



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 194

# Insurance requirements for registered liquidators

June 2008

### **About this guide**

This guide is for registered liquidators, creditors, insurers, and their professional advisers.

It sets out how ASIC will administer the insurance requirements for registered liquidators under s1284 of the *Corporations Act 2001*.

### 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.

### Document history

This guide was issued on 26 June 2008 and is based on legislation and regulations as at 1 July 2008.

### Disclaimer

This guide 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.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

# Contents

<b>A</b>	<b>Overview</b> .....	<b>4</b>
	Overview of our policy .....	4
<b>B</b>	<b>Introduction to the insurance requirements</b> .....	<b>6</b>
	The professional indemnity and fidelity insurance requirements.....	6
	Objective of the insurance requirements .....	6
	Limitations of PI and fidelity insurance .....	7
<b>C</b>	<b>Our approach to administering the insurance requirements</b> .....	<b>8</b>
	ASIC's role .....	8
	Key principles .....	10
<b>D</b>	<b>Assessing and obtaining insurance</b> .....	<b>11</b>
	Registered liquidator's responsibility .....	11
	Assessment process.....	12
	Registered liquidators' compliance systems.....	14
	Obtaining insurance: Authorised or exempt insurers only .....	15
<b>E</b>	<b>Adequate and appropriate PI insurance</b> .....	<b>16</b>
	The legislative requirement.....	16
	Adequate PI insurance .....	17
	Appropriate PI insurance .....	20
<b>F</b>	<b>Fidelity insurance</b> .....	<b>24</b>
	The legislative requirement.....	24
	What is fidelity insurance? .....	24
	Fulfilling the purpose of the fidelity insurance requirement .....	25
	Appropriate fidelity insurance .....	26
	Adequate fidelity insurance .....	28
	'Job-by-job' insurance and fidelity bond arrangements .....	29
<b>G</b>	<b>Previous business, former principals and run-off cover in PI and fidelity insurance</b> .....	<b>31</b>
	Mergers and acquisitions of insured firms .....	31
	Staff who have left a previous firm .....	31
	Retiring sole practitioners .....	32
	Insolvency and automatic run-off cover .....	33
	Run-off and fidelity bond arrangements .....	34
<b>H</b>	<b>Situations where insurance may be unnecessary</b> .....	<b>35</b>
	Registered liquidators who do not need PI or fidelity insurance.....	35
	Conditions of our no-action position .....	35
	<b>Appendix: Transitional arrangements</b> .....	<b>37</b>
	Liquidators with existing registrations.....	37
	Automatic run-off cover.....	38
	<b>Key terms</b> .....	<b>39</b>
	<b>Related information</b> .....	<b>43</b>

## A Overview

### Key points

This guide sets out our policy on how we will administer the insurance requirements for registered liquidators under s1284 of the Corporations Act.

It covers:

- an introduction to the insurance requirements, including their content, limitations and the policy objective underlying them (see Section B);
- our approach to administering the insurance requirements, including five key policy principles by which we will be guided (see Section C);
- how adequate and appropriate insurance should be assessed and obtained, including the registered liquidator's primary responsibility (see Section D);
- the issues that need to be addressed in determining whether PI insurance is adequate and appropriate (see Section E);
- the scope, form and structure of fidelity insurance and the issues that need to be addressed in determining whether fidelity insurance is adequate and appropriate (see Section F);
- key issues affecting both PI and fidelity insurance, including previous business and run-off cover (see Section G);
- a no-action position for certain categories of registered liquidators for whom we consider compliance with the insurance requirements is unnecessary (see Section H); and
- transitional arrangements (see Appendix).

### Overview of our policy

- RG 194.1 This guide sets out our policy for registered liquidators, creditors, insurers, and their professional advisers, on how we will administer the insurance requirements for registered liquidators under s1284 of the *Corporations Act 2001* (Corporations Act).
- RG 194.2 Table 1 summarises the key features of our policy regarding the insurance requirements.

**Table 1: Summary of key features of our policy**

Key features	Explanation
Introduction to the insurance requirements (See Section B)	We outline the content, underlying policy objective and limitations of the insurance requirements in s1284 of the Corporations Act.
Our approach to administering the insurance requirements (See Section C)	We will assess what is adequate and appropriate PI and fidelity insurance against five key policy principles.
Assessing and obtaining insurance (See Section D)	Registered liquidators will be primarily responsible for assessing what is adequate and appropriate PI and fidelity insurance for their circumstances.
Adequate and appropriate PI insurance (See Section E)	Whether PI insurance is adequate and appropriate depends on the: <ul style="list-style-type: none"> <li>• amount of the cover;</li> <li>• level of excesses/deductibles;</li> <li>• provision of reinstatements;</li> <li>• scope of cover;</li> <li>• persons covered by the policy;</li> <li>• exclusions contained in the policy;</li> <li>• treatment of defence costs; and</li> <li>• provision of retroactive cover.</li> </ul>
Fidelity insurance (See Section F)	Fidelity insurance varies in scope, form and structure. We consider the 'third party' aspect of fidelity insurance to be the most important aspect in fulfilling the policy objective.  Whether fidelity insurance is adequate and appropriate depends on: <ul style="list-style-type: none"> <li>• the scope and level of cover; and</li> <li>• the effect of particular exclusions and other terms and conditions.</li> </ul>
Previous business, former principals and run-off cover in PI and fidelity insurance (See Section G)	If a registered liquidator joins a new firm, they still need to ensure there is ongoing PI and fidelity insurance for the external administration work they performed at their previous firm.  Run-off cover is an important means of maximising the chance that insurance is available to compensate creditors and other claimants.
Situations where insurance may be unnecessary (See Section H)	We will take a no-action position in relation to certain categories of registered liquidators for whom we consider compliance with the insurance requirements is unnecessary.
Transitional arrangements (See Appendix)	We will take a staged approach to the commencement of the new insurance requirements for liquidators with existing registrations and existing PI insurance that aligns with usual insurance renewal cycles.

## B Introduction to the insurance requirements

### Key points

If you are a registered liquidator, you must maintain adequate and appropriate PI and fidelity insurance: see RG 194.3. These insurance requirements are set out in s1284 of the Corporations Act.

The purpose of the insurance requirements is to ensure, as far as possible, that funds are available to compensate claimants (e.g. creditors of an externally administered company) for loss suffered as a result of the inadequate or improper performance of duties or other legal obligations by a registered liquidator or their staff: see RG 194.5.

The insurance requirements are not designed to cover all losses for which claims might be made against a registered liquidator: see RG 194.7–RG 194.11.

### The professional indemnity and fidelity insurance requirements

- RG 194.3 Section 1284 of the Corporations Act requires a person registered as a liquidator, or as a liquidator of a specified body corporate, to maintain:
- (a) adequate and appropriate PI insurance (the PI insurance requirement); and
  - (b) adequate and appropriate fidelity insurance (the fidelity insurance requirement),
- for claims that may be made against them in connection with externally administered bodies corporate.
- RG 194.4 In this guide, the PI insurance requirement and the fidelity insurance requirement in s1284 are together called the ‘insurance requirements’.

### Objective of the insurance requirements

- RG 194.5 The underlying policy objective of the insurance requirements is to ensure, as far as possible, that funds are available to a registered liquidator to compensate creditors and other claimants for loss suffered as a result of the inadequate or improper performance of duties or other legal obligations by the registered liquidator or their staff in connection with externally administered companies (referred to in this guide as the ‘policy objective’).
- RG 194.6 We will interpret and apply the insurance requirements in a way that maximises their potential to achieve this policy objective, while minimising any divergence from existing industry practice.

## Limitations of PI and fidelity insurance

RG 194.7 The ability of PI insurance and fidelity insurance to protect creditors and other claimants against financial loss is subject to inherent practical limitations. The insurance requirements are not a mechanism for providing compensation *directly* to creditors or other claimants. Rather, they are a means of reducing the risk that a registered liquidator cannot meet claims arising from work performed in connection with externally administered bodies corporate because of insufficient available financial resources.

### No cover for fraud by sole practitioner registered liquidator

RG 194.8 Annual PI and fidelity insurance policies do not indemnify a registered liquidator for losses caused by their own dishonest conduct or fraud. Where a registered liquidator is a sole practitioner, such losses will therefore have to be met from their other available financial resources. However, if the fraudulent or dishonest registered liquidator is insured as part of a firm, creditors can generally claim against the firm and, as an innocent insured party, the firm can be indemnified under the fidelity insurance policy.

Note: If the registered liquidator is insured under a fidelity bond arrangement, however, their own fraudulent or dishonest acts, errors or omissions may be covered.

### Insurance does not cover all losses by creditors

RG 194.9 The insurance requirements are not intended to:

- (a) remove all risk of creditor losses relating to the provision of insolvency services; or
- (b) guarantee the recovery of funds to creditors of insolvent companies.

