



ASIC

Australian Securities & Investments Commission

REPORT 287

ASIC regulation of registered liquidators: January to December 2011

May 2012

About this report

This report is for registered liquidators and other interested stakeholders.

It summarises the work undertaken and outcomes achieved by ASIC in regulating registered liquidators in the period 1 January to 31 December 2011.

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.

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Overview

- 1 ASIC is responsible for the registration and supervision of registered and official liquidators who accept formal appointments as external administrators of companies in Australia. We supervise their compliance with the *Corporations Act 2001* (Cth) (Corporations Act).

ASIC's strategic priorities

- 2 ASIC's strategic framework focuses on three strategic priorities or outcomes:
 - (a) confident and informed investors and financial consumers;
 - (b) fair and efficient financial markets; and
 - (c) efficient registration and licensing.
- 3 An ASIC focus is to promote the confidence of creditors in the administration of insolvent companies and in our supervision of registered liquidators. Creditors are entitled to expect a liquidator to wind up an insolvent company in an orderly and fair way so they receive the maximum possible return of their money—recognising that the liquidator is entitled to reasonable costs. To that end, registered liquidators must be competent and efficient. They must bring an independent mind to their task. They cannot use the creditors' funds entrusted to them to improperly advance their own interests.

Key issues, activities and outcomes

- 4 Our activities align with the means by which we achieve our three strategic priorities—namely, through:
 - (a) surveillance;
 - (b) guidance;
 - (c) education;
 - (d) enforcement;
 - (e) engaging with industry and stakeholders; and
 - (f) policy advice.
- 5 The following areas of concern underpinned our focus in 2011:
 - (a) competence—this includes, but is not limited to, issues such as practice capacity, timeliness, adequacy of investigations, statutory reporting, poor asset realisation and failing to maintain proper books and records;

- (b) independence—a registered liquidator must be independent and also be seen or perceived to be independent. Registered liquidators must make full and relevant disclosure of relevant relationships as required by the Corporations Act; and
- (c) inappropriate self-gain—this includes, but is not limited to, excessive remuneration, drawing remuneration before obtaining appropriate approval and entering into inappropriate transactions with related parties.

6 Section A of this report describes the work undertaken and outcomes achieved by ASIC in regulating registered liquidators—in the period 1 January to 31 December 2011 (the reporting period). Table 1 summarises our key outcomes by our areas of concern.

Table 1: Key outcomes for 2011 by area of concern

| | |
|--------------------------------|--|
| Competence | <ul style="list-style-type: none"> • We entered into an enforceable undertaking with Sydney-based registered liquidator, Peter Ngan. • We obtained a voluntary undertaking from Melbourne-based registered liquidator, Paul Pattison. • On ASIC's application, the Companies Auditors and Liquidators Disciplinary Board (CALDB) cancelled the registration of Brisbane-based registered liquidator, David Anderson. • We commenced formal investigations into four registered liquidators. • We completed three industry-wide compliance projects addressing insurance, statutory reporting and late lodgement of documents. |
| Independence | <ul style="list-style-type: none"> • We cancelled the official liquidator registration of John Lord and obtained a statutory undertaking from Atle Crowe-Maxwell. Both are Sydney-based registered liquidators. • We commenced a formal investigation into one registered liquidator. • We conducted 98 reviews of independence declarations, identifying 46 declarations as inadequate and requiring reissuing to creditors. |
| Inappropriate self-gain | <ul style="list-style-type: none"> • We finalised our action against Stuart Ariff with a successful criminal conviction on 19 separate charges. The court sentenced Mr Ariff to a six-year custodial sentence. • We conducted 24 reviews of registered liquidators' remuneration reports to creditors, resulting in additional disclosure to creditors (11 cases) or a reduction in registered liquidator remuneration claims (2 cases). • We commenced formal investigations into three registered liquidators. |

7 In 2011, we:

- (a) initiated 65 new transaction reviews and 13 proactive practice reviews;
- (b) completed 85 transaction reviews and 12 proactive practice reviews;
- (c) completed, and gave feedback to industry on, three compliance projects addressing insurance, statutory reporting and late lodgement of documents (see paragraphs 42–59);

- (d) commenced eight formal investigations into registered liquidator conduct (see Table 2 in Section A); and
- (e) completed 98 reviews of independence declarations and 24 reviews of remuneration reports issued to creditors by registered liquidators.

8 A large percentage of outcomes of our activities are educative, which is consistent with our objective to communicate to the market our expectations on specific issues or behaviours. Our oversight and intervention is very often the catalyst to changing registered liquidator behaviour and their internal systems. Enforcement activity will be used where warranted and other action cannot achieve the required outcome.

Reports of alleged misconduct

- 9 In 2011, we received 426 inquiries and reports of alleged misconduct concerning registered liquidators. At initial assessment we categorised these as follows:
- (a) conduct related (16%)—these were the most serious breaches of standards, which could be seen to be deliberate;
 - (b) procedural based (33%)—although serious, the misconduct might be inadvertent; and
 - (c) educational (51%)—greater understanding of the issue by industry is needed (addresses inquiries, questions and complaints regarding commercial practice).
- 10 Our assessment of the inquiries and the reports of alleged misconduct showed that:
- (a) in 294 matters (69%), there was insufficient evidence of an offence or the registered liquidator did not breach the Corporations Act;
 - (b) in 91 matters (21.4%), conduct concerns existed and we referred the matter for further review or to support an existing surveillance/enforcement activity; and
 - (c) in 41 matters (9.6%), action was otherwise precluded for reasons including that the matter did not advance or support an existing investigation or regulatory action.
- 11 Section B of this report contains a detailed analysis of the outcomes of general inquiries and reports of alleged misconduct received.

A Activities and outcomes

Key points

This section describes the work undertaken and outcomes achieved by ASIC in regulating registered liquidators—in the period 1 January to 31 December 2011—in the following areas:

- enforcement action (see paragraphs 12–31);
- surveillance (see paragraphs 32–41);
- industry-wide compliance projects (see paragraphs 42–59);
- guidance (see paragraphs 60–68);
- education (see paragraphs 69–73);
- engaging with industry and stakeholders (see paragraphs 74–83); and
- policy advice (see paragraphs 84–87).

Enforcement action

- 12 Table 2 shows the number of registered liquidators who were subject to a formal investigation under s13(3) of the *Australian Securities and Investments Act 2001* (Cth) (ASIC Act) during the reporting period.

Table 2: Registered liquidators subject to formal investigation in 2011

| | |
|--|-----|
| Registered liquidators subject to investigation at 1 January 2011 | 4 |
| Matters referred during 2011* | 8 |
| Matters finalised during 2011** | (2) |
| Open investigations at 31 December 2011 | 10 |

* The eight matters referred for formal investigation arose from one transaction review, five proactive practice reviews and two matters from our 2010 remuneration reporting project.

