ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 217

Duty to prevent insolvent trading: Guide for directors

December 2024

About this guide

This guide is for directors and their professional advisers. It may also be of interest to registered liquidators and creditors.

The guide sets out key principles to help directors understand and comply with their duty under s588G of the Corporations Act to prevent insolvent trading. It also provides guidance on the use of the safe harbour protection from liability for insolvent trading.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in December 2024 and is based on legislation and key regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 217 issued July 2010 and reissued in August 2020

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

This guide is intended to help directors understand and comply with their duty to prevent insolvent trading. The information, principles, and laws contained in this guide are applicable to all directors, including directors of small-to-medium enterprises (SMEs).

It sets out:

- the relevant legal background (see RG 217.9–RG 217.34);
- the key principles that we consider directors need to take into account in order to comply with their duty to prevent insolvent trading (see Section B;
- the 'safe harbour' protection for directors against claims for insolvent trading (see Section C); and
- guidance on how we will assess whether a director has breached their duty (see Section D).

While compliance with the guide may avoid a breach of duty, we reserve our right to fully investigate the factual circumstances of each case of suspected insolvent trading and take action if we consider it appropriate.

The law in relation to insolvent trading involves complex legal and accounting issues. Directors should ensure that they understand their legal obligations and, if necessary, obtain appropriate advice from a professional adviser who meets the recommended requirements (see Key principle 3: Obtain advice from professional advisers where necessary).

The law relating to safe harbour also involves complex legal and accounting issues and requires advice to be obtained from an appropriately qualified entity (see RG 217.101–RG 217.116).

Note: The term 'professional adviser' is used throughout Sections A, B and D, while in Section C the term 'appropriately qualified entity' is used, as this is the language of s588GA(2) of the *Corporations Act 2001* (Corporations Act).

Scope of this guide

RG 217.1 This regulatory guide is intended to help directors understand and comply with their duty to prevent insolvent trading. It may also be of interest to company creditors, professional advisers engaged by directors to advise on insolvency, and appropriately qualified advisers engaged to advise on safe harbour.

RG 217.2 It is intended to provide general guidance to directors about their duty to prevent insolvent trading. The law in relation to insolvent trading is complex

and dependent on the facts of each case. Directors should ensure that they understand their legal obligations, and if there is uncertainty, we encourage obtaining appropriate advice (see Section B).

RG 217.3 The guide sets out some of the key principles directors should consider, to comply with this duty: see Section B.

RG 217.4 Section C contains guidance on factors a director should consider when seeking to establish safe harbour protection against claims for insolvent trading.

RG 217.5 Section D contains guidance on some of the factors we will consider in assessing whether a director has complied with their duty to prevent insolvent trading and whether the director might establish safe harbour protection against claims for insolvent trading.

RG 217.6 In addition to directors and professional advisers, this guide may be of interest to registered liquidators and creditors. A registered liquidator of a company or a creditor of a company (with the consent of the company's liquidator or the court after the end of six months, commencing when a company begins to be wound up) may bring proceedings against a director to recover compensation for loss resulting from insolvent trading (see s588R–s588T of the Corporations Act).

RG 217.7 Nothing in this guide affects the legal rights of a liquidator or creditor of a company to bring such a proceeding against a director. A liquidator or creditor of a company can bring a claim against a director whether or not we have conducted an investigation or brought proceedings against the director for insolvent trading. In bringing proceedings against a director, a liquidator or creditor may consider factors other than those we will consider in assessing whether a director has complied with their duty.

RG 217.8 Any claim against a director for insolvent trading must be determined by the court. A court may consider some, or all, of the key principles in Section B and the guidance in Section C. The court may consider other material matters when determining whether a director has breached their duty to prevent insolvent trading and whether the director might establish safe harbour protection against claims for insolvent trading.

Director's duty to prevent insolvent trading

RG 217.9 A director has a positive duty to prevent insolvent trading under s588G of the Corporations Act.

RG 217.10 The actual steps taken by a director to comply with their duty to prevent insolvent trading will depend, in part, on all the circumstances of the

company. This may include, for instance, the size and complexity of the business as well as the skills and experience of the company's management and staff. When a director is not involved, or is involved in a limited capacity, in directly overseeing the company's financial situation and is relying on internal or external advice, the director must ensure that:

(a) the management, employees and external professional advisers relied on by the director have the required level of knowledge, skill and experience necessary to undertake their functions, relative to the size and complexity of the business;

(b) systems are in place and operating effectively to provide the information the director needs to ensure they are informed about the company's affairs at all times, and are able to assess the appropriateness of the advice they receive; and

(c) they make appropriate inquiries to remain informed about the financial position and affairs of the company.

RG 217.11 If the company is insolvent, or there is a real risk of insolvency, the duties of directors will expand to include creditors (including employees with outstanding entitlements): see Information Sheet 42 *Insolvency for directors* (INFO 42).

Who does the duty apply to?

RG 217.12 The duty applies to all directors, both those who are appointed to the position and any alternate director they appoint and who is acting in that capacity.

Note: The duty applies to directors of companies registered under the Corporations Act that are registered as a charity under the *Australian Charities and Not-for-Profits Commission Act 2012* (ACNC Act). ASIC has provided guidance about the provisions of the Corporations Act that continue to apply to charities registered under the ACNC Act: See *Charities registered with the ACNC*.

RG 217.13 The duty also applies to persons who are not formally or validly appointed as directors, but who act in the position of a director, or in accordance with whose instructions or wishes the company's directors are accustomed to act.

Note: See s9 of the Corporations Act for the definition of 'director', which encompasses persons who are formally appointed to the position and those who act as de facto and shadow directors.

What does the duty require?

RG 217.14 A director of a company is required under s588G to prevent the company from incurring a debt if:

(a) a person is a director of a company at the time the company incurs a debt; and

(b) the company is insolvent at the time the debt is incurred; or

(c) by incurring that debt, or by incurring a range of debts including that debt, the company becomes insolvent; and

(d) at the time of incurring the debt, there are reasonable grounds for suspecting that the company is insolvent, or would become insolvent by incurring the debt (see s588G(1)).

RG 217.15 Section 588G sets out two levels of contravention:

(a) under s588G(2), a civil penalty provision applies to a director who fails to prevent the debt being incurred, provided they are aware that there are grounds for suspecting insolvency, or where a reasonable person in a similar position would suspect insolvency; and

(b) under s588G(3), it is a criminal offence if:

(i) at the time a company incurred the debt, the director suspected that the company was insolvent or would become insolvent as a result of incurring that debt; and

(ii) the director's failure to prevent the company incurring the debt was dishonest.

What are the consequences of breaching the duty?

RG 217.16 If a director is found by a court to have contravened the civil penalty provision in s588G(2), the court may make one or more of the following orders:

(a) **compensation order**—the court may order that the director is personally liable to pay compensation to the company equal to the amount of the loss suffered as a result of the director failing to prevent the company from incurring debts while it was insolvent (see s588J and 1317H).

(b) **pecuniary penalty order**—if the court finds that the director's failure to prevent insolvent trading is serious or materially prejudices the interests of the company or the company's ability to pay its creditors, the maximum pecuniary penalty for an individual (see s1317G) is the greater of:

(i) 5,000 penalty units; or

(ii) three times the benefit obtained or detriment avoided.

Note: See Fines and penalties for more information about penalties, including the value of a penalty unit.

(c) **disqualification from managing a corporation**—the court may disqualify the director from managing a corporation for a period of time that it considers appropriate, if it is satisfied that the disqualification is justified (see s206C).

Example 1: Obtaining a compensation order

A liquidator was appointed to XYZ Pty Ltd and, following investigation, considered that the company was insolvent from a date 248 days before winding up. The liquidator identified 25 debts totalling $456,789 incurred in that period, which have not been paid.

The liquidator also looked at what defences XYZ's sole director had and decided they have none. The liquidator took action in court to obtain an order that the director pays an amount of $456,789 to the liquidator. The liquidator will distribute money recovered in accordance with the priorities in the Act.

RG 217.17 If a director is found to have committed a criminal offence under s588G(3), a court may impose the following maximum penalties on an individual:

(a) a penalty of up to 2,000 penalty units;

(b) imprisonment for five years; or

(c) both (a) and (b).

Note: See Fines and penalties for more information about penalties, including the value of a penalty unit.

What defences are available?