RG 194.10 Further, the insurance requirements are not intended to cover claims for loss:

- (a) solely as a result of the business failure (e.g. through insolvency) of a liquidator or their firm; or
- (b) because the financial return from the external administration of a company by the registered liquidator does not meet a creditor's expectations.

RG 194.11 The insurance requirements are only intended to cover losses that result from:

- (a) services falling below acceptable professional standards (i.e. negligence);
- (b) breaches of registered liquidators' professional, statutory or fiduciary duties or other obligations (e.g. non-compliance with the Corporations Act); and
- (c) dishonest conduct by an insolvency practitioner's staff (e.g. fraud).

## C Our approach to administering the insurance requirements

### Key points

We will apply our view of what constitutes adequate and appropriate PI and fidelity insurance when we:

- consider applications for registration as a liquidator (see RG 194.13–RG 194.14);
- review registered liquidators' ongoing compliance (see RG 194.15);
- decide whether to cancel a liquidator's registration (see RG 194.16–RG 194.17); and
- decide whether to refer a registered liquidator to the CALDB for disciplinary proceedings (see RG 194.18–RG 194.19).

We have identified five guiding principles for how we will administer the insurance requirements: see Table 3.

### ASIC's role

RG 194.12 We need to form a view of what constitutes 'adequate and appropriate' PI and fidelity insurance in four particular situations: see Table 2.

**Table 2: Situations in which we apply our view of adequate and appropriate insurance**

<b>1. Applications for registration as a liquidator</b>	We must assess whether an applicant complies with the requirements of s1284 before registering them as a liquidator.
<b>2. Post-registration compliance</b>	We may carry out surveillance work to check that liquidators are complying with the insurance requirements on an ongoing basis.
<b>3. Unilateral ASIC cancellation</b>	We have the power under s1290A(1) to cancel the registration of a liquidator if they do not maintain adequate and appropriate insurance.
<b>4. Referral to the CALDB for disciplinary proceedings</b>	We may apply to the CALDB under s1292(2) to have a liquidator's registration suspended or cancelled for failing to perform their duties under Australian law.

#### Situation 1: Applications for registration as a liquidator

RG 194.13 We must consider and grant an application for registration as a liquidator if a number of conditions are met: s1282(2). If the applicant also holds adequate and appropriate PI and fidelity insurance, we must issue the successful

applicant a certificate confirming their registration: s1282(6). A liquidator's registration does not come into force until the applicant has complied with the insurance requirements: s1282(6)(d) and (8).

RG 194.14 We therefore need to assess whether an applicant has in place adequate and appropriate PI and fidelity insurance before their registration can come into force.

### **Situation 2: Post-registration compliance**

RG 194.15 The Corporations Act requires registered liquidators to maintain adequate and appropriate PI and fidelity insurance. We may undertake targeted or random surveillance to ensure that registered liquidators or their firms comply with the insurance requirements. Registered liquidators will also have to confirm each year on Form 908 *Annual statement by a liquidator* that their insurance cover meets the insurance requirements.

### **Situation 3: Unilateral ASIC cancellation**

RG 194.16 We have the power to cancel a registered liquidator's registration if they contravene s1284(1), i.e. if they do not maintain adequate and appropriate PI and fidelity insurance: see s1290A(1).

RG 194.17 In deciding whether to cancel the registration of a liquidator under s1290A(1), we will consider:

- (a) the seriousness of the breach of the insurance requirements;
- (b) whether the breach has been remedied;
- (c) the impact on creditors and other claimants;
- (d) any factual circumstances that may explain or mitigate the registered liquidator's failure to maintain insurance;
- (e) whether the issue is more appropriately dealt with by the CALDB; and
- (f) any other matters we consider relevant.

### **Situation 4: Referral to CALDB for disciplinary proceedings**

RG 194.18 As an alternative to the unilateral cancellation procedure outlined in RG 194.16–RG 194.17, we may refer a registered liquidator to the Companies Auditors and Liquidators Disciplinary Board (CALDB) for disciplinary proceedings. The CALDB may cancel or suspend a liquidator's registration on application by ASIC if the CALDB is satisfied that the registered liquidator has failed to perform their duties under Australian law: see s1292(2)(d).

RG 194.19 We may apply to the CALDB to suspend or cancel the liquidator's registration if they fail to comply with their obligation to maintain adequate

and appropriate PI and fidelity insurance. This is because a registered liquidator's compliance with s1284 forms part of their duties under Australian law.

## Key principles

RG 194.20 Table 3 sets out five key policy principles that will guide us in assessing what is adequate and appropriate PI and fidelity insurance.

**Table 3: Key policy principles**

<b>Principle 1: Responsibility of registered liquidator</b>	It is the responsibility of each registered liquidator to determine what insurance arrangements are adequate and appropriate in their circumstances.
<b>Principle 2: Insurance fit to achieve policy objective</b>	'Adequate and appropriate' broadly means that the insurance is fit for achieving the policy objective and is on usual commercial terms.
<b>Principle 3: Sufficient insurance to cover external administration claims</b>	The insurance should be for an amount sufficient to cover claims against the registered liquidator reasonably anticipated in connection with the external administration of insolvent companies.
<b>Principle 4: Practical availability</b>	An element of adequacy and appropriateness is what insurance cover is practically available in the market at any given time.
<b>Principle 5: Balance between costs and benefits</b>	A balance needs to be struck between the level of protection for creditors and other claimants afforded by the required insurance and the cost for registered liquidators.

## Practical application

RG 194.21 The availability and scope of PI and fidelity insurance for registered liquidators, as for other professional services industries, can be affected by cyclical changes in the insurance market. We will take note of fluctuating market conditions and the availability of insurance that complies with our guidance and we may update our policy as needed to reflect changes in the insurance market.

## D Assessing and obtaining insurance

### Key points

Registered liquidators are primarily responsible for assessing what is adequate and appropriate PI and fidelity insurance for their circumstances and obtaining such insurance: see RG 194.22–RG 194.25.

Applicants for registration as a liquidator need to have adequate and appropriate PI and fidelity insurance in place before we will issue a certificate of registration: see RG 194.26–RG 194.27.

This section explains:

- the initial assessment process for registered liquidators and applicants for registration as a liquidator (see RG 194.26–RG 194.30);
- our expectations regarding ongoing compliance (see RG 194.31–RG 194.36); and
- from whom PI and fidelity insurance can be obtained (see RG 194.37–RG 194.40).

### Registered liquidator's responsibility

- RG 194.22 Registered liquidators must determine what is adequate and appropriate PI and fidelity insurance (to meet their obligations under s1284) and obtain such cover. They must review their business operations or intended operations and work out their insurance needs each year, or for each external administration appointment, having regard to their own particular risk profile.
- RG 194.23 Whether a particular PI or fidelity insurance policy or arrangement is adequate and appropriate depends on all of the facts and circumstances, including the nature, scale and complexity of the registered liquidator's business, the variety of external administration work they normally perform, and their other financial resources.
- RG 194.24 The registered liquidator is in the best position to assess what will be adequate and appropriate. However, in some cases they might find it helpful to engage external consultants, actuaries, brokers or advisers to undertake a risk assessment of their business and provide professional advice on the amount and type of cover they should obtain.
- RG 194.25 Our guidance in Sections D–H of this regulatory guide is intended to assist registered liquidators to determine what are adequate and appropriate insurance arrangements for them. However, we will not 'approve' a registered liquidator's PI and fidelity insurance arrangements.

## Assessment process

### Initial assessment process for applicants

- RG 194.26 Applicants for registration as a liquidator need to have adequate and appropriate PI and fidelity insurance in place before we will issue a certificate of registration: see s1282(6) and 1284(1). Applicants should undertake their own analysis of what is adequate and appropriate insurance.
- RG 194.27 If such insurance has not been arranged at the time of application, we will require details of how the applicant will ensure their compliance with the insurance requirements. We will continue to assess the other aspects of the application in the meantime. We will not finalise the registration until the requisite insurance has been obtained.
- RG 194.28 We intend to ask applicants for registration as a liquidator questions about the matters in Table 4. Although insurance brokers may assist in providing the answers to these questions, the applicant for registration as a liquidator must themselves certify and take responsibility for the answers they give to ASIC.

Note: An application lodged with ASIC for registration as a liquidator under s1279 of the Corporations Act does not appear on ASIC public registers and is not available for inspection by the public: see s1274(2)(a)(i) of the Corporations Act.