** The two finalised matters are Mr Ngan and Mr Lord (incorporating Mr Crowe-Maxwell).

- 13 The conduct concerns that resulted in a formal investigation included:
- (a) unjust enrichment (one referral);
 - (b) remuneration concerns (two referrals);
 - (c) competence (three referrals);
 - (d) practice capacity (one referral); and
 - (e) lack of independence and facilitating fraudulent phoenix activity (one referral).

- 14 Table 3 provides details of the outcomes of the formal investigations during the reporting period.

Table 3: Outcomes of formal investigations in 2011*

| | |
|--|----------|
| Closed due to insufficient evidence of an offence | 0 |
| Court application for an inquiry under s536 of the Corporations Act | 1 |
| Cancellation/statutory undertaking under s1291(2) of the Corporations Act** | 1 |
| Enforceable undertaking[†] | 1 |
| CALDB application^{††} | 0 |
| Matter referred to the Commonwealth Director of Public Prosecutions (CDPP) | 0 |
| Total | 3 |

* The table excludes the matter concerning Mr Ariff because we finalised our investigation before 31 January 2011 and referred a brief to the CDPP.

** The matter concerning Mr Lord and Mr Crowe-Maxwell arose in the one investigation. Mr Crowe-Maxwell provided an undertaking under s1291(2) of the Corporations Act, rather than an enforceable undertaking.

† The enforceable undertaking involving Mr Ngan is recorded as an outcome for 2011 because Mr Ngan signed the undertaking before 31 December 2011, with ASIC's acceptance occurring after that date.

†† Mr David Anderson's cancellation is not recorded as an outcome because the application to CALDB was based on an administrative application, rather than a conduct application, and did not involve a formal investigation.

Stuart Ariff

- 15 The jury found Mr Ariff guilty on 26 September 2011 in the New South Wales District Court on all 19 criminal charges brought by ASIC: see Media Release ([11-308MR](#)) *Stuart Ariff jailed on ASIC charges* (19 December 2011).
- 16 Mr Ariff was found guilty of 13 charges under s176A of the *Crimes Act 1900* (NSW) concerning the transfer of \$1.8 million with intent to defraud HR Cook Investments Pty Ltd (in liq) and six charges under s1308(2) of the Corporations Act for making false statements in documents lodged with ASIC recording receipts and payments relating to HR Cook Investments (in liq).
- 17 The court sentenced Mr Ariff on 19 December 2011 to six years jail. Mr Ariff is eligible for parole on 25 March 2015.
- 18 The CDPP prosecuted the matter.

- 19 On ASIC's application, the Supreme Court of New South Wales banned Mr Ariff from acting as a liquidator for life in August 2009.

John Lord and Atle Crowe-Maxwell

- 20 We commenced an investigation of Mr Lord and Mr Crowe-Maxwell after the receipt of a detailed supplementary report from the liquidator of Premium Collections Pty Ltd (in liq) on 19 April 2010. ASIC funded the supplementary report under the Assetless Administration Fund, which we administer.
- 21 Following our investigation we determined that Mr Lord and Mr Crowe-Maxwell (both Sydney-based practitioners) failed to disclose to the Supreme Court of New South Wales that they had a commercial relationship with the petitioning creditor of companies for which they consented to act as official liquidator.
- 22 We cancelled Mr Lord's registration as an official liquidator effective 19 August 2011 in accordance with s1291(1) of the Corporations Act and obtained an undertaking from Mr Crowe-Maxwell in his capacity as an official liquidator in accordance with s1291(2) of the Corporations Act: see Media Release ([11-184MR](#)) *ASIC acts against official liquidators* (26 August 2011).

Peter Ngan

- 23 We undertook a proactive practice review of Mr Ngan's practice between April and June 2010, and identified the following concerns:
- (a) failure to identify, secure and deal appropriately with assets;
 - (b) an apparent lack of independence;
 - (c) failure to adequately report to creditors;
 - (d) not reporting to ASIC or providing reports that were deficient;
 - (e) incomplete or inadequate investigations;
 - (f) inappropriate remuneration practices and timekeeping procedures;
 - (g) inadequate maintenance of books as required by s531 of the Corporations Act;
 - (h) unnecessary delaying of the finalisation of external administrations; and
 - (i) failure to comply with various other statutory requirements.
- 24 Mr Ngan entered into an enforceable undertaking (see Media Release ([12-04MR](#)) *Sydney liquidator prevented from practising* (18 January 2012)) acknowledging our concerns and admitting to failing to carry out and perform adequately and properly the duties or functions required by an Australian law.

- 25 The key terms of the enforceable undertaking included:
- (a) preventing Mr Ngan from practising as a registered liquidator for two and a half years;
 - (b) requiring Mr Ngan to apply to the court to be replaced as the registered liquidator on all 35 external administrations in which he acted;
 - (c) preventing Mr Ngan from undertaking any work on those 35 external administrations;
 - (d) requiring Mr Ngan to provide six-monthly reports to ASIC on work he undertakes;
 - (e) requiring Mr Ngan to complete 75 hours professional development; and
 - (f) requiring an independent registered liquidator (approved by ASIC) to review and report to ASIC on Mr Ngan's appointment to the first four creditors' voluntary liquidations and first two voluntary administrations that involve the assessment of the merits and the administration of the operative terms of a deed of company arrangement, following the end of the two-and-a-half-year period.

Paul Pattison

- 26 We commenced action on 7 February 2011 against Mr Pattison and Pattison Business Recovery & Insolvency Specialists Pty Ltd in the Supreme Court of Victoria.
- 27 We sought an inquiry by the Supreme Court under s536 of the Corporations Act into Mr Pattison's conduct and his capacity to adequately and properly perform his duties as a liquidator.
- 28 Mr Pattison voluntarily resigned from all of his external appointments and agreed to orders by consent for the appointment of new liquidators or deed administrators to 80 companies that he formerly administered.
- 29 Mr Pattison also gave an undertaking that he would cease to carry out, consent to, or otherwise accept appointment as a liquidator, provisional liquidator, voluntary administrator, administrator of a deed of company arrangement or controller, until he produces evidence in a form acceptable to ASIC or to the court that demonstrates he has the practice and financial capacity to adequately and properly carry out his duties as a liquidator.
- 30 The court subsequently dismissed the proceedings with no findings of impropriety as to the conduct of Mr Pattison as a liquidator: see ASIC Advisory ([11-35AD](#)) *ASIC obtains orders from Melbourne-based liquidator* (1 March 2011).