RG 217.18 Section 588H provides a director with a number of defences to a civil claim for insolvent trading under s588G(2).

Note: The business judgement rule in s180(2) does not apply to a breach of s588G.

RG 217.19 A director has a defence to proceedings for a contravention of s588G(2) if it is proved that, at the time the debt was incurred, the director:

(a) had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent even if it incurred the debt, or incurred a range of debts, including that debt (see s588H(2));

(b) had reasonable grounds to believe, and did believe, that a competent and reliable person who was responsible for providing adequate information about the company's solvency was fulfilling that responsibility; and the director expected that, based on the information that person provided to the director, the company was—and would remain—solvent even if it incurred the debt, or incurred a range of debts, including that debt (see s588H(3));

(c) because of illness or other good reason, did not take part in the management of the company at that time (see s588H(4)); or

(d) took all reasonable steps to prevent the company incurring the debt. Matters that may be considered when determining whether this defence is made out include, but are not limited to, any action the director took to appoint an administrator to the company or a restructuring

practitioner for the company, when that action was taken, and the results of that action (see s588H(5) and (6)).

Note: A court may also relieve a director from liability (either wholly or in part) if it appears to the court that the director has acted honestly and, considering all the circumstances of the case, ought fairly to be excused: see s1317S and 1318.

RG 217.20 These defences do not apply to a criminal offence under s588G(3).

When is a company insolvent?

RG 217.21 A company is insolvent if it is unable to pay all its debts as and when they become due and payable: see s95A.

RG 217.22 Determining the company's ability to pay its debts should be by reference to the actual circumstances of the company. Determining whether a company is insolvent predominantly involves applying a cash-flow test. This requires realistically assessing whether the company's anticipated current and future cash flows will be sufficient to enable current and future liabilities to be paid as and when they become due and payable.

Note: There are a variety of factors that should be taken into account in considering whether a company is insolvent: see Table 4 in the appendix for further details.

RG 217.23 In addition, it may be relevant to look at the financial position of the company as a whole and consider other commercial factors when assessing solvency (commonly referred to as the 'balance sheet test'). For example, it may be relevant to consider:

(a) the company's assets and liabilities as a whole, including the company's ability to collect debts owed to it within agreed terms, and whether arrangements have been negotiated with creditors to defer payment of outstanding debts;

(b) whether additional money can realistically be raised in a timely manner from the issue of additional share capital, or from future borrowings; and

(c) whether there are surplus assets that can be sold in a relatively short period of time to help pay debts without damaging the company's ability to trade and its ability to pay all its debts when they become due and payable.

RG 217.24 It is important to differentiate insolvency from a temporary lack of liquidity, which may be overcome in the short term due to the successful outcome of the company's normal business activities. See *Hymix Concrete Pty Ltd v Garrity* (1977) 13 ALR 321 and *Hall v Poolman* (2007) 65 ACSR 123.

RG 217.25 If a company fails to keep proper financial records, and an insolvent trading claim is made against a director, the court may presume in a civil penalty proceeding (unless the director can prove otherwise) that the company was insolvent for the period of time that the company failed to keep proper

financial records: see s588E. This presumption does not apply in criminal proceedings under s588G(3).

RG 217.26 Whether a company is insolvent involves the consideration of complex legal and accounting issues. Directors need to obtain and consider all relevant information about the company's financial position and should consider obtaining appropriate advice from an appropriately qualified professional adviser if they have reasonable grounds to suspect the company is in financial difficulty: see RG 217.60.

Safe harbour protection for directors

RG 217.27 A director may be able to protect themselves from civil liability for insolvent trading by establishing a 'safe harbour' which is explained more fully in Section C.

Note: Directors of companies registered under the Corporations Act that are registered as a charity under the ACNC Act may establish safe harbour protection (as set out in Section C).

Course of action reasonably likely to lead to a better outcome

RG 217.28 A director may have safe harbour protection and be excluded from civil liability for insolvent trading under s588GA(1) if:

(a) at a particular time after the director starts to suspect the company may become or be insolvent, they start developing 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; and

(b) the debt is incurred directly or indirectly in connection with any such course of action, or the debt is incurred in the ordinary course of the company's business; and

(c) the debt is incurred during the period commencing at the time the director starts to suspect the company may become or be insolvent, and they start developing one or more courses of action, and ending at the earliest of the following:

(i) the end of a reasonable period of time during which the director fails to take any such course of action;

(ii) when the director ceases to take any such course of action;

(iii) when any such course of action ceases to be reasonably likely to lead to a better outcome for the company; or

(iv) the appointment of an administrator or liquidator of the company.

RG 217.29 There are statutory factors that may (without limitation) help in establishing whether a course of action is reasonably likely to lead to a better outcome for the company: see RG 217.82.

RG 217.30 A better outcome for a company is one that is better for the company than the immediate appointment of an administrator, or liquidator: see s588GA(7).

RG 217.31 Directors must continually assess whether the course or courses chosen are, and remain, reasonably likely to result in an outcome that is better for the company.

Company under small business restructuring

RG 217.32 A director may have safe harbour protection and be excluded from civil liability for insolvent trading under s588GAAB(1) if:

(a) a restructuring practitioner has been appointed to a company under s453B of the Corporations Act and the restructuring of the company has not ended under reg 5.3B.02 of the *Corporations Regulations 2001* (Corporations Regulations); and

(b) the debt is incurred in the ordinary course of business, or with the consent of the restructuring practitioner or by order of the court.

Liability of a holding company

RG 217.33 A holding company may be liable for insolvent trading by a subsidiary if:

(a) the company was the holding company at the time the subsidiary incurs a debt;

(b) the subsidiary:

(i) is already insolvent at the time the debt was incurred, or

(ii) becomes insolvent by incurring the debt, or by incurring a range of debts including that debt;

(c) at the time of incurring the debt, there are reasonable grounds for suspecting that the subsidiary is already insolvent, or would become insolvent by incurring the debt; and

(d) either or both of the following apply:

(i) the holding company or one or more of its directors was aware at the time there were reasonable grounds for suspecting the subsidiary was insolvent or would become insolvent; and/or

(ii) taking into account the nature and extent of the holding company's control over the affairs of the subsidiary and any other relevant circumstances, it is reasonable to expect the holding company or

one or more of the holding company's directors would be so aware (see s588V).

Note: See s9 of the Corporations Act for definitions of 'holding company' and 'subsidiary' and Div 6 of Pt 1.2 of the Corporations Act for further information about subsidiaries and related bodies corporate.

Safe harbour against holding company liability

RG 217.34 A holding company will not be liable for debts incurred resulting from insolvent trading by a subsidiary if:

(a) the holding company takes reasonable steps to ensure the safe harbour protection referred to in RG 217.27 applies to each director of the subsidiary and the debts; and

(b) the safe harbour protection applies to each director and to those debts (see s588WA).

B Key principles for directors

Key points

This section sets out the key principles for the guidance of directors in the context of their duty to prevent insolvent trading.

There are four key principles:

- Key principle 1: Actively monitor company solvency;
- Key principle 2: Investigate financial difficulties;
- Key principle 3: Obtain advice from professional advisers where necessary; and
- Key principle 4: Act in a timely manner.

When a director follows these key principles, they are less likely to breach their duty to prevent the company from trading while insolvent.

Carrying out their duty

RG 217.35 There is a risk of directors breaching their duty to prevent insolvent trading, unless they stay informed about the financial affairs of the company at all times, including but not limited to, putting themselves in a position to assess the impact of incurring debts.

RG 217.36 A director is less likely to breach their duty to prevent insolvent trading when they consider, and implement, where appropriate, the following key principles in carrying out their role:

(a) Key principle 1: A director must stay informed about the financial affairs of the company, and regularly assess the company's solvency (see RG 217.40–RG 217.50);

(b) Key principle 2: As soon as they identify concerns about the company's financial solvency, a director should take positive steps to investigate and confirm the company's financial position and realistically assess the options available to deal with the company's financial difficulties (see RG 217.51–RG 217.52);

(c) Key principle 3: A director should obtain appropriate professional advice where necessary (see RG 217.53–RG 217.62); and

(d) Key principle 4: A director should consider advice received and act on it appropriately in a timely manner (see RG 217.63–RG 217.72).

RG 217.37 If a director does not actively follow or implement the four key principles, they are at serious risk of breaching their duty to prevent insolvent trading.