**Table 4: Matters about which we intend to question applicants**

Question	Matter
A	The identity of the applicant's insurer
B	Whether: <ul style="list-style-type: none"> <li>the insurer is regulated by the Australian Prudential Regulation Authority (APRA); or</li> <li>the contract of insurance is relevantly exempt under the <i>Insurance Act 1973</i> (Insurance Act)</li> </ul> <p>Note: If the insurer is not regulated by APRA and the insurance contract is not exempt, the applicant will need to explain to us why they believe insurance from that insurer is adequate.</p>
C	Whether the policy and, if relevant, the 'job-by-job' insurance/fidelity bond arrangement, insures the individual applicant or the insolvency services firm
D	The policy period and, if relevant, the duration of the 'job-by-job' insurance/fidelity bond arrangement
E	The respective per claim and aggregate limits of indemnity (not taking into account any provision for reinstatement) for the applicant's PI insurance and fidelity cover
F	Whether the PI insurance cover is 'costs-inclusive' as regards defence costs
G	How many reinstatements are provided for under the PI insurance

Question	Matter
H	<p>The highest gross fees billed by the applicant (or if the applicant is a member or employee of a firm, the highest total of gross fees billed by all registered liquidators who are members or employees of the firm) in a single financial year in relation to a particular insolvency engagement if:</p> <ul style="list-style-type: none"> <li>• the limit of indemnity for the PI insurance covering the applicant is less than \$20 million (or \$25 million if defence costs are included in the limit); and</li> <li>• the applicant has provided insolvency services for more than one full year immediately before the financial year in which their PI insurance policy period, or that of their firm, commences: see RG 194.43</li> </ul>
I	<p>If the insurance contains excesses or deductibles:</p> <ul style="list-style-type: none"> <li>• their level;</li> <li>• whether they are at a level that the applicant or their firm can confidently sustain as an uninsured loss; and</li> <li>• the dollar sum derived from the greater of the following calculations: <ul style="list-style-type: none"> <li>– the amount calculated by multiplying the number of principals, partners, directors or officers of the registered liquidator’s firm and its related entities as at the beginning of the period of insurance by \$10,000; or</li> <li>– 3% of the total gross fee income of the registered liquidator, their firm and any related entity for the financial year immediately preceding the beginning of the period of insurance: see RG 194.45</li> </ul> </li> </ul>
J	<p>Whether the insurance covers claims relating to all of the services that the applicant wishes to provide in the course of their business in connection with externally administered bodies corporate</p>
K	<p>Whether the PI insurance provides retroactive cover and, if so, what the retroactive date is</p>
L	<p>If defence costs are covered in addition to the sum insured, whether there is any limit on the amount of defence costs covered and, if so, what that maximum is</p>
M	<p>Whether the insurance contract is cancellable by the insurer for innocent non-disclosure or innocent misrepresentation, or by the insured</p>
N	<p>Whether the fidelity insurance is provided:</p> <ul style="list-style-type: none"> <li>• as a stand-alone fidelity or crime insurance policy;</li> <li>• as a fidelity cover extension to the PI policy;</li> <li>• in the form of fraud and dishonesty insurance covering money and similar assets as part of the PI cover; or</li> <li>• in the form of ‘job-by-job’ insurance, e.g. under a fidelity bond arrangement</li> </ul>
O	<p>Whether the fidelity insurance includes cover for loss of third parties’ money and similar assets</p>
P	<p>Whether the insurance provides automatic run-off cover in the event of insolvency or external administration of the applicant or firm and, if so, for how many years after the expiry of the policy period</p>
Q	<p>Additional or different questions as the circumstances of the case require</p>

- RG 194.29 We will also ask the applicant for a certificate of cover/currency for the PI and the fidelity insurance. If PI and fidelity insurance are provided within the one policy, the certificate must clearly show that both types of insurance are provided.
- RG 194.30 If fidelity insurance is provided under a 'job-by-job' insurance arrangement (e.g. under a fidelity bond), we will ask the applicant for evidence of the arrangement (e.g. certification by an insurance broker or the insurer, or a copy of a binding annual contract or letter of eligibility).

### **Assessment process for liquidators with existing registrations**

#### **Annual review and confirmation of insurance**

- RG 194.31 Registered liquidators should review the terms of their PI and fidelity insurance in accordance with s1284 and our guidance at least annually (e.g. when their existing policy or arrangement is coming up for renewal) to ensure it continues to be adequate and appropriate for them.
- RG 194.32 Registered liquidators will have to confirm each year in Form 908 *Annual statement by a liquidator* that their cover meets the insurance requirements.

#### **ASIC's ongoing compliance surveillance**

- RG 194.33 From time to time we may require registered liquidators to provide certificates of insurance cover/currency for their PI and fidelity insurance policies and other information about their insurance arrangements (such as those details referred to in Table 4). For example, we may ask for these documents or details when:
- (a) we are conducting a compliance review of a registered liquidator's firm; or
  - (b) as part of targeted or random reviews of PI and fidelity insurance arrangements.

## **Registered liquidators' compliance systems**

- RG 194.34 We expect registered liquidators will take personal responsibility, or ensure that a senior officer or manager within their firm is accountable, for ensuring that:
- (a) their PI and fidelity insurance is renewed, varied or extended when required;
  - (b) premiums are paid on time; and
  - (c) their insurance continues to be adequate and appropriate.

- RG 194.35 Registered liquidators will need to make provision in their complaints handling arrangements for ensuring that claims are brought to their attention and are promptly notified to insurers. Regardless of whether responsibility for insurance is delegated within the firm, it remains the registered liquidator who is ultimately responsible for their insurance arrangements.
- RG 194.36 Registered liquidators should also review the adequacy and appropriateness of their insurance arrangements in light of any major changes in their business (e.g. if they start providing new services or engage significantly more staff).

## Obtaining insurance: Authorised or exempt insurers only

- RG 194.37 An adequate and appropriate insurance policy needs to be with an insurer either:
- (a) regulated by APRA under the Insurance Act; or
  - (b) operating under an exemption under the Insurance Act and associated regulations; or
  - (c) regulated by a system of foreign prudential insurance regulation sufficiently equivalent to that administered in Australia by APRA.
- RG 194.38 Under the Insurance Act and associated regulations, all direct offshore foreign insurers (DOFIs) carrying on insurance business in Australia have to be authorised by APRA from 1 July 2008, unless they can rely on an exemption.
- Note: An exemption is available, for example, if the insured firm is a 'high-value insured' within the definition in regulation 4B of the *Insurance Regulations 2002*.
- RG 194.39 From that date, insurance is unlikely to be adequate unless it is provided by an entity regulated by APRA or exempt under the Insurance Act or associated regulations. This approach ensures that when claims for indemnity are made against the insurer, there is a reasonable assurance that the insurer will have sufficient financial resources to be able to respond and meet their obligations under the contract of insurance in full.
- RG 194.40 If a registered liquidator or their firm intends to obtain PI or fidelity insurance from a foreign insurer that is neither APRA-regulated nor exempt, they should contact ASIC to discuss whether the relevant foreign prudential insurance regulatory regime is sufficiently equivalent to regulation by APRA. Please contact:

Liquidator Registration Team  
Australian Securities and Investments Commission  
GPO Box 9827  
Adelaide SA 5001  
Email: [LiquidatorRegistration@asic.gov.au](mailto:LiquidatorRegistration@asic.gov.au)

## E Adequate and appropriate PI insurance

### Key points

Whether a PI insurance policy is adequate and appropriate depends on:

- the amount of the cover (see RG 194.42–RG 194.44);
- the level of excesses/deductibles (see RG 194.45–RG 194.47);
- the provision of reinstatements (see RG 194.48–RG 194.50);
- the scope of the cover (see RG 194.52);
- the persons covered by the policy (see RG 194.53);
- any exclusions contained in the policy (see RG 194.54–RG 194.55);
- the treatment of defence costs (see RG 194.56–RG 194.57); and
- the provision of retroactive cover (see RG 194.58–RG 194.62).

### The legislative requirement

RG 194.41 Section 1284(1)(a) requires that the PI insurance must be ‘adequate and appropriate’ and must cover claims that may be made against a registered liquidator in connection with externally administered bodies corporate. The requirement covers claims against registered liquidators for breach of professional, fiduciary or statutory obligations. These obligations include duties to act:

- (a) independently, impartially, properly and fairly;
- (b) in good faith at all times in the best interests of the general body of creditors as a whole;
- (c) within their powers for the purpose for which those powers were conferred, and not for any private or collateral purpose;
- (d) not in a position where their own private or commercial interests conflict with their duties;
- (e) not obtaining any unauthorised benefit from the fiduciary relationship;
- (f) with reasonable care and skill and a high standard of diligence; and
- (g) with efficiency, honesty and integrity.

## Adequate PI insurance

### Level of cover

RG 194.42 We consider that, to be adequate, a PI insurance policy must meet the quantum requirement of the Institute of Chartered Accountants in Australia (New South Wales) Professional Standards Council (PSC) scheme (Scheme), which is found in clause 3.5(a) of the Scheme that started on 8 October 2007 (the 2007 Scheme). The sum insured, both for each individual claim and for all claims in the aggregate in any one policy year, must not be less than the amount of the Category 2 monetary ceiling in the Scheme.

Note: Category 2 services ('insolvency services' in RG 194.43) are defined in clause 4.2 of the 2007 Scheme.

