



ASIC

Australian Securities & Investments Commission

REPORT 514

Response to submissions on CP 276 Registered liquidators: Registration, disciplinary actions and insurance requirements

March 2017

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 276 *Registered liquidators: Registration, disciplinary actions and insurance requirements* (CP 276) 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 258 *Registered liquidators: Registration, disciplinary actions and insurance requirements* (RG 258).

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A Overview/Consultation process

1 In [Consultation Paper 276](#) *Registered liquidators: Registration, disciplinary actions and insurance requirements* (CP 276), we consulted on proposals to issue guidance on changes enacted by the *Insolvency Law Reform Act 2016* (Insolvency Law Reform Act).

2 We proposed to issue a new regulatory guide to:

- (a) update our previous guidance in Regulatory Guide 186 *External administration: Liquidator registration* (RG 186) on the registration process and incorporate this into our new regulatory guide;
- (b) provide guidance to registered liquidators on renewing their registration and their obligations to lodge an annual liquidator return and notify ASIC of significant and other events;
- (c) include an overview of the new disciplinary regime for registered liquidators under the amendments made by the Insolvency Law Reform Act; and
- (d) update our previous guidance in Regulatory Guide 194 *Insurance requirements for registered liquidators* (RG 194) on insurance requirements and incorporate this into our new regulatory guide.

The new regulatory guide would then supersede RG 186 and RG 194.

3 This report highlights the key issues that arose out of the submissions received on CP 276 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 276. We have limited this report to the key issues.

5 The report does not respond to issues raised in submissions that:

- (a) would require law reform to implement: ASIC is required to implement the legislation as enacted and our regulatory guide relates to the legislation as enacted;
- (b) raised minor drafting issues or identified ASIC drafting errors: ASIC changed the regulatory guide where appropriate to clarify the intention of the guidance and correct errors; or
- (c) provided feedback on matters not within the scope of the regulatory guide.

6 We received seven non-confidential responses to CP 276. We are grateful to respondents for taking the time to prepare and send us their comments.

7 For a list of the non-confidential respondents to CP 276, see the appendix. Copies of these submissions are on the ASIC website at www.asic.gov.au/cp under CP 276.

Responses to consultation

- 8 Submissions generally supported the proposed guidance on registration. A number of submissions suggested changes to the information to be provided with the application for registration, changes to the fit and proper guidance, and changes to the process for advertising applications for registration.
- 9 Submissions about renewal, annual liquidator returns and notifications to ASIC sought additional guidance on a number of matters.
- 10 Submissions about guidance on disciplinary actions generally supported the proposed guidance, although several submissions questioned aspects of the legal process.
- 11 All submissions supported our proposed guidance on insurance requirements, although there were differences of views about some aspects of determining the adequacy of insurance cover.
- 12 Sections B–E of this report set out the key issues raised during our consultation, and our response to the feedback received.
- 13 Following consultation, we have:
- (a) issued new guidance in Regulatory Guide 258 *Registered liquidators: Registration, disciplinary actions and insurance requirements* (RG 258);
 - (b) updated [Information Sheet 30](#) *Fees for commonly lodged documents*; and
 - (c) withdrawn RG 186 and RG 194.

B Registration as a liquidator

Key points

This section outlines the responses we received relating to Proposal B1 and our approach to those responses.

It covers feedback on proposed changes to how an individual may apply to be registered as a liquidator.

- 14 Submissions generally supported the proposed guidance on how an individual may apply to be registered as a liquidator. However, submissions raised issues about:
- (a) the information to be provided with the application to be registered as a liquidator and the registration process;
 - (b) the appropriateness of proposed guidance on the eligibility requirement to be ‘otherwise a fit and proper person’; and
 - (c) matters to be considered by the registration committee.