RG 217.38 On the other hand, when a director does follow the key principles set out in this guide, they are more likely to be able to demonstrate that they complied with their duty.

RG 217.39 Some of the specific factors we will consider in assessing whether the director has breached their duty to prevent insolvent trading, and the evidentiary material we will look for, are set out in Table 2.

Key principle 1: Actively monitor company solvency

RG 217.40 Both executive directors and non-executive directors must actively monitor, and keep themselves informed about, the financial position of the company. This means the director must, among other considerations, take steps to:

(a) ensure the company maintains proper financial records and prepares relevant financial information; and

(b) make any other reasonable enquiries to assist the director in understanding the company's financial position and cashflow requirements at all times.

RG 217.41 Unless there is a good reason, such as those listed at RG 217.19, a director is never excused or relieved from actively monitoring the financial position of the company and its affairs.

Example 2: Possible defences to monitoring solvency

A director who is seriously ill and unable to attend to the affairs of the company might be excused if, during the period of their absence, the company incurs a debt that cannot be paid.

Similarly, if a director is overseas and incapable of engaging in the company's operations, and has appointed an alternate director to act in their absence, they may also be excused if, during their absence, the company incurs a debt that cannot be paid.

A director will not be excused if they rely on others, such as their accountant, bookkeeper or other director, to monitor the solvency of the company without taking an active and considered interest in the business and informing themselves of the company's financial affairs.

What directors need to do

RG 217.42 A director must generally monitor the company's position for any indication that it might not be able to pay its debts as they become due and payable. To do so, a director will need to ensure that they are kept informed on an ongoing basis. Relying solely on advice or reviewing financial statements at the end of each financial year is insufficient.

RG 217.43 Some of the specific activities a director may need to undertake to ensure that they are sufficiently informed about the company's position may include:

(a) being involved in or overseeing the preparation of profit and cash-flow budgets and regular management accounts, and monitoring actual results against budget expectations;

(b) reviewing the company's ability to collect debts owed to it and to realise other current assets, including stock, on a regular basis;

(c) monitoring when creditors are due to be paid and the company's ability to comply with normal terms of trade;

(d) reviewing the current level of bank lending facilities and the ability to access additional funding if required;

(e) reviewing the company's tax obligations including lodgement, compliance and ability to pay liabilities as and when they become due and payable; and

(f) periodically reviewing employee entitlement obligations, including whether single touch payroll reports are lodged on time, paying superannuation and wages, and ensuring all employee entitlements are paid and accrued—accurately reflecting relevant awards, agreements or contracts.

RG 217.44 The actual steps taken by a director to ensure they are kept informed will depend, in part, on all the circumstances of the company. This includes: factoring in the size and complexity of the business, as well as the skills and experience of the company's management and staff.

RG 217.45 When a director is not involved directly in overseeing the company's day-to-day activities, they should ensure that:

(a) appropriate systems are in place;

(b) they make adequate inquiries to keep informed about the financial position and affairs of the company; and

(c) it is appropriate to rely on the information and advice provided to them.

Relying on information provided by third parties

RG 217.46 A director may rely on information about the solvency of the company provided by others in certain circumstances.

RG 217.47 This will generally be a person who is specifically responsible for providing information about the company's solvency to the director (e.g. another director, chief financial officer, internal or external accountant, or professional adviser).

RG 217.48 To rely on the information provided by a particular person, the director should first establish that the person is suitably qualified (see RG 217.55), appropriately insured (where the third party is an external adviser), competent and reliable to provide information about the company's solvency. The director should also ask sufficient questions of the person advising them to:

(a) understand the financial effect of the advice they receive; and

(b) be satisfied that the information on which the advice is based is up to date, accurate and complete.

RG 217.49 A director is able to rely on information provided by a third party only if the party relied on is fully briefed and is given sufficient information by the director or the company to perform their task properly and adequately.

RG 217.50 If information about the solvency of the company is not provided to the director as requested, or the provision of that information is repeatedly delayed or presented in an unsatisfactory or unprofessional manner, a director should consider making any necessary changes to the processes and persons responsible for providing this information. This may include obtaining appropriate input from a professional adviser, as necessary.

Example 3: Neglecting to actively monitor financial activity

A director who is actively involved in the day-to-day running of the company spends most of his time marketing and growing the business, and developing relationships with customers. He relies on staff to pay creditors on time. Every six months, he reviews information about the financial position of the company that is prepared by one of his employees, and makes few inquiries about the information provided to him.

The director is not diligently monitoring the financial affairs of the company. He should ensure there are systems in place that let him know—at all times:

- the realistic value of the assets and liabilities of the company;
- whether the company can pay its debts as and when they become due and payable, and if the company is doing so; and
- whether the business is trading profitably.

The director's actions might include:

- ensuring realistic profit and cash-flow budgets are prepared, and monitoring cash available to pay debts;
- reviewing regular management accounts and comparing actual performance to budgets; and
- reviewing the aged listing of debtors and creditors to ensure that trade terms are being met.

If the director or his staff do not have the skills to prepare this information, the director should consider hiring a suitably qualified bookkeeper or

accountant to maintain adequate financial records and provide regular updates of this information.

Reviewing information about the company's financial position every six months is not sufficient. Reviewing information monthly may be more appropriate for most businesses where there are no solvency concerns. If there are solvency concerns, even more frequent reviews and more regular updates about the company's financial position are needed. This might include weekly, or even daily, review of cash at bank, as well as aged debtor and aged creditor balances.

Key principle 2: Investigate financial difficulties

RG 217.51 As soon as there are reasonable grounds to suspect that the company is in financial difficulty, or that there is a risk that the company is insolvent or will become insolvent as a result of incurring a debt, directors should:

(a) take positive steps to confirm the company's financial position and realistically assess the options available to deal with the company's financial difficulties so the company can meet its obligations;

(b) ensure that systems are in place to carefully consider the company's solvency before the company incurs each new debt; and

(c) obtain advice from a professional adviser, if necessary.

What directors need to do

RG 217.52 Table 2 in the appendix sets out some of the factors that a reasonable person would take into account when monitoring the company's position and assessing whether a company is insolvent. Positive steps to confirm the company's financial position may also include those suggested at RG 217.43.

Example 4: Investigating indicators of potential insolvency

XYZ Pty Ltd is being pushed for payment by a number of creditors, and a few payments have been declined by the bank because there were insufficient funds.

Although most of the critical supplier creditors are being paid on normal terms, the company is unable to pay a creditor with whom it had negotiated an extended repayment arrangement. In addition, XYZ has recently received a notice from the Australian Taxation Office detailing an outstanding debt.

Outstanding statutory liabilities, payments being declined by the bank and trade creditors not being paid on agreed terms are all significant indicators of potential insolvency.

> In this example, to help avoid potential insolvency the directors of XYZ should:
>
> - fully inform themselves about all the relevant facts and the financial position of the company;
> - realistically assess the options available;
> - obtain appropriate advice about how they might deal with the current financial difficulties; and then
> - consider and act appropriately on that advice in a timely manner.

Key principle 3: Obtain advice from professional advisers where necessary

RG 217.53 As soon as there are reasonable grounds to suspect that the company is in financial difficulty, a director should consider obtaining appropriate advice. Advice should be sought from one or more appropriately qualified, appropriately insured, competent and reliable professional advisers about the financial position of the company and how the financial difficulties can be addressed.

RG 217.54 A director is potentially able to rely on appropriate advice in circumstances where the professional adviser is given full, complete, accurate and up-to-date instructions by, or on behalf of, the director to enable the adviser to properly and adequately provide competent advice.

What directors need to do

RG 217.55 In addition to relying on suitably qualified, competent and reliable management and staff (where available), a director may obtain appropriate professional advice from a number of sources. It is the responsibility of the director to seek out the appropriate advice from the adviser or advisers and act on that advice in a timely manner.

RG 217.56 An appropriate professional adviser should be someone who:

(a) is practicing as one or more of the professionals listed in RG 217.59;

(b) is a member of a professional body;

(c) holds appropriate insurance; and

(d) has the necessary experience in the relevant field of insolvency.

RG 217.57 A person on ASIC's banned and disqualified persons register, or someone who has a current court enforceable undertaking, is unlikely to be considered a suitable professional adviser.