RG 194.43 Under the 2007 Scheme this means that the sum insured for each claim, and for all claims in the aggregate, must not be less than the lowest of the following three amounts:

- (a) \$20 million; or
- (b) 10 times the highest gross fees billed by the registered liquidator (or if the registered liquidator is a member or employee of a firm, the highest total of gross fees billed by all registered liquidators who are members or employees of the firm) in a single financial year *in relation to a particular insolvency engagement*:
  - (i) over the three full years immediately before the financial year in which the registered liquidator's or their firm's insurance policy period commences; or
  - (ii) if the registered liquidator has provided insolvency services for less than three full years but more than one year immediately before the financial year in which the registered liquidator's or their firm's insurance policy period commences, then over that shorter time period; or
- (c) if the registered liquidator has provided insolvency services for less than one full year immediately before the financial year in which the registered liquidator's or their firm's insurance policy period commences:
  - (i) \$750,000 where the registered liquidator's or their firm's insurance policy period commences on or before 30 June 2009;
  - (ii) \$1 million where the registered liquidator's or their firm's insurance policy period commences after 1 July 2009.

Note: This is based on clauses 3.6(c) and 3.1 of the 2007 Scheme and clause 7PI.3.5(i)(a) of Appendix R4 *Professional Indemnity Insurance* (Appendix R4) to the Institute of Chartered Accountants of Australia (ICAA) *Regulations Relating to Certificate of Public Practice* (ICAA Regulations).

### Explanation

- RG 194.44 We have taken the Scheme as the basis for our guidance:
- (a) because the Category 2 monetary ceiling in the Scheme reflects an independent actuarial assessment of an appropriate level of insurance cover for insolvency practitioners, based on the claims history of the professional accounting body's members;
  - (b) because most registered liquidators will already have PI insurance in place that satisfies the Scheme's quantum requirements;
  - (c) to ensure a level playing field between all members of the ICAA, CPA Australia Ltd (CPAA) and the National Institute of Accountants (NIA), and any registered liquidators who are not members of any professional accounting bodies; and
  - (d) to maintain high standards of practice for registered liquidators and uniform procedures across the insolvency services industry.

### Excesses and deductibles

- RG 194.45 To be adequate, a PI insurance policy's excess or deductible for each and every claim should not exceed either of the following two amounts:
- (a) whichever is the greater of:
    - (i) the amount calculated by multiplying the number of principals, partners, directors or officers of the registered liquidator's firm and its related entities as at the beginning of the period of insurance by \$10,000; or
    - (ii) 3% of the total gross fee income of the registered liquidator, their firm and any related entity for the financial year immediately preceding the beginning of the period of insurance; and
  - (b) 5% of the sum insured under the PI insurance policy.

Note: This reflects the requirements of Appendix R4, clause 7PI.3.5(ii), read in conjunction with the definitions in clause 7PI.1.

**Table 5: Worked example for excesses or deductibles**

#### Hypothetical factual scenario

- An insolvency firm structured as a partnership with 10 partners is negotiating its insurance for the period from 1 July 2009 to 30 June 2010. The firm has no related entities, i.e. other partnerships, companies, corporations or trusts carrying on any part of the professional insolvency services business of the registered liquidator's firm.
- The total gross fee income across the whole insolvency practice was \$7 million for the 2008–09 financial year.

**Hypothetical factual scenario**

- The highest total of gross fees billed by all the registered liquidators who are members or employees of the firm in a single financial year (e.g. the 2007–08 financial year) in relation to a particular insolvency engagement over the three full years immediately before the financial year in which the registered liquidator or their firm's insurance policy period commences (i.e. 1 July 2006 to 30 June 2009) was \$1 million.
- The actual sum insured under the PI insurance policy (which is also the minimum amount as calculated under RG 194.43 and therefore adequate) for the 2009–10 financial year will be \$10 million.

**Application of formulae to hypothetical facts**

- The amount calculated by multiplying the number of principals, partners, directors or officers of the firm as at the beginning of the period of insurance by \$10,000 is  $10 \times \$10,000 = \$100,000$ .
- 3% of the total gross fee income of the registered liquidator and their firm for the financial year immediately preceding the beginning of the period of insurance (i.e. 1 July 2008 to 30 June 2009) is  $3/100 \times \$7 \text{ million} = \$210,000$ .
- The minimum sum insured under the PI insurance policy (as calculated under RG 194.43) for the 2009–2010 financial year was  $10 \times \$1 \text{ million} = \$10 \text{ million}$ .
- 5% of the sum insured under the PI insurance policy (i.e. \$10 million) is  $5/100 \times \$10 \text{ million} = \$500,000$ .
- An appropriate PI insurance policy would not have an excess or deductible exceeding either the greater of \$100,000 and \$210,000 (i.e. \$210,000), or \$500,000.

**End result**

- The PI insurance policy should therefore not have an excess or deductible above \$210,000.

RG 194.46 More generally, in addition to the guidance at RG 194.45, the excess or deductible in an appropriate PI insurance policy will need to be set at a sufficiently low level for the registered liquidator's business to be able confidently to sustain it as an uninsured loss, taking into account the financial resources of the registered liquidator and their firm.

Note: This is consistent with clause 9.2(d) of the PSC Policy Statement, which refers to deductibles or excesses being set at reasonable levels having regard to, among other things, the apparent capacity of the member to meet the deductible or excess from other available assets.

**Explanation**

RG 194.47 PI insurance policies generally have an excess or deductible, which requires the insured to use their own funds to meet some of the liability for successful claims. The deductible or excess in a policy refers to the threshold amount of damages that the insured in essence self-insures. Unreasonably high deductibles might mean the insurance policy is not adequate for the purposes of fulfilling the policy objective.

## Reinstatements

RG 194.48 To be adequate, a registered liquidator's insurance policy should provide for at least one automatic reinstatement of the aggregate limit of indemnity.

Note: This is consistent with clause 9.2(c) of the PSC Policy Statement, which refers to having at least one automatic reinstatement.

RG 194.49 As an alternative, the insurance policy should have an aggregate limit of indemnity at least twice the minimum sum insured calculated under RG 194.43.

## Explanation

RG 194.50 If the original amount of cover available is exhausted before the end of the policy period by a claim or a series of claims, a reinstatement clause allows the aggregate sum insured to be reinstated with a level of additional cover that equals or exceeds the original sum insured. This additional insured amount will then be available to meet new claims that might be made and notified during the remainder of the policy period.

## Appropriate PI insurance

RG 194.51 Whether a registered liquidator's PI insurance is appropriate depends on the terms and conditions of their insurance policy.

## Scope of cover

RG 194.52 To be appropriate, the insurance policy should:

- (a) cover civil liability for loss or damage suffered by creditors and other claimants arising out of acts, errors or omissions of the registered liquidator or their staff in the course of the provision of professional insolvency services including, for example:
  - (i) negligence;
  - (ii) misleading or deceptive conduct; and
  - (iii) breaches of professional, fiduciary or statutory duties;

Note: This is consistent with:

- the ICAA's requirements for the insurance to cover 'either any civil legal liability or any act, error or omission of an insured who is providing the services for which a current Certificate of Public Practice is required' (clause 7PI.3.6(i) of Appendix R4) and 'all services offered by an insured' (clause 7PI.3.3 of Appendix R4);
- the CPAA's requirement for 'indemnity to attach to any civil liability arising out of or in any way related to the provision of Public Accounting Services by the assured': by-law 9.5(b)(iii)(D); and
- clause 9.2(a) of the PSC Policy Statement, which refers to a reasonably broad form of insuring clause, including cover for misleading and deceptive conduct.

- (b) not be cancellable by the insurer for innocent non-disclosure or innocent misrepresentation, or by the insured at all; and
- (c) be on usual, ordinary commercial terms offered by insurers for this type of insurance.

Note: See clause 7PI.3.6 of Appendix R4.

## Persons covered

- RG 194.53 An appropriate PI insurance policy will cover civil liability of the insured registered liquidator or firm resulting from the work of the registered liquidator or of employees, directors, officers, partners, agents, consultants and sub-contractors of the registered liquidator or their firm performed in connection with externally administered bodies corporate.

Note: However, the insurance policy need not, and often will not, indemnify such employees, agents, consultants and sub-contractors personally.

## Exclusions

- RG 194.54 An appropriate PI insurance policy should not contain clauses with the effect of excluding cover for:

- (a) the registered liquidator's appointment as an officer of an insolvent or failing company by virtue of becoming the external administrator of the company;
- (b) claims against the registered liquidator appointed as one particular type of external administrator (e.g. as creditors' voluntary liquidator); or
- (c) breaches of obligations (by a registered liquidator, their employees or partners, or their firm's employees, directors, officers, partners, agents, consultants or sub-contractors) while providing services in connection with the external administration of bodies corporate, for which the registered liquidator or their firm is legally responsible.

Note: This is consistent with clause 9.2(b) of the PSC Policy Statement, which refers to insurance covering *all reasonable occupational activities and services* and to *minimal exclusions*.

