The Report as to Affairs

An appraisal

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This article summarises a research report for which I was successful in obtaining funding under the Terry Taylor Scholarship for 2011. The research involved a written survey of official liquidators about their experiences and attitudes in relation to the Report as to Affairs form (**RATA**) and to associated compliance issues. The survey revealed deficiencies in the form of the RATA and raised a number of ideas for reform. The full report is available from the IPA.

Introduction

The RATA is a form which is prepared for the purpose of showing the financial position of a company at commencement of its entry into liquidation, controllership or administration. There are eight provisions in the External Administration chapter of the *Corporations Act 2001* (Cth) (**Corporations Act**) under which an obligation to prepare such a report is imposed or may arise.[1] In most circumstances, the report is to be prepared by company directors. Since late 2004, sole responsibility for design and content of the form has resided with the corporate regulator, the Australian Securities and Investments Commission (**ASIC**).[2] It is referred to as ASIC Form 507.

Most of the results of the survey are shown in the body of this paper. However, some important information that is discussed in the paper only appears in the full report. The most thought-provoking information of this type are comments, criticisms and suggestions made by liquidators concerning the RATA. These are reported verbatim, but anonymously (in accordance with a term of the survey).

The survey focused on *'official liquidators'* – those registered liquidators who are permitted to act in court-ordered liquidations. It appears that about 75 to 80 percent of registered liquidators are also registered as official liquidators.[3] Official liquidators were selected for several reasons, but mainly because the RATA is really put to the test in the environment of compulsory liquidation rather than voluntary liquidation. In addition, official liquidators are far more likely to have witnessed first-hand ASIC's enforcement work in this area.

At the time of the survey there were 523 official liquidators on ASIC's database. Of these liquidators, 309 were selected randomly and asked to participate in the survey. Approximately one third of those selected chose to participate by returning a completed survey form. The endorsement by the IPA of this project may have been one reason for this high response rate; another may have been the high level of interest in the profession about the need for change of the RATA form.

Focal point

Of the many findings coming out of the survey there are two that stand out because they highlight a considerable disparity between what liquidators need and what they receive. The survey shows that liquidators rate receiving a properly prepared RATA – one with full particulars of the company's assets, liabilities and securities – as an important requirement for the efficient performance of their role in a court-ordered winding up. But they also rate the typical RATA that they receive as incomplete, inaccurate and unreliable.

The Report as to Affairs form

The main part of the RATA form is the part which serves as a summary of assets and liabilities and gives the estimated deficiency or surplus. The current summary page is reproduced in the following diagram (Figure 1).

1 A Report as to Affairs (ASIC Form 507) is required under ss 421A(1), 429(2)(b), 475(1), and 497(5) of the *Corporations Act 2001* (Cth). The Form 507 may also be used in relation to ss 438B, 446C, 475(2) and 496(4). **2** On 23 December 2004 regulations came into effect removing some insolvency forms – including the RATA (Form 507) – from the list of forms prescribed by Corporations Regulations 2001. See Corporations Amendment Regulations 2004 (No 9). From then on the RATA ceased being a statutory form and became instead an ASIC Approved Form. **3** In March 2010 ASIC advised the Senate Economics References Committee that there were 662 registered liquidators. In September 2011 I found that there were 523 official liquidators on ASIC's database.

Figure 1

ASIC Form 507 (pages 3 and 4 only)

REPORT AS TO AFFAIRS

Current Version (dated 30/1/2012)

2	Assets and liabilities	Valuation (for each entry show whether cost or net book amount) $	Estimated Realisable Value $
2.1	Assets not specifically charged		
	(a) interest in land as detailed in schedule A		
	(b) sundry debtors as detailed in schedule B		
	(c) cash on hand		
	(d) cash at bank		
	(e) stock as detailed in annexed inventory		
	(f) work in progress as detailed in annexed inventory		
	(g) plant and equipment as detailed in inventory		
	(h) other assets as detailed in schedule C		
	Sub Total		
2.2	Assets subject to specific security interests, as specified in schedule D		
	Less amounts owing as detailed in schedule D		
	Total assets		
	Total Estimated Realisable Values		
2.3	Less payable in advance of secured creditor(s)		
	Amounts owing for employee entitlements as detailed in schedule E		
2.4	Less amounts owing and secured by debenture or circular security interest over assets		
2.5	Less preferential claims ranking behind secured creditors as detailed in schedule F		
2.6	Balances owing to partly secured creditors as detailed in schedule G		
	Total claims	**($)**	
	Security Held	**($)**	
2.7	Creditors (unsecured) as detailed in schedule H		
	Amount claimed	**($)**	
2.8	Contingent assets		
	Estimated to produce as detailed in schedule I	**($)**	
2.9	Contingent liabilities		
	Estimated to rank as detailed in schedule J	**($)**	
	☐ Estimated deficiency, or ☐ Estimated surplus		
	☐ Subject to costs of administration, or ☐ Subject to costs of liquidation		
	Share capital $		
	Issued $		
	Paid up $		

In all fundamental respects today's RATA form is the same as the Statement of Affairs was when the Uniform Companies Acts were passed in 1961.[4] In fact, it appears that the form has remained almost the same since the 1890s.[5]

