



Wednesday, 25 October 2023

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

By email: RG217.Feedback@asic.gov.au

Dear Director

Consultation Paper 372: Guidance on insolvent trading safe harbour: Update to RG 217

Chartered Accountants Australia and New Zealand (CA ANZ) welcomes the opportunity to provide its views on the matters raised in *Consultation Paper 372 Guidance on insolvent trading safe harbour: Update to RG 217* (the Consultation paper). Our members are often the first to see financial stress in entities, particularly small-to-medium enterprises (SMEs) and are therefore well-placed to raise awareness of a director's duty to prevent insolvent trading and the safe harbour provision.

Overall, we consider the Guide to provide sufficient information to encourage directors to take action early and assess if entering a safe harbour is appropriate, including directors of SMEs. We do not see a need for separate guidance for SME directors as, by necessity, it would contain the same information.

We do consider the draft Guide could be streamlined, the text broken up with flowcharts and some areas clarified. In particular, what a director must do and what a director may do. We outline these in Appendix A and provide further information about CA ANZ in Appendix B.

To question B2Q8 if ASIC should take further steps to raise awareness. We see ASIC as the first port of call for directors seeking education, particularly, directors of SMEs. We recommend ASIC also leverage industry bodies to raise awareness with the director community. For our members, we will continue to provide them with support and education on identifying and managing financial stress and advocate for a grant for directors of small businesses to get a financial health check.

If you would like to discuss our submission further, in the first instance please reach out to [REDACTED] ([REDACTED]) at [REDACTED].

Sincerely,

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Group Executive
Advocacy and International Development

Karen McWilliams FCA
Sustainability and Business Reform Leader
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Appendix A

We provide the following feedback for your consideration.

B1Q2 Do you think the key principles set out in Section B of the existing guidance (unchanged in draft updated RG 217) are helpful? If not, explain how we could improve them or what further guidance we could provide.

We question whether the drafting of principles 3 and 4 may lead a director to understand that they must seek advice. The legislation indicates regard would be given to whether the director obtained advice in assessing the application of the safe harbour but a director is not required to obtain advice.

While *Key principle 3: Directors should obtain advice from an appropriately qualified person where necessary* does not use the word 'must', *Key principle 4 Directors should consider and act appropriately on that advice in a timely manner*, assumes advice has been obtained. Subsequent paragraphs reinforce this message, for example, RG 217.46 indicates a director should consider appropriate advice and RG 217.47 assumes that advice is sought.

Of particular concern is RG 217.50, which speaks to directors acting in a timely manner but only once they have obtained advice. An unintended consequence of the guidance on Principle 4 may be that directors miss the key message, to act in a timely manner, whether they choose to seek advice or not. Similarly, RG 217.54 and 55 are based on receiving advice and may be disregarded by a director who chooses not to seek advice.

An alternative could be;

- Key Principle 3: Directors may obtain advice from an appropriately qualified person; and
- Key Principle 4: Directors should act appropriately and in a timely manner.

If adopted, this change would then need to be reflected throughout the Guide so it is clear obtaining advice is optional. As we do think seeking advice early and from an appropriately qualified entity is beneficial, we would suggest comments to that effect be added.

B1Q4 Do you consider the existing guidance helps directors of both small-to-medium enterprises (SMEs) and large or listed companies? If not, what additional guidance would you suggest we provide?

We consider the draft guidance helpful for all directors and additional guidance is not required. The following outlines our suggestions to refine the draft guidance through the lens of SME directors. Importantly, recognising that the director or directors of SMEs are often also the financial controllers of the business.

Clarity

For clarity, provide guidance on a particular issue once and under the most appropriate section.

For example, RG 217.81 talks to a director acting decisively and in a timely manner. This is not directly related to this section *What debts are included in safe harbour protection* and the guidance has been provided several times in previous sections: refer Part B Key principle 4 on page 10; RG 217.31 (d); RG 217.32; RG 217.50; RG 217.61(d).

Similarly, clarity in the guidance with consistency on which obligations are a must for directors and which represent good practice.

For example, the table of contents states Part B What directors must do, yet in the body of the document, Part B, opening comment, sets out principles that directors should consider. Similarly, Key principle 1 at the start of Part B indicates directors should actively monitor solvency yet in RG 217.31 where this principle is repeated it states a director must. Then in RG 217.34 we again read that directors must actively monitor the company's position followed by RG 217.36 that a director should generally monitor the company's position.

B2Q1 Do you think the scope and nature of the safe harbour protection is adequately explained in draft updated RG 217.