David Mark Anderson

- 31 Following our application, on 24 June 2011, the CALDB cancelled Mr Anderson's liquidator registration due to his failure to lodge an annual statement (Form 908 *Annual statement by liquidator*) as required by s1288 of the Corporations Act. A copy of the decision is available from the CALDB's website at www.caldb.gov.au. Form 908 is an important document disclosing seminal information concerning a registered liquidator's practice.

Surveillance

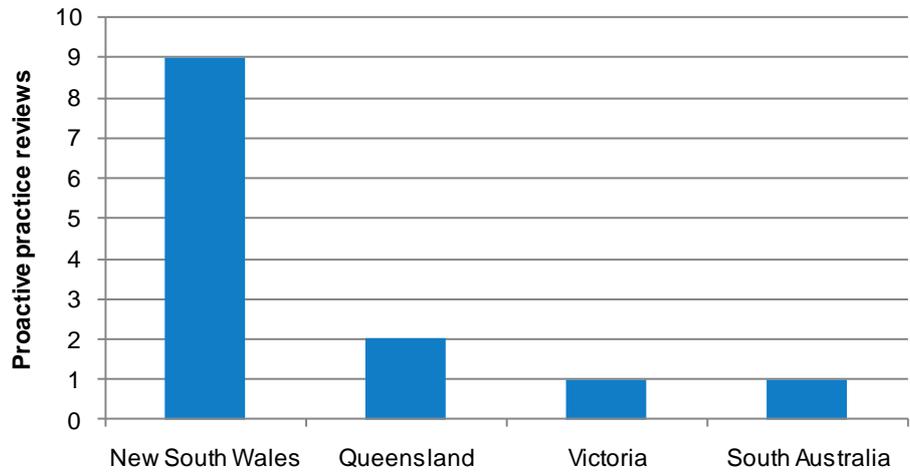
- 32 We undertake surveillance activity of registered liquidators by either reviewing a specific transaction or appointment or by undertaking a targeted review of a registered liquidator's practice (a proactive practice review). Our surveillances allow us to objectively assess whether a registered liquidator is adequately and properly performing their duties and functions and complying with the Corporations Act and Corporations Regulations 2001 (Corporations Regulations). This, in turn, allows us to assess whether a registered liquidator remains a fit and proper person to be registered.
- 33 Following either a transaction or proactive practice review, we assess whether we should refer a matter for a formal investigation. The issues we consider in making the assessment are:
- (a) the extent of harm or loss;
 - (b) the benefits of pursuing the misconduct, relative to the expense;
 - (c) the impact of other issues, including the type and seriousness of the misconduct and the evidence available; and
 - (d) the availability of alternative courses of action.

The specific factors we consider vary according to the circumstances of the case. Information Sheet 151 *ASIC's approach to enforcement* (INFO 151) provides further guidance about the issues we consider when determining what action, if any, we take.

Proactive practice reviews

- 34 In 2011, we initiated 13 proactive practice reviews: see Figure 1. The reviews covered New South Wales (nine reviews), Queensland (two reviews), Victoria (one review) and South Australia (one review).

Figure 1: Proactive practice reviews commenced in 2011 by region



35 Practice reviews focus on the following key compliance areas:

- (a) independence;
- (b) remuneration disclosure and approval;
- (c) quality of investigations;
- (d) reporting to creditors and to ASIC;
- (e) asset realisations; and
- (f) adequacy of practice systems.

36 We select practitioners for review based upon a risk-weighted model that considers several factors, including, but not limited to, the number and profile of external administrations, the number of staff, any intelligence gathering from our project work and any complaints received.

37 Of the 12 practice reviews finalised during 2011 (see Table 4), we escalated five reviews to a formal investigation in accordance with s13(3) of the ASIC Act: see Table 5.

Table 4: Proactive practice reviews conducted in 2011

| | |
|---|-------------|
| Reviews open at 1 January 2011 | 19 |
| Reviews commenced during 2011 | 13 |
| Reviews finalised during 2011 | (12) |
| Reviews open at 31 December 2011 | 20 |

Table 5: Outcomes of proactive practice reviews finalised in 2011

| | |
|--|-----------|
| No issues identified | 1 |
| Positive outcome | 6 |
| Referred for formal investigation | 5 |
| Total | 12 |

38 Positive outcomes reflect cases where we identified issues or behaviours that do not warrant a formal investigation or disciplinary action and the registered liquidator has voluntarily agreed to amend their systems and procedures.

Transaction reviews

39 In 2011, we initiated 65 individual transaction reviews: see Table 6. These reviews result from both third parties bringing an issue to our attention (see Table 12 in Section B) or from our own research. We undertake a full review of the transaction to ensure the registered liquidator adequately and properly performs their duties and functions in compliance with the Corporations Act and the Corporations Regulations.

Table 6: Transaction reviews conducted in 2011

| | |
|---|-------------|
| Reviews open at 1 January 2011 | 44 |
| Reviews commenced during 2011 | 65 |
| Reviews finalised during 2011 | (85) |
| Reviews open at 31 December 2011 | 24 |

40 Table 7 summarises the nature of the concern of the 85 finalised reviews during the year and Table 8 summarises the outcomes of those reviews.

41 An analysis of transaction reviews by region is set out in Figure 2. Selecting a particular transaction for review is a function of the nature of the allegation and availability of evidence and not region. The transaction review coverage does reflect roughly the numbers of registered liquidators by state, with the exception of Western Australia.

Table 7: Area of concern* for transaction reviews

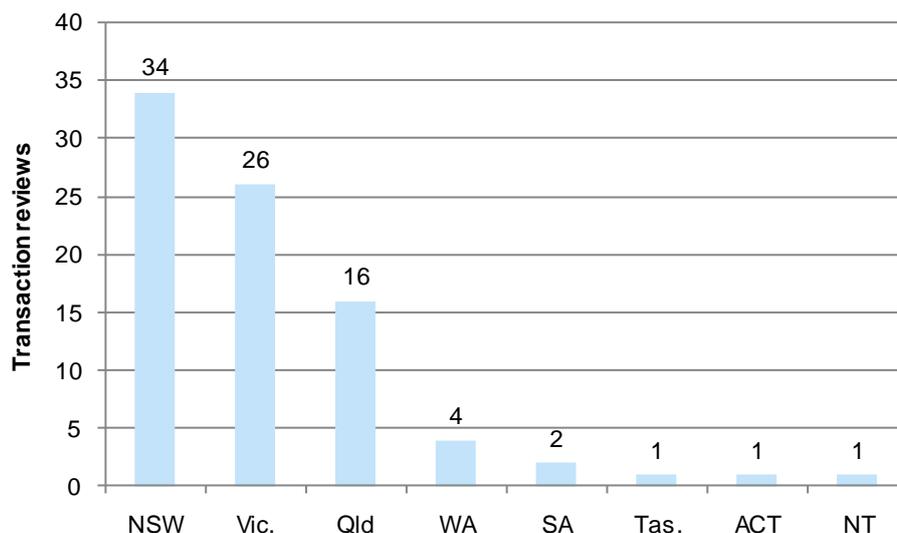
| | |
|--|-----------|
| Independence | 30 |
| Remuneration | 12 |
| Adequacy of investigation and reporting to creditors | 12 |
| Insurance | 5 |
| Dispute over dealing with employee priority and admission of proofs | 4 |
| Failure to lodge forms and complete external administrations in a timely manner | 3 |
| Timeliness in dealing with matter | 3 |
| Adequacy of sale process | 3 |
| Concern over terms or operation of a deed of company arrangement | 2 |
| Other | 11 |
| Total | 85 |

* The area of concern identified is the primary concern only and our review may include multiple areas of concern.

