



INSTITUTE OF
PUBLIC
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Submission to ASIC on
CP 372: Guidance on insolvent trading
safe harbour provisions:
Update to RG 217

October 2023

27 October 2023

RG 217 Consultation Feedback
Companies and Small Business
Australian Securities and Investments Commission
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Brisbane QLD 400

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Dear Sir/ Madam

CP 372: Guidance on insolvent trading safe harbour provisions: Update to RG 217

The Institute of Public Accountants (IPA) welcomes the opportunity to make a submission on CP 372 relating to RG 217.

We consider that, generally speaking, the scope and nature of the safe harbour protection is adequately explained in the draft updated RG 217. However, it would be helpful to include additional cross-referencing to the relevant sections in the guide. Many sections make high level comments that are later explained, cross-referencing would help the reader understand the detail behind those high level comments. We have made some specific suggestions in the points below.

- The guidance on the steps a director may take to establish safe harbour are succinctly set out at RG 217.61. It would assist the reader if, like sub-point (a), all the steps were similarly cross-referenced to the appropriate sections of RG 217. We note in this regard that most, if not all, of the steps are further explained in other areas of the guidance.
- In our view, there should be a stronger emphasis on encouraging directors to obtain advice from an appropriately qualified professional. RG 217.61(d) actually appears to presume that such advice is obtained. This should be reflected in sub-point (b), with reference to RG 217.70, that the director should obtain appropriate advice from an appropriately qualified entity on potential courses of action which may lead to a better outcome for the company.
- RG 217.72 provides helpful examples of course(s) of action which may lead to a better outcome for the company than the immediate appointment of an administrator or liquidator, as required by s 588GA. RG 217.67 also provides a useful list of factors to assist directors in assessing whether a course of action may lead to a better outcome. Necessarily, both lists lack specific objectives to achieve a 'better outcome'. We consider that this reflects the broad range of strategies that may satisfy the test, which is of course situation-specific. However, in our view, it is important that the guidance makes clear that the assessment of the better outcome is best undertaken by an appropriately qualified entity. While this is raised at RG 217.70, we would encourage the drafters to include further reinforcement throughout the guide of the importance of independent analysis. For example, we suggest a sentence to that effect be included at the end of RG 217.76. While this is later explained in the guidance, the broad references to plans that lead to a better outcome may cause confusion as to whether this is a subjective belief by the director. Ultimately, whether a chosen course of action was reasonably likely to lead to a better outcome is a matter to be independently assessed by the Court. Accordingly, the guide should emphasise the importance of having a proper basis for deciding on a course of action, which ought be based on obtaining appropriate advice (and documenting the basis for that decision and the implementation of the course of action – see our comments below).

- Better guidance for the ‘reasonably likely’ test would also be helpful. The inclusion of a case study under the heading ‘Developing a course of action’ (similar to the examples provided in Section B of RG 217), in which the same course of action may be ‘reasonably likely’ to lead to a better outcome for one company but not another, may be useful to assist directors in identifying the relevant circumstances which may be determinative.
- RG 217.79 should be clarified to state that ‘Protection is only available from the time that it can be shown that the director starts developing one or more courses of action...’ If the director cannot prove that he had started developing a plan at a given point in time, he is unlikely to successfully be able to establish safe harbour. Similarly, it should be emphasised that the director should ensure that they document the entire process appropriately from the outset, with reference to Table 2, noting that the director bears the evidentiary burden to rely on the safe harbour provisions.
- We understand that, at the time the Bill with the safe harbour provisions was being introduced, the government’s rationale was that adopting the broad term ‘appropriately qualified entity’ would allow small businesses to find a ‘cheaper’ adviser. However, it appears that ASIC concedes that there are limited professionals who are appropriately qualified to provide advice on whether a course of action may lead to a better outcome, and this is reflected at RG 217.87. The reality of this should be made clear from the outset as the guidance tends to suggest that, if directors choose to obtain advice from an entity who is not a registered liquidator, specialist turnaround professional, insolvency lawyer or other adviser with significant insolvency experience – or choose not to obtain any advice at all – it may impact their ability to rely on the safe harbour protections. The risk of not obtaining any advice or obtaining (and relying on advice) from an advisor who is not so-qualified should be made apparent in the guidance, given the potential consequences for the director.
- As to whether there should be separate guidance for SME directors, we note that the regime does not distinguish safe harbour for SMEs and those for larger or listed companies. The requirements are the same and, on this basis, we do not think SME directors need separate guidance. In fact, separate guidance may create unnecessary confusion about whether there are different standards based on organisation size.
- We agree that ASIC should take further steps to raise awareness of *all* directors’ duties, particularly for SME directors. In our experience, SME directors are often not aware of the full scope of their directors’ duties and potential exposure for claims (eg to prevent insolvent trading) upon their appointment.

Should you require additional information or have queries, please contact Vicki Stylianou (vicki.stylianou@publicaccountants.org.au).

Yours sincerely

[signed]

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