The application and registration process

- 15 A number of submissions recommended changes to the information to be provided with the application for registration.
- 16 Some of those submissions suggested that certain information should not be required, including:
- (a) details of legal or disciplinary action taken against the applicant in the last 10 years where no adverse finding was made or penalty imposed;
 - (b) details of past residential addresses;
 - (c) a certified copy of an academic record, or evidence of specialist insolvency qualifications, where the applicant is a member of a professional/industry body and the provision of this information is a requirement to become a member of that professional/industry body; and
 - (d) two referee reports (i.e. only one referee report should be required).
- 17 Submissions also suggested that the process could be streamlined by seeking alternative information, namely:
- (a) a statutory declaration in place of a domestic criminal history check and bankruptcy check; and
 - (b) a summary of relevant insolvency experience that covers the 4,000 hours of required experience only, rather than all experience over the five-year period.

- 18 One submission suggested that additional information should be required, being a statement from the applicant's employer noting that they are aware of the application and advising whether there are any matters about which the committee ought to be aware.
- 19 One submission requested clarification of whether documentary evidence of the applicant's capacity to perform satisfactorily the functions and duties of a registered liquidator will be required as part of the application.
- 20 One submission noted that there may be additional courses that would satisfy the requirements for a specialist insolvency qualification.
- 21 One submission suggested that a written or oral exam should be mandatory.

ASIC's response

In RG 258 we have clarified our guidance in relation to the information to be provided in the application, but we have not materially altered the guidance we provided in Attachment 1 to CP 276 (the draft guide).

We note that disciplinary actions may be relevant to the committee's consideration of whether the applicant is a fit and proper person even when those actions result in outcomes which, viewed subjectively, may not be considered adverse to the applicant or result in the imposition of a penalty (e.g. outcomes negotiated between the disciplinary body and the applicant). We expect applicants to disclose actions that have been taken, and we expect that the committee will take into account the outcome in determining the relevance of the action to the committee's consideration of whether the applicant is a fit and proper person.

Details of past residential addresses will assist the committee in corroborating other information in the application (e.g. confirming whether an applicant is required to provide an overseas criminal history check).

In our view, it is essential that the committee has access to appropriate and independently verified evidence of the applicant's criminal, bankruptcy and academic history. We do not consider it appropriate to rely solely on information provided by the applicant or processes undertaken by third parties to confirm these matters. In our view, having two referee reports also provides an important means of cross-checking information about the applicant's suitability and capability to be a registered liquidator.

We consider that the requirements in Section B of RG 258, to provide recent referee reports and a letter from the applicant's employer about the applicant's work arrangements, are sufficient to ensure that the applicant's employer is aware of, and has provided information relevant to, the application.

Our guidance in RG 258:

- clarifies our intention that the summary of relevant experience need only demonstrate that the applicant has met the eligibility requirement of 4,000 hours of experience during the five-year period (see Table 4 in RG 258);
- clarifies that the *Guide to practice capacities* will contain guidance about the type of information a committee may seek in considering whether the liquidator has the capacity to perform satisfactorily the functions and duties of a registered liquidator. The guidance also clarifies that information relating to capacity is required from an applicant's employer as part of the application form, but that additional documentary evidence about capacity will not be sought as part of the application form (see RG 258.26);
- clarifies that a certification letter will be adequate evidence of satisfaction of the requirements for a specialist insolvency qualification (see Table 3 in RG 258); and
- takes into account that there may be several courses that meet the criteria for a specialist insolvency qualification (see RG 258.21).

In accordance with the legislation, it will be a matter for individual registration committees to determine whether applicants are required to sit for an exam.

Guidance on fit and proper requirements

- 22 Two submissions suggested that it may be more appropriate to refer to the Code of Professional Practice issued by the Australian Restructuring Insolvency & Turnaround Association or to Accounting Professional and Ethical Standard APES 110 *Code of ethics for professional accountants* issued by the Accounting Professional & Ethical Standards Board, rather than to Prudential Standard APS 520 *Fit and proper*.

ASIC's response

We do not intend to limit our guidance on the fit and proper requirements to consideration of a particular industry standard. We clarify this in RG 258.42.

Other issues

- 23 One submission requested additional guidance on the process for advertising applications and what happens with any feedback (e.g. objections) received from this process. It expressed support for the application process to include the advertising of applications to ensure reasonable transparency and public scrutiny.

