



ASIC

Australian Securities & Investments Commission

## Insolvency Law Reform Bulletin 4

**Guide for registered liquidators:** This bulletin is the final of a series about implementing changes in the Corporations Amendment (Insolvency) Act 2007, the Corporations Amendment Regulations 2007 and the Australian Securities and Investments Commission Regulations 2007. These changes, collectively referred to as 'insolvency law reform' or 'the amendments', generally come into effect on 31 December 2007.

### Other amendments

In this bulletin, we provide information to registered liquidators about implementation of some of the remaining amendments.

It complements the three other Insolvency Law Reform Bulletins covering: forms; information sheets; and registration and regulation of liquidators.

### Further information

If you require any further information on our implementation of the amendments generally, please email your inquiry to [karen.gross@asic.gov.au](mailto:karen.gross@asic.gov.au).

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## 1. Reports

### Reports lodged under s533

The amendments introduce a maximum time limit of 6 months from the suspicion of suspect conduct for lodgement of a report under s533(1). This report is referred to in Regulatory Guide 16 *External administrators: reporting and lodging* (RG 16) as the 'Schedule B report'. We ask that, where possible, liquidators try to lodge this information within 2 months of the date of appointment (see RG 16.54).

RG 16 has not yet been updated to incorporate this new time limit.

### Lodgement of reports by managing controller

A managing controller will now have to lodge a report with ASIC under s422 of the Act. This will apply to managing controllers appointed, entering into possession or taking control of property on or after 31 December 2007.

RG 16 has not yet been updated to incorporate this change but practitioners should be aware of the application of RG 16 to managing controllers after the new amendments take effect.

**Important note:** This bulletin contains general information from ASIC to assist registered liquidators to comply with the amended Corporations Act 2001, Corporations Regulations 2001 and Australian Securities and Investments Commission Regulations 2001 as at 31 December 2007. The information does not purport to be, and is not, a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to the specific circumstances of a registered liquidator or a company subject to an external administration.

## 2. Voluntary administrations and deeds of company arrangement

### Transition from VA to DOCA

The amendments include a number of changes meant to clarify the roles of the administrator of the company and the deed administrator in the period of transition between a voluntary administration (VA) and a deed of company arrangement (DOCA).

Revised s444A(3) now specifies that it is the administrator of the company who prepares the DOCA instrument, rather than the deed administrator. Section 444B(5) refers to the **proposed** deed administrator executing the instrument.

However, under s450C(a), where **the company** fails to execute the deed under s444B(2), it is the **deed administrator** who must lodge a notice with ASIC and notify the creditors.

### Termination of DOCA on grounds that wholly effectuated

The amendments have introduced a new obligation on a deed administrator where the DOCA has been wholly effectuated. The following is the text of the new s445FA:

- (1) If a company is subject to a deed of company arrangement, and
  - (a) the administrator of the deed has applied all of the proceeds of the realisation of the assets available for the payment of creditors; or
  - (b) the administrator of the deed has paid to the creditors:
    - (i) the sum of 100 cents in the dollar; or
    - (ii) any lesser sum determined by the creditors at a general meeting; or
  - (c) all of the following conditions are satisfied:
    - (i) the company's obligations under the deed have been fulfilled;
    - (ii) the obligations of any other party to the deed have been fulfilled;

(iii) creditors' claims under the deed have been dealt with in accordance with the deed;

the administrator of the deed must:

- (d) certify to that effect in writing; and
- (e) within 28 days' lodge with ASIC a notice of termination of the deed.

- (2) The notice of termination must be in the prescribed form.

This new section applies to any VA that commence on or after 31 December 2007 where that VA results in the DOCA.

Deed administrators should be aware of this obligation.

It appears that a prescribed form has not yet been released. Deed administrators are able to lodge FORM 5056 with ASIC to indicate that a DOCA has been wholly effectuated.

Practitioners should note that s445C now contains a distinction between:

- A DOCA that terminates because the deed specifies circumstances where it shall terminate and those circumstances exist (s445C(c)); and
- A DOCA that terminates where the deed administrator executes a notice of termination of the deed in accordance with s445FA (s445C(d)).

### Receipts and payments in VA and DOCA

An administrator and a deed administrator must now lodge accounts and statement (FORM 524) with ASIC under s438E and 445J respectively. The circumstances under which these accounts are lodged are covered in bulletin 1.

## 3. Creditors' voluntary windings up

### VA or DOCA ends in CVWU

Where creditors resolve that a company be wound up following a VA or DOCA, the liquidator may require an officer of the company to provide a report as to affairs which is lodged with ASIC (see s446C).

## Report rather than annual meeting in CVWU

A liquidator in a creditors' voluntary winding up now has a choice between convening an annual meeting of creditors or lodging a report with ASIC (see s508 (1)(b)).

If the liquidator chooses to prepare the report, the report must set out (this text is from new s508(3)):

- (a) an account of:
  - (i) the liquidator's acts and dealings; and
  - (ii) the conduct of the winding-up; during the first year or that succeeding year, as the case may be; and
- (b) a description of the acts and dealings that remain to be carried out by the liquidator in order to complete the winding up; and
- (c) an estimate of when the winding-up is likely to be completed.

We are approving a new form for lodgement of this report. This form will initially be available for paper lodgement. A facility for electronic lodgement will follow.

## 4. Requirements and exemptions to hold AGMs in external administrations

Section 508 has been amended so that a liquidator of a **creditors' voluntary winding-up** does not have to convene an annual meeting of **members**, although the requirement does remain for a members' voluntary winding up that continues for more than 12 months.

Section 250N of the Act requires public companies to hold an AGM within 18 months of registration and at least once a calendar year and within 5 months after the end of its financial year. Public companies can apply to ASIC for an extension of time for holding the AGM from ASIC under s250P. However, up to now, ASIC has been unable to provide an exemption from the requirement.

Our Regulatory Guide 174 *Externally administered companies: Financial reporting and AGM's* (RG 174) currently gives guidance on seeking relief from the financial reporting obligations in Pt 2M.3 of the Act and the obligation to hold an AGM in s250N.

New s250PAA has been inserted into the Act, giving ASIC the power to make an order exempting a specified class of companies in external administration from the requirement to hold an AGM under s250N. There is also a new s250PAB to allow ASIC to provide individual exemptions from the requirement.

ASIC has not yet issued a class order under s250PAA nor amended RG174. Until ASIC issues any such class order, practitioners who are administering a public company should make an application for an exemption on an individual basis.

It appears that no new form has yet been prescribed for lodgement of this application. However, ASIC will accept applications that accord with the guidelines provided in Regulatory Guide 51 *Applications for relief* (RG 51).

## 5. Liquidator conduct

### Broader prohibition on inducements

We would like to draw practitioner's attention to the broader prohibition of inducements aimed at securing or preventing an appointment or nomination as an external administrator. This is contained in the revised s595.

### Compulsory powers to investigate liquidator conduct

New s13(3) of the Australian Securities and Investment Commission Act (ASIC Act) will allow ASIC to use the investigatory powers in Part 3 of the ASIC Act when ASIC has reason to suspect that a registered liquidator has not, or may not have, faithfully performed his or her duties; or is not, or may not be, faithfully performing his or her duties as a liquidator. Part 3 of the ASIC Act includes the s19 examination power.