Table 8: Outcomes of transaction reviews finalised in 2011

| Outcome | Number | % |
|---|---------------|--------------|
| Insufficient concerns identified to warrant ASIC action | 53 | 62.3 |
| Educative outcome | 23 | 27.1 |
| Advice to other ASIC stakeholder teams | 3 | 3.5 |
| Matter referred for future review | 2 | 2.4 |
| Referred for formal investigation* | 4 | 4.7 |
| Total | 85 | 100.0 |

* We referred three of the four matters for formal investigation in late 2010 and these are reflected in Table 2 as matters already under investigation. The matters were not finalised as a transaction review until early 2011 due to secondary issues not the subject of the referral.

Figure 2: Transaction reviews finalised in 2011 by region

Industry-wide compliance projects

Monitoring project: Declarations of relevant relationships and declarations of indemnities

- 42 A voluntary administrator must prepare a declaration of relevant relationships and a declaration of indemnities, while a creditors' voluntary liquidator is required only to prepare a declaration of relevant relationships.
- 43 Following the completion of a successful pilot project in 2010 to measure compliance with the Corporations Act, we continued to monitor registered liquidators' ongoing compliance with the relevant provisions of the Corporations Act.
- 44 In 2011, we conducted 98 reviews and found that 46.9% of declarations were inadequate, with ASIC requiring the registered liquidator to reissue the declaration: see Table 9. We continue the project because independence is a key concern for ASIC.

Table 9: Outcomes of monitoring project in 2011: Declarations of relevant relationships and declarations of indemnities

| Outcome | Voluntary administration | | Creditors' voluntary liquidation | | Total | |
|------------------------|--------------------------|--------------|----------------------------------|--------------|-----------|--------------|
| | No. | % | No. | % | No. | % |
| Inadequate declaration | 17 | 47.2 | 29 | 46.8 | 46 | 46.9 |
| Adequate declaration | 19 | 52.8 | 33 | 53.2 | 52 | 53.1 |
| Total | 36 | 100.0 | 62 | 100.0 | 98 | 100.0 |

- 45 Generally, declarations were identified as inadequate when there was:
- (a) a failure to disclose a relevant relationship as the result of pre-appointment dealings and/or, where such a relevant relationship has been identified, failing to adequately explain why it does not create a conflict of interest;
 - (b) inadequate disclosure if there are any terms and conditions attaching to an indemnity received from a third party and, if there are terms and conditions, what they are; and
 - (c) a failure to disclose all companies involved in appointments to a group of companies, and whether or not circumstances existed between the group entities that may give rise to a conflict and how the appointees would manage those issues.
- 46 When the concerns warrant it, we will initially provide a letter of concern to the registered liquidator to table at the creditors' meeting. Creditors are then better informed and can determine whether they wish to replace the incumbent registered liquidator.

Remuneration monitoring project

- 47 In August 2011, we commenced our remuneration monitoring project, which focuses primarily on disclosure but also considers reasonableness of external administrator remuneration.
- 48 In 2011, we performed an initial review of 199 external administrations, selecting 24 for a more detailed review.
- 49 Where appropriate, we seek corrective action around disclosure and approval concerns, which may involve:
- (a) reissuing remuneration reports;
 - (b) adjourning a creditors' meeting so that creditors can be provided with better disclosure;
 - (c) tabling an ASIC letter of concern at a creditors' meeting; or
 - (d) requiring registered liquidators to correct their remuneration approval procedures.
- 50 We believe the project has a largely educative benefit for registered liquidators. However, for matters where we form a preliminary view that remuneration may be unreasonable, we undertake a further detailed review and consider what action is then warranted. Also, where we identify material concerns, we refer these matters for formal investigation and consideration of enforcement action.
- 51 An analysis of the outcomes of the 24 external administrations reviewed is set out in Table 10.

Table 10: Outcomes of remuneration monitoring project in 2011

| Outcome | Number | % |
|--|-----------|--------------|
| No issue identified | 1 | 4.2 |
| Educative outcome | 7 | 29.2 |
| Improved disclosure provided | 2 | 8.3 |
| Voluntary undertaking not to seek fee approval based on existing remuneration report | 6 | 25.0 |
| Voluntary agreement not to draw remuneration approved due to deficiencies identified and seek court approval | 1 | 4.2 |
| New remuneration report issued | 3 | 12.5 |
| Reduced remuneration sought by practitioner | 2 | 8.3 |
| Other | 2 | 8.3 |
| Total | 24 | 100.0 |

52 None of the reviews in 2011 resulted in a formal investigation. Our 2010 pilot remuneration project resulted in a referral of two registered liquidators to our enforcement team in 2011 for formal investigation: see Table 2. The investigations are ongoing.

Insurance project

53 In December 2010, we commenced a project to assess registered liquidator compliance with their statutory obligations under s1284 of the Corporations Act and Regulatory Guide 194 *Insurance requirements for registered liquidators* (RG 194) to hold appropriate insurance.

54 Table 11 shows the nature of remedial actions registered liquidators took to comply with their statutory obligations.

Late lodgement project

55 In March 2011, we wrote to 129 registered liquidators out of a population of 667 (19.3%) who received initial late lodgement fee assessments.

56 The project aimed to raise awareness of the need to comply with lodgement timeframes and to bring about improved behaviours and standards across the industry. We are currently finalising our assessment and findings.