- 24 Another submission questioned whether it was necessary or appropriate to provide guidance on subjects that a committee might consider when deciding whether an individual has completed a tertiary qualification that includes at least three years full-time study in commercial law and accounting.

ASIC's response

We have not changed our guidance in RG 258 in response to these submissions.

A registration committee may make reasonable and appropriate inquiries of any person for the purposes of making an informed decision in relation to registration. We consider it is a matter for a registration committee to determine whether to seek public feedback on applications under consideration by the committee, and we will not continue our previous practice of advertising applications on our website before they are referred to a committee.

Our guidance on the subjects that we expect would meet the tertiary education requirements is provided to assist applicants in understanding how those requirements may be applied by a committee in practice. We note that a committee may accept other subjects in a particular case, if the committee considers the subjects meet the statutory requirements.

C Renewal, annual liquidator returns and notifications to ASIC

Key points

This section outlines the responses we received relating to Proposal C1 and our approach to those responses.

It covers feedback on proposed changes to the renewal process for registered liquidators.

- 25 Submissions generally supported the proposed guidance on renewal, annual liquidator returns and notifications to ASIC. Additional guidance was requested in several areas.

Renewal of registration

- 26 One submission sought further guidance on:
- (a) the consequences where a registered liquidator has applied to court for an extension of time to lodge their renewal application and the renewal date lapses, noting that ASIC could replace the external administrator under s40-111(2) of Sch 2 to the *Corporations Act 2001* (Corporations Act) if a court does not grant an extension in time; and
 - (b) the timing of renewals for persons registered between 1 January 2017 and 28 February 2017.

ASIC's response

We have not provided additional guidance in these areas.

The note to RG 258.77 sets out that a person's registration may cease to have effect even where the court grants an extension of time to lodge the renewal. Individuals will need to seek their own legal advice about the types of court orders that they may need to obtain to manage the consequences of their registration ceasing to have effect.

We consider that the guidance in RG 258.86 is adequate to assist existing registered liquidators in determining the timing of the first anniversary of their registration on or after 1 March 2017. Individual liquidators should consider seeking legal advice if they remain uncertain as to how the requirements apply to their particular circumstances.

Annual liquidator returns

- 27 One submission sought additional guidance on the timing of lodging annual liquidator returns in the first year.

ASIC's response

We consider that the guidance in RG 258, and in particular the note to RG 258.91, is adequate to assist existing registered liquidators in determining the timing of their annual liquidator return for liquidator return years commencing before 1 March 2017. Individual liquidators should consider seeking legal advice if they remain uncertain as to how the requirements apply to their particular circumstances.

Notice of significant events

- 28 One submission suggested that the guidance on notifications of significant events refer to the transitional provisions in s1562 of the Corporations Act that require existing registered liquidators to notify ASIC of 'significant events' that have occurred in the two years before 1 March 2017. Guidance was also sought on the types of event that might be considered 'any other event prescribed' for the purposes of s35-1(1)(h) of Sch 2 to the Corporations Act.

ASIC's response

We have provided guidance in RG 258.111 on the transitional provisions in the Corporations Act relating to notifications of significant events.

As noted in the draft guide, at 1 March 2017 the Insolvency Practice Rules (Corporations) 2016 (the Rules) have not prescribed any other significant events for the purposes of s35-1(1)(h) of Sch 2 to the Corporations Act. Registered liquidators are required to maintain the currency of their knowledge about other significant events that may be prescribed in the Rules (from time to time).

D Disciplinary actions

Key points

This section outlines the responses we received relating to Proposal D1 and our approach to those responses. It covers feedback on whether we should include an overview of the disciplinary and other actions that may affect a registered liquidator on or after 1 March 2017.

- 29 Submissions generally supported the proposed guidance. However, several submissions raised issues relating to:
- (a) the process for requesting voluntary suspension or cancellation of registration;
 - (b) the grounds on which ASIC may issue a show-cause notice;
 - (c) the timing of publication of a committee's decision; and
 - (d) further guidance on the process for an industry body to submit a notice of possible grounds for disciplinary action.