As did its predecessors, the current RATA form seeks to obtain details of a company's assets and liabilities and have them presented in a way that discloses:

- the cost or book value and estimated realisable value (assets) or the amount owing (liabilities);
- which assets are subject to specific or fixed charges as security for debts;
- which assets are not subject to specific or fixed charges;
- whether a floating charge over assets has been given and, if so, the amount owing under the floating charge;[6]
- the amount of any surplus that is expected to flow from realisation of assets that are subject to specific or fixed charges;
- the amount of any liability that is expected to arise due to a deficiency on realisation of assets that are subject to specific or fixed charges;
- whether there exists any unsecured liabilities that rank by law in priority to floating charge liabilities or in priority to other unsecured liabilities;
- whether there are any contingent assets or liabilities; and
- the *'bottom line'*, that is, the estimated shortage/deficiency (or surplus) of funds resulting when liabilities are deducted from the amount that assets are estimated to produce.

Traditionally, another important aim of a statement of affairs in corporate insolvency has been to show the estimated amount available to meet the claims of unsecured creditors. But this feature has now disappeared from ASIC Form 507.

There is no official guide to what the terms used in the RATA mean or how it should be completed.[7] The onus of providing instructions to directors is placed by the court on the liquidator.[8] There are no official directions or principles as to what constitutes adequate instructions.[9]

Role and importance of the RATA

In the survey, liquidators were asked to indicate how much they agreed or disagreed with several statements relating to the role, importance and standing of the RATA /statement of assets and liabilities in an official liquidation.

The greatest degree of approval was given for one statement which played down the importance of directors correctly categorising and portraying assets and liabilities, but affirmed the need for a RATA that contained full particulars of assets, liabilities and securities:

> Statement:
>
> *'It does not matter that the assets and liabilities appearing in a RATA that I receive are correctly categorised and portrayed. What matters is that the RATA contains full particulars of the company's assets, liabilities and securities, including locations, relevant dates, names and addresses.'*

Eighty-nine percent of respondents said they agreed with this statement.

Other statements in a similar vein – stressing the importance of the RATA - received high levels of support. All other statements considered and responses given can be seen opposite (Figure 2).

4 Companies Act Regulations, Form 56. See, for example, Victoria Gazette, number 64, 22 June 1962, page 2181. The form was then called a Statement of Affairs. The name change occurred in 1981. **5** Long before the Uniform Companies Acts of 1961, officers of companies entering liquidation had to supply the liquidator with a Statement of Affairs. It appears that laws requiring this were introduced in all States (then colonies) in the 1890s – see 'The Law of Company Liquidation' by B H McPherson, first edition,1968, pages 21 to 23. For an example of such legislation see s 131 of the Companies Act 1896 (Victoria). **6** Since the *Personal Property Security Act 2009* commenced on 31 January 2012, the *Corporations Act 2001* refers to a floating charge as a *'circulating security interest'*, or a security interest in a circulating asset. In the current on-line version of ASIC's RATA Form 507, the phrase *'floating charge'* has been replaced by *'circular (sic) security interest'*, the phrase *'specific charges'* has been replaced by *'specific security interests'*, and the word *'charge'* has been replaced by *'security interest'*. **7** A so-called 'Guide: Report as to affairs' is issued by ASIC as part of Form 507. However, although it claims that it will *'assist you in completing and lodging the Form 507'*, it only refers to the lodgement period, late fees, and the manner in which additional information should be attached. **8** Under Court rules liquidators must give the person required under s 475 to submit a RATA *'instructions for the preparation of the report'*. See, for example, Federal Court (Corporations) Rules 2000, Div 7, rule 7.3(1). **9** The instructions given to directors vary from liquidator to liquidator. Those who subscribe to the precedent letters, forms and checklists available from specialist publishes – such as CORE Australia, MYOB Insolvency and CCH's *Australian Insolvency Management Practice* – would probably use the RATA instructions form released by the publisher, or perhaps an edited version of that form. Others would, of course, use forms devised in-house.

Figure 2			
Statement	**Agree %**	**Neither agree nor disagree %**	**Disagree %**
'Failure to submit a RATA results in a liquidator expending additional time and expense in identifying the company's assets and liabilities'.	81.9	14.3	3.8
'When lodged with the ASIC the RATA should give creditors and the public visibility as to the position of the company at the date of winding up.'	75.2	17.1	7.7
'The lack of a properly prepared RATA from directors is a serious impediment to the efficient and satisfactory fulfilment of the official liquidator's function.'	71.4	18.1	10.5
'A RATA is required to ensure a proper preliminary examination of the affairs of the company.'	66.7	22.9	10.4
'A RATA is required in order that the liquidator may identify, collect, secure and protect the assets of the company.'	60.0	24.8	15.2
'A RATA is the most important information required by a liquidator to commence winding up the company's financial affairs.'	44.8	37.1	18.1

Note: The *'agree'* responses shown here are an amalgamation of the *'strongly agree'* and *'agree'* responses. Similarly, the *'disagree'* responses are amalgamations of *'disagree'* and *'strongly disagree'*.

Quality of RATAs received

Liquidators were asked to consider several statements to do with the inclusion, appropriate valuation and proper classification of assets and liabilities. The resultant data shows that liquidators rate the typical RATA that they receive as significantly defective.