## Explanation

- RG 194.55 Exclusions that undermine the policy objective by reducing the scope of cover to below an acceptable minimum may mean the PI insurance policy is not appropriate. The PI insurance policy should not contain significant exclusions relating to the liquidator's compliance with their duties or to the nature of their work reasonably performed in connection with the external administration.

## Defence costs

RG 194.56 Insurance policies should generally cover defence costs (i.e. costs and expenses of investigating, defending and settling claims) in addition to the sum insured under the policy, as opposed to requiring defence costs to be paid out of the sum insured. If there is a maximum limit on the amount of defence costs covered in addition, that additional limit must not be less than 25% of the minimum sum insured as calculated using the method identified in RG 194.43.

Note: PI insurance policies commonly limit the amount of defence costs covered in addition to the same amount as the sum insured (which is acceptable).

RG 194.57 However, an acceptable alternative would be for registered liquidators to have ‘costs-inclusive’ cover with a higher sum insured, to offset the effect of costs reducing the level of indemnity available for meeting liability. This higher insured amount should not be less than 25% greater than the minimum sum calculated using the method identified in RG 194.43.

Note: This guidance is consistent with clause 9.3 of the PSC Policy Statement, which refers to defence costs in addition to the stated level of cover being preferred. It is also consistent with the formula in the second paragraph of clause 7PI.3.5(iii) in Appendix R4.

## Retroactive cover

RG 194.58 If the registered liquidator’s insurance policy will form the latest in an immediately preceding series of continuous ‘claims made and notified’ PI insurance policies, the retroactive date must be the same as or must precede the retroactive date specified in the first PI insurance policy in the series (or if there was no such retroactive date, the commencement date of that first PI insurance policy).

RG 194.59 If there will not be an immediately preceding insurance policy, the new PI insurance policy will need, in order to be appropriate, to have a retroactive date that is either:

- (a) on or earlier than the date on which the insured registered liquidator started providing services in connection with externally administered companies; or
- (b) at least seven years before the beginning of the period of insurance; or
- (c) unlimited.

Note: This is consistent with clause 9.2(e) of the PSC Policy Statement, which states that a not unreasonably limited retroactive date is preferred.

## Explanation

RG 194.60 A retroactive date on a ‘claims made and notified’ PI insurance policy is the date on or after which acts, errors or omissions are covered by the insurance. If the policy has a retroactive date, therefore, any claim made during the

policy period will not be covered if the circumstances from which it arises occurred before the retroactive date.

- RG 194.61 The date may be a specified date, or it may be expressed to be ‘inception’ or ‘unlimited’. If the retroactive date is ‘inception’, this means there is no retroactive cover. The policy will only cover claims for acts, errors or omissions that occurred after the inception of the policy, i.e. the start of the period of insurance. If the policy is ‘unlimited’, however, this means there is in effect no retroactive date in the policy, so the policy covers claims arising from acts, errors or omissions that occurred at any time (as long as they are made and notified during the policy period).
- RG 194.62 It is important that insurance covers liability resulting from acts, errors or omissions that occur during the whole period that the registered liquidator or their staff perform work in connection with external administrations. However, the operation of statutory limitation periods means that exposure to such liability in most cases extends only for a limited number of years.

## F Fidelity insurance

### Key points

Contemporary fidelity insurance varies in scope and structure: see RG 194.64–RG 194.67.

It is the ‘third party’ aspect of fidelity insurance that is most important for fulfilling the policy objective: see RG 194.68–RG 194.70.

Whether fidelity insurance is adequate and appropriate depends on the following:

- the scope of cover (see RG 194.71–RG 194.74);
- the effect of particular exclusions and other terms and conditions (see RG 194.75–RG 194.81); and
- the level of cover (see RG 194.82–RG 194.86 and Table 6).

### The legislative requirement

- RG 194.63 Paragraph 1284(1)(b) requires fidelity insurance to be ‘adequate and appropriate for claims that may be made against the registered liquidator in connection with externally administered bodies corporate’.

### What is fidelity insurance?

#### Scope of contemporary fidelity insurance

- RG 194.64 Contemporary fidelity insurance varies in scope, depending on the insurance provider.

- RG 194.65 Increased competition in the insurance market has resulted in some insurers now offering broad fidelity policies covering the risk of loss of money and similar assets:

- (a) belonging to the insured registered liquidator or firm (first party losses); or
- (b) in the care, physical custody or control of the insured, for which the insured is legally liable to account to third parties, e.g. creditors of the insolvent company to which the registered liquidator has been appointed as external administrator (third party losses),

where the loss is directly attributable to fraudulent or dishonest acts, errors or omissions by staff of the registered liquidator or their firm.

Note: By ‘money and similar assets’, we mean money, negotiable instruments, bearer bonds, coupons, stamps, bank notes, currency, cheques, bills of exchange and letters of credit. Some fidelity insurance clauses may specifically cover coins, bullion, local or foreign currency, postal orders, money orders, shares, preference shares, stocks, debentures, warrants, options, bonds, promissory notes and other equity or debt securities.

RG 194.66 Fidelity insurance proper only indemnifies innocent parties. It does not cover any persons committing or condoning the dishonest or fraudulent act, error or omission. However, a fidelity bond arrangement may, in addition, cover a registered liquidator who commits or condones the dishonest or fraudulent act, error or omission.

### Structure of contemporary fidelity insurance

RG 194.67 Fidelity insurance cover for a registered liquidator or their firm may either:

- (a) form part of the PI insurance policy offered by an insurer;
- (b) be incorporated as an additional extension to that PI insurance policy if requested by the registered liquidator or their firm;
- (c) constitute a separate, stand-alone fidelity insurance policy (sometimes called a ‘crime insurance policy’); or
- (d) be provided on a ‘job-by-job’ basis, e.g. under the umbrella of a fidelity bond arrangement, whereby the amount of cover may vary with each external administration appointment.

## Fulfilling the purpose of the fidelity insurance requirement

RG 194.68 Insurance against loss of money and similar assets belonging to *third parties*, which is attributable to fraud or dishonesty by people for whose misconduct the registered liquidator is liable, is more important in trying to meet the policy objective than *first party* insurance cover that merely protects the insured registered liquidator or their firm against loss of their own funds. What is key is that the fidelity cover provides adequate and appropriate indemnity for third party losses.

RG 194.69 For the purposes of complying with s1284(1)(b), it does not matter what structural form the fidelity insurance takes. Depending on the scope of the insuring clause wording and any relevant exclusions, fraud and dishonesty cover forming part of or an extension to PI insurance, or ‘job-by-job’ insurance (e.g. under a fidelity bond arrangement), can serve a sufficiently similar function to third party fidelity insurance and, therefore, fulfil the purpose of the fidelity insurance requirement in s1284(1).

RG 194.70 Our view of the underlying policy objective means that we consider that the registered liquidator or their firm should obtain either:

- (a) fidelity insurance (whether in the form of an annual policy or extension, or provided on a 'job-by-job' basis, e.g. under a fidelity bond arrangement) for third party loss, resulting from fraud or dishonesty, of money and similar assets in the insured's care, custody or control, for which the insured is legally responsible; or
- (b) the liability insurance equivalent to such fidelity cover obtained through the fraud and dishonesty aspect of normal PI insurance, which should cover liability to third parties for losses of money and similar assets.

## Appropriate fidelity insurance

### Scope of cover

RG 194.71 A registered liquidator or their firm should maintain either:

- (a) (as a part of their PI insurance policy) cover for *civil liability* to third parties for losses of money and similar assets through fraud and dishonesty of the staff of the registered liquidator or their firm; or
- (b) fidelity insurance for *loss* (resulting from the fraud or dishonesty of the staff of the registered liquidator or their firm) of money and similar assets belonging to a third party, in the insured's care, custody or control, for which the insured is legally responsible.

Note: This fidelity cover could be provided as part of, or as a policy extension to, the registered liquidator's PI insurance policy, or as a separate fidelity or crime insurance policy, or as 'job-by-job' insurance, e.g. under a separate fidelity bond arrangement: see RG 194.67–RG 194.70.

RG 194.72 If practically available at a reasonable cost, fidelity insurance or fraud and dishonesty cover should also be obtained for physical assets, including goods, chattels and equipment (but not real property such as land or buildings).

### Fidelity cover not intended for insolvent company's staff

RG 194.73 When a registered liquidator is appointed as external administrator of a failing or insolvent company, they take over responsibility for the running of that company. The company may not already have fidelity insurance in place. One decision the external administrator may have to make is therefore whether, in order to protect the insolvent company's assets, the external administrator should enter into a form of temporary insurance that includes fidelity insurance to cover the risk of fraud or dishonesty by officers, employees or agents of the insolvent company.

