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RG 217 Consultation Feedback
Companies and Small Business
Australian Securities and Investment Commission
GPO Box 9827
BRISBANE QLD 4001

Via Email Only: RG217.Feedback@asic.gov.au

Dear Sir/Madam

We are pleased to provide our submission regarding the draft *Regulatory Guide 217: duty to prevent insolvent trading: Guide for directors* (RG 217). As you are aware, Treasury established an independent panel in late 2021 to review the effectiveness of the safe harbour laws. The Government response to the review, issued in March 2022 recommended, amongst other things, that a best practice guide be developed and that ASIC is the appropriate agency to release such a guide (Recommendation 4). We understand the draft RG 217, being the subject of this consultation, is intended to be that guide.

Deloitte made a submission to the safe harbour review panel. In response to the question of whether there is sufficient awareness of safe harbour, we submitted that safe harbour was being regularly utilised by directors of larger companies, but there was little evidence of use by small and medium enterprises (SME). This suggested a knowledge gap exists amongst those SME directors. Directors of SME's tend to have skills that align best with their company's direct day to day business activities (e.g. carpentry), but are perhaps less experienced in formal business and financial management matters. This can make them less likely to recognise that certain financial events or issues are signals of financial distress and are indeed indicators of possible insolvency. While directors of SME's may hold a suspicion of insolvency, based on cash flow difficulties being experienced, many are reluctant to or do not know how to respond to what might be a developing financial crisis in their business. A timely response is essential if any company is to have an opportunity to successfully restructure and/or turnaround their business operations. Accordingly, we believe a well written RG 217, that will be easily understood and provides significant practical and realistic examples will resonate better with SME directors. Ensuring SME directors can comprehend the contents of RG 217 is essential to upskilling this cohort. That in turn may have significant benefits in terms of the financial impact for Australian businesses generally, as well as reduce the regulatory burden of ASIC.

In this submission, we have made suggested additions or alternative wording/phrasing for certain paragraphs of the guide. All of our suggestions use the plain English writing style meaning words such as 'you' and 'we' and active verbs are featured, which is different to the style currently used in the draft RG 217. We believe plain English will be more effective and more easily understood by the SME directors.

Your Consultation Paper 372 also asks us to describe alternative approaches that may be adopted to better achieve your objectives. We are strongly of the view that there should be training available so new directors can be quickly and easily informed and upskilled in relation to the matters covered in RG 217. This could be done by way of a self-paced online learning module, offered by ASIC, which explains the key points from RG 217. The online learning module should be interactive and use graphics or other features to ensure it is not only informative, but engaging. Test quizzes could be included throughout the learning module so directors can assess their own learning. Nevertheless, it is not our view that directors should be required to pass a test as our laws are such that there should not be any barrier to anyone wishing to incorporate a company in Australia. We would however be supportive of making the training mandatory, and the learning module could form part of the process for applying for a Director Identification Number (DIN).

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In formulating this response, our Partners and senior turnaround and restructuring practitioners have invested significant time and consideration to this matter. For the reasons outlined above, our suggested amendments to the draft RG 217 are all made for the purpose of improving its readability and the capacity for SME directors to comprehend the information provided. On the other hand, directors of larger companies are generally better informed, have better access to professional advice and are likely to be members of the AICD. To become an AICD member, they will have undertaken in-depth training on all director duties as well as the safe harbour provisions. AICD members are additionally required to undertake continuing professional development to ensure they remain up to date with legal or other developments affecting corporate governance. They are therefore less likely to be solely relying on ASIC publications to completely inform themselves, however in the event they do read RG 217, the information remains of use nonetheless.

We are greatly encouraged that the ASIC is keen to continually improve the effectiveness and utility of RG 217. To quote the Safe Harbour Review Panel[1], Australia's insolvency laws are perceived by many, including lawyers and insolvency specialists themselves, as *"an impenetrable quagmire that is scary, complex and unknown"*. This particular quote underscores the need for clear plain English guidance for all directors, but particularly those operating in the SME market.

We thank you for the opportunity to make this submission. If you have any queries, please contact [redacted] at [redacted] or by phone [redacted].