RG 217.58 The appropriate qualifications of the adviser will depend on the nature of the advice being sought, in addition to the individual circumstances of the company.

RG 217.59 A professional adviser might be one or more of the following persons who can provide appropriate advice to the director, such as a:

(a) registered liquidator; or

(b) lawyer; or

(c) accountant.

Note: Lists of Registered Liquidators by state showing their name and firm can be found at Insolvency statistics—Series 4A Registered liquidator lists. Individual names can be searched on the *ASIC Professional Register of Registered Liquidators* via login to ASIC Connect.

RG 217.60 It is the responsibility of the director to seek out the appropriate professional adviser or advisers, to receive the advice that is best suited to the current circumstances of the company. Regard must be given to experience, qualifications, and the reasonableness of any assumptions on which the advice is based.

RG 217.61 Directors should consider obtaining advice on:

(a) the solvency of the company and whether there is a risk that the company is trading while insolvent;

(b) the options available to the company to deal with its financial difficulties; and

(c) whether it is realistically possible for the company to continue to trade while attempting to restructure the company's affairs to enable it to meet its obligations (including whether it can renegotiate its obligations) and return the company to long-term financial health.

RG 217.62 Advisers may also be able to assist directors to prepare cash flow budgets and negotiate with creditors.

Example 5: Initiating independent inquiries about solvency

PQR Pty Ltd is in financial distress and is negotiating with its bank to extend its credit facility. The bank has appointed an investigating accountant to advise on whether the extension should be granted and further funds advanced to the company.

The directors of PQR have other factors to consider beyond the company's financial standing with the bank. For example, PQR also has a large debt to unsecured noteholders due at the end of the year, and a number of its trade creditors are outside of trading terms.

Directors need to consider the solvency of the company as a whole and ensure that all debts (including outstanding employee entitlements and superannuation contributions) can be paid as and when they become due

> and payable, while also ensuring that sufficient funds will be available to repay unsecured noteholders at the end of the year.
>
> The directors should not rely on the bank's advisers, but should make their own inquiries and obtain independent professional advice concerning the company's solvency and ability to meet its debts as and when they become due and payable.

Key principle 4: Act in a timely manner

RG 217.63 If there are reasonable grounds for suspecting that the company is insolvent, or would become insolvent by incurring a debt, the director should act in a timely manner to seek advice and implement it.

RG 217.64 A director should consider the advice (including any qualifications and the reasonableness of any assumptions on which the advice is based) and take timely and appropriate action.

What directors need to do

Where there are doubts about the company's solvency

RG 217.65 If the advice received is that the company, although not yet insolvent, is experiencing financial difficulties and may soon become insolvent, action is still likely to be required on the director's behalf—for example, to address the cause of any temporary lack of liquidity.

RG 217.66 If there are reasonable grounds to expect that the financial position of the company will further deteriorate, the director is at risk of breaching their duty to prevent insolvent trading if they do not take immediate steps. This may include obtaining further advice and preventing the company from incurring further debts or seeking the appointment of an external administrator, in appropriate circumstances.

RG 217.67 The director should continue to monitor the financial position of the company closely. They should be prepared to take further action as soon as they suspect the company's ability to meet its debts as they become due and payable is deteriorating.

RG 217.68 If the directors implement a course of action that is reasonably likely to lead to a better outcome for the company (see Section C), they should carefully monitor trading to ensure the company's ability to meet its debts as and when they become due and payable does not deteriorate, and that the course of action continues to be reasonably likely to lead to a better outcome for the company.

Where the company is already insolvent

RG 217.69 If the advice received is that the company is insolvent, the director must take immediate action. This may involve obtaining further advice from a professional adviser, such as one listed in RG 217.59.

RG 217.70 Above all, if a director knows, or has reasonable grounds to suspect, that the company is incurring debts that it will not be able to pay, or they cannot rely on safe harbour, they should take all reasonable steps to prevent incurring further debts. These steps must be clear, positive and unequivocal. Such steps might include:

(a) actively seeking to persuade, in writing, the other directors not to incur the debt;

(b) convening a meeting of the board of directors to discuss and resolve that the debt should not be incurred, and ensuring that the minutes accurately reflect the attempts made to prevent the debt being incurred;

(c) obtaining appropriate advice as to what they should do if the other directors resolve to incur the debt despite the director's dissent;

(d) suspending trading activities.

RG 217.71 Where there are reasonable grounds to suspect that the company is insolvent, as well as taking steps not to incur further debts, directors should obtain and consider advice about the options available to them to deal with the company's financial difficulties.

RG 217.72 Where there are reasonable grounds to expect that the company cannot pay its debts as and when they become due and payable or develop a course of action that is reasonably likely to lead to a better outcome for the company (than the immediate appointment of an administrator or liquidator), based on the advice the directors receive, the directors should consider the immediate appointment of an external administrator to the company (see Section C).

Example 6: Selecting restructure options when insolvent

DEF Pty Ltd has experienced cash flow difficulties. The company is considering the restructure of its affairs and is considering a marketing program to sell certain business assets to raise sufficient cash to repay its debts, which are now due. As markets are currently depressed, asset values are down. DEF has been unable to borrow further money to help pay its debts.

Depending on the amount realised from the sale of business assets, DEF may not be able to pay all its debts as and when they become due and payable by relying on this plan.

In circumstances where a company needs to sell off its business assets to pay its debts, and it is unlikely there will be enough funds to repay all the creditors, there is a significant risk of insolvency. Directors in this situation

run the risk of trading while insolvent during the period of any attempted restructuring.

The directors of DEF need to consider the time it will take the company to realise the assets, the effect of the sale of assets on the company's ability to continue to trade, and the effect the sale of assets will have on future cash flows. They should obtain appropriate advice from one or more professional advisers to consider whether they are able to satisfy their duties and obligations by applying this strategy, and must carefully monitor its progress, if implemented.

If this plan is commenced (which would require negotiating a deferral in repayment of existing debts during the period of the asset restructuring) and it becomes apparent that the plan may not be fully successful in returning the company to long-term financial health, the directors should immediately obtain further advice about the various courses of action available to them.

Such action may include considering whether a course or courses of action can be developed that is reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator or liquidator and, if not, the appointment of an external administrator.

C Safe harbour protection from liability for insolvent trading

Key points

In addition to a director's defences against civil liability for insolvent trading (see RG 217.18–RG 217.19), a director may be able to establish safe harbour protection from civil liability for insolvent trading.

Safe harbour protection will only be available to a director if:

- at the time the debt was incurred, the company is paying its employees on time and complying with its lodgement obligations under taxation laws—this requirement is subject to some exceptions; and
- the director is taking steps to develop and implement a course or courses of action that are reasonably likely to lead to a better outcome for the company.

A better outcome for the company is one that is better than the immediate appointment of an administrator or liquidator.

Specific actions taken by a director that may help them to establish a course of action that is reasonably likely to lead to a better outcome for the company may include properly informing themselves about the company's financial position, keeping appropriate financial records, and obtaining advice from an appropriately qualified entity.

A director who wants to rely on the safe harbour protection in proceedings bears the evidential burden of establishing that the protection applies.

Safe harbour protection is also available to a director of a company during the period a restructuring practitioner is appointed under s453A of the Corporations Act.

RG 217.73 Safe harbour protection against civil liability for insolvent trading only applies to a director who, after beginning to suspect their company is insolvent or may become insolvent, starts developing 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 to the company.

Note: Safe harbour protection applies to directors of companies registered under the Corporations Act that are registered as a charity under the *Australian Charities and Not-for-Profits Commission Act 2012* (ACNC Act). ASIC has provided guidance about the provisions of the Corporations Act that continue to apply to charities registered under the ACNC Act: See *Charities registered with the ACNC*.

RG 217.74 Consistent with the key principles set out in Section B, a director should actively monitor the solvency of the company and act in a timely manner to investigate financial difficulties. The safe harbour may protect a director, who

acts early, from potential civil liability for insolvent trading and provides the time and flexibility to consider options to potentially restructure the company.

What should a director do?