Note: Registered liquidators make such decisions as part of their identification and management of risks in each entity to which they may be appointed as external administrator: see Regulatory Guide 186 *External administration: Liquidator registration* (RG 186) at RG 186.20(e) and RG 186.65. If the external administrator is

negligent, or breaches their duties, in deciding not to cause the insolvent company to enter into such insurance, then any liability arising out of that possible negligence or breach of duty would probably be covered under the registered liquidator's PI insurance policy.

- RG 194.74 We do not consider that having fidelity insurance to cover the risk of fraud or dishonesty by staff of the insolvent company falls within the scope of the s1284 fidelity insurance requirement.

### **Criminal penalties**

- RG 194.75 A fidelity insurance policy or arrangement may be appropriate even though it contains blanket exclusions relating to all criminal penalties and fines imposed by law.
- RG 194.76 Fidelity insurance policies sometimes define the scope of cover by reference to losses suffered as a result of specific conduct that amounts to a crime. However, policies or arrangements with this wording may not cover the actual penalties imposed on the insured themselves for dishonest, intentional or reckless statutory breaches that amount to a crime. We do not consider that the policy objective requires criminal penalties to be covered by fidelity insurance, as they do not comprise a civil claim for pecuniary loss suffered by a creditor or other person.

### **Prior prosecution and indemnification**

- RG 194.77 To be appropriate, a fidelity insurance policy or arrangement should not contain a condition requiring a successful criminal prosecution against the fraudulent or dishonest party before the indemnity is provided.
- RG 194.78 The presence of a prior prosecution clause may mean that significant civil liability to third parties is not covered under the policy, because the higher standard of proof in criminal cases compared to civil liability cases means that the registered liquidators or their firm may be liable to third parties for the loss of the money stolen, embezzled or misappropriated, but either:
- (a) no criminal prosecution is undertaken owing to insufficient evidence; or
  - (b) the criminal prosecution is unsuccessful because the higher onus of proof ('beyond a reasonable doubt') is not satisfied at trial.

### **Post-discovery notification periods in fidelity insurance**

- RG 194.79 Fidelity cover is commonly restricted to loss arising from acts of fraud or dishonesty that are *discovered* within the policy period (or within a specified period after the period of insurance ends) and *notified* before the expiration of a specified notification period that runs from the date of discovery, i.e. when the insured has reasonable cause for suspicion of a loss resulting from dishonesty or fraud, or discovers/becomes aware of such a loss.

RG 194.80 Although post-discovery notification periods are not required, if the fidelity insurance is in the form of a ‘claims made and notified’ contract, the existence of reasonable notification periods (i.e. of not less than 21 days) for the acts of fraud or dishonesty will not prevent the insurance from being appropriate.

### Notification of losses to ASIC or creditors

RG 194.81 In order for the insurance policy to be appropriate, the wording of any ‘no admission of liability’ condition must not be such as to prohibit factual notification of incidents to ASIC or to the creditors of the insolvent company. Notification of claims, incidents or losses to ASIC or to the creditors of the insolvent company to which the registered liquidator has been appointed may be in mandatory fulfilment of the registered liquidator’s statutory or fiduciary duties. As a matter of public policy, the terms of an insurance contract should not undermine a person’s compliance with the law.

## Adequate fidelity insurance

RG 194.82 A registered liquidator or their firm must obtain an adequate level of fidelity insurance or fraud and dishonesty cover. In assessing adequacy, registered liquidators should have regard to the factors in Table 6.

**Table 6: Factors to consider in determining an adequate level of cover**

Factors to consider	Explanation
<b>Prudence and reasonableness</b>	In light of the policy objective, registered liquidators should take a prudent, conservative approach when assessing the infidelity risk to their business.  The approach should also be reasonable from a practical commercial perspective.
<b>Liabilities that might reasonably be expected during the period of cover</b>	Registered liquidators should consider the liabilities that might reasonably be expected to arise from fraud and dishonesty claims during the period of cover, having regard to, for example: <ul style="list-style-type: none"> <li>• the number of insolvent companies to which the registered liquidator is expected or likely to be appointed as external administrator during the period of cover;</li> <li>• the volume of insolvency business the registered liquidator and their firm has, in terms of expected billings, during the period of cover;</li> <li>• the nature and infidelity risk profile of the kinds of businesses to which the registered liquidator is usually appointed as external administrator;</li> <li>• the nature, geographical scope, and complexity of the insolvency services work performed by the registered liquidator and their firm;</li> <li>• the number of claims that could arise from a single event; and</li> <li>• a reasonable estimate (e.g. projections based on past experience) of the amount of funds likely to be controlled by the registered liquidator and their staff.</li> </ul>

Factors to consider	Explanation
<b>Internal aspects of the registered liquidator's firm</b>	<p>Registered liquidators should consider all the internal circumstances of the registered liquidator's firm relevant to the infidelity risk, for example:</p> <ul style="list-style-type: none"> <li>• the number of employees and partners the registered liquidator or their firm has;</li> <li>• the quality of the firm's internal controls and compliance systems;.</li> <li>• the infidelity claims history of the registered liquidator and their firm; and</li> <li>• the assets and other financial resources of the registered liquidator and their firm.</li> </ul>
RG 194.83	<p>As a general rule, where larger engagements are undertaken, or expected to be undertaken, higher amounts of cover will be needed in order for the fidelity insurance to be adequate, on the basis that the level of assets to which the registered liquidator and their staff have access is greater.</p>
RG 194.84	<p>Fidelity insurance may be held on a 'job-by-job' basis, e.g. under a fidelity bond arrangement, so that the specified limit of indemnity applies only to the individual job and the level of that limit (and thus the amount of cover) may vary with each insolvency appointment. Individual registered liquidators or firms need to consider if this is an appropriate risk management arrangement in their circumstances and ensure that adequate insurance is indeed taken out in respect of each external administration to which the registered liquidator is appointed.</p> <p><b>Explanation</b></p>
RG 194.85	<p>Rather than mandating a 'one size fits all' minimum amount of cover, we have adopted a principles-based approach to determining an adequate level of fidelity insurance cover. This is because of:</p> <ol style="list-style-type: none"> <li>(a) the diverse size and type of potential fraud, infidelity or dishonesty risks to which registered liquidators may be exposed; and</li> <li>(b) differences in the size, revenue and activities of the firms in which registered liquidators work.</li> </ol>

## 'Job-by-job' insurance and fidelity bond arrangements

### Adequacy of level of cover

RG 194.86	<p>For fidelity insurance held on a 'job-by-job' basis (e.g. under a fidelity bond arrangement), we would expect registered liquidators to consider the infidelity risk level for each appointment, which will depend, among other things, on the level of assets in the insolvent or failing company to which they have been appointed.</p>
-----------	--

**Duration of cover**

- RG 194.87 If the fidelity cover is provided as ‘job-by-job’ insurance, we understand it will not predominantly be on a ‘claims made and notified’ basis, but on a ‘claims occurring’ basis. This means the arrangement covers liability for infidelity, fraud or dishonesty occurring in relation to external administration appointments taken on by the registered liquidator during the period of the bond, even if the claim is made and notified after that period.
- RG 194.88 However, there may be a restriction on the time after the end of the appointment that the bond covers, during which claims must be made in order to be covered. If this is the case, subject to commercial availability, that limitation should not be unreasonably short, e.g. less than two years after the end of the appointment.

## G Previous business, former principals and run-off cover in PI and fidelity insurance

### Key points

In achieving the policy objective of the insurance requirements, previous business cover or run-off cover is important to maximise the chances that PI and fidelity insurance will be available as a source of funds to compensate creditors or other claimants in situations where:

- the identity of the registered liquidator's firm changes (see RG 194.89–RG 194.94); or
- the registered liquidator ceases business or the registered liquidator or their firm becomes insolvent or enters external administration (see RG 194.96–RG 194.102).

### Mergers and acquisitions of insured firms

RG 194.89 If the insured registered liquidator's firm is a new firm formed by:

- (a) the merger of two or more firms; or
- (b) one firm acquiring another (or more than one other),

then in order to be appropriate, if it is on a 'claims made and notified' basis, the PI and fidelity insurance of the new firm generally needs to cover civil liability claims arising from work performed in the predecessor businesses for a period after the merger or acquisition until relevant statutory limitation periods have expired.

RG 194.90 Alternatively, the predecessor firms may maintain separate run-off for their claims arising from their prior work.

Note: This is consistent with clause 7PI.6 of Appendix R4, which states that if the practice entity merges with another practice and the member will not be covered by future policies, members must ensure that a valid and binding contract of PI insurance is maintained through a period of not less than seven years. It is also consistent with clause 9.2(f) of the PSC Policy Statement, which refers to reasonable run-off cover for at least traditional statutory limitation periods.

### Staff who have left a previous firm

#### Previous firm still in operation: Former principals' cover

RG 194.91 Firms need to ensure their PI and fidelity insurance continues to cover civil liability claims against a registered liquidator who has left the insured firm

(whether to retire, cease business as an insolvency practitioner, or to move to another firm), in respect of acts, errors or omissions made in their work undertaken while at the firm for a reasonable, commercially available period of time, e.g. a total of seven years after the departure for PI insurance.