Table 11: Outcomes of insurance project in 2011

| Outcome | Number | % |
|--|-----------|--------------|
| Obtained cover for lapsed policy | 7 | 10.9 |
| Obtained fidelity policy cover | 13 | 20.3 |
| Obtained fidelity policy cover and insolvency policy cover | 1 | 1.6 |
| Amended cover to include provisions of insolvency services | 16 | 25.0 |
| Increased policy cover in accordance with RG 194 | 21 | 32.8 |
| Obtained run-off cover | 2 | 3.1 |
| Obtained automatic run-off in the event of insolvency | 4 | 6.3 |
| Total | 64 | 100.0 |

Section 533(1) project

- 57 In 2011, we wrote to registered liquidators who did not lodge reports under s533 of the Corporations Act, seeking an explanation. These reports are important in notifying ASIC of alleged offences by company directors and others. The project aims to improve the timeliness of lodgement of reports by registered liquidators.
- 58 We identified outstanding reports for 886 unfinalised liquidations administered by 199 registered liquidators and 424 liquidations (involving 169 registered liquidators) finalised in the last three years where the registered liquidator failed to lodge a report.
- 59 We will report our findings in the second half of the 2012 calendar year.

Guidance

Regulatory guides

- 60 Regulatory guides give guidance to registered liquidators by explaining when and how we will exercise specific powers under legislation (primarily the Corporations Act), how we interpret the law and the principles underlying our approach.
- 61 They also give practical guidance (e.g. describing the steps of a process such as applying for registration or giving practical examples of how regulated entities may decide to meet their obligations).

- 62 The following regulatory guides apply to registered liquidators:
- (a) Regulatory Guide 16 *External administrators: Reporting and lodging* (RG 16);
 - (b) Regulatory Guide 81 *Destruction of books* (RG 81);
 - (c) Regulatory Guide 82 *External administration: Deeds of company arrangement involving a creditor's trust* (RG 82);
 - (d) Regulatory Guide 109 *Assetless Administration Fund: Funding criteria and guidelines* (RG 109);
 - (e) Regulatory Guide 174 *Externally administered companies: Financial reporting and AGMs* (RG 174);
 - (f) Regulatory Guide 186 *External administration: Liquidator registration* (RG 186);
 - (g) Regulatory Guide 194 *Insurance requirements for registered liquidators* (RG 194); and
 - (h) Regulatory Guide 217 *Duty to prevent insolvent trading: Guide for directors* (RG 217).
- 63 In 2011, we commenced work on redrafting RG 186, including draft guidance on the key issues of independence and remuneration for registered liquidators.
- 64 We intend to release consultation papers on independence and remuneration in the latter part of 2012 after the Australian Government concludes its current insolvency law reforms canvassed in its proposals paper *A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia* (14 December 2011).
- 65 We are currently reviewing RG 16 to improve the quality of the information received from registered liquidators for alleged offences under s588G(2) and (3) of the Corporations Act. A high percentage of total reports received allege a civil offence for insolvent trading, but the registered liquidator advises in their report that either:
- (a) there is no evidence to support the offence in their possession; or
 - (b) that the matter does not warrant further action.
- 66 We wish to obtain more accurate statistics concerning alleged insolvent trading and focus on instances where there have been serious breaches of the Corporations Act and evidence exists to support regulatory action.
- ACCC fact sheets**
- 67 We helped the Australian Competition and Consumer Commission (ACCC) issue a fact sheet regarding external administration with a view to ensuring

consumers have access to accurate and timely information from all relevant Australian Consumer Law regulators when a company is identified as being in financial difficulty.

- 68 The ACCC interest lies in ensuring that complainants/creditors have information that assists them without the need to contact a regulator and to ensure that, if they wish to seek further information, they do so from the most appropriate source, whether that is the relevant regulator or the administrator.

Education

- 69 Our direct activities (proactive reviews, transaction reviews and industry-wide compliance projects) are a major means of communicating to the market our expectations on a range of issues and a means of achieving educative outcomes.
- 70 We published the following four articles in the *Australian Insolvency Journal*, the quarterly journal of the Insolvency Practitioners Association (IPA):
- (a) 'Disclosure of relevant relationships and indemnities' (vol. 23, issue 1);
 - (b) 'Insolvency compliance projects' (vol. 23, issue 2);
 - (c) 'ASIC's review of registered liquidator policies of insurance' (vol. 23, issue 3); and
 - (d) 'Open letter to the Insolvency Practitioners Association' (vol. 23, issue 4).
- 71 We also provided a newsletter, *ASIC insolvency update for registered liquidators: October 2011*. The newsletter covers a broad spectrum of issues relevant to the profession. Copies of all seven newsletters published since November 2007 are available on our website at www.asic.gov.au.
- 72 We also seek to write to all registered liquidators before the commencement of an industry-wide project to advise what we intend doing and why we think it is important. Following the conclusion of a project, we again write to all registered liquidators to communicate the key findings. In 2011, we wrote to registered liquidators regarding the commencement of three projects concerning:
- (a) statutory reporting to ASIC under s533(1) of the Corporations Act;
 - (b) the late lodgement of documents with ASIC; and
 - (c) adequate disclosure to creditors and reasonableness of remuneration claims.
- 73 We also communicated the key findings of our insurance project.

Engaging with industry and stakeholders

- 74 We engage with registered liquidators and other stakeholders through regional liaison meetings, liaison meetings with the IPA and the Institute of Chartered Accountants Australia (ICAA), liaison with government and statutory bodies, eligible applicants, acting as *amicus curiae* (friend of the court), our liquidator assistance program and the Assetless Administration Fund.

Regional liaison meetings

- 75 We hold meetings twice a year with stakeholders in each state capital city and the Australian Capital Territory. The meetings provide an opportunity to communicate our priorities and our regulatory action. They also provide a forum to obtain feedback from the marketplace on emerging issues. In 2011, we held meetings around Australia in February and November.

IPA and ICAA liaison meetings

- 76 The IPA is the main industry organisation representing registered liquidators. The ICAA is one of the main professional accounting bodies whose members form a material part of the IPA membership. We regularly meet, and otherwise liaise with, the IPA and the ICAA regarding current market issues, law reform and other regulatory developments. These liaison meetings are important for ASIC in understanding stakeholder views on a range of issues.

Liaison with government and statutory bodies

- 77 We regularly meet with Treasury, the Insolvency and Trustee Service Australia, the Australian Taxation Office (ATO) and other government agencies regarding law reform, regulatory action and emerging issues relating to the efficient operation of the insolvency industry, and we provide assistance where required.

Eligible applicants

- 78 We received and assessed 17 applications during 2011 from registered liquidators acting in the capacity as a receiver, receiver and manager or controller for authorisation, as an eligible applicant, to conduct a public examination of relevant persons regarding the examinable affairs of the company.

Amicus curiae

- 79 We appear as *amicus curiae* in proceedings where we can assist the court in cases concerning insolvency law and practice. We appeared once during 2011 in proceedings brought by the voluntary administrators of Bevillesta Pty Ltd (in voluntary administration) (*Re Bevillesta Pty Ltd (In Voluntary Administration)* [2011] NSWSC 417), under s447D of the Corporations Act, seeking directions regarding a deed of company arrangement and creditors' trust. Our interest lay in ensuring protection of creditor rights.