The questions/statements put to liquidators referred only to those RATAs that had been completed by directors without any participation by the liquidator or his or her staff.[10]

The highest rating in each outcome category could be given by a response of *'always'*. From that level the rating fell, first to *'often'* then to *'sometimes'* then to *'rarely'* and then to *'never'*. As will be seen below, the mid to low ratings of *'sometimes'* and *'rarely'* predominated.

On the broad question of whether the RATAs received were of a reasonable and acceptable standard, 59 percent of respondents said *'sometimes'* and 33 percent said *'rarely'*. On another broad question of whether the RATAs provided all the required information about assets and liabilities, 56 percent said *'rarely'* and 26 percent said *'sometimes'*.

It is also worth noting that the adverse rating of *'rarely'* was at its highest in questions about *'proper classification'*. Sixty-three percent said the classification of liabilities was rarely correct, and 58 percent said the classification of assets was rarely correct.

The statements (in the order in which they were put) and the results are shown in Figure 3.

Figure 3					
Statement	**Always %**	**Often %**	**Sometimes %**	**Rarely %**	**Never %**
'All assets that should be in the RATA are included.'	1.9	25.7	52.4	20.0	0.0
'All liabilities that should be in the RATA are included.'	1.9	7.6	50.5	39.0	1.0
'The classification of assets (1) *is correct.'*	0.0	4.8	29.5	58.1	7.6
'The classification of liabilities (2) *is correct.'*	0.0	3.8	28.6	62.9	4.7
'Assets are included in the RATA at appropriate values.'	0.0	3.8	53.4	39.0	3.8
'Liabilities are included in the RATA at appropriate values.'	0.0	20.0	55.2	22.9	1.9
'All the information required about assets and liabilities (3) *is provided.'*	0.0	8.6	25.7	56.2	9.5
'The RATA that is received is of a reasonable and acceptable standard.'	0.0	6.7	59.0	33.3	1.0

Note: The following explanatory text was included in the relevant remark:
(1) *'eg, assets not specifically charged, assets subject to specific charges, contingent'.*
(2) *'eg, preferential, secured, partly secured, ordinary unsecured, contingent'.*
(3) *'eg, location, names and addresses of debtors and creditors'.*

10 Sometimes liquidators choose to become closely connected with the preparation of a RATA by directors. However, whether that practice is good policy – for the liquidator or for the director – is questionable: see for example, the comments in *Re Reiter Brothers Exploratory Drilling Pty Ltd* (1994) 12 ACLC 430.

Explain, modify or switch?

Prior to conducting this survey, my own experience and discussions in insolvency circles suggested that RATAs prepared by directors were often materially defective, and that one reason for this was that the RATA was hard to understand. It was occasionally suggested that a better outcome would be achieved if the RATA was converted into a questionnaire.

Therefore the following questions were raised in the survey: *is there something wrong with the RATA; would a questionnaire be better?*

Replacement by a questionnaire?

When asked: *'Would you like to see the RATA changed from its present layout (ie, as a financial statement) to that of a set of questions seeking information about the company's assets and liabilities?'*, most liquidators (60 percent) said *'yes'*. Of the others, 22 percent said *'no'* and 18 percent said they were undecided.

Several respondents (21) offered reasons for their views. Their comments have been reproduced in an annexure to the full research report.

Most of those in favour of switching to a questionnaire regarded the existing RATA as difficult to complete. But one cautioned against a *one size fits all* design approach which would see directors of small companies being asked questions relevant only in the case of large companies. On the other side, opponents considered that a questionnaire would be too cumbersome, or that existing questionnaires, designed and issued by liquidators, were adequate. Some who favoured a questionnaire praised the one designed by the Insolvency and Trustee Service Australia (ITSA) for use in personal bankruptcy.

In the personal bankruptcy regime – which is governed by the Bankruptcy Act and administered by ITSA – the equivalent form, a Statement of Affairs (SOA) under s 54, was changed from a financial statement to a questionnaire over ten years ago.[11]

Improvements and changes to the RATA

When asked: *'What suggestions for improvements or changes to the RATA would you like to make (if any)?'*, 57 of the 105 liquidators (54 percent) made suggestions and/or criticised the form. Their comments have been reproduced in an annexure to the full research report.

The most common criticism was that the form is difficult for directors to understand, because of its layout (illogical, confusing), its complexity, and the lack of explanations and guidance. A frequent complaint was that directors are expected to know unfamiliar rules about the priority of employee and creditor claims and the difference between types of secured creditors.

Given these criticisms, it is no surprise that the most common suggestion was that the form should be made easier to understand, or more user-friendly. The need for detailed instructions in plain language rates very highly. But other specific suggestions included *'walking'* the director through the process, giving examples for different categories of assets and liabilities, removing the categories of assets and liabilities; and making specific reference to leases and hire purchase agreements. In several instances, sections 2.2 to 2.6 of the summary page (see Figure 1) have been singled out for criticism.[12]

Belief in the need for a questionnaire was evident in many suggestions. Some said that the RATA should incorporate questions about asset disposals, payments to creditors, signs of insolvency, other persons involved in management, what records were kept, the location of records, personal guarantees, fixed and floating charges, and real property mortgages.

