



Association of Independent Insolvency Practitioners

By the practitioner, For the practitioner

25 October 2023

RG 217 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 Sirs

In response to the consultation paper 372 issued September 2023 by ASIC, the following observations are made by AIP:

1. The publication should guide directors and their professional advisors about the need to prevent insolvent trading generally rather than just the safe harbour provisions. There appears to be a disproportionate focus on safe harbour provisions, which are not always applicable to micro businesses and small to medium businesses.
2. A reference to director's statutory duties (s180 and s181) of the *Corporations Act 2001* ("the Act") and their fiduciary duties more generally ought be part of the guide.
3. There is no reference to the presumption of insolvency in s588E(4). As you will be aware that section provides that where it is proved that a director has failed to ensure that the company has kept financial records as required by s286 (1) of the Act or failed to retain financial records as required by s286 (2) of the Act then insolvency is presumed.

A lack of books and records has always been a significant issue for external administrators in investigating the affairs of a company including potential claims for insolvent trading.

This is becoming an increasingly difficult area of practice having regard to financial records being maintained "in the cloud" and the service providers not permitting access to financial records due to unpaid invoices. This problem is more acute when the records are held by a provider outside the Australian jurisdiction.

*The AIP represents more than 200 liquidators and bankruptcy trustees across Australia.
More information about the AIP can be found at www.aiip.org.au*

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The failure to keep adequate financial records and the consequences of that failure should be emphasised. Cases like *In the matter of SSET Construction Pty Ltd In liquidation – Sims v Khattar* [2010] NSWSC 102 and more recently *Earth Civil Australia Pty Ltd, RCG CBD Pty Ltd, Diamondwish Pty Ltd and Rackforce Pty Ltd, Re (All in liquidation)* [2021] NSWSC 966, could be referenced.

4. There is no reference to the director penalty regime established under the *Tax Administration Act 1953* which is a clear warning sign to directors of a company's inability to meet its debts as and when they fall due. Given that the ATO has publicly stated that some 18,500 DPN notices were issued in 2022/2023, self-evidently it is a widespread regulatory issue.
5. While ASIC's guide to insolvent trading is available on their website, directors have little reason to research insolvent trading, until it is often too late. ASIC may raise awareness on insolvent trading through the distribution of a short guide to all directors of newly registered companies, and again at the time of issuing the annual fee. This will provide directors with ongoing education and awareness on insolvent trading, and may lead to better options.
6. The length of the Regulatory Guide could be reduced from the present 36 pages to say 20.

We thank ASIC for the opportunity to make comments on the consultation paper and look forward to further opportunities to provide input into this process.

If you wish to discuss these points further, please contact [REDACTED] ([REDACTED]) or [REDACTED] ([REDACTED]).

Yours faithfully

[REDACTED]

Suelen McCallum
Director/Secretary