RG 217.75 A director may be able to rely on safe harbour protection if they:

(a) ensure that none of the factors that prevent safe harbour protection from operating exist (see RG 217.77);

(b) start developing one or more courses of action that are reasonably likely to result in a better outcome for the company than the immediate appointment of an administrator or liquidator (see RG 217.80);

(c) ensure that only debts directly or indirectly connected to the course or courses of action are incurred, or ensure that only debts are incurred in the ordinary course of the company's business (see RG 217.96–RG 217.100);

(d) when the course of action, or any subsequent or amended course of action, is no longer reasonably likely to lead to a better outcome for the company, consider the immediate appointment of an external administrator to the company or, when an external administrator is not to be appointed, immediately cease incurring debts (see RG 217.107);

(e) ensure the steps the director has taken to develop and implement the course or courses of action are adequately documented so that supporting evidence can be available if necessary (see RG 217.108–RG 217.110).

RG 217.76 A director wishing to rely on safe harbour protection from liability bears the onus of pointing to the course(s) of action taken leading to an improved outcome. Therefore, a director should document decisions and retain supporting evidence, to be made available later.

Example 7: Evidencing steps taken in relation to safe harbour protection

The director of XYZ Pty Ltd has taken the steps outlined at RG 217.75. To have available the appropriate evidence created at the time the action happened—to support any future claim to safe harbour protection—the director has also:

- prepared and kept an up-to-date financial forecast and accompanying analysis that helps her form a view that a course of action was reasonably likely to lead to a better outcome;
- signed a minute of her belief that the company is in safe harbour from the date she believes she satisfied all criteria;
- noted on financial forecasts that they form part of a safe harbour course of action and the date it commenced;

- created a document setting out details of the course(s) of action and included a commencement date;
- documented the steps she takes to monitor the progress of the course(s) of action; and
- for each debt incurred, maintained an internal note that they were consistent with the course(s) of action.

If XYZ ultimately goes into liquidation, and the liquidator makes a claim for compensation for insolvent trading against the director, she can make the evidence available to the liquidator to support her claim that she has a defence.

The liquidator reviews the evidence to determine whether:

- the course of action she proposed and documented was realistic, given all the circumstances;
- the financial forecasts were realistic; and
- the proposed turnaround supported by evidence.

When safe harbour protection will not be available

RG 217.77 Unless the court otherwise orders, safe harbour protection will not apply to a director if, at the time the debt was incurred, the company is failing to:

(a) pay the entitlements of its employees (including superannuation contributions payable by the company) that are due and payable; or

(b) comply with its lodgement obligations under the taxation laws (within the meaning of the *Income Tax Assessment Act 1997*),

and that failure:

(c) amounts to less than substantial compliance; or

(d) is one of two or more failures to do any or all of those matters in the last 12 months (see s588GA(4) and 588GA(6)).

RG 217.78 The safe harbour protection was not intended to apply if the company is either serially failing to meet its obligations, or if there has been a serious failure by the company to substantially meet its obligation to pay employees or meet tax reporting obligations.

Note: See the Explanatory Memorandum to the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 at paragraph 1.79.

RG 217.79 Unless the court orders otherwise, safe harbour protection also will not apply in relation to a debt if, after the debt is incurred, a controller, administrator or liquidator is appointed to the company and the director fails to comply (or substantially comply) with their obligation to provide to the:

(a) **controller**—a report about the affairs of the corporation (s429(2)(b));

(b) **administrator**—a report about the company's business, property, affairs, and financial circumstances (s438B(2)); or

(c) **liquidator**—a report about the affairs of the company (s475(1) and 497(4)), and deliver to the liquidator the books in their possession relating to the company's affairs, tell the liquidator the location of any other books of the company and otherwise be available to the liquidator and provide information about the company's business as the liquidator reasonably requires (s530A) (see also s588GA(5) and 588GA(6)).

Developing a course of action

RG 217.80 A director may develop one or more courses of action that are reasonably likely to lead to a better outcome for the company. It is important that directors have a proper basis for deciding on a course or courses of action, based on obtaining advice from an appropriately qualified entity, if appropriate, and documenting the basis for the adoption and implementation of the course of action.

RG 217.81 A course of action could include some or all of the following aspects:

(a) undertaking a business review

(b) undertaking capital raising or a debt-for-equity swap;

(c) executing a plan to compromise or restructure debt facilities;

(d) addressing operational issues that are negatively affecting the financial position of the company;

(e) implementing cost-saving initiatives;

(f) negotiating or compromising key creditor claims or building support for a restructuring plan with key creditors and stakeholders;

(g) renegotiating better supplier terms or standstill agreements while refinancing is achieved;

(h) preparing for the subsequent appointment of a registered liquidator to implement a company restructure through a form of external administration, to provide for a better return to creditors than might have been achieved had the appointment been made immediately;

(i) if eligible, preparing for the appointment of a small business restructuring practitioner (see RG 217.114); and

(j) sale of the company's non-core or even core business, in appropriate circumstances.

What is a better outcome?

RG 217.82 A better outcome for the company means an outcome that is better for the company than the immediate appointment of an administrator, or liquidator, of the company (see s588GA(7)).

RG 217.83 There are statutory factors that may (without limitation) help in establishing whether a course of action is reasonably likely to lead to a better outcome for the company—that is, whether the director seeking to rely on the safe harbour provisions is:

(a) is properly informing themselves about the company's financial position;

(b) taking appropriate steps to prevent misconduct by the company's officers and employees that could adversely affect the company's ability to pay all its debts;

(c) taking appropriate steps to ensure the company maintains appropriate financial records consistent with the size and nature of the company;

(d) obtaining advice from an appropriately qualified entity who was given sufficient information to give appropriate advice; or

(e) developing or implementing a plan for restructuring the company to improve its financial position (see s588GA(2)).

RG 217.84 A director must continue to comply with the general duties set out in Div 1 of Pt 2D.1 of the Corporations Act (s180–184) (see RG 217.111) during safe harbour. And in deciding whether a course of action is reasonably likely to lead to a better outcome for the company, the director should consider the interests of the company as a whole, including the interests of its creditors.

RG 217.85 What is a better outcome for the company will vary depending on the company's circumstances at the time the course or courses of action are developed, and the decision is made. This includes matters such as the size and financial position of the company, the industry in which the company operates and the complexity of issues affecting the company's viability.

RG 217.86 Developing one or more courses of action that are reasonably likely to lead to a better outcome for the company requires considered and meaningful analysis based on accurate, reliable information, and in most cases will include advice from an appropriately qualified entity.

RG 217.87 The director should proactively consider and continuously assess the courses of action that might be available, and evaluate whether the courses of action are reasonably likely to lead to a better outcome than the immediate appointment of an administrator or liquidator. If necessary, the directors should revise the course(s) of action if, for example, there is new information or if unexpected issues arise. In deciding, the director should consider which outcome—administration or liquidation—is most reasonable in the company's circumstances, and complete their assessment of whether the course(s) of action will be reasonably likely to lead to a better outcome for the company on that basis.

Example 8: Obtaining, updating and monitoring course(s) of action

Two directors of 123 Pty Ltd, a large proprietary company, engage a large accounting firm that provides taxation, audit, financial modelling, and corporate insolvency services.

They ask the firm to help them assess which course(s) of action would provide a better outcome for the company.

The accounting firm produces financial forecast models showing expected future profit and loss, asset and liability positions and cash flows from continuing to trade the business under the assumptions in each course of action.

The accounting firm also provides an estimate of an immediate liquidation, including expected liquidation asset sale values, debtor collections (noting contracts may not be completed) and expected liabilities, including estimates of possible damages for not completing contracts. They estimate the priority costs of a liquidation process, including the liquidator's remuneration and possible legal costs. The directors can see from the documentation and the assumptions underlying them that in a liquidation, creditors would only receive a small dividend.

In the alternative course of action outlined by the accounting firm, the company creditors would possibly be paid a substantial amount of their debts, if not the entire amounts, through continued trading in accordance with the plan.

The directors make sure they receive regular updates about the original assessment, including the expected cost of an immediate liquidation. This allows them to monitor whether the course of action is still reasonably likely to lead to a better outcome for the company.

RG 217.88 A director should monitor changing circumstances during the development and implementation of a course of action and make any necessary adjustments to ensure the course of action is still likely to lead to a better outcome for the company. This may require implementing a new course of action, or placing the company into administration or liquidation.

Example 9: Directors in conflict about solvency

Director A and Director B of JKL Pty Ltd have concerns about the solvency of the company. They are not working together on developing courses of action.

Director B is hoping to rely on safe harbour. Director A refuses to meet with Director B and the advisers she has engaged.

