

Schedule C: Supplementary report by receiver or managing controller under s422(2), by voluntary administrator under s438D(2), or by liquidator under s533(2)

Schedule C contains a sample layout of a supplementary report under s422, 438D or 533: see Section C for further details. It is intended for the use of receivers, managing controllers, administrators and liquidators.

This sample format is *not* a prescribed format, and is provided merely as a guide to the information that ASIC would be interested in receiving, particularly if the external administrator is recommending that ASIC take action against a director or officer of the company.

We are aware that, in many cases, the external administrator may not have the information available to provide all of the information set out in this schedule, or the external administrator may have insufficient funds available to prepare a detailed report (if the external administration is assetless, please see www.asic.gov.au/aafund for details of the Assetless Administration Fund).

ASIC staff are available to discuss with external administrators, or their staff, any issues involving the preparation of a supplementary report. In the event of queries, insolvency practitioners may contact ASIC's Infoline on 1300 300 630 and ask for 'Liquidator Assistance'.

Section 1: Background

1.1 Appointment of external administrator

- Details of your appointment

1.2 Purpose of report

- State whether this report is submitted as a supplementary report pursuant to s422(2), 438D(2) or 533(2) of the *Corporations Act 2001* (the Act).
- List those persons who you believe may have committed an offence or engaged in other misconduct.

Example

| Name | Date of birth | Capacity or relationship to company |
|--|---------------|--|
| [First name (A)] [Middle name (B)] [Surname (C)] | 1/4/1970 | Director (1/7/03 to present) |
| [First name (X)] [Middle name (Y)] [Surname (Z)] | 14/2/1940 | Previous director (1/7/99 to 30/6/03), [father] / [mother] of A B C |

1.3 Ability of company to pay its debts

- For liquidations, comment on whether the company to which you have been appointed (the company) may be unable to pay its unsecured creditors a dividend of more than 50 cents in the dollar.

1.4 Director's previous failures

- Provide details of any previous corporate failures involving the director(s).

1.5 Possible misconduct/offences

- Provide a list of the possible offences or other misconduct and the time period over which they took place.

Section 2: Company details

2.1 Statutory information

2.1.1 Incorporation date

- Show date of incorporation.

2.1.2 Registered office

- Show address of registered office.

2.1.3 Officers of the company

- Provide details of the officers of the company according to the search of the corporate register maintained by ASIC:

Example

| Name and address | Position | Appointment date | Cessation date |
|---------------------|----------|------------------|----------------|
| [Name] [Address] | | | |
| [Name] [Address] | | | |
| [Name] [Address] | | | |

2.1.4 De facto directors/officers

- Provide details of any relevant persons not appointed as a director or officer of the company, who acted in the position of a director or officer.

2.1.5 Shareholders of the company

- Provide details of the members of the company according to the search of the corporate database maintained by ASIC:

Example

| Name and address | No. of shares | % shareholding |
|---------------------|---------------|----------------|
| [Name] [Address] | | |
| [Name] [Address] | | |
| [Name] [Address] | | |

2.2 Nature of the company's business

- Describe the nature of the business operated by the company and its principal place of business.
- State whether the company acted as trustee.

- Detail the director's/relevant person's role and extent of activities and authority in the operations of the company.

2.3 History of the company

- Provide a brief trading history of the company.
- Provide details if the company was a subsidiary or holding company of another entity.

Section 3: Events leading to appointment of external administrator

3.1 Director's explanation for appointment of external administrator and/or company failure

- Detail the reasons provided by the director for your appointment as external administrator and/or the failure of the company.

3.2 External administrator's opinion as to events leading to the appointment and/or company failure

- Detail your opinion as to the events leading to your appointment as external administrator and/or the reasons for the company's failure, including whether:
 - there was insufficient working capital;
 - the director was involved in any dishonest conduct;
 - there were any uncommercial transactions generally or transfers of assets to related companies; and
 - any possible negligence or mismanagement of the company or its finances by the director led, or contributed, to the company's failure.

Section 4: Company assets and liabilities

4.1 Assets and liabilities and estimated deficiency

- Provide a statement of the company's known assets and liabilities, their estimated realisable value, and the estimated deficiency in the external administration.

Example

| Item | Book value | Estimated realisable value |
|---|------------|----------------------------|
| Assets | | |
| <i>List by category</i> | | |
| Total assets | | |
| Secured liabilities | | |
| Unsecured liabilities | | |
| Employee entitlements (excluding super) | | |
| Superannuation | | |
| PAYG | | |
| GST | | |
| Other statutory liabilities | | |
| Workers' compensation premiums | | |
| Ordinary unsecured creditors | | |
| Total liabilities | | |
| ESTIMATED NET DEFICIENCY | | |

4.2 Comments on estimated deficiency

- Provide details of any material omissions from the report as to affairs.
- Provide any other comments seen as appropriate in relation to the deficiency to creditors.

Section 5: Insolvency

If you believe that the company was insolvent either before or on the date of your appointment, please provide further information in relation to the insolvency.