Other suggestions were that the RATA:

- require additional details of assets
- require attachment of the most recent balance sheet
- be made investigative in nature
- be made more similar to a balance sheet
- provide separate schedules for wages, leave entitlements and superannuation owing and
- allow room for comments

11 The process of change to the bankruptcy SOA began in 1987 when the law was amended to give the Inspector-General in Bankruptcy the authority to revise and simplify the SOA with the intention of developing a SOA which would *'give the trustee a reasonable initial overview of the debtor's affairs, whilst being reasonably free from legal terms'*: see Bankruptcy Amendment Bill 1987 – Explanatory Memorandum – pages 43, 44, 57 & 58. It was approaching a questionnaire style in 1997, as can be seen in Commonwealth Government Gazette GN 25, 25/6/1997, page 1610. The SOA seems to have completed its transformation to a questionnaire by about 1999. The current version does not contain a financial statement. **12** Personally, I consider it remarkable that the form does not request any details – other than the amount owing – in relation to the holders of floating charges (now called *'circulating security interests'*), who are frequently present in corporations as predominant creditors.

What happens to defective RATAs?

When a RATA is submitted to an official liquidator under s 475 of the Corporations Act the liquidator must file a copy of it with the court and lodge a copy with ASIC.[13] In other forms of external administration, lodging RATAs with ASIC is also obligatory.[14] In this way the information in the RATA become a matter of public record. The main idea behind this procedure is to give creditors, other interested parties and the public visibility as to the position of the company at the date of winding up.[15] For a fee, anyone may obtain a copy of a RATA from an ASIC information broker.

But what happens if the RATA submitted to the liquidator is defective? Does such a RATA go on the public record as a statement as to the position of the company at the date of winding up?[16]

What constitutes a defective RATA is, of course, a matter of opinion. In the survey, I described a defective RATA as one which is *'only partially completed or is otherwise not completed to an acceptable standard'*. I asked liquidators:

> When a director submits a RATA to you under section 475 **but the RATA is defective** – ie, only partially completed or is otherwise not completed to an acceptable standard – what do you do? (Select all that apply.)

The options that I thought might be chosen, and the results of the survey, are shown in the table below (Figure 4).

Figure 4

What do you do with a defective RATA?	%
Lodge a copy of the defective RATA with ASIC.	61.9
Return the RATA to the director for rectification.	57.1
Offer assistance to the director to prepare the RATA to an acceptable standard.	53.3
Make a report about the defective RATA to ASIC (section 533).	23.8
Lodge a complaint about the defective RATA with ASIC (Liquidator Assistance Program).	21.9
Other (Please describe).	3.8

As can be seen, the survey found that approximately 62 percent of liquidators lodge copies of defective RATAs with ASIC.

On one view it is surprising that this figure is not 100 percent, since the law does not appear to allow liquidators any choice in the matter.[17] Also, liquidators would be eager to avoid the late lodgement penalty that is imposed automatically if a copy of the RATA is not lodged as stipulated.

Perhaps some liquidators consider that a RATA that is *'only partially completed or is otherwise not completed to an acceptable standard'* does not qualify as a RATA at all and, that being so, there is no obligation to lodge it.[18]

In the bankruptcy regime, the Official Receiver has advised that he or she may refuse to accept a Statement of Affairs for filing if it is, *inter alia*, *'incomplete'*. The meaning of *'incomplete'* is described as:

> If the debtor has not reasonably attempted to answer all the questions on the statement of affairs …. The Official Receiver will assess whether the unanswered question(s) is critical to an understanding of the debtor's affairs and whether the information provided is sufficient, for example an indication that the debtor owns assets without details of the location or estimated value would not constitute a reasonable attempt, and/or an indication by the debtor that they have creditors other than the petitioning creditor without identifying them would not constitute a reasonable attempt.[19]

