Law Council
OF AUSTRALIA

Business Law Section

31 October 2023

RG217 Consultation Feedback
Companies and Small Business
Australian Securities and Investments Commission
GPO Box 9827
BRISBANE QLD 4001

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

Dear Sir or Madam

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

This submission concerning *CP 372 Guidance on insolvent trading safe harbour provisions: Update to RG 217* is made by the Insolvency and Restructuring Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

The Committee is made up of experienced senior legal practitioners working in the insolvency and restructuring market.

This response deals with Part B2 of Consultation Paper 372, and only addresses questions directed to that part.

As a broad observation, it seems to us that ASIC's guidance to directors on insolvent trading (Part B1) does not require further amendment.

Question	Feedback
B2 Q1: Do you think the scope and nature of the safe harbour protection is adequately explained in draft updated RG 217 at RG 217.24 – RG 217.27 and Part C? If not, what further information should be provided?	We consider the wording clear, precise and legally correct. However, consideration might be given to clarifying the wording in the preamble of paragraph 217.25(c)—the attempt to paraphrase the legislative language is a little confusing and could be assisted by inserting the words "period commencing at the" before the word "time", and then replacing the word "ends" with "ending".

Telephone [redacted] • *Email* [redacted]
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale St, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Question	Feedback
B2 Q2: Is the proposed guidance in draft updated RG 217 at RG 217.61, on steps a director may take to establish safe harbour protection, helpful? If not, explain how we could improve the guidance.	The guidance is helpful. However, we suggest consideration be given to the following two slight amendments to RG 217.61 (f): • inserting after the words in the first line "course of action" these additional words: "or any subsequent or amended course of action (see RG 217.73 – RG217.74)"; and • at the conclusion of the paragraph inserting the word "or the immediate cessation of incurrence of debts, where an external administrator is not to be appointed".
B2 Q3: Is the proposed guidance in draft updated RG 217 at RG 217.65 – RG 217.77, on when a course of action may be reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator or liquidator, helpful? If not, explain how we could improve the guidance.	We suggest the following changes in order to better explain the rationale for the intrusion of creditors' interests in any safe harbour process, so as to better reflect the state of the law in Australia: • RG 217.68 be amended so that: (a) it would commence with these words: "A director owes statutory and fiduciary duties to a company (see RG 217.93). In discharging those duties during safe harbour and …" (b) and conclude with these words: "—both current and future". • The following two new paragraphs be inserted between RG 217.68 and RG 217.69: "Although the circumstances in which directors invoke safe harbour protection will differ, where the company is nearing or approaching insolvency, the interests of creditors will potentially assume greater significance than the interests of its shareholders

Question	Feedback
	though the interests of the company are likely to be broader than those of merely its creditors. In our view RG217.71 is worded in an unnecessarily binary manner. There does not seem to us to be a requirement for the director to make a comparison to just one of the liquidation or administration outcomes; rather, the course of action must be reasonably likely to lead to a better outcome than either the appointment of a liquidator or administrator. Each of those prospects may involve a number of different potential outcomes for the company and its stakeholders and restricting the consideration to one particular alternative outcome is unnecessarily prescriptive. Consideration should be given to clarifying RG217.73 and 217.77 to ensure it is clear that if a new or alternative course of action does not continue to satisfy the "reasonably likely" test, the consequence is that safe harbour protection will no longer apply. That may not necessitate the immediate appointment of an external administrator, so long as no new debt is incurred (for example, the directors may be justified in ceasing to trade but waiting for a particular outcome before an appointment). The first sentence of RG217.75 might benefit from rewording to make it clear that satisfying the requisite information, judgment and reasonability threshold is not itself sufficient. Perhaps it would read better as "A course of action will usually not be reasonably likely to lead to a better outcome unless the course of action is based on …"

Question	Feedback
B2 Q4: Is the proposed guidance in draft updated RG 217 at RG 217.83–RG 217.88, on who may be an appropriate adviser, helpful? If not, explain how we could improve the guidance.	Yes, we agree that the guidance is appropriate and helpful. Further, it may be worth reconsidering the use of the phrase "reasonable period" in two places in RG217.82. In our view the relevant period is binary and is determined by the legislative language. The period commences when the person starts to develop one or more courses of action which satisfy the threshold requirements.
B2 Q5: Is the proposed guidance in draft updated RG 217 at RG 217.90–RG 217.92, on the evidentiary onus on the director who wishes to rely on safe harbour protection, helpful? If not, explain how we could improve the guidance.	Yes, we agree that the guidance is appropriate and helpful.
B2 Q6: Is the information in Table 2 of draft updated RG 217, about evidentiary material we will take into account when assessing whether a director can establish safe harbour protection, helpful? If not, explain how it could be improved.	Yes, we agree that the guidance is appropriate and helpful.
B2 Q7: Is further guidance required? If so, what further guidance should we provide?	As it pertains to our response to B2 Q3, we suggest that the following cases be added to the Related Information at the conclusion of the Regulatory Guide: • *Walker v Wimborne* (1976) 137 CLR 1 • *Kinsela v Russell Kinsela Pty Ltd (in liq)* 4 NSWLR 722; 4 ACLC 215 • *Sycotex Pty Ltd v Baseler* [1994] FCA 332; 51 FCR 425

Question	Feedback
	Though not the subject of a specific consultation question, the Committee notes the references in RG217.94 and 217.95 to continuous disclosure obligations. It may be useful to note here (perhaps alongside the reference to ASX Guidance Note 8) that ASX considers the fact that one or more directors may consider they have access to a safe harbour defence does not in and of itself require disclosure, though the relevant factors contributing to the company's financial position may well be disclosable.
B2 Q8: Should ASIC take further steps to raise awareness of the insolvent trading and safe harbour provisions? If so, explain how we could raise awareness of the provisions, particularly for directors of small-to-medium sized enterprises.	In our experience, directors are often aware of insolvent trading risks, but are not as familiar with the safe harbour regime. The proposed amendments to the Regulatory Guide are to be welcomed.

The Committee would be pleased to discuss any aspect of this submission.

Please contact the chair of the Committee, [redacted], on [redacted] if you would like to do so.

Yours faithfully

[redacted]

Philip Argy
Chairman
Business Law Section,
Law Council of Australia