5.1 Date of insolvency

- Provide details of your opinion as to when the company became insolvent. If you are unable to specify a date, please state the month or financial quarter.
- Provide details of the reasons why you consider that the company became insolvent at that time. For example:
 - by application of the cash flow test of insolvency (see *Powell v Fryer* (2000) 18 ACLC 480 at 482); or
 - reliance upon the statutory presumption of insolvency based on insufficient accounting records (see 588E(4)); or
 - because of the presence of key indicators of insolvency. For example, the company exhibited the following indicators of insolvency on or about [date] [list any applicable indicator from the following:]
 - ongoing losses;
 - poor cash flow;
 - problems selling stock or collecting debts;
 - unrecoverable loans to associated parties;
 - creditors unpaid outside usual terms;
 - solicitors' letters, demands, summonses, judgements or warrants issued against the company;
 - suppliers placed the company on cash-on-delivery (COD) terms;
 - issued post-dated cheques or dishonoured cheques;
 - special arrangements with selected creditors;
 - payments to creditors of rounded sums that are not reconcilable to specific invoices;
 - overdraft limit reached or defaults on loan or interest payments;
 - problems obtaining finance;
 - change of bank, lender or increased monitoring/involvement by financier;
 - inability to raise funds from shareholders;
 - overdue taxes and superannuation liabilities;
 - board disputes and director resignations, or loss of management personnel;
 - increased level of complaints or queries raised with suppliers;

- an expectation that the ‘next’ big job/sale/contract would save the company.
- Please list the documentation available that supports any of these key indicators of insolvency.

Section 6: Details of liabilities

Provide further information about the creditors to which the company has liabilities identified in the table in Section 4.

6.1 Secured creditors

- Provide details of the nature of all securities given over the assets of the company.
- Detail amounts owing and any failure(s) to remit payments.
- Detail whether any of the secured creditors are related to, or associated with, the director.
- Provide details of any new secured debt or increase in existing secured debt on or after the estimated date of insolvency (if applicable).

6.2 Employee entitlements

- Detail amounts outstanding for wages, annual leave, long service leave, superannuation, etc.
- For outstanding superannuation, provide details of the period over which employee superannuation contributions have not been remitted.

6.3 Statutory liabilities

- Detail amounts owing for outstanding statutory liabilities (e.g. PAYG, GST, workers’ compensation premiums).
- For each category of statutory liability provide details on:
 - how long the debt has been outstanding;
 - the date the last statutory return was lodged; and
 - any repayment arrangement that had been negotiated with the statutory authority and any breach of that agreement.

6.4 Ordinary unsecured creditors

- Provide an ageing of creditors, if available.
- Provide details of any related party creditors.
- Provide details of any known judgments.

6.5 Largest creditors

- List the largest creditors in categories 6.2 to 6.4.
- Detail the amounts outstanding.
- Provide an ageing of these creditors, if available.
- Provide details of any repayment arrangement that had been negotiated with these creditors and any breach of that agreement.
- Detail whether these creditors are related to, or associated with, the director.

6.6 Comments on liabilities

- Provide any further comments that may assist ASIC in deciding whether to take further action.

Section 7: Possible misconduct

Set out comprehensive particulars of the possible misconduct with reference to the guidance below and Schedule D of RG 16.

Guidance in relation to possible misconduct

- The examples below indicate the type of information required for common types of misconduct.
- Refer to Schedule D of RG 16 for more detailed information on the type and nature of the information required to substantiate these types of misconduct.

Example: Sections 180–184—Possible breaches of directors' and officers' duties

With respect to each possible breach of duty:

- identify which section (180/181/182/183/184/other) may have been breached;
- provide details of the nature of the possible breach (e.g. Did the director, officer or relevant person draw excessive remuneration? Did they enter into transactions that attempt to avoid payment of employee liabilities? Did they make loans to themselves or related entities to the detriment of creditors? Did they sell assets to related parties at undervalue?);
- explain why, in your opinion, the conduct may have been a breach of duty;

- in the case of possible phoenix company activity, provide details of circumstances surrounding the relevant transactions/events, and details of the involvement of the relevant company officer(s) and of any other persons involved in assisting or advising the officer(s) as regards any possible phoenix activity, even if you are unable to identify which section of the Act may have been breached; and
- in the case of s180, indicate (if known) whether you believe that the director may be able to rely on the Business Judgment Rule (s180(2)) in defence to this allegation.
- in the case of s184, provide details of the recklessness, or the intentional or reckless dishonesty.
- detail the documents or other evidence relied on.

Example: Section 206A—Disqualified person not to manage corporations

- Provide details of the activities of the director/relevant person that it appears to you may constitute a breach.
- Explain how, in your opinion, the activities may constitute a breach of the section.
- Detail the documents or other evidence relied on.

Example: Section 286/344—Obligation to keep financial records

- Provide details of the records that should be maintained.
- Provide details of the company's books and records received.
- Identify what records have not been maintained.
- Identify areas where records do not accurately record or explain transactions or the company's financial position and performance.