Yours faithfully

[redacted]

Salvatore Algeri
National Leader – Turnaround and Restructuring Service
Deloitte Financial Advisory Pty Ltd

Glossary:

AICD	Australian Institute of Company Directors
Act	Corporations Act 2001 (Cth)
ASIC	Australian Securities & Investment Commission
ATO	Australian Taxation Office
DOCA	Deed of company arrangement
IPS	Insolvency Practice Schedule (Corporations) (Schedule 2 of the Act)
EA	External administrator (as defined in the IPR as well as a controller as defined in s9 of the Act)
RL	Registered liquidator
SBR	Small business restructure (Part 5.4B of the Act)
SBRP	Small business restructuring practitioner (appointed under Part 5.4B of the Act)
VA	Voluntary administration (Part 5.3A of the Act)

Attachment:
Table 1 – Responses to proposals and questions

[1] November 2021 Report to Treasury on the review of the insolvent trading safe harbour (pg. 84)

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Table 1 – Responses to proposals and questions

Question		Response
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?	We assume this question pertains to Part A (the Overview) of RG 217. The scope and nature of a director's duty to prevent insolvent trading, as currently written, is accurate and relevant however it is technical and legalistic and in many instances, more or less directly quotes the provisions from the Act. We suggest RG 217 should use hyperlinks to section references from the Act wherever they are quoted throughout the document, but a plain English explanation be provided in RG 217 as well. This will enable the reader to quickly cross-reference the actual legal provision to gain a better understanding of the explanation provided in RG 217, should they wish. For example, RG 217.11 reads like s588G which is legalistic and may be a barrier to some SME directors comprehending the information. It could be simplified by re-stating it as follows *Section 588G requires a director not to incur a debt at a time when the company is already insolvent or where that debt will cause the company to become insolvent. This is a legal duty you owe to your company which is commonly referred to as a duty to prevent insolvent trading. If you fail to prevent your company from incurring the debt when it is insolvent, you may be liable to compensate your company (see RG 217.XX). Failing to prevent your company from incurring debts when it is insolvent is commonly referred to as "insolvent trading" and it is against the law to behave in this manner.* *The test for insolvent trading relies on the concept of the director having reasonable grounds to suspect insolvency. This means you don't actually have to have formed an opinion yourself that your company is actually insolvent. Rather, it is a question of whether a 'reasonable person' in your position and in the same circumstances would have reasonable grounds for suspecting insolvency.* *In other words, you won't be excused by asserting you "did not know" your company was insolvent. The fact that you should have known (i.e. a reasonable person in your position should have known) is sufficient for you to be liable. To put it another way, if there are significant warning signs that a reasonable person would consider to be reasonable grounds for suspecting insolvency, but you have chosen to ignore them, you will be liable.* We also make the following two additional suggestions to improve Part A: 1. **Provide clear guidance on where to get proper advice** RG 217.23 suggests that directors should obtain advice, but there is no guidance as to who might be best placed to provide that advice.

