ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

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 Sir/Madam

Guidance on insolvent trading safe harbour provisions: Update to RG217

Thankyou for the opportunity to provide a submission in response to the Update to RG217 consultation paper (**Consultation Paper**).

As the professional body representing around 85% of Australia's insolvency, turnaround and restructuring professionals, the Australian Insolvency, Turnaround and Restructuring Association (**ARITA**) is Australia's largest representative body of insolvency practitioners. More about ARITA is provided at the end of this letter.

We have responded to the questions raised in the Consultation Paper and these responses are attached to this letter.

We are supportive of the comments made in the *Review of the insolvent trading safe harbour – Final report* regarding the lack of awareness and understanding of a director's duty to prevent insolvent trading. We agree that RG 217 needs to be updated "to refer to the insolvent trading prohibition, and the safe harbour provisions, together with general guidance on the operation of the relevant provisions". We also strongly agree that the is a differing level of awareness between directors of large and small companies.

Our general comments focus on the useability of the information drafted. Although the information provided in the draft Regulatory Guide RG 217 is technically correct, it is not a document that would be easily used and understood by the average director, particularly directors of small companies. The information is complex, wordy and difficult to process, which is reflective of the wording in the legislation.

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A plain English explanation of a director's duty to prevent insolvent trading and the safe harbour provisions needs to be made available to directors so they can actually understand their obligations.

We note that ASIC provides Information Sheet 42 (**INFO 42**) Insolvency for directors, on its website, and this information is simpler and easier to understand. However, INFO 42 does not seem to include a discussion of safe harbour. The only reference to safe harbour seems to be in the topic "What to do if your company is insolvent", where it says "see safe harbour" but there is no link and no readily apparent place to refer to for further information. We recommend that INFO 42 is also updated. It would also be helpful to include a link to INFO 42 in RG 217, and vis-a-versa.

Other general improvements that could be made include:

- It would also be useful for terms used in the RG to be defined by hyperlink or appear when a term is hovered over. This may assist directors with understanding complex terminology.
- A meaningful explanation of what is:
    - proper financial records
    - a relevant professional body or association, and
    - any other terms that may be readily apparent to a professional working in insolvency but not understood outside the profession or the regulator.

Should you wish to discuss any aspect of our submission, please contact [redacted], ARITA's Policy & Education Director, on [redacted].

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have close to 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

We are a not-for-profit, incorporated professional association run for the benefit of our members.

Around 82% of Registered Liquidators and 86% of Registered Trustees choose to be ARITA members.

ARITA's ambition is to lead and support appropriate and efficient means to expertly manage financial recovery.

We achieve this by providing innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large. In 2022, ARITA delivered 82 professional development sessions to over 5,000 attendees.

ARITA promotes best practice and provides a forum for debate on key issues facing the profession.

We also engage in thought leadership and public policy advocacy underpinned by our members' knowledge and experience. We represented the profession at 14 inquiries, hearings and public policy consultations during 2022.

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1 Consultation questions

1.1 Proposal B1

We seek feedback on whether the existing guidance in RG 217 for directors about their duty to prevent insolvent trading remains relevant and adequate.

Question	Feedback
B1Q1 Do you think the existing guidance about the scope and nature of the director's duty to prevent insolvent trading remains relevant and adequate? If not, what further guidance should we provide?	The information provided is technically correct, but complex and difficult to understand. RG 217 needs to be supported with plain English guidance for directors. RG 217 is not suitable for most directors in its current form.
B1Q2 Do you think the key principles set out in Section B of the existing guidance (unchanged in draft updated RG 217) are helpful? If not, explain how we could improve them or what further guidance we could provide.	Yes, the key principles are useful, and the examples are helpful.
B1Q3 Are the indicators of potential insolvency set out in Table 2 of the existing guidance (unchanged in Table 3 of draft updated RG 217) sufficient? If not, what further guidance should we provide?	Yes, the indicators of potential insolvency are useful. Consideration could be given to including indicators such as: • no further support available from related entities (eg. shareholders or holding company). • Action being taken by the financier, such as appointment of an investigating accountant to assess the lender's exposure.
B1Q4 Do you consider that the existing guidance helps directors of both small-to-medium enterprises (SMEs) and large or listed companies? If not, what additional guidance would you suggest we provide?	See answer to question B1Q1 and the discussion in our covering letter.
B1Q5 Do you think SME directors need separate guidance? If so, what should that guidance be?	See answer to question B1Q1 and the discussion in our covering letter.

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Question	Feedback
B1Q6 Do you consider including guidance on the liability of a holding company is necessary and, if so, is the information provided sufficient? If not, what additional guidance would you suggest we provide?	This information is necessary to provide a complete view in a technical document such as RG 217. However, it would not be applicable to, or understood by, many directors, particularly those of small companies.

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1.2 Proposal B2

We propose to provide additional guidance on:

a) the nature and scope of the safe harbour provisions and when a director may be able to rely on the safe harbour to protect them from liability for insolvent trading;
b) the steps a director might consider if seeking to rely on safe harbour protection against a claim for alleged breach of duty to prevent insolvent trading;
c) 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;
d) who may be an appropriate adviser to help directors develop and assess whether a course of action is reasonably likely to lead to a better outcome for the company;
e) the evidentiary onus on the director who wishes to rely on safe harbour protection; and
f) some of the factors we will take into account when assessing whether a director may establish safe harbour protection against liability for insolvent trading.

Note: See Table 2 and Section C of draft updated RG 217.

Question	**Feedback**
B2Q1 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?	The information provided is technically correct, but complex and difficult to understand. RG 217 needs to be supported with plain English guidance for directors. RG 217 is not suitable for most directors in its current form. The guidance on safe harbour would also benefit from examples like those given in section B.
B2Q2 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.	Yes, however it is wordy and difficult to read. We recognise that this is an issue with the wording used in the legislation. Examples would be useful to make it easier for directors and their advisers to understand what is meant and relate it to their own situation.
B2Q3 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.	Somewhat, though some examples like in Section B would be useful to make it easier for directors and their advisers to understand what is meant and relate it to their own situation.

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Question	Feedback
B2Q4 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.	No. As mentioned in our covering letter, directors and their general accountants may not understand what guidance such as “relevant professional bodies and associations” means. What are these “relevant professional bodies and associations”? What is “adequate professional indemnity insurance”? What “access to resources” should the adviser have? It is ARITA’s position that an appropriately qualified advisor needs to be a registered liquidator, or someone qualified to that level in order to be able to undertake the “better outcome” test, which requires a comparison of the course of action to the immediate appointment of an administrator or liquidator. A registered liquidator is best placed to undertake this assessment, and the holding of a registration ensures many of the other elements of an appropriate advisor, such as relevant professional body and adequate professional indemnity insurance, are also met. Failing to make it clear the type of advisor that advice should be sought from will expose directors, particularly those from smaller companies, to seeking help from the wrong type of untrustworthy adviser.
B2Q5 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.	Most of this part of RG 217 is a reiteration of the legislation. The inclusion of examples would make it easier for directors and their advisors to understand their obligations and apply it to their circumstances.

Question	Feedback
B2Q6 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, this table is very helpful and includes useful information which directors are much more likely to understand than a reiteration of the legislation.
B2Q7 Is further guidance required? If so, what further guidance should we provide?	Refer to our comments in the covering letter about definitions and explanation of technical/industry terms.
B2Q8 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.	Refer to the comments in our covering letter regarding updating INFO 42 to include information on safe harbour. Information provided to directors needs to be written in plain English with examples provided so that directors can see how the information would apply to their own circumstances.