Liquidator assistance program

- 80 We assist registered liquidators in obtaining compliance by company officers with their obligations to prepare a report as to a company's affairs, provide books and records, and assist liquidators through our liquidator assistance program.
- 81 Details of prosecutions under the program are on our website at www.asic.gov.au/publications under 'Statistics'.

Assetless Administration Fund

- 82 We administer the Assetless Administration Fund, which the Australian Government established in 2005 to finance preliminary investigations and reports by registered liquidators into the failure of companies with few or no assets and where it appears to ASIC that enforcement action may result from the liquidator's investigation and report. A particular focus of the Assetless Administration Fund is curbing fraudulent phoenix activity.
- 83 We reported the amount paid from the fund in 2010–11 in the *ASIC Annual Report: 2010–11* (Note 18A) and provided details of applications received and outcomes achieved on our website at www.asic.gov.au/publications under 'Statistics'.

Policy advice

- 84 In 2011, we assisted government in its law reform agenda, in particular with reforms responding to the recommendations made by the Senate Economics Committee in its report *The regulation, registration and remuneration of insolvency practitioners in Australia: The case for a new framework* (14 September 2010), following the Senate's inquiry into the insolvency profession. We assisted the Government with its:
- (a) options paper *A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia* (2 June 2011); and

- (b) proposals paper *A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia* (14 December 2011).

85 The government proposals include two pieces of legislation aimed at phoenix activity:

- (a) the Corporations Amendment (Phoenixing and Other Measures) Bill 2012 amends the Corporations Act to provide ASIC with an administrative power to order the winding up of a company; and
- (b) the Corporations Amendment (Similar Names) Bill 2012 amends the Corporations Act to provide that a director of a failed company can be jointly and individually liable for the debts of a company that has a similar name to the failed company.

86 In response to a government initiative announced in December 2011, we commenced work on establishing an insolvency notices website to host all insolvency notices that registered liquidators and ASIC must publish in newspapers and the *Gazette* under the Corporations Act.

87 We also assisted Treasury concerning an expansion of the scope of the Assetless Administration Fund. On 5 December 2011, Treasury announced the Australian Government's decision to expand the fund's scope to further support activities aimed at deterring or reversing phoenix activity, including depriving persons of the benefits of such activities. The fund can finance the cost of replacing and investigating a former liquidator where they are suspected of complicity in such activity.

B Inquiries and reports of alleged misconduct

Key points

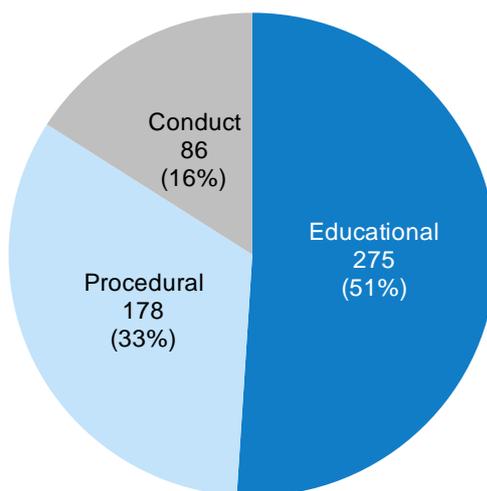
This section contains a detailed analysis of the outcomes of general inquiries and reports of alleged misconduct received by ASIC in 2011.

- 88 ASIC's Misconduct and Breach Reporting stakeholder team receives and conducts an initial assessment of all inquiries and reports of alleged misconduct arising from external administrations conducted by registered liquidators.
- 89 Reports of alleged misconduct and inquiries against registered liquidators have averaged 3.5% of total reports and inquiries received by ASIC over the five and a half years to 31 December 2011.

Categorisation of inquiries and reports of alleged misconduct

- 90 Figure 3 shows an analysis of the nature of the inquiries and reports of alleged misconduct we received in 2011.

Figure 3: Nature of inquiries and reports of misconduct received in 2011



Note: Inquiries and reports of misconduct received total 539, compared to 426 inquiries and reports of alleged misconduct disclosed in Table 12. The difference is the result of merging activities where there are multiple inquiries and reports about the one issue for a registered liquidator (e.g. where we receive multiple inquiries and reports from the public about a matter such as honouring gift cards when a national retailer enters into external administration).

Conduct matters

- 91 ‘Conduct’ matters are those that concern a deliberate, or at least conscious, act or omission by the registered liquidator, which has significant ramifications for the complainant or other stakeholders—for example, a person alleges that the liquidator of a group assisted a director in fraudulent phoenix activity by transferring assets to one or more related entities.

Procedural matters

- 92 ‘Procedural’ matters are those that relate to circumstances where there has been an inadvertent act or omission by the registered liquidator, which is less significant than a ‘conduct’ matter. This relies on there being no intent behind the alleged action or where there may be an indication that the registered liquidator has admitted fault and/or has sought to make good. An example would be where a person alleges that the practitioner does not return their calls or has failed to report on a timely basis, and subsequent inquiries result in improved communication and acceptable explanations.

Educational matters

- 93 ‘Educational’ matters are those that involve circumstances where the outcome or resolution of the inquiry results from educating the person of the applicable law/practice or the provision of information pertaining to the normal practice of the insolvency process. For example, a person may allege that the liquidator is refusing to tell them the value of certain assets (it may simply be that the liquidator is reluctant to disclose this information because, if disclosed, it could result in a lesser return for creditors).

Outcomes of inquiries and reports of alleged misconduct

- 94 Table 12 summarises the outcomes of the 426 inquiries and reports of alleged misconduct by registered liquidators.
- 95 The Insolvency Practitioners stakeholder team individually assesses conduct matters referred to it. Where the team determines that a matter does not warrant a referral for a formal investigation, we record the information obtained as part of our profiling of registered liquidators.

Table 12: Outcomes of inquiries and reports of misconduct in 2011

| Outcome | Number | % |
|---|------------|--------------|
| Provided assistance to resolve the inquiry | 96 | 22.5 |
| Insufficient evidence was identified to support the alleged breach* | 163 | 38.3 |
| No breach of the Corporations Act was identified | 35 | 8.2 |
| Referred to a specialist team within ASIC for further review** | 58 | 13.6 |
| Referred for formal investigation | 0 | 0 |
| Referred to assist existing investigation or other surveillance | 33 | 7.8 |
| Action otherwise precluded† | 41 | 9.6 |
| Assessment in progress | 0 | 0 |
| Total | 426 | 100.0 |

* Before closing a matter on the basis that there is insufficient evidence to support an allegation, we make relevant inquiries. This normally includes speaking to the person to obtain further information, including documents, reviewing lodgements with ASIC and speaking to the registered liquidator.