13 Section 475(7) of the Corporations Act. **14** Managing Controllers and Controllers have obligations under ss 421A(2) and 429(2)(c) respectively. In a creditors' voluntary liquidation, the legal position is complicated. Since 2007 – as a result of *'an unintended anomaly introduced by the 2007 insolvency reforms'* there has been no specific requirement to lodge a RATA with ASIC in the case of a creditors' voluntary liquidation. However, if current reform proposals become law, the specific requirement will be reinstated. **15** In *Re: Harris Scarfe Ltd (in liq)* (no 2) (2007) SASC 211, Debelle J said: *'The purpose and intent of s 475 is to equip the liquidator and the creditors with knowledge of the affairs of the company and thereby to assist the orderly and efficient administration of the winding up. Shortly put, its object is to provide information for the purpose of the winding up: re New Pars Consol Ltd [1898] 1 QB 573 at 576. … Section 476 (which requires a liquidator to lodge a preliminary report to ASIC) provides the means by which the information gained by the liquidator is made available to the public. Section 475 and 476 … are steps of a procedural nature intended to elicit information as to the affairs of the company and to provide that information to creditors and contributories.'* In bankruptcy, see similar statement in *Nilant v Macchia* (2000) 104 FCR 238 at 245; and *Wangman v The Official Receiver* [2006] FCA 202 at [49]. **16** In bankruptcy law the Official Receiver may refuse to accept a Statement of Affairs and return it to the bankrupt on the basis that the statement had not been satisfactorily or properly completed. See the Inspector-General in Bankruptcy's Practice Statement number 14. See also Inspector-General Practice Statement 14, Referring offences against the Bankruptcy Act 1966 to the Inspector-General, 2 February 2010. In the Official Receiver's Practice Statement 10 – Filing Of A Statement Of Affairs and Issue Of 77CA Notices by The Official Receiver - issued 1 December 2010, the word 'incomplete' is used to describe a Statement of Affairs that may not be accepted. **17** Section 475(7) states: *'The liquidator must, within 7 days after receiving a report under subsection (1) or (2), cause a copy of the report to be filed with the Court and a copy to be lodged'*. **18** In *Wangman v The Official Receiver* [2006] FCA 202, the court refers to case law stating that *'the defects in the 1998 Statement of Affairs were so significant that it could not be said that the document was a statement of affairs at all'; 'very little of the document was genuinely attempted by the appellant (bankrupt)'*; and *'the 1998 Statement of Affairs was clearly defective because of: (a) the quantity of information which had either not been included or not appropriately address by the appellant (bankrupt)'*. In that case, Collier J found that because the Statement of Affairs was so defective, it was not a statement of the bankrupt's affairs at all, and ITSA was under no obligation to accept it. These statements and findings may mean little in the liquidation arena. But they do suggest that for a report *'as to the affairs of the company'* – the phrase used in ss 475(1) and (2) – to qualify as such, the report needs to reach some standard. **19** Official Receiver's Practice Statement 10 - Filing Of A Statement Of Affairs and Issue Of 77CA Notices by The Official Receiver – Issued 1 December 2010.

There is at least one reported case – concerning the banning of a director – in which ASIC has expressed a view about when a RATA fails to be of an acceptable standard. ASIC spoke then of the absence of *'full disclosure'*.[20] But it is doubtful that it would apply that view generally to issues arising under s 475.

ASIC has the power to refuse to receive a document and request an amended, fresh or supplementary document where the document has, for example, not been duly completed because of an omission or misdescription. But without amendment this law is unlikely to be of any use in the case of an incomplete or defective RATA because it is aimed at the person attempting to lodge the document, who would be the liquidator, and not the author of the RATA, which is the director.[21]

Compliance issues – Background

The requirement that directors make out and submit a RATA gives rise to several compliance issues which are central to the proper functioning of the court-ordered liquidation system.

It has long been an offence for directors to refuse or fail to make out, verify and submit a RATA to the official liquidator.[22] The frequent breach of this law (and of other laws requiring directors to assist liquidators) led in 2002 to establishment by ASIC of its specially funded Liquidator Assistance Program (**LAP**) to assist liquidators and ASIC to enforce these laws.[23]

If a director breaches s 475 and the official liquidator lodges a complaint with ASIC under

20 These comments were made in a case concerning a decision by ASIC to ban a director. One of ASIC's many reasons for the ban was *'failure to give full disclosure in a report as to affairs'*. The RATA did not disclose any assets (including debtors) or creditors of the company, although the director knew there were assets and liabilities. ASIC was of the view that *'failure by the Applicant (director) to submit a RATA that fully disclosed the company's liabilities showed a reckless disregard of his obligations under the legislation and a reckless disregard for the interests of creditors.'* The AAT agreed, saying that *'The RATA declared by the Applicant to be true to the best of his knowledge and belief was patently untrue and not consistent with the accounting records then maintained by the company'* Byrnes and ASIC [2000] AATA 333. **21** Section 1274(8) of the Corporations Act 2001. **22** Section 475 of the Corporations Act 2001. Precursors were s 234 of the Uniform Companies Act 1981 and s 131 of the Companies Act 1896 (Victoria). **23** ASIC had a group of staff carrying out liquidator assistance work before 2002, but it did not receive special funding until that year.

the LAP, ASIC sends the director a warning letter.[24] If the director still fails to submit a RATA, ASIC will initiate a summary prosecution, bringing the matter before a Local or Magistrates Court, where a conviction may be recorded and a fine imposed. Referring to this process ASIC said in its submission to the 2010 Senate Inquiry[25] that *'since July 2006 ASIC has prosecuted 1,955 officers in respect of 2,317 contraventions'*.[26]

ASIC advised the Senate Inquiry that complaints of failure to provide a RATA or books and records to an external administrator ranked at the top if its list of the most common of all complaint issues raised during 2008-09.[27]

Besides making a complaint to ASIC under the LAP, liquidators and other external administrators must report all apparent offences by directors – including failing to prepare a RATA – to ASIC.[28] Statistics published by ASIC show that in the three years from July 2008 to June 2011 external administrators reported 3,033 alleged cases of *'post-appointment criminal conduct'* by directors failing to prepare a RATA.[29]

It seemed appropriate to include questions in the survey concerning attitudes to the performance of ASIC in pursuing directors for RATAs and concerning the amount of the fines that are imposed for breaches of s 475. It also seemed opportune to inquire into practices regarding the reporting of s 475 offences.

