



**ASIC**  
Australian Securities &  
Investments Commission

**REPORT 803**

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

December 2024

## **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 372 *Guidance on insolvent trading safe harbour provisions: Update to RG 217* ([CP 372](#)) and details our responses to those issues.

### 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.

### Disclaimer

This report 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.

This report does not contain ASIC policy. Please see Regulatory Guide 217 *Duty to prevent insolvent trading: Guide for directors* ([RG 217](#)).

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## A Overview

- 1 In Consultation Paper 372 *Guidance on insolvent trading safe harbour provisions: Update to RG 217* ([CP 372](#)), we consulted on proposals to update Regulatory Guide 217 *Duty to prevent insolvent trading: Guide for directors* ([RG 217](#)). We sought feedback from external administrators and controllers, professional bodies and other interested parties.
- 2 The proposals included questions about:
  - (a) existing guidance on a director's duty to prevent insolvent trading, and
  - (b) new guidance about the safe harbour provisions.
- 3 This feedback report highlights the key issues that arose out of the submissions received on CP 372 and our responses to those issues.
- 4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 372. We have limited this report to the key issues raised in the consultation.
- 5 We received one confidential and ten non-confidential responses to CP 372 from industry associations, two professional services firms, a legal professional body, and two individuals. We are grateful to respondents for taking the time to send us their comments.
- 6 For a list of the non-confidential respondents to CP 372, please see the appendix. Copies of these submissions are currently on the [CP 372](#) page on the ASIC website.

### Responses to consultation

- 7 All respondents were supportive of our intent to update RG 217 to provide further guidance to directors on a director's duty to prevent insolvent trading and to introduce guidance on how a director can enter safe harbour.
- 8 The main issues raised by the respondents relate to:
  - (a) a request for simplification of the guidance, including further practical examples, diagrams and plain language;
  - (b) clarity on guidance about obtaining advice relating to insolvency and safe harbour and the differences in those requirements;
  - (c) the appropriateness of guidance for directors of small-to-medium enterprises (SMEs);

- (d) additional guidance on the separate elements of the safe harbour protection;  
and
  - (e) numerous positive specific suggestions for enhancing the guidance.
- 9 We have considered the feedback and, where appropriate, have made changes to [RG 217](#).
- 10 Some feedback suggested ASIC should provide SME directors with additional resources. This included revising Information Sheet 42 *Insolvency for directors* ([INFO 42](#)) to include safe harbour information, creating an online learning module on safe harbour, and providing further regulatory guidance in consultation with professional associations.
- 11 Subject to ASIC priorities and resources, we may separately consider these and other opportunities for ASIC to provide information to directors, in particular those in the SME space.
- 12 Our changes in RG 217 focus on:
- (a) adopting specific actionable feedback to enhance the clarity of the guidance;
  - (b) adding practical guidance examples on safe harbour where appropriate;  
and
  - (c) clarifying the differences in guidance for general advisers on solvency and specific advisers on safe harbour.

## B Guidance on the duty to prevent insolvent trading

### Key points

This section outlines stakeholder feedback on our proposals in [CP 372](#) relating to general guidance for directors on the duty to prevent insolvent trading.

In particular, we sought feedback on whether:

- the existing guidance on the scope and nature of the director's duty to prevent insolvent trading remains relevant and adequate (proposal B1Q1);
- the key principles in Section B of the existing guidance are helpful, and what improvements could be made (proposal B1Q2);
- the indicators of potential insolvency in Table 3 of the proposed guidance are sufficient (proposal B1Q3);
- the existing guidance helps directors of both SMEs and large or listed companies (proposal B1Q4);
- SME directors require separate guidance (proposal B1Q5); and
- industry considers it is necessary to include guidance about a holding company and, if so, whether the information currently provided is sufficient (proposal B1Q6).

This section summarises the responses we received to these proposals. Where much of the feedback was similar, we have grouped the proposals.

### Existing guidance about the scope and nature of the director's duty to prevent insolvent trading, key principles and insolvency indicators

- 13 In CP 372, we sought feedback on whether:
- (a) the existing guidance about the scope and nature of the director's duty to prevent insolvent trading remains relevant and adequate;
  - (b) the key principles in Section B of the existing guidance are helpful to directors, and what improvements could be made to them, if any; and
  - (c) the indicators of potential insolvency in Table 3 of the proposed guidance are sufficient and, if not, what further guidance should be provided.

## Summary of feedback received

- 14 The majority of respondents were supportive of the existing guidance in [RG 217](#) about the director's duty to prevent insolvent trading. One respondent stated that the guidance in Section B does not require further amendment and some respondents provided minimal suggestions for change.
- 15 Most respondents agreed that the indicators of potential insolvency in Table 3 of the proposed guidance were useful. Some suggested adding examples of indicators of insolvency. One respondent thought the list of indicative factors contained in the proposed guidance should be treated as a best-practice guidance list. Some feedback indicated that further guidance for directors should only be provided if it is based on practical insights gained through ASIC's regulatory activities and experience.
- 16 Some respondents suggested rewording or adding more examples to the key principles, such as:
- (a) clarifying the need for timely financial reports;
  - (b) the consequences of not providing accurate information; and
  - (c) the steps directors can take in different scenarios to avoid breaching their duty.
- 17 Some respondents indicated that the information in RG 217 is technically correct and would benefit from further simplification. Other respondents suggested enhancements to the guidance to make it clearer that directors need to act appropriately all the time rather than only after obtaining advice.
- 18 One submission recommended updating the key terms definitions and the list of key cases to reflect the current legislation and case law. New terms introduced included, among others, holding companies, professional bodies, and course(s) of action. Additional case law was added due to specific suggestions to add. Not all case suggestions were appropriate to include.
- 19 Another respondent suggested there was a 'gap' in the guidance on how the insolvency regime applies to directors of charities and not-for-profit organisations. This respondent suggested that ASIC should work with the Australian Charities and Not-for-profits Commission to develop specific guidance for this sector.
- 20 Feedback further recommended simplifying the guidance in RG 217 by using visual aids, diagrams, flowcharts, and examples that are more applicable to SMEs.
- 21 Other respondents did not find Section D of the proposed guidance on our approach to insolvent trading to be helpful and suggested it should be replaced or deleted.

*ASIC's response*

ASIC will implement proposal B1Q1, B1Q2 and B1Q3 in CP 372 by:

- expanding the guidance on key principle 1 to stress the importance of timeliness in obtaining and understanding financial reporting;
- clarifying the guidance on key principle 3 about obtaining advice to include a non-exhaustive list of persons we consider may be appropriate advisers;
- expanding the guidance on key principle 4 about directors acting in a timely manner;
- including further guidance on actions directors should take to avoid breaching their duty to prevent insolvent trading;
- including additional indicators in Table 4 for directors to take into account when considering whether a company is insolvent;
- noting in the guidance that directors and responsible persons of charities or not-for-profit organisations incorporated under the *Corporations Act 2001* (Corporations Act) are subject to the duty to prevent insolvent trading; and
- expanding the key cases list to include further examples of case law on insolvency.

We have tried to simplify and clarify our guidance but there are limitations due to the need to accurately reflect the legislation and case law. For similar reasons, we do not consider there are opportunities to use diagrams effectively without causing greater uncertainty or lack of clarity.

We agree that directors may benefit from an expanded list in Table 4 of factors that a court may consider as common indicators of insolvency and are grateful to those respondents who provided specific examples.

## Scalability of guidance for SMEs and large entity directors, including whether and what separate guidance might be provided

- 22 In [CP 372](#), we sought feedback on whether the existing guidance in [RG 217](#) helps directors of both SMEs and large or listed companies to comply with their obligation not to trade while insolvent and, if not helpful, what additional guidance should be included. We also sought feedback on whether SME directors require separate guidance and, if so, what guidance should be provided.

### Summary of feedback received

- 23 These proposals received mixed feedback from the respondents. Roughly half the respondents found the guidance in [RG 217](#) helpful for all directors.



However, these respondents equally suggested improvements relating to the clarity and consistency of the terms used in RG 217.

- 24 Generally, respondents did not consider that separate guidance for SME directors is required. However, respondents did provide specific recommendations for changes to current guidance which may help with understanding.
- 25 One respondent highlighted that the proposed guidance on the scope and nature of the director's duty to prevent insolvent trading accurately reflects the legislative provisions and key principles as they apply to all directors, including those of SMEs.
- 26 One respondent argued the guidance was not suitable for SME directors due to its complexity and the general lack of clarity on the director's duty to prevent insolvent trading. Another respondent commented that the guidance should clearly state that it applies to SME directors.
- 27 One respondent provided feedback that the guidance does not specifically address charities and not-for-profit organisations.
- 28 Another respondent included suggestions about various resources and tools at ASIC's disposal that could be used to provide information about insolvency to SME directors.
- 29 One respondent commented that RG 217 was not suitable for any directors in its current format.

#### *ASIC's response*

Based on the feedback received we have amended the proposed guidance to better reflect the current legislative provisions and key principles.

ASIC will implement proposal B1Q4 and B1Q5 in CP 372 by:

- implementing specific suggestions for simplification and clarity;
- making it explicit that the guidance applies to directors of SMEs and charities and not-for-profit organisations, if incorporated under the Corporations Act;
- including references to additional resources in the 'Related information' section of [RG 217](#); and
- reviewing content of materials produced by ASIC for the SME sector and considering how that information might be enhanced to complement the guidance in RG 217.

The provisions relating to the duty to prevent insolvent trading apply to all directors. However, we accept that, while the duties may be identical, their discharge method may depend on the circumstances and nature of the company. The feedback was

mixed about whether specific guidance for SME directors is necessary and, if so, what form that might take.

On balance, ASIC decided that separate guidance is not appropriate for SME directors within this generally applicable regulatory guide. As a director's duty to prevent insolvent trading applies to all directors, adding more tailored guidance may add unnecessary regulatory complexity or overlap.

We consider that the same applies to any additional or tailored guidance for directors of charities and not-for-profit organisations, if incorporated under the Corporations Act.

## Guidance on liability for holding companies

- 30 In [CP 372](#), we sought feedback on whether including guidance for a holding company is necessary and, if so, whether the information currently provided is sufficient. If not, we asked what additional guidance could be provided.

### Summary of feedback received

- 31 Most respondents agreed the information suggested in proposal B1Q6, which concerned whether it considers it is necessary to include guidance about a holding company, is necessary, useful, and broadly fit for purpose.
- 32 One respondent commented that the guidance on the liability to a holding company is very useful for SMEs because SMEs are often structured to include holding companies and trusts.
- 33 One respondent acknowledged the information is necessary to provide a complete view in a technical document such as [RG 217](#).

#### *ASIC's response*

ASIC will implement proposal B1Q6 in CP 372 by inserting a definition for 'holding company' in the key terms.

## C Guidance on the safe harbour provisions

### Key points

This section outlines stakeholder feedback on our proposals in [CP 372](#) relating to the proposed guidance on safe harbour provisions.

In particular, we sought feedback on whether:

- the scope and nature of the safe harbour protection is adequately explained (proposal B2Q1);
- the proposed guidance on the steps a director may take to establish safe harbour is helpful (proposal B2Q2);
- the guidance relating to when a course of action may be reasonably likely to lead to a better outcome is helpful (proposal B2Q3);
- the proposed guidance in relation to who may be an ‘appropriate adviser’ is helpful (proposal B2Q4);
- the proposed guidance on the evidentiary onus on directors relying on safe harbour is helpful (proposal B2Q5);
- the information in Table 2 on evidentiary material used to assess whether safe harbour can be established is helpful (proposal B2Q6);
- further guidance on the duty to prevent insolvent trading and safe harbour is required (proposal B2Q7); and
- we should take further steps to raise awareness of the insolvent trading and safe harbour provisions (proposal B2Q8).

### Guidance on safe harbour, including the scope and nature and elements to establish protection

34 In CP 372, we sought feedback on whether the scope and nature of the safe harbour protection is adequately explained and, if not, what further information should be provided. We also sought feedback on whether the proposed guidance on:

- (a) the steps a director may take to establish safe harbour protection is helpful and, if not, how it could be improved; and
- (b) courses of action that may be reasonably likely to lead to a better outcome is helpful and, if not, how it could be improved.

#### Summary of feedback received

35 All respondents supported providing guidance on the safe harbour provisions. Most respondents acknowledged the technical correctness of the guidance and understood the legislative intention underpinning the provisions.

- 36 Most respondents expressed positive feedback on the proposed guidance, including acknowledging its helpfulness, the relevance of the examples, and the benefit of guidance about the safe harbour provisions for directors and creditors.
- 37 Some respondents provided feedback that the complexity of the legislation makes it challenging to provide clear regulatory guidance. General suggestions were made that the guidance could be simplified using diagrams, but no examples were provided.
- 38 Respondents provided suggestions on how to improve clarity in the guidance by using practical examples and clarifying key terms and statutory factors.
- 39 In particular, these suggestions related to:
- (a) the meaning of certain terms, including a ‘realistic and achievable course of action’ and ‘reasonably likely’;
  - (b) the role of expert advice;
  - (c) the documentation of decisions and evidence;
  - (d) the onus of proof for directors;
  - (e) the application of the safe harbour to groups of companies; and
  - (f) its applicability to charities and not-for-profit organisations.
- 40 Some respondents suggested specific amendments to improve the proposed guidance.

#### *ASIC’s response*

A number of respondents provided practical examples of potential safe harbour actions based on their experience, which ASIC considers are appropriate to be adapted and adopted in the guidance.

ASIC will implement proposal B2Q1, B2Q2 and B2Q3 in CP 372 by:

- adopting specific suggestions where appropriate;
- outlining further guidance on s588GA(2) of the Corporations Act;
- including practical examples relating to safe harbour;
- inserting an additional table with a non-definitive list of course(s) of action or steps we consider may be reasonably likely to lead to a better outcome (than administration or liquidation);
- providing specific additional guidance on the interpretation of legislative terminology, such as ‘reasonably likely’ and ‘better outcome’; and
- noting in the guidance that safe harbour protections are available to directors of charities or not-for-profit organisations incorporated under the Corporations Act.

## Guidance on ‘appropriate adviser’

- 41 In [CP 372](#), we sought feedback on whether the proposed guidance on who may be an ‘appropriate adviser’ is helpful and, if not, how it could be improved. To establish a safe harbour defence, a director is required to obtain advice from ‘an appropriately qualified entity’, which is not defined in the legislation.

### Summary of feedback received

- 42 Some feedback expressed concerns about the lack of clarity and specificity in the guidance and found some terminology unclear. Further, some respondents suggested the guidance should emphasise the role and qualifications of registered liquidators as the most suitable advisers on the safe harbour provisions.
- 43 Some respondents suggested improving the guidance by using consistent terminology, expanding the scope of advisers included as being appropriate, warning about the risks of unqualified or unsuitable advisers, and refining the language and examples in the guidance.

#### *ASIC’s response*

In the context of Sections A, B, and D, a general term of ‘professional adviser’ is used. However, in Section C, the term in the context of the safe harbour provisions is ‘appropriately qualified entity’, which is the legislative term used in section 588GA(2). We understand the legislative intent was not to limit that term to any particular profession or licence.

The law does not require these general or specific advisers to hold particular registrations or qualifications.

It is appropriate that directors have a basis on which to select an appropriately qualified entity as an adviser on the safe harbour provisions, which may be different to an adviser only in relation to the solvency of the company.

ASIC will implement proposal B2Q4 in CP 372 by:

- replacing ‘appropriate adviser’ with ‘appropriately qualified entity’ in Section C of [RG 217](#); and
- adopting a broader view on the persons or entities that may be an appropriately qualified entity (noting the need for necessary qualifications and experience).

## Evidentiary onus for directors and evidentiary materials

- 44 In [CP 372](#), we sought feedback on, and suggestions for possible improvement to, the proposed guidance on:
- (a) the evidentiary onus on directors relying on safe harbour; and

- (b) material listed in Table 2 of the proposed guidance to assess whether safe harbour can be established.

### Summary of feedback received

- 45 Some respondents suggested improving the guidance by including more practical examples of how directors can meet their obligations and create evidence of their course of action. Another respondent suggested some examples to be included in Table 2.
- 46 Most respondents viewed Table 2 of the proposed guidance as a helpful tool for directors to understand the evidentiary requirements to enliven safe harbour protection from liability for insolvent trading.
- 47 Most respondents also agreed that the guidance is appropriate and helpful for directors to access safe harbour and avoid liability for insolvent trading.

#### *ASIC's response*

As noted, the nature of safe harbour makes it difficult for ASIC to provide practical examples based on our regulatory experience. It is rare that ASIC becomes aware of a company entering safe harbour.

There is also a lack of judicial precedent relating to safe harbour protection to provide more certainty on the meaning of courses of action that are reasonably likely to lead to a better outcome for the company.

ASIC will implement proposal B2Q5 in CP 372 by providing an additional practical example.

## Further guidance and raising awareness of insolvent trading and safe harbour provisions

- 48 In [CP 372](#), we sought feedback on whether further guidance on safe harbour protection was required and, if so, what guidance should be provided. We also sought feedback about whether we should take steps to improve awareness of the insolvent trading prohibition and safe harbour provisions and, if so, how.

### Summary of feedback received

- 49 Most respondents viewed the proposed guidance as sufficient and helpful and made suggestions on how ASIC could improve awareness of the insolvent trading prohibition and safe harbour provisions.

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The suggestions included:

- (a) updating [INFO 42](#) to include safe harbour information;
- (b) developing a self-paced online learning module that covers the content of [RG 217](#);
- (c) taking proactive steps to increase awareness of the insolvent trading prohibition and safe harbour provisions, particularly in relation to SME business owners;
- (d) ASIC providing separate, simpler guidance on the pitfalls and dangers of using unqualified, uninsured pre-insolvency advisers or seeking advice from unqualified persons; and
- (e) adding further case law to the 'Related information' section of RG 217 and listed some examples.

*ASIC's response*

ASIC is considering the suggestions provided by the respondents.

ASIC can update the guidance to accommodate case law when there is a significant new precedent.

While information sheets, webpages and stakeholder communications are used to provide more timely information, they do not have the same level of reliance as regulatory guides.

ASIC will implement proposal B2Q7 and B2Q8 in CP 372 by:

- including references to further case law in the 'Related information' section of RG 217; and
- considering further suggestions for raising awareness.

## Appendix: List of non-confidential respondents

- Association of Independent Insolvency Practitioners (AIIP)
- Australian Institute of Company Directors (AICD)
- Australian Restructuring Insolvency & Turnaround Association (ARITA)
- Chartered Accountants Australia and New Zealand (CA ANZ)
- CPA Australia
- David Blanchett
- Deloitte
- Institute of Public Accountants
- Law Council of Australia (LCA): Insolvency and Restructuring Committee of the Business Law Section
- SV Partners