** Of the 58 referrals by Misconduct and Breach Reporting, 55 were to the Insolvency Practitioners stakeholder team.

† Action otherwise precluded is due to the matter already being subject to investigation or some other regulatory action that has been assessed and does not assist the existing action.

Appendix: Industry profile

Registered liquidator profile

96 As at 31 December 2011, the Australian insolvency industry consists of 671 registered liquidators (of which 523 were also official liquidators): see Table 13. As Figure 4 shows, 44% of registered liquidators operate in a firm of 10 or more practitioners. As Figure 5 shows, 76.5% of registered liquidators operate predominantly in the eastern states: New South Wales (35.5%), Victoria (24.6%) and Queensland (16.4%).

Table 13: Number of registered and official liquidators as at 31 December 2011

| | Registered liquidators | Official liquidators |
|--------------------------------------|------------------------|----------------------|
| Registered at 1 January 2011 | 668 | 515 |
| Registered during 2011 | 29 | 25 |
| Voluntary cancellation during 2011 | (25) | (16) |
| Involuntary cancellation during 2011 | (1) | (1) |
| Registered at 31 December 2011 | 671 | 523 |

Figure 4: Number of registered liquidators by firm size as at 31 December 2011

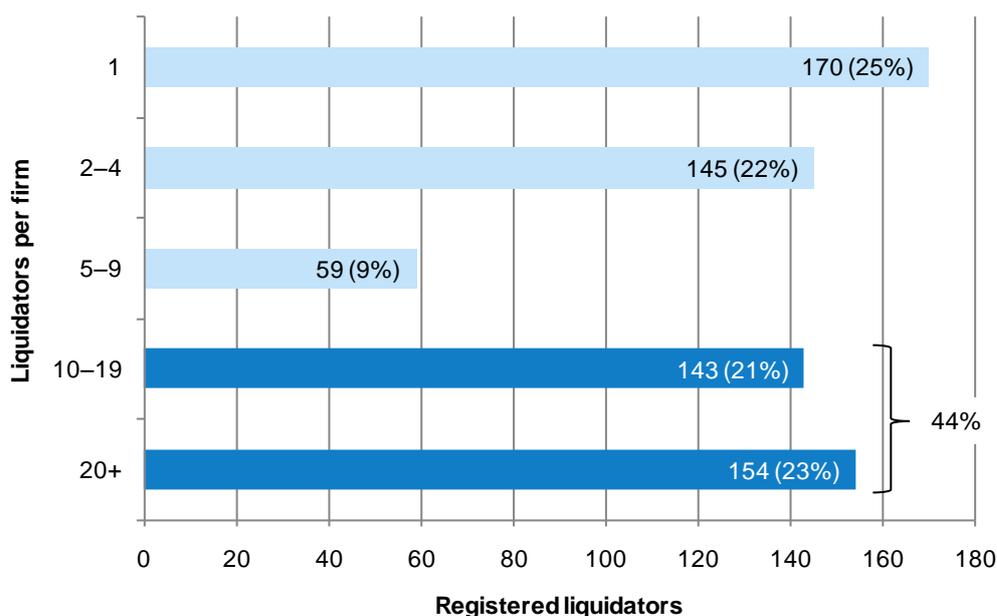
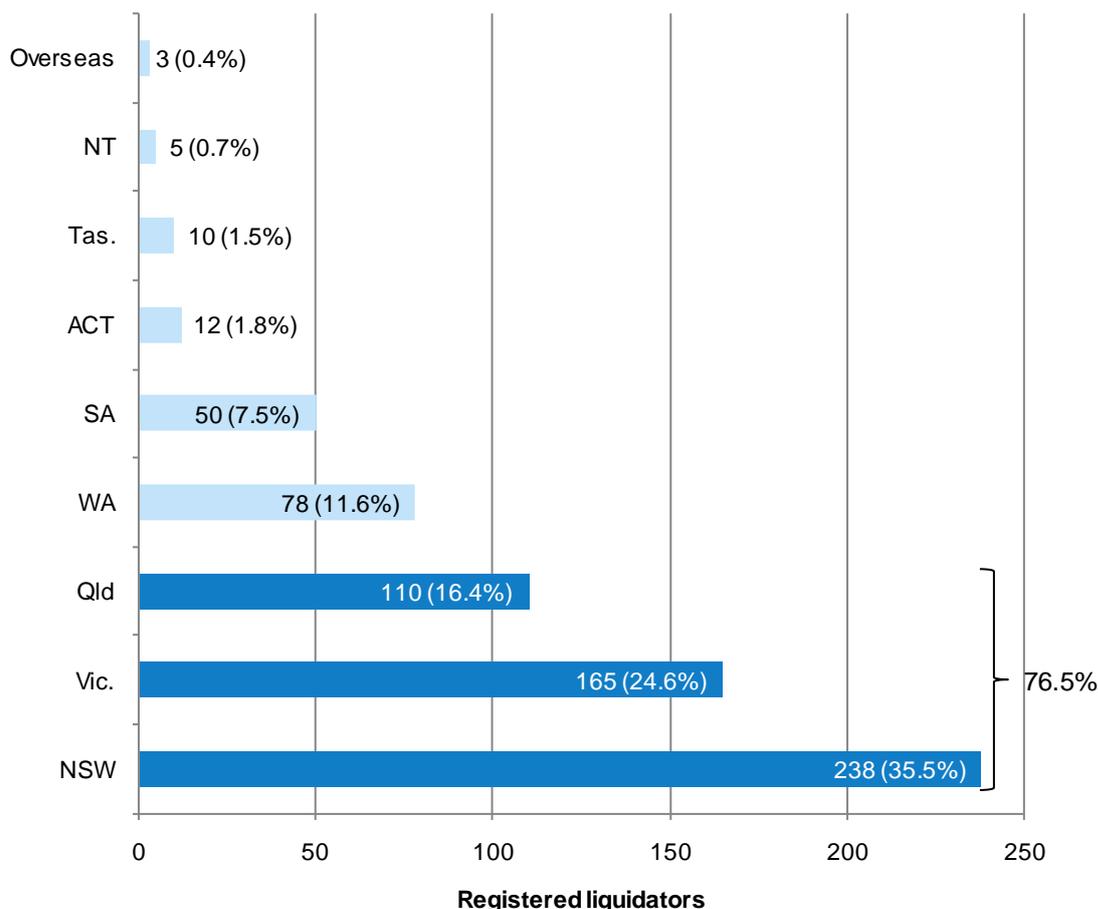


Figure 5: Number of registered liquidators by region

Registration of registered liquidators

- 97 Under the Corporations Act, we may only register as liquidators natural persons who satisfy the criteria listed in s1282(2) and are not disqualified by s1282(4). Registered liquidators are eligible to be appointed to all types of external administrations referred to in Ch 5 of the Corporations Act, except the role of court-appointed liquidator or provisional liquidator: see s532(8).
- 98 We may register a natural person who is a registered liquidator as an official liquidator under s1283 of the Corporations Act.
- 99 As set out in RG 186 and the Information Sheet 34 *Registration of liquidators* (INFO 34), under s1282(2)(c) of the Corporations Act, we will only determine an applicant to be a fit and proper person if satisfied as to their honesty, integrity, good reputation and personal solvency.