Director B has written to Director A, trying to persuade him that no further debt should be incurred while they explore the courses of action that will result in a better outcome for the company.

Director B requests a meeting to discuss whether further debts should be incurred and to explore the courses of action she considers will result in a

better outcome. Director A declines the meeting invitation and counters with a proposal to purchase Director B's shares.

Director B is concerned about liability for trading while insolvent and Director A's reluctance to work through the steps required to enliven safe harbour protection.

Director B seeks advice from an appropriately qualified entity about what actions she could take to protect herself from any claim for insolvent trading given the lack of engagement by Director A.

Director B is given advice, including to put Director A on written notice that the company should not incur any further debt, and that she could consider resigning as a director or apply to the court to wind up the company.

Meaning of 'reasonably likely'

RG 217.89 A director may consider and discard different courses of action as they see appropriate.

RG 217.90 A course of action is reasonably likely to lead to a better outcome for the company if the course of action is based on relevant and accurate information, is developed using good judgement, and is objectively reasonable in the company's circumstances.

RG 217.91 Paragraph 1.52 of the Explanatory Memorandum for the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill emphasises that:

> The phrase "reasonably likely" does not require a better than 50 per cent chance of a better outcome than the immediate appointment of an administrator or liquidator. "Reasonably likely" here requires that there is a chance of achieving a better outcome that is not fanciful or remote, but is "fair", "sufficient" or "worth noting".

RG 217.92 The course of action that is reasonably likely to lead to a better outcome for the company will vary depending on the company and its circumstances at the time the decision is made.

RG 217.93 A director should continue to monitor the course of action being implemented, make adjustments, or change it, if necessary, to ensure the course of action being followed remains reasonably likely to lead to a better outcome for the company.

RG 217.94 If the course(s) of action (including any amendments) do not continue to satisfy the 'reasonably likely' test, safe harbour protection is unlikely to continue to apply. The directors should consider whether to immediately appoint an external administrator, and cease to incur new debt.

RG 217.95 For examples of courses of action that may or may not be reasonably likely to lead to a better outcome, see Table 1.

Table 1: Practical examples of courses of actions and their likely outcomes

Actions reasonably likely to lead to a better outcome	Actions not reasonably likely to lead to a better outcome
• Undertaking a restructure • Undertaking the sale of assets • Ceasing the incurrence of debts • Restructuring of debt facilities • Negotiating key creditor claims • Reducing expenses • Appointing an experienced director or directors • Undertaking a business review	• Ignoring expert advice • Significantly and unsustainably discounting stock • Continuing to trade as usual • Drawing down on bank facilities, knowing that the funds drawn cannot be repaid in full • Ordering more stock from creditors, knowing that the debt cannot be repaid in full

Note: The above examples are extracted from the Explanatory Memorandum to the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 and Treasury's *Review of the insolvent trading safe harbour: Final report*, March 2022.

What debts are included in safe harbour protection?

RG 217.96 Safe harbour only excludes a director from liability for insolvent trading for the debts that are incurred—directly or indirectly—in connection with developing and implementing a course or courses of action that are reasonably likely to lead to a better outcome than the immediate appointment of an administrator or liquidator. This could include debts incurred in the ordinary course of the company's business (where the course of action involves ongoing trading) and debts specifically incurred to develop and implement that course or courses of action (e.g. obtaining advice from an appropriately qualified entity).

RG 217.97 Protection is only available from the time that it can be shown the director starts developing 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.

RG 217.98 Safe harbour protection is not available if, at the time the debt is incurred, the safe harbour preconditions are not met.

RG 217.99 Safe harbour protection is only available for debts incurred during a reasonable period from when;

(a) the director starts to develop a course or courses of action that are likely to lead to a better outcome for the company; and

(b) that plan is implemented.

Note: See RG 217.107 for when the safe harbour protection ends.

RG 217.100 Determining what is a reasonable period will depend on the circumstances, including the size of the company and the complexity of its business and operations.

Obtain appropriate advice from an appropriately qualified entity

RG 217.101 A director should consider obtaining appropriate advice from an appropriately qualified entity that is suitably qualified, adequately insured, competent and reliable, about the financial position of the company, how the financial difficulties can be addressed and whether the course or courses of action are reasonably likely to lead to a better outcome for the company (see s588GA(2)(d)). Failure to obtain such advice may impact the ability of the director to rely on safe harbour protections.

RG 217.102 Before obtaining advice, a director should provide their advising entity with complete, current and relevant information. Any cash flow projections or other financial details supplied by the director should be objectively reasonable, to ensure that appropriate advice is received.

RG 217.103 Whether the advising entity or entities are appropriately qualified will depend on the circumstances of the company including the strategic, financial and operational issues contributing to the company's financial difficulties. Factors to consider may include:

(a) the nature, size and complexity of the company's business;

(b) the qualifications and professional memberships (including whether they are a member of good standing of relevant professional bodies and associations) of those providing the advice;

(c) the entity's relevant industry experience;

(d) the entity's access to resources for undertaking the assignment effectively and efficiently; and

(e) whether the appropriately qualified entity maintains adequate professional indemnity insurance for the type of advice being sought.

RG 217.104 The director should consider whether it is necessary to engage multiple appropriately qualified entities who together have the necessary accounting, legal, financial and industry-specific knowledge and expertise to review and advise on:

(a) the company's current position;

(b) the course or courses of action to address the company's difficulties; and

(c) whether the course or courses of action are reasonably likely to lead to a better outcome for the company.

RG 217.105 An appropriately qualified entity may be one of those professional advisers discussed at RG 217.53–RG 217.59, or firms including those professional advisers. The individuals or firm should have the expertise to provide advice on whether the course or courses of action developed are reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator or liquidator.

RG 217.106 The director is still responsible for deciding which course of action to pursue, including considering any advice obtained.

When does safe harbour protection end?

RG 217.107 Safe harbour protection ends when the earliest of any of the following occurs:

(a) the director fails to take up the course(s) of action within a reasonable period;

(b) the director ceases to take any course of action;

(c) the course or courses of action cease to be reasonably likely to lead to a better outcome for the company; or

(d) an administrator or liquidator is appointed to the company (see s588GA(1)(b)).

Note: For small business restructuring, please refer to RG 217.114.

A director’s evidentiary burden to establish safe harbour protection

RG 217.108 A director who wishes to rely on the safe harbour protection in relation to a debt bears the onus of pointing to evidence that suggests a reasonable possibility that the following scenarios exists (see: s588GA(1) and (3)):

(a) at a particular time after the director starts to suspect the company was or may become insolvent, the director started to develop one or more courses of action that are reasonably likely to lead to a better outcome for the company; and

(b) that the debt was incurred directly or indirectly in connection with the course or courses of action or in the ordinary course of the company’s business during the period starting at the time referred to in RG 217.99 and ending at the earliest of:

(i) the end of a reasonable period for the director to take any course of action developed;

(ii) the time the director ceases to take any course of action developed;

(iii) the time any course of action ceases to be reasonably likely to lead to a better outcome for the company; or

(iv) the appointment of an administrator or liquidator of the company.

RG 217.109 The evidence required to establish these factors will need to consist of more than a mere statement that the company developed or undertook a course of action that was reasonably likely to lead to a better outcome for the company. Table 3 sets out some of the specific factors we will take into account in assessing whether a director can rely on safe harbour protection, and the evidentiary material we will look for.

RG 217.110 The Corporations Act sets out, at s588GB, when a director will not be able to rely on books or other information as evidence to establish safe harbour protection in relation to a debt if they have failed to:

(a) permit inspection or delivery of books of the company; and/or

(b) give information about the company.

Example 10: Safe harbour denied for insufficient records

The director of XYZ Pty Ltd (in liquidation) delivers some of the company's books and records to the liquidator, but no records to support transactions between the director and XYZ, and she refuses to provide the liquidator with access to inspect those records.

The director also provides the liquidator with a Report on Company Activities and Property (ROCAP) but without completing all the required information, leaving some sections marked as 'unknown'.

The liquidator determines that the director traded XYZ while it was insolvent, and makes a demand on her to pay compensation to XYZ for the amount of debt incurred after the point in time when XYZ became insolvent.

The director then claims safe harbour protection, which is denied because she did not give the liquidator the books and records related to her dealings with the company, nor provide all the information about the company, as required in a ROCAP.