### Explanation

RG 194.92 Under ‘claims made and notified’ policies, claims may be notified during a policy period subsequent to the policy period during which the conduct that gives rise to the claim occurred. By that time, the registered liquidator whose acts, errors or omissions form the basis for the claim may have left the firm. However, the risk remains with the firm or the jointly and severally liable partners of the registered liquidator who remain at the firm (in addition to the registered liquidator themselves).

### Previous firm no longer maintaining insurance

RG 194.93 Registered liquidators are responsible for ensuring the ongoing risk of claims arising from their prior conduct is covered, either by:

- (a) the previous firm from which they moved (or that firm’s successor in business); or
- (b) their current firm if, for example, their previous firm is no longer maintaining its own PI and fidelity insurance for claims relating to the external administration work they undertook while at the previous firm, e.g. because it is insolvent or otherwise no longer in operation; or
- (c) by stand-alone run-off insurance cover taken out by the registered liquidator personally if, for example, the current firm’s insurer is unwilling to accept the risk for insolvency services previously carried out at another firm.

### Explanation

RG 194.94 If a registered liquidator’s previous or current firm is not maintaining PI and fidelity insurance to cover their conduct prior to moving firms, they retain a risk of uninsured personal liability. It is the responsibility of the registered liquidator to protect themselves (and, ultimately, the interests of claimants against them) through insurance against their ongoing potential personal liability.

## Retiring sole practitioners

RG 194.95 If a sole practitioner registered liquidator retires or ceases practice, and claims made in connection with work performed by them or their staff before the registered liquidator retired will not be covered by future insurance policies of any firm that may have acquired the registered

liquidator's insolvency business, the registered liquidator should use their best endeavours to obtain run-off PI and fidelity insurance cover each year for a reasonable, commercially available period of time, e.g. a total of seven years for PI insurance.

Note 1: This is consistent with clause 7PI.6 of Appendix R4, which states that if the member ceases to practice or retires, they must ensure that a valid and binding contract of PI insurance is maintained through a period of not less than seven years. It is also consistent with clause 9.2(f) of the PSC Policy Statement, which refers to reasonable run-off cover for at least traditional statutory limitation periods.

Note 2: However, if fidelity cover was obtained under 'occurrence-based' job-by-job insurance (e.g. through a fidelity bond arrangement), provided the period for claims to be made is reasonable, run-off fidelity cover is not necessary: see RG 194.105–RG 194.106.

## Insolvency and automatic run-off cover

- RG 194.96 Registered liquidators should:
- (a) ensure that no clause has been inserted that provides for the insurance policy or arrangement to terminate in the event of:
    - (i) the insolvency of the registered liquidator or firm; or
    - (ii) their entering into any form of external administration; and
  - (b) use their best endeavours to obtain automatic run-off cover for as long as reasonably practicable.

RG 194.97 In any event, their insurance policy should contain run-off cover for at least one year after the expiry of the policy period in the event of insolvency or external administration of the registered liquidator or firm.

### Explanation

RG 194.98 Our objective is to maximise the ability of PI and fidelity insurance to provide a source of available funds to meet claims if a registered liquidator or their firm becomes insolvent. We understand that most policies will continue until the end of the policy period regardless of the insolvency of the registered liquidator or their firm. However, registered liquidators should check to ensure that an event of insolvency or external administration does not terminate the insurance policy.

RG 194.99 We understand that PI insurance generally operates on a 'claims made' rather than 'claims incurred' basis. An insolvent firm or one in external administration is unlikely to:

- (a) notify claims promptly; or
- (b) be in a position to continue to renew, vary or extend the policy for a further period.

- RG 194.100 Insurance policies have a limit of indemnity, which can be rapidly exhausted in the event of numerous claims resulting from the same incident that might have contributed to the firm's insolvency. In addition, most policies have an excess, which an insolvent firm may not be able to pay.
- RG 194.101 Because most negligence claims are 'long tail' (i.e. claims arise some time after the negligent act), there is a risk that before the creditor or other claimant realises they have suffered a loss:
- (a) the registered liquidator might have gone bankrupt or their firm might have become insolvent and been dissolved; and
  - (b) the period for notifying claims might have passed.
- RG 194.102 Ideally, insurance policies should therefore continue to cover the registered liquidator or their firm after they have become insolvent, for as long a period as is reasonably practicable. We encourage the development of policies that provide some period of automatic run-off cover to, in effect, extend the policy period in the event of insolvency so that liabilities crystallised by claims made after this time will be covered. This would maximise the potential of the insurance requirements to meet the policy objective.

### Implementation period

- RG 194.103 We will take a staged approach to administering the insurance requirements as regards automatic run-off cover, so that registered liquidators are only required to have automatic run-off cover after a two-year implementation period. This is to give the insurance industry time to develop insurance products to meet this automatic run-off cover standard.
- RG 194.104 This means that both applicants for registration as a liquidator and registered liquidators will only need to include automatic run-off cover in their insurance policies when they are entered into, renewed, varied or extended on or after 1 August 2010.

Note: Further details about transitional arrangements are set out in the Appendix.

## Run-off and fidelity bond arrangements

- RG 194.105 If the fidelity cover is provided as 'job-by-job' insurance, e.g. under a fidelity bond arrangement, we understand it will not normally be on a 'claims made and notified' basis, but on a 'claims occurring' basis. This means that the concepts of stand-alone or automatic run-off cover do not apply.
- RG 194.106 However, as explained in RG 194.87–RG 194.88, if the period for claims to be made is limited, the limit should be reasonable.

## H Situations where insurance may be unnecessary

### Key points

There are certain categories of registered liquidator for whom compliance with the new insurance requirements is unnecessary in certain circumstances: see Table 7.

We will take a no-action position in relation to these categories of registered liquidator who do not hold any PI or fidelity insurance provided they have the benefit of adequate and appropriate run-off cover: see RG 194.108–RG 194.110.

### Registered liquidators who do not need PI or fidelity insurance

RG 194.107 Table 7 sets out three categories of registered liquidator for whom we will take a no-action position if they:

- (a) do not hold any PI or fidelity insurance; but
- (b) have the benefit of adequate and appropriate run-off cover.

**Table 7: Registered liquidators for whom we will take a no-action position**

<b>Category 1</b>	Registered liquidators who no longer take on any Ch 5 appointments and no longer perform work in connection with the external administration of bodies corporate (even as consultants for other insolvency practitioners)
<b>Category 2</b>	Registered liquidators who reside and work (even as insolvency practitioners) only overseas
<b>Category 3</b>	Retired registered liquidators whose only work in connection with the external administration of bodies corporate is to act as expert witnesses in court proceedings where expertise regarding insolvency practice is required

### Conditions of our no-action position

RG 194.108 We will take a no-action position in relation to the three categories of registered liquidator who do not hold any PI or fidelity insurance on condition that adequate and appropriate PI and fidelity run-off cover is maintained each year, for a minimum period of seven years in total (or as long as it is commercially practicable to obtain run-off cover) after the registered liquidator ceased working in connection with the external administration of companies in Australia.

**Explanation**

RG 194.109 Although s1284 technically applies even to Category 1 and 2 registered liquidators, once the relevant statutory limitation periods expire, there will be no relevant potential claims that may be made against them. In accordance with the policy objective of s1284 and with Principle 3 in Table 3, it is not necessary for such registered liquidators to maintain PI and fidelity insurance. Requiring compliance with the insurance requirements would impose costs on these registered liquidators with no benefit to creditors or other claimants.

RG 194.110 Although s1284 technically applies to Category 3 registered liquidators too, if any potential claims were made against them in connection with their expert evidence regarding the external administration of bodies corporate in Australia, they would be entitled to indemnification or immunity from liability under the common law principles of witness immunity against civil suit.

Note: See *Cabassi v Vila* [1940] HCA 41; *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12.

## Appendix: Transitional arrangements

### Key points

As far as practicable, we will seek to facilitate a smooth transition to the new insurance requirements.

Liquidators with existing registrations previously relying on our no-action position in RG 33 have a one year-long transitional arrangement: see RG 194.113–RG 194.115.

There is also a two-year implementation period for automatic run-off cover: see RG 194.103–RG 194.104.

### Liquidators with existing registrations

- RG 194.111 Liquidators registered before 31 December 2007 do not have to comply with the new insurance requirements until 1 July 2008: see s1284(2).

### Registered liquidators who have lodged a security

- RG 194.112 Registered liquidators who have lodged a security (e.g. a performance bond) with us must maintain it until they obtain adequate and appropriate PI and fidelity insurance. These registered liquidators should contact us when they have obtained such insurance to discuss discharge of their performance bonds.