Cancellation or suspension of registration

- 30 One submission suggested that ASIC should not require a registered liquidator to request suspension or cancellation on grounds that the registered liquidator has ceased to be a fit and proper person or ceased to have adequate and appropriate professional indemnity (PI) or fidelity insurance, on the basis that such a request would require a registered liquidator to reach a legal conclusion that an adverse determination be made against the registered liquidator.
- 31 Another submission suggested that ASIC should take steps to suspend or cancel registration when ASIC has the power to do so and should not require the registered liquidator to request suspension or cancellation.
- 32 One submission queried whether it was appropriate for ASIC to refuse a request for suspension or cancellation where there is legal action pending against, or otherwise involving, the registered liquidator in their capacity as an external administrator, receiver or receiver and manager.

ASIC's response

In RG 258.202 we have clarified our view that it is reasonable and appropriate for registered liquidators, as professionals and persons who act in a fiduciary capacity, to consider requesting cancellation or suspension of their registration where they are

aware of circumstances that would give ASIC grounds to suspend or cancel the registration.

As noted in RG 258.200, we will consider each request for suspension or cancellation, and the appropriate grounds on which to base a suspension or cancellation, on a case-by-case basis.

This includes assessing the implications of any pending legal action on the decision to suspend or cancel.

Show-cause notices

- 33 One submission raised a concern that the guidance on ASIC's approach to assessing compliance and issuing show-cause notices could be interpreted to mean that ASIC can determine whether a contravention or breach has occurred without reference to any court determination.
- 34 One submission suggested that standards set by professional bodies should be applied to all liquidators and not just members, as these have been accepted as industry best practice in past decisions of the court and the Companies Auditors and Liquidators Disciplinary Board.
- 35 One submission raised concerns about the guidance on the circumstances in which ASIC may issue a show-cause notice on the grounds that the registered liquidator has not maintained the currency of their experience, knowledge, abilities and capacity, in particular:
- (a) a concern that the guidance in Table 6 does not recognise that work in a risk management role may be 'sufficiently connected' to allow a registered liquidator to maintain the currency of their experience, knowledge, abilities and capacity; and
 - (b) a concern that the guidance in Table 6 on practice capacities is unnecessarily prescriptive and detailed.
- 36 One submission requested additional guidance on how to record the 30 hours of continuing professional education (CPE) that is not required to be capable of being objectively verified by a competent source.

ASIC's response

In RG 258 we have clarified, but not amended, the substance of our guidance on the matters we will take into account in assessing compliance. It is part of ASIC's role to seek to identify matters that ASIC believes to be contraventions of the law within its areas of regulatory responsibility, and to take action in relation to those matters. Further, it is not necessary for a court to have made a finding of contravention before ASIC can issue a show-cause notice on the grounds that ASIC believes that the registered liquidator has contravened a provision of the Corporations Act or has failed to carry out the registered

liquidator's duties adequately and properly: see s40-40(1)(f) and (l) of Sch 2 to the Corporations Act.

In RG 258.150 we have amended our guidance to clarify our expectations in relation to compliance with standards set by industry bodies by persons who are not members of those bodies.

We have not amended Table 6, which provides important principle-based guidance to registered liquidators on the matters we expect to take into account in considering whether a registered liquidator has maintained the currency of their experience, knowledge and capacities. ASIC recognises that individual circumstances may differ and will consider on a case-by-case basis whether grounds exist for the issue of a show-cause notice.

At the note to RG 258.139 we have amended our guidance to clarify that registered liquidators should keep records that enable them to demonstrate that they have complied with the CPE requirements, but we have not prescribed the type of records a registered liquidator should keep for this purpose.

Committee's decision

- 37 One submission noted that the timing of publication of specified information regarding the committee's decision and the reasons for that decision is unclear, and suggested that the result of a disciplinary action should not be published until after the expiry of the 28-day period during which the registered liquidator could apply to the Administrative Appeals Tribunal for review of the committee's decision.