Impact on other director's duties

RG 217.111 A director must continue to comply with the general duties set out in Div 1 of Pt 2D.1 of the Corporations Act (see: s180–184) while they develop a course or courses of action. They must:

(a) act with due care and diligence;

(b) act in good faith in the best interests of the company and for a proper purpose;

(c) not use their position as director to gain an advantage, gain an advantage for someone else, or cause detriment to the company; and

(d) not improperly use information obtained in their capacity as a director to gain an advantage for them, or for someone else, or cause detriment to the company.

RG 217.112 A listed company must also continue to comply with its continuous disclosure obligation.

RG 217.113 Paragraph 1.15 of the Explanatory Memorandum for the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill which introduced s588GA into the Corporations Act specifically stated that the:

> Safe harbour does not affect any obligation of a company (or any of its officers) to comply with any continuous disclosure obligations under the law, including section 674 of the Act, or any continuous disclosure rules imposed by a market operator which apply.

Note: See also ASX, Guidance Note 8 *Continuous disclosure: Listing rules 3.1–3.1B* (GN 8).

Safe harbour protection—small business restructuring

RG 217.114 A director may have safe harbour protection and be excluded from personal liability for insolvent trading under s588GAAB if:

(a) a restructuring practitioner has been appointed to a company under s453B of the Corporations Act and the restructuring of the company has not ended under reg 5.3B.02 of the Corporations Regulations; and

(b) the debt is incurred in the ordinary course of business, with the consent of the restructuring practitioner or by order of the court.

RG 217.115 A director who wishes to rely on safe harbour protection for debts incurred during the period a restructuring practitioner was appointed to the company bears the onus of pointing to evidence in relation to the matter.

RG 217.116 A director must continue to comply with the general duties set out in Div 1 of Pt 2D.1 of the Corporations Act (see: s180–184) during the period the restructuring practitioner is appointed.

D ASIC's approach to insolvent trading and safe harbour

Key points

To assess whether a director has breached their duty to prevent insolvent trading or whether they may rely on safe harbour protection and be excluded from liability for insolvent trading, we will look at a number of factors, including the extent to which a director has followed the key principles set out in Section B and the guidance in Section C.

This section describes some of these factors in detail: see Table 2 and Table 3. We note these are not exhaustive lists, and that a court may consider other factors.

Assessing whether a director has breached their duty

RG 217.117 Whether a director has breached their duty to prevent insolvent trading or can rely on safe harbour protection and be excluded from liability, involves looking at the specific facts of each case. In assessing this in a particular case, we will take into account the key principles set out in Section B and the guidance in Section C, and consider the extent to which a director has followed them.

RG 217.118 Table 2 sets out some of the specific factors we will consider in assessing whether we think there has been insolvent trading, and the types of evidentiary material we require. Table 3 sets out some of the specific factors we will consider in assessing whether we think a director can rely on safe harbour protection, and examples of the evidentiary material we require.

RG 217.119 Both the liquidator of a company, or a creditor of the company with the liquidator's consent, can bring proceedings against a director to recover compensation for loss resulting from insolvent trading. These parties may consider factors other than those set out in Table 2 when assessing whether to bring proceedings.

RG 217.120 Any claim against a director for insolvent trading, whether brought by us, a liquidator or a creditor, must be determined by the court. A court may consider some or all of the key principles in Section B and the guidance in Section C, or other matters, when determining whether a director has breached their duty to prevent insolvent trading.

Table 2: Factors ASIC will take into account in assessing whether a director has breached their duty to prevent insolvent trading

Key principle	Factors we take into account	Evidentiary method
Key principle 1: Actively monitor company solvency	The information the director had at their disposal to form the view that the company was solvent, and its accuracy	We will look at the systems and processes that the director has put in place and used to allow them to actively monitor the solvency of the company, including the documents that were available to the director to obtain and review. For example, we will look at whether the following documents were available: • a bank reconciliation prepared on a regular basis that shows what cash at bank is available to pay debts; • a list of debtors and creditors, showing the age and size of all debts and amounts owing; • regular profit and loss, balance sheet and cash flow statements; and • a report of any arrangements or negotiations with creditors whose debts are outside normal trading terms.
	Whether the director monitored the financial affairs of the company and made sufficient inquiries into its financial affairs on a regular basis	Of the information that was available to the director, we will look at what the director actually obtained and reviewed, including: • the available financial information; • information about whether debts owed to the company can be collected and are being collected; • information about when debts are due to be paid and whether they are being paid on time; • information presented to directors about the financial operations and position of the company; • actual trading performance and, by comparison, projections; and • the assumptions on which cash-flow projections are based (and whether these were updated, as necessary).
	Whether the director took part in the management of the company at the time the debt was incurred	If the director did not take part in the management of the company at the time the debt was incurred, we will look at: • the reasons given by the director to explain the absence; and • whether these reasons are adequate to excuse the director (e.g. because the director was ill).

Key principle	Factors we take into account	Evidentiary method
Key principle 1: Actively monitor company solvency (cont.)	Where the director relied on a third party to provide information about the solvency of the company, whether the director made diligent and timely inquiries of them	We will look at whether: • the person relied on was, in fact, responsible for providing information about the company's solvency to the director; • the director took reasonable steps to establish that the person was suitably qualified to provide such information about the company's solvency; • the director provided sufficient information to enable the third party to adequately and properly perform their task; • the director trusted the third party to provide the information; and • the director asked sufficient questions to understand the financial effect of the advice they received and be satisfied that the information on which the advice was based was accurate and complete.
Key principle 2: Investigate financial difficulties	Whether there were indicators of potential insolvency that a reasonable person would have taken into account in determining whether the company was insolvent	The appendix sets out some of the common indicators of potential insolvency. We will look at whether any of these, or other indicators not listed, were present.
	Whether the director took positive steps to confirm the company's financial position and realistically assess the options available to deal with the company's financial difficulties	We will look at: • what information was available to the director, and the steps they took and inquiries they made, to investigate and confirm the company's financial position and assess the options to deal with the company's financial difficulties; • whether the director considered the company's solvency before incurring new debts; and • what evidence there is that the director acted quickly after becoming aware of potential indicators of insolvency.

Key principle	Factors we take into account	Evidentiary method
Key principle 3: Obtain advice from professional advisers where necessary	Whether the director sought advice immediately on identifying concerns about the company's viability	We will look at: • whether the director obtained appropriate advice, including external professional advice if necessary, from a suitably qualified person as soon as the concerns about the company's financial viability were identified; • whether the director gave full, complete, accurate and up-to-date information to the adviser (or ensured that such information was given to the adviser by the company) to enable the adviser to provide appropriate and competent advice; • what steps the director took to consider the effect and reasonableness of the advice they received; and • what steps the director took to act on the advice.
Key principle 4: Act in a timely manner	If the director knew, or had reasonable grounds to suspect, that the company was not able to meet its debts, whether the director took active, timely and genuine steps to prevent the debt being incurred	We will examine a range of company material including: • board minutes and correspondence indicating whether the director expressed concern at incurring further debts; and • internal documents, such as working papers from the in-house or external accountant (including financial statements and cash flow forecasts), that indicate whether the company has sufficient cash flow to pay its debts as and when they become due and payable.

Table 3: Factors ASIC will consider when assessing whether a director may establish safe harbour protection

Factors we take into account	Evidentiary method
If the director started to suspect the company may become or be insolvent, whether the director developed an alternative course of action reasonably likely to result in a better outcome for the company than the immediate appointment of an administrator or liquidator	We will look for: • a documented and well-developed plan for an alternative course of action setting out the director's rationale as to why the alternative course of action is reasonably likely to provide a better outcome for the company; • evidence of whether the director continued to assess the merits of the alternative course of action on an ongoing basis; • materials that verify that the alternative course of action was in fact implemented by the director as planned; • evidence of whether the director has properly informed themselves as to the company's financial position, taken steps to prevent misconduct by officers and employees, and maintained appropriate financial records.
Whether the director obtained advice from an appropriately qualified entity who was given sufficient information to give appropriate advice	We will look at: • any advice received from advisers appointed to the company; • whether the adviser was appropriately qualified to provide the advice; • the accuracy and reasonableness of the information, assumptions and instructions provided to the adviser; • evidence of whether the professional advice was followed by the director.
Whether debts incurred by the company were incurred directly or indirectly in connection with the alternative course of action	We will look at the company's financial and other internal records to confirm the nature of the debts incurred during the time the alternative course of action was being implemented.
Whether any of the factors preventing safe harbour protection are present	We will look at the company's records to confirm whether during the time the company was implementing the alternative course of action: • employee entitlements were being paid when they fell due; and • the company gave all returns, notices, statements, applications or other documents as required by taxation laws. We will also seek verification from the company's receiver, administrator and/or liquidator that the director complied with his or her obligations to provide assistance to the receiver, administrator and/or liquidators after their appointment.