Question		Response
		Reference should specifically be made to registered liquidators (RLs) and lawyers who are qualified to give advice in circumstances where insolvency is suspected. As ASIC are aware, there are unregulated pre-insolvency advisers who promote illegal phoenix style solutions and aggressively target insolvent SMEs when insolvency related notices are given (e.g. on the Public Notice Website). In the absence of clear guidance in RG 217 that RL's are the most suitably qualified professional, there remains a very high risk SME directors may get advice from an unregulated pre-insolvency adviser and unknowingly become involved in breaches beyond s588G. SME companies tend to have limited resources as a general rule. If insolvency is suspected, it is likely there will be significant cash constraints and directors often feel they can't afford any advice. In order to comply with independence obligations, insolvency practitioners (RLs) typically provide an initial free, no-obligation consultation when a director approaches them for advice about their company. It would greatly assist directors to know this is the case. Not only does this benefit the individual director(s) of a particular company, but it may be of enormous economic benefit to Australia as a whole if SME directors were aware there is available access to free expert advice any time they have concerns about solvency. We believe directors will readily take advantage of that immediately if only they knew it existed. The sooner a financially distressed entity gets proper, expert advice, the more turnaround options will be available improving the chances of those businesses resolving their difficulties and minimising losses to creditors. Our collective experience shows that often by the time a director of an SME is eventually referred to an insolvency practitioner, their company will be hopelessly insolvent and there will be limited or no options left other than to appoint a Liquidator and wind the company up. Our subsequent investigations typically reveal the business has been struggling financially for many years. If they had sought assistance sooner a better outcome could have been achieved and losses to creditors mitigated. Accordingly, there ought to be a paragraph added, perhaps after RG 217.23 to the following effect: *If your company is experiencing signs of financial distress and/or possible insolvency, it is important to get proper timely advice. Registered liquidators (RL) are professionals who routinely assist companies in financial difficulty. They are licenced to act as a liquidator, receiver, administrator or restructuring practitioner of a company if that is the directors preferred option. RL's also regularly assist distressed companies and many companies are able to be turned around as a result of the assistance and advice given by a RL. Most RLs will provide an initial free, no obligation meeting with company directors to discuss options available to their company. ASIC considers it prudent that you consult with a RL as soon as practicable after you develop concerns about insolvency. If you are uncertain about the advice received, you could contact a different firm of RL's (again, for an initial free consultation) or your external accountant or legal advisor to discuss your options further.* *You can find a RL by searching the ASIC Professional Register. A google search may also help however you should be warned there are unlicenced advisers who often describe themselves as 'pre-insolvency advisers' who often promote solutions which may be illegal and may cause you to breach other laws. These solutions typically involve incorporating a new company with a similar sounding name and "selling" the business assets to the new company for little or no consideration, and without paying most or all of the creditors. This is illegal because it has the effect of removing the assets away from the insolvent company which is to the detriment of the creditors. That is what is commonly referred to as "illegal phoenixing". Please be*

Question		Response
		wary of meeting with anyone who holds themselves out to be an insolvency specialist who is not in fact a registered liquidator. If the person is promoting a scheme which seems like illegal phoenixing, or generally sounds too good to be true, consider getting advice from a RL or a lawyer. *Not every new business will survive and thrive. Many will fail. The Australian Government recognises the importance of encouraging entrepreneurship and for that to be achieved, Australia also needs to have an efficient insolvency regime that can quickly and efficiently deal with companies' whose businesses are unsuccessful. If you feel your entrepreneurial efforts are not proving to be a success, there is no shame or penalty should you decide to stop, so long as you have acted honestly, reasonably and importantly, did not trade your company whilst insolvent. Getting urgent advice from a RL when you do conclude your company is possibly insolvent is important. It can protect you from insolvent trading liability and it protects your creditors from having their losses made worse.* We note the ASIC Professional Register requires a person to enter a name or registration number in order to complete a RL search. This does not assist members of the public who do not know any RL's but are wishing to find one. Accordingly, to improve RG 217 in line with the suggestion above, we strongly recommend ASIC restructure the search functionality for the professional register to enable a member of the public to obtain a list RLs without any prior knowledge of a surname or registration number of one. Having the ability to filter results by, say, postcode or state/territory, would also be useful so a member of the public can find a suitably qualified professional near them. Otherwise, this may leave directors with no option but to find a RL via a 'Google search' and that inadvertently risks leading them to an unregulated pre-insolvency adviser. 2. **Include more realistic and practical examples** Part A should elaborate on the types of company records directors ought to be referencing when trying to assess whether their company might be insolvent (RG 217.18 to 217.23). RG 217 simply suggests directors should look at *the financial position of the company*. This phrase might be too vague/ambiguous for SME directors to fully understand what in practice they should be looking at and what steps they should take to determine solvency. We suggest the examples provided at RG 217.20 should include the following: [*For example, it may be relevant to consider*:] *a) the profit & loss statements to determine whether your business is profitable. If it is not profitable, how are you funding the losses? Perhaps there is a bank loan and/or shareholder funding available? If your company is profitable, how long will it take to accumulate sufficient profits/funds to pay other outstanding debts?;* *b) the balance sheet to review what assets exist could be quickly realised (e.g. debtors, inventory) to assist in paying debts when they fall due. The balance sheet will also show you the full extent of the companies liabilities and you may identify certain liabilities which may be able to be deferred or to have a payment arrangement negotiated with creditors. The balance sheet as a whole will show you what the total assets are and what the total liabilities are;* We also suggest this additional information should be inserted after 217.23:

Question		Response
		It is common for companies to experience financial distress and it can be difficult to know whether the financial distress is a consequence of a short term, one-off event (e.g. loss of a major customer, pandemic business disruption) that you will trade out of with few changes to your business, or whether it is more entrenched and significant restructuring is required. Timely, expert advice is highly recommended as these circumstances present a very real risk you may be trading whilst insolvent. Options for SME directors include: - *Speak with your accounting/bookkeeping employees and listen to their views. Whilst they may not have skills to conduct a turnaround and/or restructure of your company, they will have intimate knowledge of the company's financial affairs and often have good intuition as to the extent of the financial distress. They may also be able to prepare additional or more frequent financial reports to assist you to closely monitor the financial situation* - *If you engage an external accountant you should seek their opinion on the solvency of the company and whether they believe the business can 'trade its way out' of its difficulties. It is likely they will assist you to prepare a projected profit and loss and cash flow as part of the process. You should also ask your accountant what experience they have had helping financially distressed companies and what assistance they might be able to give you. Not all accountants in public practice will have the necessary skill set to provide turnaround advice and they should not be offended by such a question* - *If the financial position is very concerning and/or you are convinced or have been advised by your company's accountant that the company is likely to be insolvent, you should immediately speak with a registered liquidator. If necessary, you can speak to more than one in order to compare the advice given. There are formal insolvency processes that can be used to help restructure your company's balance sheet so it can continue to survive in the future (e.g. voluntary administration that can lead to a deed of company arrangement or small business restructure, both of which offers creditors a full and final payment of x¢/$). Or there may be opportunities to improve profitability and trade out over time without a formal appointment. Trading out of financial difficulties within the confines of safe harbour protection (explained below) will allow you to continue to incur debts in the ordinary course of business but be protected from possible insolvent trading liability. A registered liquidator or legal advisor will be able to explain all the various options available for your company.*
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.	The principles set out in Section B are very helpful, however the guidance could be significantly improved by providing more practical, realistic examples of steps directors can take. We also feel the need for having <u>timely</u> financial reports hasn't been adequately pressed. We suggest the following improvements **Timely financial reports:** Para 217.34 explains the need for proper financial records, but doesn't comment on the timeliness of those reports. We suggest re-stating the paragraph as follows: *If you are a director, and regardless of whether you are an executive director (one who also works in the business) or a non-executive director (one who generally only attends board meetings from time to time) you must (amongst other responsibilities):*

Question		Response
		- *actively monitor and continually inform yourself about the company's financial position (balance sheet) and financial performance (profit & loss)* - *ensure these financial statements are properly prepared and are prepared in a timely manner, which we consider should be on a monthly basis at the very least.* - *make any other enquiries you need to assist you in understanding your company's financial affairs. For example, preparing forecasts of projected income and expenditure (profit & loss) and cash flow forecasts are very helpful tools to measure cash flow and solvency. You should closely monitor your accounts receivable and ensure your customers are paying in accordance with agreed terms as non-payment by customers can adversely impact your cashflows. You should also closely monitor your accounts payable and tax debts to ensure you are paying suppliers and the ATO on time* The final paragraph in Example 2, should be re-stated as follows in order to press the need for <u>timely</u> financial information: *Reviewing the company's financial information every six months is not sufficient. You should be reviewing your company's financial statements at least on a monthly basis, irrespective of whether you have any solvency concerns . When you are aware the company is experiencing cash flow difficulties or other signs of financial distress, you should consider reviewing financial information more frequently. For example, you might request bi-monthly P&Ls and balance sheets and request weekly aged listings of debtors and creditors be given to you. Reviewing the cash at bank balances or available overdraft facilities on a daily basis can help to keep you more fully informed.* **More practical examples:** Para 217.53 warns directors to be prepared to 'take further action as soon as they suspect…', however there is no real, practical information or guidance on what that 'further action' could be. The next paragraph (217.54) then references safe harbour and the appointment of an administrator or liquidator yet the guide has not yet properly explained these options in a meaningful way. We recommend there should be a new paragraph added after 217.53 which more fully explains the various practical options that may be available and suggest: *Once you start to develop serious concern about deteriorating finances, there are a variety of options available. SME directors in particular should consider getting advice from a RL and/or your external accountant or lawyer. Some of the practical options include:* *a) 'turn the business around' (i.e. improve profitability) by increasing sales revenue and/or reducing costs* *b) resolve cash flow constraints by obtaining additional working capital. This could be via a loan from a bank or other investor(s) or raising further share capital from existing shareholders* *c) pursue some other turnaround or restructuring initiative* *d) options a) through c) may be pursued within the confines of safe harbour if you believe these courses of action will lead to a better outcome for the company. Pursing a course(s) of action with the benefit of safe harbour may protect you from possible insolvent trading liabilities in the event your turnaround/trade out plan doesn't work and the company ends up in liquidation*

Question		Response
		d) appoint a VA or SBRP to formally reduce or eliminate liabilities by entering into a compromise with creditors *e) appoint a liquidator (this is your exit strategy and should be considered if you believe the company can't be rescued)* We have already submitted at B1Q1 that RG 217 should be more explicit in guiding directors to seek advice from a RL when there are clear signs of distress and/or insolvency. We press that point again in relation to Para 217.55 which is providing guidance on what to do where the company is already insolvent. It is our strong view that once a company is already insolvent, a RL is the best qualified person to speak to, so there should be less emphasis on suggesting advice 'from an accountant or lawyer' and more emphasis on the urgency now to see a RL. In our experience, SME directors usually continue trading their businesses well past the point when they should have stopped because they didn't know how to properly 'exit' the situation. Accordingly, we would recommend re-writing 217.55 as follows: *If you have received advice your company is likely to be insolvent you should take immediate action in order to protect yourself from liability for insolvent trading. Consulting with a registered liquidator is a prudent first step and most RL's will meet for an initial assessment of your company's options for free. Your external accountant or lawyer may also be able to advise you.* Para 217.57 should give more practical and direct guidance by explaining that advice from a RL would be of high importance at this stage by re-stating as follows: *When there are reasonable grounds for you to suspect your company is insolvent, as well as not incurring further debts, you should immediately get advice from a registered liquidator about the options available for your company. Registered liquidators have the necessary skills and experience to provide advice in these situations. Other professionals who are well placed to advise a financially distressed company are lawyers who specialise in insolvency, turnaround & restructuring.* Paragraph 217.58 does helpfully explain that when a company is insolvent and unable to be saved, directors should consider appointing an external administrator, but no information has been provided in RG 217 to help them know how to practically do that. In other words, they need to consult with a registered liquidator to understand the practical solutions available to them as directors. As we have already recommended above, there should be adequate information provided which explains how a director can find a RL and that the search functionality of the ASIC Professional Register be updated to facilitate this need **Other minor suggested improvements:** Para 217.37 should have an added item, e) which addresses tax and other statutory debts, such as: *e) monitoring lodgements of BAS and other tax lodgements and the ability of the company to pay its tax debts (e.g. PAYG, GST, superannuation, income tax) when they fall due* Para 217.42 should warn of the consequences of not giving their adviser complete, accurate information. Using plain English, we suggest 217.42 should read as follows:

Question		Response
		You can only rely on advice given by your adviser if they have been fully briefed and given sufficient, accurate information on which to base their advice. Therefore, if you give your adviser incomplete, misleading and/or inaccurate financial information about the company, you may not be able to rely on his/her advice as a defence against insolvent trading.
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?	We believe the list in Table 2 could be further enhanced as follows: *a) Add "(PAYG)" after pay-as-you-go* *b) the 8th bullet should include the terms 'profit & loss and balance sheet'* *c) the 9th bullet should refer to the resignation of directors and/or key personnel* *d) Add: The book value of the company's readily realisable current assets (cash, inventory, debtors) are less than the book value of current liabilities (trade creditors, tax debts, other short term liabilities)* e) *Add: Where creditors are unable to obtain adequate credit insurance, which suggests the company's insurance company considers that your company is a poor credit risk*
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?	We believe that if the guidance is well written and can be readily understood by the SME director cohort, then it would be equally helpful to directors of larger/listed companies. RG 217 should state clearly that it has been written specifically for SME directors, however, the principles and matters covered are relevant to all directors regardless. For example, on the front page, under **About this guide**, we suggest: *This guide is for directors and has been written specifically with directors of small and medium enterprises (SME) in mind, but it is relevant to all directors regardless of the company's size and complexity and this includes those who serve as directors on larger companies boards, including listed companies. This guide may also be of interest to professional advisers, such as accountants and lawyers. 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 to prevent insolvent trading (s588G of the Corporations Act). It also explains the safe harbour regime which can provide protection to directors from personal liability when a company is financially distressed but seeks to trade its way out of difficulties and/or restructure its affairs via a plan of action that is reasonably likely to lead to a better outcome for the company.*
B1Q5	Do you think SME directors need separate guidance? If so, what should that guidance be?	No. We believe RG 217 should as a matter of first principles be drafted specifically with SME directors in mind as the target audience. Directors who sit on boards of larger organisation including listed companies or those who have professional training and experience in legal and/or accounting disciplines will already have a well-developed understanding of the duty to prevent insolvent trading and the availability of the safe harbour regime. Many of these directors are also AICD members and will have undertaken specialised training to obtain their membership. As such AICD directors will have a more sophisticated understanding of the issues covered by RG 217. It is not our view that ASIC should provide these directors with additional guidance. It is the SME director who typically has limited formal training in corporate stewardship matters and who are more likely to look for Government published guidance. Nevertheless, the guide will by its very nature provide guidance to all directors of companies no matter the size of the company or the experience of the director.

Question		Response
		As also recommended in our cover letter, we strongly recommend the contents of RG 217 be covered in an online learning module, provided by ASIC, which directors can work through at their own pace and in their own time.
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	Holding company liability is important to include, but for most SME directors, it will often be irrelevant. The amount of guidance included is adequate in our view.
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?	Directors would be further assisted if the guidance discussed the benefits of being able to identify a date/point in time when safe harbour begins. This will be relevant and very important in the event the company is wound up and a liquidator alleges that the director may have been guilty of insolvent trading. In such a circumstance, if the director was to claim safe harbour as a defence, the question of when the company entered safe harbour is going to be an important fact. The legislation doesn't specify any mechanism or event which triggers the commencement of an entity being in safe harbour other than the fact it is embarking on a course(s) of action. While we understand the benefit of having the safe harbour provisions widely worded to allow greater flexibility of options for directors, the practical fact remains that the date of insolvency and the date the company entered safe harbour will be relevant in any court proceeding where insolvent trading is being alleged. Accordingly, Part C ought to include guidance in this regard. In the many safe harbour engagements we have undertaken since 2017, we always recommend the board/directors pass a resolution or minute of their belief that the company is in safe harbour from a specified date. It need not be that formal, however our safe harbor engagements are usually with larger organisations with well constituted boards of experienced directors and it provides greater clarity when formalised in this way. For SME's, many of which are sole-director entities, other options for recording a safe harbour 'start date" could include: • Noting on P&L and cash flow forecasts that they form part of a safe harbour course of action which commenced on *X* date • Making a file note which sets out details of the course(s) of action and include a commencement date • Make an entry in their minute book that a safe harbour course of action commenced on *X* date • If they document their safe harbour course(s) of action, include a start date Providing practical examples in the guidance is very helpful. The safe harbour guidance also needs to continually repeat that the onus of proof rests with the directors at all relevant paragraphs which discuss what directors need to do. We suggest re-stating the introductory paragraphs in the Overview (RG 217.24 – 217.27) as follows. 217.24 *You can protect yourself from a civil liability for insolvent trading by establishing a 'safe harbour' which is explained more fully in Part C of this Regulatory Guide. Safe harbour is a defence you can use in the event your company ends up in liquidation and the liquidator or creditor seeks to recover damages from you for trading whilst insolvent. To be 'in a safe*

Question		Response	
			harbour', you need to develop one or more courses of action which are likely to lead to a better outcome for the company than would be the case if you were to appoint a liquidator or administrator instead. There are a few additional criteria (see Part C), but the main thrust of safe harbour is that you must have a realistic and achievable plan to turn the company around.
		217.25	*To have safe harbour protection under s588GA(1) you need to be developing and/or embarking on a course(s) of action (i.e. a turnaround plan) that is likely to lead to a better outcome than would be the case if you put the company into liquidation or administration instead. While you are in the safe harbour, you will be protected from personal liability for the debts that you incur in the ordinary course of business and in accordance with the course(s) of action.* *If events unfold in such a way that you eventually decide the course(s) of action (i.e. your turnaround plan) is not going to provide a better outcome, that is when the company ceases to be in safe harbour and you will now be exposed to possible liability for insolvent trading in relation to future debts you incur outside of the safe harbour. If this occurs, it may be prudent to immediately appoint a liquidator or administrator to avoid potential personal liability. The first step would be to meet with an independent RL and consider their advice.*
		217.26	*You can also be protected from potential personal liability for insolvent trading if you appoint a restructuring practitioner. The protection lasts while the restructuring practitioner remains in place. A person must be a registered liquidator to act as restructuring practitioner. The small business restructuring regime is only available to companies with less than $1m in liabilities. Other minor criteria also exists. More information can be found here Simplified debt restructuring: a factsheet for small business*
		217.27	*Part C of this guide provides more information about safe harbour*
		As regards the details in Part C, in addition to adding guidance around documenting and specifying a point in time when safe harbour commences, it could also be improved by: - Concluding 217.61 by reminding directors the onus is on them to prove their company was 'in a safe harbour' and they will better be able to do this by ensuring they document their decisions and include the financial analysis and/or forecasts that helped them form the view the course of action was reasonably likely to lead to a better outcome - Re-state 217.62 – 217.64 in plain English - 217.68 should provide some practical examples of documents that directors might rely on to prove their course of action did indeed appear to lead to a better outcome. Including P&L forecasts, analysis of the likely estimated dividends for creditors if the company was immediately wound up as compared with the forecast future position - There should be an added paragraph, perhaps after 217.70, which reads as follows: *While you don't need to engage an adviser to assist you with your safe harbour initiative, it is highly recommended. It will be taken into account should there ever be an insolvent trading legal action and you are relying on the safe harbour defence. The best qualified people are likely to be registered liquidators, but your circumstances may be such that you believe someone with different qualifications would better serve the company and the safe harbour initiative.*	

Question		Response
		- Re-state 217.71 as follows: *You must proactively and continuously monitor your course of action to ensure it continues to support your conclusion that it will reasonably likely lead to a better outcome. It is OK to revise the course of action as and when new information or unexpected issues arise, but whatever course you are pursuing, you still need to ensure it is reasonably likely to lead to a better outcome. A practical way to do that is to assess the likely return to creditors should a liquidator or administrator be appointed now, and compare it with the future returns to creditors should the course of action play out as expected. If you have an adviser who is a registered liquidator, they will be able to assist you in setting out all the required financial information. Remember, if you are ever sued for insolvent trading and you want to rely on the safe harbour defence, the onus of proof is on you to show the Court why you believed your course of action was likely to lead to a better outcome. Accordingly, all your decisions need to be well documented and include good financial comparisons* - For paragraphs 217.90 – 217.92, it would better assist SME directors by providing examples of the types of documentary evidence that could assist in discharging their onus of proof. Adding a table to the guide which lists examples, similar to the evidence matrix that ASIC provided in Schedule D to RG 16 would be an excellent addition - Guidance should be added for groups of companies. While most SME directors are not dealing with corporate groups, the guidance should at least comment that where there is a group of companies, the directors owe a duty not to trade whilst insolvent individually to each company. The duty is not owed to the group as a whole
B1Q2	Is the proposed guidance in draft updated RG 217 at RG 217.61, on the steps a director may take to establish safe harbour protection, helpful? If not, explain how we could improve the guidance.	Paragraph 217.61 could be improved by: - specifying that the course of action needs to be realistic and achievable. Fanciful predictions for miraculous turnarounds and unrealistic financial forecasts will not be accepted as evidence of being in a safe harbour - remind directors of the need to document their decisions and have realistic financial forecasts and financial comparisons between the status quo versus the course(s) of action in order to improve the likelihood their safe harbour defence will succeed
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	In addition to our submissions at B1Q1, 217.65 – 217.77 could be greatly improved by providing added guidance on the need to focus attention on the outcome for creditors individually (as well as also considering the outcome for the company as a whole). There should be more emphasis on the use of budgets, forecasts and cashflows to inform directors whether a course of action is reasonably likely. As it stands, RG 217 lacks practical examples and practical guidance on the level of detail required from directors. These paragraphs would also benefit from repeated reminders that the onus of proof rests with the directors so they are being reminded to consider how they might document their decisions, their chosen course of action and prove how they concluded it would likely lead to a better outcome.
B2Q4	Is the proposed guidance in draft updated RG 217 at RG 217.83–RG 217.88, on who may be an appropriate	Paragraph 217.87 should be re-stated more positively towards RL's likely having the best experience and skills to provide advice for safe harbour generally, as well as analysing financial outcomes for creditors under differing scenarios. We suggest: *Registered liquidators are most likely to have the best qualifications and experience for safe harbour advice and we recommend directors speak to a RL (remember, most will offer a free initial consultation) to understand how they might*

Question		Response
	adviser, helpful? If not, explain how we could improve the guidance.	*practically assist as well as understand the likely costs. There are other professionals, such as insolvency lawyers and accountants in public practice with turnaround skills who you could also consider. If you do intend to engage an adviser, which is strongly recommended, you should make proper enquiries as to their experience with financially distressed companies.* *Please be aware however that there are some unregistered pre-insolvency advisers who promote illegal phoenixing style 'turnaround' plans and if you participate in and/or facilitate these plans, you may be liable for other breaches of the Corporations Act. Refer paragraph 217.XX for further information about illegal phoenixing* [we refer to the suggested addition at B1Q1 about pre-insolvency advisers and if inserted, it should be cross-referenced here] As previously submitted, RG 217 should provide details explaining how to find a RL as well as improving the search functionality of the ASIC Professional register so users can find RL's who operate near them.
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	As submitted at B2Q1, ASIC should create an evidence matrix (similar to Sched D of RG16) listing examples of the types of documents that may assist the directors with their evidentiary burden, and it would be useful to cross-reference it throughout Part C of RG 217
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	As submitted at B2Q1 and B2Q5, an evidence matrix which lists practical suggestions, such as - P&L and BS forecasts - cashflow forecasts - budget v actual analysis - Estimated outcomes for creditors under the various scenarios - Records of decisions made, including reasons why As an alternative to a stand-alone additional Table, these practical examples could be incorporated into Table 2
B2Q7	Is further guidance required? If so, what further guidance should we provide?	No further guidance is necessary in our view
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.	As submitted in our cover letter, directors of SME's would benefit greatly from a self-paced online learning module which covers the content in RG 217. We propose the online learning module be made mandatory for completion for all new directors applying for a DIN.

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Question		Response
		The module should not take more than one hour to complete in order to ensure it is not too onerous. Completing an interactive online course which is engaging will enhance a director's understanding and may improve their comprehension of the written information I RG 217. There is the opportunity to include quizzes at key milestones in the online module to allow a director to test their level of understanding. However, we don't believe it should be necessary for directors to pass a test. ASIC's Form 490, Notice of appointment of officeholders should also be updated with a tick-box requiring newly appointed directors to acknowledge they have read and understood RG 217.