- 100 To form this view, we take into account the following:
- (a) the applicant’s experience with corporate insolvency, focusing on length of experience and seniority;
 - (b) two referees attesting to currency and depth of liquidation experience, competency, integrity and reputation (whether the applicant is ‘fit and proper’);
 - (c) proof of relevant qualifications;
 - (d) historical searches on the status of the applicant (i.e. whether they are the subject of any previous adverse decisions); and
 - (e) the statement by the applicant declaring that they are not:
 - (i) an insolvent under administration;
 - (ii) convicted of a criminal offence;
 - (iii) the subject of disciplinary action by their professional body or the ATO; or
 - (iv) disqualified from managing corporations under Pt 2D.6.
- 101 The conduct of registered liquidators is governed by:
- (a) the Corporations Act;
 - (b) common law; and
 - (c) professional standards.

Profile of companies in external administration

- 102 The majority of appointments involve small to medium proprietary limited companies. Table 14 summarises key data sourced from our published Report 263 *Insolvency statistics: External administrators’ reports 1 July 2010–30 June 2011* (REP 263).

Table 14: Profile of companies in external administration 2010–11

| | |
|---|-----|
| Employees—Companies with less than 20 full-time equivalent employees | 78% |
| Assets—Companies with assets of \$100,000 or less | 84% |
| Unsecured creditors owed \$250,000 or less | 44% |
| Deficiency—asset deficiency of \$500,000 or less | 65% |
| Dividends to unsecured creditors of less than 11 cents in the dollar | 97% |

Key terms

| Term | Meaning in this document |
|---------------------------------------|--|
| ACCC | Australian Competition and Consumer Commission |
| <i>amicus curiae</i> | Friend of the court |
| ASIC | Australian Securities and Investments Commission |
| ASIC Act | <i>Australian Securities and Investments Commission Act 2001</i> (Cth) |
| ATO | Australian Taxation Office |
| CALDB | Companies Auditors and Liquidators Disciplinary Board |
| CDPP | Commonwealth Director of Public Prosecutions |
| Corporations Act | <i>Corporations Act 2001</i> (Cth), including regulations made for the purposes of that Act |
| Corporations Regulations | Corporations Regulations 2001 |
| declaration of indemnities | Has the meaning given in s9 of the Corporations Act |
| declaration of relevant relationships | Has the meaning given in s60 of the Corporations Act |
| deed administrator | An administrator of a deed of company arrangement |
| external administration | The corporate insolvency that the external administrator has been appointed to administer |
| external administrator | A liquidator, receiver, voluntary administrator or deed administrator |
| ICAA | Institute of Chartered Accountants Australia |
| insolvency practitioner | A generic term to describe registered liquidators generally, regardless of whether they have been appointed to one or more specific external administrations |
| IPA | Insolvency Practitioners Association |
| liquidator | An insolvency practitioner appointed under Ch 5 of the Corporations Act to wind up the affairs and distribute the property of a body corporate |
| receiver | An insolvency practitioner appointed under an instrument or by the court to receive property of a body corporate |
| registered liquidator | A person registered by ASIC under s1282(2) |

| Term | Meaning in this document |
|-------------------------|--|
| remuneration | Remuneration paid to the external administrator for services rendered in conducting an external administration |
| remuneration report | A report prepared in accordance with s449E(5),(6) and (7) or s473 (11) and (12) of the Corporations Act |
| RG 186 (for example) | A regulatory guide issued by ASIC (in this example, numbered 186) |
| s9 (for example) | A section of the Corporations Act (in this example, numbered 9) |
| voluntary administrator | An administrator of a company but not a deed of company arrangement |

Related information

Regulatory guides

RG 16 *External administrators: Reporting and lodging*

RG 81 *Destruction of books*

RG 82 *External administration: Deeds of company arrangement involving a creditor's trust*

RG 109 *Assetless Administration Fund: Funding criteria and guidelines*

RG 174 *Externally administered companies: Financial reporting and AGMs*

RG 186 *External administration: Liquidator registration*

RG 194 *Insurance requirements for registered liquidators*

RG 217 *Duty to prevent insolvent trading: Guide for directors*

Legislation

ASIC Act (Cth), s13(3)

Corporations Act (Cth), s176A, 447D, 531, 532(8), 533, 533(1), 536, 588G(2), 1282(2), 1282(2)(c), 1282(3), 1283, 1284, 1288, 1291(1), 1291(2) and 1308(2); Corporations Regulations; Corporations Amendment (Phoenixing and Other Measures) Bill 2012; Corporations Amendment (Similar Names) Bill 2012

Crimes Act 1900 (NSW)

Case

Re Bevillesta Pty Ltd (In Voluntary Administration) [2011] NSWSC 417

Consultation papers and reports

ASIC Annual Report: 2010–11

REP 263 *Insolvency statistics: External administrators' reports 1 July 2010–30 June 2011*

Senate Economics Committee, *The regulation, registration and remuneration of insolvency practitioners in Australia: The case for a new framework*, 14 September 2010

Treasury, *A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia*, options paper, 2 June 2011

Treasury, *A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia*, proposals paper, 14 December 2011

Information sheets

INFO 34 *Registration of liquidators*

INFO 151 *ASIC's approach to enforcement*

Form

Form 908 *Annual statement by liquidator*

Journal articles

ASIC, 'Disclosure of relevant relationships and indemnities', *Australian Insolvency Journal*, vol. 23, issue 1, 2011

ASIC, 'Insolvency compliance projects', *Australian Insolvency Journal*, vol. 23, issue 2, 2011

ASIC, 'ASIC's review of registered liquidator policies of insurance', *Australian Insolvency Journal*, vol. 23, issue 3, 2011

ASIC, 'Open letter to the Insolvency Practitioners Association', *Australian Insolvency Journal*, vol. 23, issue 4, 2011

Newsletter

ASIC insolvency update for registered liquidators: October 2011