Appendix: Indicators of potential insolvency

RG 217.121 Table 4 sets out some of the factors that a reasonable person would take into account when determining whether a company is insolvent. Should the financial position of a company display one or more of these indicators of potential insolvency, a director should investigate the financial position of the company and consider obtaining appropriate advice about the financial position of the company and how any financial difficulties can be addressed.

Note: The list contained in this table is not intended to be exhaustive. There may be other factors that would indicate to a reasonable person that a company may be insolvent.

Table 4: Factors to take into account when considering whether a company is insolvent

Indicators of potential insolvency
• The company has a history of continuing trading losses. • The company is experiencing cash flow difficulties. • The company is experiencing difficulties selling its stock, or collecting debts owed to it. • The sum of realisable current assets (cash, inventory, debtors) is less than the sum of current liabilities (trade creditors, tax debts including superannuation payable, other short term liabilities) i.e. liquidity ratio is less than 1. • Creditors are not being paid on agreed trading terms and are either placing the company on cash-on-delivery terms, or requiring special payments on existing debts before they will supply further goods and services. • The company is not paying its Commonwealth and state taxes when due (e.g. pay-as-you-go (PAYG)) instalments are outstanding, goods and services tax (GST) is payable, or superannuation guarantee contributions are payable). • Legal action is being threatened or has commenced against the company, or judgements are entered against the company, in relation to outstanding debts, such as solicitor's letters, demands, court summonses, judgements or warrants against the company or directors. • The company has taken out special arrangements with selected creditors or seeking alternative credit arrangements, such as high interest loans from non-traditional lenders. • The company has reached the limits of its funding facilities and is unable to obtain appropriate further finance to fund operations—for example, through: – negotiating a new limit with its current financier, or – refinancing or raising money from another party. • There is no further support available from related entities (e.g. shareholders or holding company—if any). • The company is unable to produce accurate financial information on a timely basis that shows the company's trading performance (profit and loss) and financial position (balance sheet) or that can be used to prepare reliable financial forecasts. • Company directors and/or key personnel have resigned, citing concerns about the financial position of the company or its ability to produce accurate financial information on the company's affairs. • The company auditor has qualified their audit opinion, on the grounds of uncertainty that the company can continue as a going concern. • The company has defaulted, or is likely to default, on its agreements with its financier. • One or more of the company's financiers has taken action to recover debt, including but not limited to the appointment of an investigating accountant to assess the lender's exposure.

Indicators of potential insolvency
• Employees, or the company's bookkeeper, accountant or financial controller, have raised concerns about the company's ability to meet, and continue to meet, its financial obligations. • It is not certain that there are assets that can be sold in a relatively short period of time to provide funds to help meet debts owed, without affecting the company's ongoing ability to continue to trade profitably. • Inability to secure relevant and appropriate insurance coverage for the company. • Loss of key customers or contracts that cannot be replaced.

Key terms

Term	Meaning in this document
ACNC Act	*Australian Charities and Not-for-Profits Commission Act 2012*
ASIC	Australian Securities and Investments Commission
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	*Corporations Regulations 2001*
creditor	A person who is owed money, goods or other consideration
course(s) of action	In the context of s588GA, this refers to the steps or measures taken by a director to prevent the company from incurring debts while it is insolvent or which cause it to become insolvent. This includes actively monitoring the company's solvency, investigating financial difficulties, obtaining advice from professional advisers, and acting in a timely manner.
director	A natural person appointed as a director of a company who is then responsible for directing and managing the affairs of a company, or a de facto or shadow director Note: See the definition in s9.
external administrator	A defined term for a registered liquidator formally appointed to control the affairs of a company and its property. This includes a provisional liquidator, liquidator, voluntary administrator, administrator of a deed of company arrangement, restructuring practitioner for a company and a restructuring practitioner of a restructuring plan. It does not include a controller, managing controller, receiver, receiver and manager, or scheme administrator
financial records	Written records that correctly record and explain a company's transactions and financial position and performance, and enable true and fair financial statements to be prepared and audited, including: • invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; • documents of prime entry; and • working documents that explain how the financial statements have been prepared and adjustments made in preparing the financial statements Note: See also the definition of 'financial records' in s9 and the obligation to keep financial records in s286. Section 286 requires that financial records are kept for seven years.

Term	Meaning in this document
holding company	In relation to a body corporate, means a body corporate of which the first body corporate is a subsidiary.
insolvent person	A person (including a company) is insolvent if they are not solvent. That is, they are unable to pay all their debts as and when they for payment Note: See the definition in s95A.
professional body	An organisation that represents the interests of individuals engaged in a specific profession. These organisations often set standards for professional practice, provide certification and accreditation, offer continuing education and training, and advocate for the profession's interests. They may also establish ethical guidelines and disciplinary procedures to ensure that members adhere to high standards of conduct and competence. Examples of professional bodies include accounting associations and legal societies
registered liquidator	A person registered by ASIC under s20-30 of Sch 2 to the Corporations Act
s588G (for example)	A section of the Corporations Act (in this example, numbered 588G)
SME	Small-to-medium enterprise

Related information

Headnotes

creditors, directors, duty to prevent insolvent trading, insolvent trading, registered liquidators

Information sheets

INFO 42 *Insolvency for directors*

Consultation papers

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

Reports

REP 803 *Response to submissions on CP 372 Guidance on insolvent trading and safe harbour provisions*

Legislation

Australian Charities and Not-for-Profits Commission Act 2012

Corporations Act 2001, Pt 1.2 Div 6, Pt 2D.1 Div 1; s9, 95A, 180–184, 206C, 429, 438B, 453A, 453B, 475, 497, 530A, 588E, 588G, 588GA, 588GAAB, 588H, 588J, 588R–588T, 588V, 588WA, 1317G, 1317H, 1317S, 1318

Corporations Regulations 2001, reg 5.3B.02

Explanatory Memorandum to the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017, paragraphs 1.15, 1.52, 1.79

Cases

ASIC v Plymin (No. 1) (2003) 175 FLR 124

Commonwealth Bank of Australia v Friedrich (1991) 5 ACSR 115

Copeland v Murace [2023] FCA 14

Devine v Liu; Devine v Ho [2018] NSWSC 1453

Edwards v ASIC (2009) 235 FLR 207

Elliott v ASIC (2004) 185 FLR 245

Giovanni Maurizio Carrello as Liquidator of Perrinepod Pty Ltd (In Liq) v Perrine Architecture Pty Ltd [2016] WASC 145

Group Four Industries Pty Ltd v Brosnan (1992) 59 SASR 222

Group Four Industries Pty Ltd v Brosnan (1991) 56 SASR 234

Hall v Poolman (2007) 65 ACSR 123

Hymix Concrete Pty Ltd v Garrity (1977) 13 ALR 321

Lewis v Doran (2005) 219 ALR 555

Manpac Industries Pty Ltd v Ceccattini (2002) 20 ACLC 1304

McLellan (in his capacity as liquidator of The Stake Man Pty Ltd) (ACN 006 602 919) and Another v Carroll (2009) 76 ACSR 67

Metropolitan Fire Systems Pty Ltd v Miller (1997) 23 ACSR 699

Morley v Statewide Tobacco Services Ltd [1993] 1 VR 423

Re Balmz Pty Ltd (in liq) [2020] VSC 652

Sandell v Porter (1966) 115 CLR 666

Shapowloff v Dunn (1981) 148 CLR 72

Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation (2001) 53 NSWLR 213

Tourprint International Pty Ltd v Bott (1999) 32 ACSR 201

Williams (as liquidator of Scholz Motor Group Pty Ltd (in liq)) v Scholz (2008) QCA 94

Other publications

Charities registered with the ACNC

GN 8 *Continuous disclosure: Listing rules 3.1–3.1B*

Treasury, *Review of the insolvent trading safe harbour: Final report*