We think the scope and nature of safe harbour protection is adequately explained.

We provide feedback on the particular sections raised in questions B2Q2-5 noting opportunities to streamline and clarify.

Additional guidance

RG 217.91 – 92 outlines what a director cannot rely on to evidence their claim of safe harbour protection but does not provide guidance here on what directors may be able to rely on. We suggest pointing the reader to Table 2 for factors ASIC will take into account as an example, noting other parties may rely on different factors.

Streamlining

RG 217.11 precede with a flowchart on what directors should monitor and what they must and may do.

RG 217.25 precede with a flowchart of developing and recording actions for safe harbour protection.

RG217.25 (a) at the first instance of the phrase ‘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’, follow with ‘(courses of action)’ and subsequently use ‘courses of action’.

RG 217.63 remove the paragraph and keep the Note. This paragraph outlines the basis for the guidance at RG 217.62 and we consider the Note that references the source adequate.

RG 217.77 remove the paragraph as it appears to repeat RG 217.73.

RG 217.81 remove the paragraph as not related to what debts are included

RG 217.82 remove the paragraph as not related to what debts are included and RG 217.89 clearly outlines when protection ends.

RG 217.95 remove the paragraph and keep the Note. This paragraph outlines the basis for the guidance at RG 217.94 and we consider the Note that references the source adequate.

Clarity

RG 217.61 (d) assumes advice is received yet obtaining advice is not a requirement to rely on safe harbour protection. Further, the key message, to take appropriate action in a timely manner may be lost. As guidance on the benefits of seeking advice is contained in paragraphs RG 217.83-88, we suggest item (d) should read ‘take appropriate action in a timely manner’.

RG 217.61 (g) uses the term ‘adduced’ when referring to documentation of steps taken. This may be a common term in legal environments though it is unlikely to be known by directors, particularly directors of SMEs. We suggest replacing ‘*that evidence can be adduced if necessary*’ with ‘*they can be used to support your claim for safe harbour protection*’.

RG 217.67 provides a list of statutory factors that may be considered though, without a word connecting the factors, it could be taken that they will be considered as a whole. As this is a list of statutory factors, as in the legislation, the word ‘or’ should be added after each factor. This would make it clear that each factor is considered, not if a director has done all of them.

If RG 217.82 is retained, we note it implies that safe harbour protection ends when ‘that plan is implemented.’ Yet the protection is available from developing a course of action and for as long as that course of action is being followed. If the intent is to indicate that if no course of action is implemented the protection ends, we suggest replacing the opening sentence with ‘Safe harbour protection will end if the director fails to implement a course of action in a reasonable period. ...’

RG 217.87 indicates that expert advice '*will probably be required*'. As obtaining advice is not a requirement, we suggest replacing these words with '*have the expertise*'.

RG 217.88 commences with the assumption that a director has obtained advice. We suggest reversing the order in the sentence, starting with the director is responsible for deciding which course of action to pursue, so this is clear even if they obtain advice.

RG 217.101 – 102 refers to who can commence an action and does not appear related to ASIC's approach to insolvent trading. We suggest these be moved to before paragraph RG 217.8, the start of the director's duty to prevent insolvency trading, so directors are aware of who may raise a claim and where that claim will be heard.

Appendix B

Chartered Accountants Australia and New Zealand (CA ANZ) represents more than 136,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live.

Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

CA ANZ promotes the Chartered Accountant (CA) designation and high ethical standards, delivers world-class services and life-long education to members and advocates for the public good. We protect the reputation of the designation by ensuring members continue to comply with a code of ethics, backed by a robust discipline process. We also monitor Chartered Accountants who offer services directly to the public.

Our flagship CA Program, the pathway to becoming a Chartered Accountant, combines rigorous education with practical experience. Ongoing professional development helps members shape business decisions and remain relevant in a changing world.

We actively engage with governments, regulators and standard-setters on behalf of members and the profession to advocate in the public interest. Our thought leadership promotes prosperity in Australia and New Zealand. Our support of the profession extends to affiliations with international accounting organisations.

We are a member of the International Federation of Accountants and are connected globally through Chartered Accountants Worldwide and the Global Accounting Alliance. Chartered Accountants Worldwide brings together members of 13 chartered accounting institutes to create a community of more than 1.8 million Chartered Accountants and students in more than 190 countries. CA ANZ is a founding member of the Global Accounting Alliance which is made up of 10 leading accounting bodies that together promote quality services, share information and collaborate on important international issues.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents more than 870,000 current and next generation accounting professionals across 179 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications.