

27 October 2023

Australian Securities and Investments Commission

[RG217.Feedback@asic.gov.au](mailto:RG217.Feedback@asic.gov.au)

Dear Australian Securities and Investments Commission

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

Thank you for the opportunity to provide a submission on the Australian Securities and Investments Commission (**ASIC**) consultation on draft regulatory guide 217, *Duty to prevent insolvent trading: Guide for directors* (**RG 217**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 50,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small and medium enterprises (**SMEs**) and the government sector.

The AICD has contributed extensively to insolvency policy development processes over a number of years reflecting the importance of these settings to how directors make decisions on the viability of businesses, including assessing turnaround prospects and preserving employment.

The AICD was a key industry proponent of the introduction of the Insolvency Safe Harbour under sections 588GA and 588GB of the *Corporations Act 2001* (**the Corporations Act**) (**the Safe Harbour**) in 2017 and separately strongly supported the temporary COVID-19 insolvent trading moratorium (COVID-19 moratorium) in 2020.

We are pleased to see ASIC moving forward with more detailed guidance on the Safe Harbour given this has been a longstanding gap in the suite of resources to support directors and advisors navigate challenging financial situations.

## **1. Executive Summary**

The AICD welcomes ASIC's intention to update RG 217 to reflect the Safe Harbour provisions. Consistent with our submissions to the Safe Harbour Review (**Review**) in 2021 and the Parliamentary Joint Committee on Corporations and Financial Services inquiry into corporate insolvency settings in Australia, we strongly support changes to RG 217 to improve directors and advisors' understanding of the Safe Harbour.<sup>1</sup>

While the AICD broadly supports the proposed Safe Harbour focused amendments to RG 217 we recommend that ASIC assess how it can provide more guidance on its website on the restructuring options that are available to directors. An elevation of restructuring options would be consistent with

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<sup>1</sup> AICD BCA joint submission to the Insolvency Safe Harbour Review, October 2021, available [here](#). AICD submission to the PJC inquiry into corporate insolvency in Australia, November 2022, available [here](#).

Government policy, including the Safe Harbour, to encourage directors to consider how to turnaround financial struggling businesses rather than prematurely placing them into voluntary administration or liquidation.

The AICD's recommends the following changes to RG 217 to improve accessibility and awareness of the insolvency obligations and the Safe Harbour:

- Guidance focused on the obligations and expectations on directors and responsible persons of charities and NFPs as it relates to insolvency;
- Enhanced use of visual aids, diagrams and additional examples to improve accessibility and understanding, particularly for directors of family-owned SMEs; and
- Targeted additions to the proposed Safe Harbour guidance, including expanding the guidance on 'reasonably likely' consistent with the Explanatory Memorandum.

We elaborate on these points further below.

## 2. General comments – Awareness of restructuring options

As noted above, we are supportive of amendments to RG 217 to reflect the Safe Harbour provisions. However, we consider that ASIC's actions to support understanding and awareness of the Safe Harbour should not be solely limited to changes to RG 217. The AICD considers that the audience for RG 217 is likely to be limited to advisers and directors actively seeking detailed guidance. In contrast, the ASIC website is the first port of call for individuals seeking information from a trusted source and we strongly recommend that the website should appropriately reflect the Safe Harbour.

The ASIC website currently does not have any recognition or reflection of the existence of the Safe Harbour.<sup>2</sup> Notably, the 'Insolvency for directors' webpage does not list the Safe Harbour as a regime that a director should be alive to when assessing how to meet their duties when a business is facing financial difficulties. We are concerned that, as currently framed, the details on the ASIC website are focused on directors' obligations in respect of insolvency and administration rather than conveying that there are also options that promote the restructuring of businesses.

A director seeking high level information on insolvency and restructuring options would be left with the impression from the ASIC website that such is the threat of liability from insolvent trading that they should generally look to appoint an administrator or liquidator, rather than a business or turnaround adviser. Of note on the 'Insolvency for directors' webpage there is an extensive section high on the page on the 'consequences of insolvent trading' but there is no section on turnaround or restructuring with the small business restructuring avenue appearing under 'What to do if your company is insolvent'. The Review identified similar shortcomings with the ASIC website and how it presents detail on options for turnaround and restructuring.<sup>3</sup>

ASIC appropriately reflecting the existence of the Safe Harbour as an important option available to directors, would be consistent with the findings of the Review that the Safe Harbour has improved

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<sup>2</sup> AICD review of ASIC website on 25 October 2023.

<sup>3</sup> Safe Harbour Review Final Report, November 2021, page 20.

governance and economic outcomes and delivered real turnaround options to directors of listed, large, and some medium sized companies with no observed instances of misuse.<sup>4</sup>

Limiting Safe Harbour guidance to RG 217 would be a missed opportunity to build awareness and understanding of this important restructuring option.

### 3. B1: Existing guidance

This section responds to section B1 of the consultation paper on whether the existing guidance in RG 217 for directors about their duty to prevent insolvent trading remains relevant and adequate.

The AICD considers that the existing guidance is broadly fit for purpose and accurately reflects the existing legislative provisions and the key principles that a director should account for in meeting their duty to prevent insolvency trading. However, we consider there is a gap in guidance on how the insolvency regime applies to directors and responsible persons of charities and NFPs, including the application of the Safe Harbour.

There is a patchwork of state and Commonwealth legislation that is relevant to governance of the NFP sector with application varying on whether an NFP is an incorporated association under a state or territory law, or whether it is a company limited by guarantee and subject to the Corporations Act. In addition, there is the Australian Charities and Not-for-profits Commission (**ACNC**) requirements via Governance Standard 5: Duties of Responsible Persons that place an obligation on a responsible person to not allow a charity to trade while insolvent. This complexity has created ambiguity for directors on how to approach decision making around solvency and administration. This is a particularly pronounced issue for the NFP sector where there is often limited financial resources.

While the Safe Harbour Review provided clarity that directors of NFPs that are companies limited by guarantee can access the Safe Harbour, it recognised that broader challenges with the insolvency regime's application to NFPs exist.<sup>5</sup> In particular, the concept of 'solvency', where a NFP often has limited capital and relies on grants or donations. The AICD recommends that ASIC work with the ACNC to develop guidance, including through amendments to RG 217, that is focused on the decision making of directors and responsible persons of NFPs and charities.

Separately we also recommend ASIC consider options to improve the accessibility of the guidance in RG 217 in a manner that would improve understanding of core insolvency director obligations, particularly by directors of SMEs. We suggest the following improvements:

- Use of visual aids, diagrams and flow charts to assist interpretation of the guidance material and the decision making steps of the director. For example, a visual aid would assist a director or advisor understand the key steps in the Safe Harbour.
- An example or examples that reflect the reality that many directors, particularly of family-owned SMEs, have personal liability, such as a mortgage, that is intertwined with a business. The current

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<sup>4</sup> Safe Harbour Review Final Report, November 2021, pages 4 – 5; 31 – 32 (misuse).

<sup>5</sup> Safe Harbour Review Final Report, November 2021, page 75

examples, while beneficial, do not highlight the challenges for directors of these businesses where decisions on solvency are impacted by personal financial circumstances.

- As discussed above, guidance focused on insolvency decision making for directors of charities and NFPs.

#### 4. B2: Proposed safe harbour guidance

This section responds to section B2 of the consultation paper on the proposed guidance on the Safe Harbour. The AICD welcomes the proposed amendments to RG 217 to reflect the Safe Harbour and considers it an important step in raising understanding and awareness of an effective restructuring reform, particularly amongst advisors.

We consider the proposed guidance could be enhanced through a number of targeted amendments to reflect the legislative intent and to improve accessibility. Our recommendations are as follows:

- Expand the guidance on the meaning of 'reasonably likely' (paragraphs 74 – 77). The Explanatory Memorandum to the legislation notes that reasonably likely 'does not require a better than 50 per cent chance of a better outcome than the immediate appointment of an administrator or liquidator' rather it requires the chance of achieving that outcome to be 'fair' or 'sufficient' and this will vary on a case-by-case basis.<sup>6</sup> We consider, as drafted, the guidance is narrow and does not convey that the likelihood does not necessarily need to be greater than 50% and the comparison or counterfactual is against administration or liquidation;
- Amend paragraph 67 to reflect that the statutory factors under s588GA(2) are separate (i.e. 'or') not cumulative (i.e. 'and') as currently drafted;
- Reflect that the Safe Harbour is available to directors of charities that are companies limited by guarantee under the Corporations Act;
- Develop an example on the use of the Safe Harbour by directors consistent with the other examples in RG 217;
- Amend paragraph 82 to reflect that the safe harbour protection does not end when the course of action(s) is 'implemented' rather it will cease when the action has been completed or ceases as is reflected in paragraph 89;
- Replace the use of 'adduced' at paragraph 61 with 'present' or similar to allow for a plain English interpretation.

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<sup>6</sup> Explanatory Memorandum, *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017*, page 14.

## 5. Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Simon Mitchell, Senior Policy Adviser at [smitchell@aicd.com.au](mailto:smitchell@aicd.com.au) or Christian Gergis, Head of Policy at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au).

Yours sincerely,



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