ASIC's response

In RG 258.172 we have clarified the timing of publication of information regarding the committee's decision. In conformity with our practice for other administrative decisions, we intend to publish any information the committee requires us to publish, and to update the relevant register, no earlier than the second business day after the committee's report has been given to the person concerned.

Industry notices

- 38 One submission requested that ASIC provide additional guidance for industry bodies when lodging a notice under s40-100 of Sch 2 to the Corporations Act relating to possible grounds for disciplinary action, including how industry bodies will determine whether misconduct has occurred and the standard of reasonable suspicion.

ASIC's response

We have not provided further guidance in this area at this time. We expect industry bodies to exercise their own discretion and judgment in deciding whether to lodge a notice under s40-100. Industry bodies should seek their own advice to confirm that the notice is given in good faith and on reasonable grounds. We will consider providing further guidance on the reporting arrangements at a future date once we have the benefit of experience in administering those arrangements.

E Insurance requirements

Key points

This section outlines the responses we received relating to Proposals E1, E3 and E4 and our approach to those responses. It covers feedback on whether we should update guidance set out in RG 194 and incorporate this into our new regulatory guide.

Summary of feedback

- 39 Submissions supported the proposed guidance.
- 40 All submissions that responded to Proposal E1 supported incorporating guidance on insurance requirements for registered liquidators with our guidance on the registration and disciplinary framework for registered liquidators.
- 41 Two submissions supported ASIC making a legislative instrument in future setting out the insurance requirements, provided that ASIC implemented it following proper consultation with industry.
- 42 One submission argued that ‘usual commercial terms’ should not be a relevant criteria for assessing whether insurance achieves the policy objective.
- 43 Submissions were generally supportive of the proposed guidance for determining the adequacy of cover for PI insurance although one noted differences in the requirements between the schemes approved by the Professional Standards Council for Chartered Accountants Australia & New Zealand and CPA Australia Ltd.
- 44 One submission noted that ASIC should not need to consider the level of insurance cover on a case-by-case basis if the cover meets the requirements of the professional schemes, and raised a concern about ‘double-handling’ by ASIC, the committees and professional bodies in assessing the level of insurance cover. However, another submission took the view that the minimum level of PI insurance is a matter specific to the registered liquidator, taking account of current and intended business operations and his or her risk profile.
- 45 Two submissions responded to Proposal E3 relating to withdrawing the previous guidance in RG 194 about fidelity insurance under a fidelity bond arrangement. Both supported removing the guidance and both stated that ASIC should not require registered liquidators to hold fidelity insurance

under a fidelity bond arrangement. However, one submission noted that there may be benefits to implementing a fidelity bond arrangement, including coverage for sole practitioners.

- 46 Submissions that responded to Proposal E4 supported withdrawing the previous guidance in RG 194 setting out when maintaining adequate and appropriate PI and fidelity insurance may not be necessary.

ASIC's response

As stated in CP 276, ASIC will consider making a legislative instrument determining adequate and appropriate insurance in the future, and will undertake separate consultation before doing so. In the meantime, we have removed the guidance that was provided in CP 276 about fidelity insurance under a fidelity bond arrangement, but we will consider the potential benefits of those arrangements as part of any further consultation process.

At Table 9 of RG 258 we have amended our guidance on the five key policy principles for adequate and appropriate insurance, to clarify that our approach balances the policy objectives with practical considerations such as whether insurance that meets the policy objectives is available on usual commercial terms.

We consider that our guidance seeks to minimise duplication between us, Part 2 committees and professional bodies in performing our respective roles in assessing the adequacy of insurance. However, generally, we remain of the view that insurance requirements set by professional bodies should be regarded as a minimum and that registered liquidators must review their business operations to determine their insurance needs and ensure that the cover is adequate and appropriate.

Appendix: List of non-confidential respondents

- Australian Restructuring Insolvency & Turnaround Association
 - Barrett Walker
 - Chartered Accountants Australia & New Zealand
 - Ernst & Young
 - Law Council of Australia – Business Law Section
 - SV Partners
 - Symes, Professor Christopher – The University of Adelaide
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