise sector, and in particular for entities with a turnover of more than \$10 million. Different considerations are likely to be more relevant to smaller enterprises.