Reporting alleged offences

Liquidators were asked how they reported alleged offences under sections 475(1) or (2) to ASIC. The precise question was:

> When a director fails to submit a RATA to you as required by section 475(1) or (2), *how* do you report the alleged offence to ASIC?

Three well-known methods were shown. More than one method could be selected. The responses are shown below (Figure 5).

Figure 5

Ways Section 475 Offences are Reported	%
By lodging a complaint with ASIC (eg, under its Liquidator Assistance Program).	91.4
By making a report under section 533(1) (eg, Regulatory Guide 16, Schedule B, Form EX01).	60.0
By making a report under section 533(2) (eg, Regulatory Guide 16, Schedule C).	12.4
Other (Please describe).	0

It is interesting to note that 8.6 percent of liquidators said they do not lodge a complaint with ASIC under the LAP. This is odd, because not only does ASIC advocate use of the LAP,[30] but that process appears to be the only way in which compliance and prosecution action concerning a RATA can be initiated.

Just as interesting is the fact that only 60 percent of liquidators said that they reported the breach of section 475 to ASIC in their initial s 533 report. This suggests that ASIC's statistics on the number of alleged breaches of laws requiring preparation of a RATA may be significantly understated.[31]

Getting a RATA after reporting an alleged offence

In an attempt to gauge how successful the LAP procedure is, liquidators were asked:

> At some stage after reporting a breach of s 475 to ASIC, do you receive a RATA?

Five percent of the liquidators chose the highest rating of *'always'*. Thirty-seven percent said *'usually'*. However, 55 percent said *'sometimes'*, and three percent said *'never'*.

These ratings may be compared with figures published by ASIC on its LAP activities. It has reported that in 2010/11 there were 406 *'compliance outcomes'* from 1,386 requests for assistance to obtain a RATA or delivery of books and records. *'Compliance outcomes'* are said to *'generally involve activities (including court proceedings) that*

24 ASIC says that it issued 1,465 warning letters to company officers in 2008/09 under the LAP. (See ASIC submission to the 2010 Senate Inquiry – submission number 69, March 2010, page 74, Table 16.) These figures appear to be the most recent that are publicly available. **25** The Senate Economics References Committee Inquiry into the Conduct of Insolvency Practitioners and ASIC's Involvement. **26** ASIC Submission number 69, March 2010, page 15, Table 1. **27** ASIC Submission number 69, March 2010, page 57, Table 7. All published submissions are available at **http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/liquidators_09/submissions.htm** **28** Sections 533, 422 and 438D of the Corporations Act 2001 and ASIC Regulatory Guide 16, Section B. **29** On its website ASIC publishes annual reports titled 'Insolvency Statistics – External administrators reports'. The number of alleged breaches of RATA provisions in ss 429, 438B, 446C and 475 are given under the heading stream "Initial external administrators reports" > "Possible misconduct" > "Alleged criminal misconduct" > "Post-appointment criminal misconduct". **30** *'As a liquidator or administrator you can ask us for help with RATA, s530A and s530B offences. We would prefer if you put in a complaint (separate from your S533 report) so we can deal with the matter quickly and efficiently.'* See **http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+assistance:+Books,+records+&+RATA+**. See also Table 1, page 15, of ASIC's March 2010 submission to the 2010 Senate Inquiry. **31** Already cited at note 29. **32** These latest statistics on ASIC's LAP activities appear in the October 2011 edition of *'ASIC Insolvency Update for Registered Liquidators'*. See **http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC-Insolvency-Update-October-2011.pdf/$file/ASIC-Insolvency-Update-October-2011.pdf.** Also, in its March 2010 submission to the 2010 Senate Inquiry into insolvency practices the ASIC said that under the LAP: *'ASIC's initial response is a warning letter to directors, which achieves compliance in 55 percent of cases.'* In earlier years ASIC has spoken of receiving *'compliance rates'* under the LAP of 74 percent and 67 percent.

result in voluntary compliance by directors in submitting Reports as to Affairs and/or producing books and records to the RLs.' Out of the 1,386 requests for assistance there were also 575 charges issued and 425 *'successful individual prosecutions (761 offences)'*.[32] Unfortunately figures on the number of RATAs obtained are not given.

ASIC convictions and penalties imposed

Of the liquidators surveyed, 53 percent (ie, 56 liquidators) said they knew of at least one occasion when ASIC had obtained a s 475 conviction against a director of a company to which they had been appointed.

The question put to liquidators was:

> In respect of any of the companies to which you have been appointed official liquidator, has ASIC obtained a conviction against a director for a breach of section 475?

As mentioned, 53 percent replied in the affirmative. Of the remaining 47 percent, 31 percent said *'no'* and 15 percent said, *'don't know/can't say'*.

Under the Corporations Act, the maximum penalty for an offence under s 475 is currently 25 penalty units (total $2,750) or imprisonment for six months, or both.[33] The government recently proposed that the maximum penalty be doubled to bring it in line with the maximum prescribed under bankruptcy law.[34] Research carried out by me, independent of this study, shows that the average amount of fines imposed by magistrates for a s 475 offence prosecuted by ASIC over the five calendar years 2006 to 2010 was $875.[35]

The 56 liquidators who were aware that a conviction had been obtained against a director of a company over which they had been appointed were asked to rate the penalty imposed by the court as either *'very light'*, *'light'*, *'fitting/appropriate'*, *'heavy'*, or *'very heavy'*. Forty-five of these 56 liquidators (ie, 80.4 percent of them) rated the penalty imposed as either *'very light'* or *'light'*. The results are depicted below in Figure 6.