Please contact:

Liquidator Registration Team  
Australian Securities and Investments Commission  
GPO Box 9827  
Adelaide SA 5001  
Email: [LiquidatorRegistration@asic.gov.au](mailto:LiquidatorRegistration@asic.gov.au)

### Registered liquidators previously relying on RG 33

- RG 194.113 Most liquidators registered before 31 December 2007 have followed the requirements in Regulatory Guide 33 *Security deposits* (RG 33) as an alternative to lodging a security with us. This means they should already have PI insurance in place consistent with the minimum acceptable terms set out in RG 33.9B.

RG 194.114 ASIC will require registered liquidators previously relying on RG 33 to have adequate and appropriate PI and fidelity insurance when they renew, vary or extend their existing PI insurance policies on or after 1 August 2008. This transitional arrangement will end on 31 July 2009. If the PI insurance policy of the registered liquidator has not come up for renewal, variation or extension by 31 July 2009, they must comply with s1284 after that date.

#### **Explanation**

RG 194.115 When a new legislative requirement is introduced, there will often need to be a period of adjustment. In the s1284 context, PI insurance policies are generally written for one-year periods, standard policies are settled by insurers even further in advance, and time will be required for new insurance policies, fidelity bond arrangements or other products tailored to the insolvency services market that meet the policy objective to be developed and agreed.

RG 194.116 As this regulatory guide was issued in June 2008, we have decided to allow an additional month after the commencement of the s1284 obligations on 1 July 2008 before they need to be complied with. Then, from 1 August 2008, compliance will need to commence on a rolling basis when registered liquidators renew, vary or extend their existing PI insurance policies. This transitional concession will come to an end on 31 July 2009.

#### **What if a registered liquidator cannot comply?**

RG 194.117 Liquidators with existing registrations who are unable to obtain adequate and appropriate PI and fidelity insurance by the time their insurance comes up for renewal, variation or extension after 1 August 2008, or by 31 July 2009 (whichever is earlier), may need to cease operating.

### **Automatic run-off cover**

RG 194.118 As explained in RG 194.103–RG 194.104, there is also a two-year implementation period for automatic run-off cover.

## Key terms

Term	Meaning in this document
administrator	Has the same meaning as in s9 Note: It therefore includes both deed administrators and voluntary administrators.
aggregate sum insured	The amount of cover in the aggregate that the insurance policy provides, irrespective of the number of separate claims that may occur that are subject to a 'per claim' limit
Appendix R4	Appendix R4 to the ICAA Regulations
APRA	Australian Prudential Regulation Authority
APRA-regulated insurer	An entity permitted by the <i>Insurance Act 1973</i> to write insurance business in Australia
ASIC	Australian Securities and Investments Commission
CALDB	Companies Auditors and Liquidators Disciplinary Board
Ch 5 (for example)	A chapter of the Corporations Act (in this example, numbered 5)
'claims incurring' policy	A liability policy for claims arising out of incidents that occur during the policy period, regardless of whether the policy is still in effect at the time the claim is made. Also called a 'claims occurred' or 'occurrence based' policy, it continues to provide cover after expiry for incidents that occurred during the period of insurance
'claims made and notified' policy	A contract that provides cover for claims made against the insured and notified to the insurer during the period of insurance (or any extended reporting period), even though these may have arisen from acts, errors or omissions that occurred before the inception of the policy, as long as they took place on or after the policy's retroactive date, if it has one (see 'retroactive cover' below)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
CPAA	CPA Australia Ltd
creditors	The creditors of an insolvent or failing company to which the registered liquidator is appointed as external administrator
deductible or excess	The first part of a loss, which is borne by the insured, so that the insured in essence self-insures this amount. The insured is responsible for payment of the loss out of their own financial resources up to the threshold amount of damages payable, i.e. the deductible, and the insurer pays the remainder of the loss, up to the policy limit

Term	Meaning in this document
deed administrator	An administrator of a DOCA
DOCA	A deed of company arrangement
employee	A past or present employee of the registered liquidator or their firm
exclusion	A provision of an insurance policy that excludes coverage in particular circumstances; it specifically sets out occurrences that are not covered by the policy
external administration	The corporate insolvency that the external administrator has been appointed to administer
external administrator	An insolvency practitioner appointed as a receiver (including a receiver and manager), liquidator, a provisional liquidator, a voluntary administrator, a deed administrator or a scheme administrator appointed to administer a Pt 5.1 arrangement under Ch 5
firm	The partnership or other business structure (whether incorporated or unincorporated) through or by means of which an insolvency practitioner conducts or intends to conduct their work as a registered liquidator
former principals' cover	Insurance cover provided in relation to former partners and officers (and sometimes employees) who have left the insured registered liquidator's firm
ICAA	Institute of Chartered Accountants in Australia
ICAA Regulations	ICAA Regulations Relating to Certificate of Public Practice
Insurance Act	<i>Insurance Act 1973</i> , including regulations made for the purposes of that Act
insured amount	The maximum indemnity that the insurance policy will provide in respect of the insured's liability for damages arising out of a cause of action resulting from an external administrator's professional work that may be awarded against a person. Also called the 'level of cover', 'limitation amount', 'limit of indemnity' or 'sum insured'
insuring clause or policy wording	The core clause or essential part of an insurance policy that states the extent of the cover that the insurer provides to the insured and sets out the specific agreement for the insurer to protect the policyholder against the particular risk for which the insurance is purchased
liquidator	An insolvency practitioner appointed under Ch 5 to wind up the affairs and distribute the property of a body corporate
NIA	National Institute of Accountants

Term	Meaning in this document
policy objective	Is explained in RG 194.5
professional accounting bodies	The CPA, the ICAA and the NIA
provisional liquidator	An insolvency practitioner appointed by the court under s472(2)
PSC	Professional Standards Council
PSC Policy Statement	The PSC's <i>Policy Statement on PI Insurance</i> issued on 14 September 2007
Pt 5.1 (for example)	A part of the Corporations Act (in this example, numbered 5.1)
quantum requirement	The requirement in clause 3.5(a) of the 2007 Scheme regarding the amount payable under the insurance policy in respect of occupational liability
receiver	An insolvency practitioner appointed under an instrument or by the court to receive property of a body corporate
receiver and manager	Has the same meaning as in s9
registered liquidator	A person registered by ASIC under s1282(2)
regulation 4B	Regulation 4B of the Insurance Regulations 2002
reinstatement	If the aggregate sum insured in the insurance policy is exhausted before the end of the policy period, the policy is 'refreshed' and the sum insured is reinstated for the balance of the period of insurance to cover any new claims that may arise. However, the 'per claim' limit of indemnity remains unaffected. The number of reinstatements refers to the number of times the sum insured may be reinstated during any one policy period.
RG 33 (for example)	An ASIC regulatory guide (in this example numbered 33)
RG 33.9B (for example)	A paragraph of an ASIC regulatory guide (in this example numbered 33.9B)
retroactive cover	Where a 'claims made and notified' policy extends cover into the past to cover acts, errors or omissions that occurred or were committed during a period of time before the policy was obtained (but after the retroactive date)
retroactive date	A date on a 'claims made and notified' policy that triggers the beginning of the period of insurance coverage, i.e. on or after which acts, errors or omissions are covered: see RG 194.60–RG 194.62

Term	Meaning in this document
run-off cover	Insurance cover in respect of claims made after the insurance policy has ended that have arisen from the acts, errors or omissions of the insured during the period of insurance cover. In a 'claims made and notified' policy, run-off cover extends the period for reporting covered claims beyond the normal policy period. Run-off cover can be provided as a standard term of a PI policy ('automatic run-off cover'), but is currently more commonly a stand-alone policy that a policyholder can buy each year on an annual renewal basis once they cease to operate their business.
s1284 (for example)	A section of the Corporations Act (in this example, numbered 1284)
Scheme	The Institute of Chartered Accountants in Australia (New South Wales) Professional Standards Council scheme under the <i>Professional Standards Act 1994</i> (NSW)
2007 Scheme	the ICAA (NSW) Professional Standards Council scheme that started on 8 October 2007
voluntary administrator	An administrator of a company but not of a DOCA

## Related information

### Headnotes

Registered liquidators, insurance arrangements, externally administered bodies corporate, creditors, professional indemnity insurance, fidelity insurance, fidelity bond arrangements, adequate and appropriate insurance, risk management, authorised insurers, direct offshore foreign insurers

### Regulatory guides

RG 33 *Security deposits* (RG 33)

RG 186 *External administration: Liquidator registration* (RG 186)

### Legislation

*Corporations Act 2001* s1282, 1284, 1290A, 1291, 1292, *Insurance Act 1973*, *Insurance Regulations 2002*

### Cases

*Cabassi v Vila* [1940] HCA 41

*D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12

### Consultation papers and reports

CP 96 *Insurance requirements for registered liquidators*

### Media and information releases

IR 08-01 *ASIC consults on new insurance requirements for registered liquidators*

### ASIC forms

Form 903B *Application for registration as a liquidator*

Form 908 *Annual statement by a liquidator*