Example: Section 471A—Exercising power(s) of an officer while powers suspended

- Provide details of the activities of the director/relevant person that appear to you may constitute a breach.
- Explain how, in your opinion, the activities may constitute a breach of the section.
- Detail the documents or other evidence relied on.

Example: Sections 429(2)(b), 438B(2), 446C(2), 475(1)—Failure to provide report as to affairs (RATA)

- Identify which section may have been breached.
- Was the director informed of their obligations under the relevant section?

- Provide details of the failure of the director that allegedly constitutes the breach.
- Detail the documents or other evidence relied on.

Example: Section 530A—Officers to help liquidator

- Identify which sub-section may have been breached (eg. s.530A(1)(a)).
- Was the director informed of their obligations under the relevant sub-section?
- Provide details of the failure of the director that allegedly constitutes the breach.
- Detail the documents or other evidence relied on.

Example: Section 530B—Liquidator's rights to company's books

- Identify which sub-section may have been breached.
- Was the director informed of their obligations under the relevant sub-section?
- Provide details of the failure of the director that allegedly constitutes the breach.
- Detail the documents or other evidence relied on.

Example: Section 588G—Insolvent trading

- Is there any evidence specifically indicating the involvement of a particular director with the incurring of particular debts after the estimated date of insolvency?
- Do creditors appear to be concerned about insolvent trading having taken place? Which creditors, if any, have complained to you about insolvent trading? Are they willing to assist ASIC in any further investigation?
- For how long did the director continue directly to allow the company to incur specific debts while it was insolvent?
- Detail the insolvency indicators of which the director was, or should reasonably have been, aware.
- Indicate whether it appears to you that the insolvent trading may have been dishonest and, if so, why you consider that it may have been dishonest.
- Indicate (if known) whether you believe that the director may be able to rely on a defence (not applicable in criminal proceedings) listed in s588H (e.g. defence of reasonable presumption of insolvency (s588H(2)), defence of illness (s588H(4)), defence of reasonable steps to prevent debt being incurred (s588H(5))).

- Detail the documents or other evidence relied on.

Example: Section 590—Offences by officers

- Identify which sub-section it appears to you may have been breached.
- Provide details of the activities of the director/relevant person that it appears to you may constitute a breach.
- Explain how, in your opinion, the activities may constitute a breach of the section.
- Detail the documents or other evidence relied on.

Example: Section 596AB—Entering agreements or transactions to avoid employee entitlements

- Provide details of the activities of the director/relevant person that it appears to you may constitute a breach.
- Explain how, in your opinion, the activities may constitute a breach of the section.
- Detail the documents or other evidence relied on.

The following is a suggested layout to report on each instance of possible offence/misconduct.

7.1 Details of possible offence/misconduct 1

- Provide the following details:

7.1.1 Relevant section of the Act

7.1.2 Nature of offence/misconduct

7.1.3 Key dates and events

7.1.4 Supporting evidence and analysis

7.1.5 Possible defences

7.2 Details of possible offence/misconduct 2

- Provide the following details:

7.2.1 Relevant section of the Act**7.2.2 Nature of offence/misconduct****7.2.3 Key dates and events****7.2.4 Supporting evidence and analysis****7.2.5 Possible defences****7.3 Other matters for ASIC consideration/public interest considerations**

- Detail any other matters concerning the director's (or other relevant person's) conduct in relation to the management, business or property of the company or public interest factors which, in your opinion, ASIC should consider when deciding whether to take further action.
- Detail the documents or other evidence relied on.

Section 8: Action taken by external administrator**8.1 Details of any public examinations**

- Provide details of any public examinations held, including:
 - date of examination(s);
 - names of examinee(s);
 - precis of outcome of examination(s); and
 - intended future action.
- Provide details of any proposed public examinations, including:
 - names of examinee(s); and
 - date of examination(s), if known.

Note: Section 533(1)(d) of the Act requires a liquidator to state in a report whether they propose to make (or have made) an application for an examination or order under s597.

8.2 Details of any recovery action taken

- Provide details of any litigation commenced, including:
 - type of litigation;
 - names of all defendants;
 - when commenced;
 - where funding obtained, whether it is:

- litigation funding;
 - creditor funding;
 - company funding; or
 - external administrator funding; and
- current status.
- Provide details of any litigation contemplated, including:
 - type of litigation; and
 - proposed defendants.

Section 9: Other matters of interest

A reference to other matters that you consider may be of interest to ASIC, such as:

- offences pursuant to Pt 5.8 of the Act (s589–592 and 596);
- details of the personal insolvency of company officers;
- company officers' involvement in other liquidations or insolvency proceedings, including suspected phoenix activity;
- whether you consider that ASIC should undertake any investigation or action pursuant to Pt 2D.6 of the Act (disqualification from managing corporations);
- details as to whether the officers may have any other assumed names or identities;
- details of any concerns you may have regarding the current trading of the director(s);
- your opinion on whether the director(s) represents any risk to the public; and
- details of the documents or other evidence relied on.

Section 10: Supporting documents

Please attach copies of any relevant documents not lodged with ASIC, including:

- reports to creditors under s439A of the Act; and
- any directors' and officers' questionnaires you have obtained.