Figure 6

How would you rate the penalty that was imposed by the court? (If you have had this experience more than once, rate the penalties generally)	**%**
Light	41.1
Very light	39.3
Don't know	8.9
Fitting/appropriate	7.1
Heavy	1.8
Very heavy	1.8

In the section of the survey dealing with the role and importance of the RATA (discussed earlier in this article) liquidators were asked how much they agreed or disagreed with the following statement:

> Failure to submit a RATA without reasonable excuse should be treated as a contempt of court.

Seventy-four percent of the 105 respondents said they agreed with this statement.

Satisfaction with process

Liquidators were asked about their level of satisfaction with the process that follows after they report to ASIC that a director has breached s 475.

The majority (39 percent) said they were *'neither satisfied nor dissatisfied'*, while slightly less (37 percent) said they were *'satisfied'*. The results are depicted in Figure 7.

33 Schedule 3 of the Corporations Act 2001. There have also been cases in which failure to submit a RATA to the liquidator has been a factor in ASIC's decision to exercise its power under s 206F of the Corporations Act to disqualify or ban a person from acting as a director: see, for example, the case of Robert Doon, reported in ASIC Media Release 10-172AD of 12/8/2010, which can be found at **http://www.asic.gov.au/asic/asic.nsf/byheadline/10-172AD+ASIC+disqualifies+13+directors+of+failed+companies+from+managing+corporations?openDocument. 34** Paragraph 227 of The Treasury *'Proposals paper: A modernization and harmonisation of the regulatory framework applying to insolvency practitioners in Australia'*, December 2011. **35** In the five years the average fine under s 475 was $1,099 (2006), $1,001 (2007), $818 (2008), $640 (2009) and $817 (2010). I obtained this data by conducting detailed analysis of periodic conviction reports published by ASIC as media releases. My research paper is currently with the Australian Institute of Criminology undergoing a review process.

Figure 7

After reporting a breach of s 475, which one of the following best describes your usual level of satisfaction with the process that follows?	%
Neither satisfied nor dissatisfied	39.0
Satisfied	37.1
Dissatisfied	20.0
Very dissatisfied	2.9
Very satisfied	1.0

Proposed changes to enforcement process

Late in 2011 the government proposed changes to the way in which the requirement to submit a RATA is enforced.[36] If adopted the new regime would see ASIC *'empowered to issue information gathering notices requiring the former directors or officers to complete the RATA within a stipulated timeframe'*. Failure by a director to comply with such a notice would, or could, result in a *'notice of suspension'* being issued and placed on a public record.[37] Such a suspension – which *'(is) not full disqualification'* – would ban the director from managing any company for a period. The duration of the ban would depend on several factors such as the period of non-compliance and the time it takes for the external administration to be completed.[38] The IPA has supported this proposed reform.

Conclusion

A number of recommendations and additional observations can be made with respect to this survey of liquidators.

Discontent with RATA form

Clearly, our corporate doctors believe that the RATA needs urgent treatment. The survey has shown that there is considerable dissatisfaction with the inadequate information that they receive in many RATAs. There is a tendency to blame the form for this, and also to blame the form for the fact that many directors fail to prepare a RATA. There is also a strong desire to have the form made more user-friendly or to have it replaced by a questionnaire. Many liquidators feel that the requirement that directors classify assets and liabilities according to insolvency rules regarding priorities is not necessary and is a frequent cause of problems in getting a properly prepared RATA.

To be or not to be a questionnaire

In this country, the statement of affairs required in personal bankruptcy has been changed from a financial statement to a questionnaire.[39] In view of the vote for change expressed by many liquidators, and in the context of a broader desire for harmonisation of personal and corporate insolvency regulation, a move to a questionnaire-style RATA ought to be seriously considered. However, an inquiry into the pros and cons should look first into:

- whether the change of style that occurred in personal bankruptcy has, alone, led to a measurable improvement in the standard of information received and in greater compliance with the requirement to prepare a statement of affairs;
- whether bankruptcy trustees have found that, because of the change, they can administer the affairs of bankrupts more efficiently and effectively;
- whether bankrupts have appreciated the change; and
- whether creditors have appreciated the change.

In New Zealand the company statement of affairs is in the style of a questionnaire.[40] But in England[41] – and many other places - including Scotland,[42] Ireland,[43] Hong Kong,[44] and India[45] – a form in the traditional style of a financial

36 Paragraphs 227 to 236 of *'Proposals paper: A modernization and harmonisation of the regulatory framework applying to insolvency practitioners in Australia'*, December 2011. **37** The director would have the right to appeal to the AAT against the notice of suspension. **38** The Government proposal seems to suggest that regardless of other factors the suspension period will expire *'after three years of non-compliance'*. **39** As cited at note 11. **40** The NZ Statement of Affairs for companies is available at **http://www.insolvency.govt.nz/cms/pdf-library/forms/Liquidation%20statement%20of%20affairs**. A copy of this form is included in my full research report as an annexure. **41** Form 2.14B. **42** Form 2.13B (Scot). **43** Form No.13. **44** Form RC2. **45** Form 57.

statement, very similar to our RATA, is used. An inquiry into whether Australia should move to a questionnaire-style RATA should take into account the thoughts and experiences of liquidators and regulators in New Zealand and in the countries that have not changed.

Input from company directors, especially those in small enterprises, should also be sought. A common criticism of the present RATA is that it is too complicated for the average company director to understand. If that is a valid point, then a central issue will be whether directors find it easier to prepare a RATA in questionnaire style than one in financial statement style.

An improved form

Obviously it is desirable that the RATA form be user-friendly, whatever style it comes in.[46] But as the RATA is a multi-user form – for directors, liquidators, secured creditors, preferential creditors and general creditors – consideration must be given to the needs of all users.

There is a tendency to aim for a very simple form that almost anyone could complete. However, such a move may be counterproductive. The financial position of a company can be complex. Arguably it is better for liquidators, creditors and the public that directors be required to provide comprehensive information.

The present RATA form could be improved by making its course and objectives clear once again. In recent years petty or perhaps accidental changes made to the summary page – altering borders, columns and rows, and removing sub-total areas– have made the form more difficult to fathom. (For an example of what I mean by making its course and objectives clear, see annexure 6 of the full research report.) Reinstating borders, columns, rows, and sub-totals would not be a cure, but would be a simple, partial remedy.

Greater official guidance, education and help

The standard of the average RATA submitted to external administrators would almost certainly improve if company directors were given a helping hand.

ASIC ought to issue a detailed guide or information sheet about the RATA. This guide should be available free online from ASIC website, and a copy should be sent to directors whenever a RATA is required. A telephone help service, provided by ASIC, should also be available. Such services are provided by other government regulatory agencies, the model probably being the Australian Taxation Office.

ASIC says that it *'regard(s) failure to provide a RATA or to disclose and deliver up books and records as a serious breach of the Act.'* [47] But even though it rates the duty to prepare a RATA as important, ASIC does not appear to do anything to help directors fulfil that duty as soon as it arises. On its website at present ASIC has approximately 220 Regulatory Guides and 150 Information Sheets, for the purpose, *inter alia*, of *'explaining how ASIC interprets the law', 'giving practical guidance'* and *'provid(ing) concise guidance on a specific process or compliance issue'*. [48] Yet none of these guides or information sheets provides information about how to prepare a RATA.[49] It is surprising, to put it mildly, that a form like the present RATA – one which is unusual, complex and important – does not at least have an official guide to what its terms mean and how it should be completed.

Enforcement

The proposed amendment to double the maximum penalty for failure to submit a RATA[50] would be supported by most liquidators, and may lead to improved compliance rates if the doubling is reproduced in the actual fines imposed by magistrates. But greater follow-up action by ASIC after it accomplishes an initial prosecution success seems to be required.

46 The attributes of useable forms are described in a paper issued by the Australian National Audit Office in January 2006 – 'User-Friendly Forms: Key Principles and Practices to Effectively Design and Communicate Australian Government Forms'. **47** ASIC Information Sheet 53 for directors – *'Providing assistance to external administrators: books, records and RATA'*, dated November 2004. Available from **http://www.asic.gov.au/asic/asic.nsf/byheadline/Providing+assistance+to+external+administrators:+books,+records+and+RATA** . **48** **http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/New%20regulatory%20documents**. **49** There are nine regulatory guides and 11 information sheets touching on other corporate insolvency matters. **50** As cited above at note 34.

If enacted the proposal to empower ASIC to issue information gathering notices requiring directors to submit a RATA and suspend their right to manage companies if they fail to do so,[51] should improve compliance with the duty to submit the form. But as long as there is no rule as to what constitutes a valid RATA, these measures – and those designed to increase fines – are not likely to remedy the principal complaint.

Consultation with relevant parties

This survey of liquidators has brought to light substantial criticisms and concerns about the RATA and a desire for change. It coincides with moves towards harmonisation of personal and corporate insolvency regulation, and with the start of the Personal Property Securities Act, which makes significant changes to priority rules for secured parties as well as introducing a new vocabulary. All this suggests that it is time the RATA form was revisited and overhauled.

ASIC should make the RATA the subject of an inquiry through a Consultative Paper, in the way it did in 2009/2010 in relation to insolvent trading.[52] The ultimate aims of the consultation would be to produce a new or redesigned form, a Regulatory Guide to the form, and an information sheet for directors. The inquiry should consider, for example, what constitutes an acceptable standard for a RATA, ie, when does a professed RATA qualify as a valid RATA and how the receipt of a RATA that fails to meet that standard should be handled.

For reasons of space many footnotes have been substantially shortened. For the complete footnotes and annexures please see the full research report available from the IPA website.

51 As cited at note 36. **52** Consultation Paper 124, 'Duty to prevent insolvent trading: Guide for directors', November 2009. From this process came Regulatory Guide 217 of the same name in July 2010. **http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg217-29July2010.pdf/$file/rg217-29July2010.pdf.**