



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 55

External administration: Liquidator registration

October 2004

Your comments

You are invited to comment on the proposals and issues for consideration in this paper, including the explanation sections.

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of your submission as confidential.

Comments are due by 30 November 2004 and should be sent to:

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You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

What this policy proposal is about

1 This policy proposal paper outlines ASIC's proposed new approach to the registration of liquidators and official liquidators under Part 9.2 of the *Corporations Act 2001* (Act). Our proposals will replace Policy Statement 40 *Registration of liquidators—experience criteria* [PS 40] and Policy Statement 24 *Registration of official liquidators* [PS 24], which have not been substantively reviewed since the introduction of Part 5.3A.

2 A significant proportion of corporate insolvency work is now done under Part 5.3A and often involves work that is more complex than work under a compulsory winding up. We have reviewed our current policy statements in the light of current insolvency practice and changes to other areas of the law, and consider that our policy and our administrative processes for registering liquidators and official liquidators should be updated and improved.

3 In particular, we consider that the amount of corporate insolvency experience we require for registration as a liquidator should be increased. Our proposed new policy on registered liquidators is intended to enhance the overall performance by registered liquidators of their duties and functions when they are appointed as external administrators. It also provides the foundation for our proposed new policy on registering official liquidators.

4 This policy proposal paper sets out:

- (a) our approach to the criteria you must meet to become a registered liquidator (**Section A**);
- (b) our approach to what you must do to remain registered (**Section B**); and
- (c) when we will register you under the categories of 'official liquidator' or 'liquidator of a specified body corporate' (**Section C**).

5 This policy proposal paper also includes two schedules:

- (a) **Schedule 1** contains guidance on the process we intend to implement for liquidator registration and sets out the information we will require in an application; and
- (b) **Schedule 2** contains guidance on the information we intend to require in referee reports.

6 Our approach in this policy proposal paper has been influenced by:

- (a) the fact that registered liquidators act in a fiduciary capacity, often have total management control of the affairs, money and other property of a body corporate, and in some cases, are officers of the court;
- (b) legislative and other developments affecting the insolvency industry since [PS 40] and [PS 24] were issued or substantively reviewed, including the introduction of Part 5.3A of the Act; and
- (c) requirements in other jurisdictions for registration of corporate insolvency practitioners.

Important note: The proposals, explanations and examples in this paper do not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act applies to you. It is your responsibility to determine your obligations under the Corporations Act and regulations. The proposals, explanations and examples in this paper are at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Examples in this paper are purely illustrative; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

This paper is based on legislation and regulations as at 31 August 2004. However it takes into account relevant amendments made by the Bankruptcy Legislation Amendment Act 2004 which will commence on 1 December 2004. These amendments will be in force before we issue our final policy.

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Policy proposals

We have three groups of policy proposals on liquidator registration. For each group, we have identified issues that we would like you to comment on. Where necessary we have also included explanations of our proposals.

Special note: There may be other issues that you consider important. We are keen to hear from you on our general approach and any other issues you consider important, as well as your answers to our specific questions.

A What criteria must you meet to become a registered liquidator?

Policy proposal	Your feedback
<p>A1 To become a registered liquidator, you must:</p> <ul style="list-style-type: none"> (a) be a natural person: s1279(1); (b) meet all the criteria in s1282(2) (see policy proposal paragraphs [A2]–[A15]); (c) not be a person disqualified under Part 2D.6 from managing corporations: s1282(4) (see policy proposal paragraph [A16]); (d) (generally) be resident in Australia: s1282(5) (see policy proposal paragraph [A17]); and (e) satisfy us that if the application is granted, you will comply with our policy on the security required under s1284 (see policy proposal paragraph [A18]). <p>Criteria in s1282(2)</p> <p><i>‘Standard’ qualifications: s1282(2)(a)(i) and (ii)</i></p> <p>A2 For s1282(2)(a)(i), we interpret ‘member’ as referring to a full member, and not an associate or affiliate member.</p> <p><i>‘Equivalent’ qualifications: s1282(2)(a)(iii)</i></p> <p>A3 For s1282(2)(a)(iii), you must satisfy us that:</p> <ul style="list-style-type: none"> (a) your qualifications and experience taken together have given you knowledge equivalent to the knowledge that would be gained from a bachelor degree that includes a 3-year course of study in accountancy and a 2-year course of study in commercial law (including company law); and (b) your knowledge includes adequate current knowledge of Australian accountancy procedures and standards and Australian commercial and corporations law. 	<p>A2Q1 Do you agree with this approach? If not, why not?</p> <p>A3Q1 Does this approach raise any significant practical difficulties? If so, what are they and how should they be overcome?</p>

Policy proposal

A4 We will generally accept that you have ‘equivalent’ qualifications if you have one of the following combinations of qualifications and experience:

- (a) *Non-standard Australian qualification* — you hold a minimum 3-year full-time undergraduate qualification from an Australian tertiary institution but the qualification and/or the institution does not meet s1282(2)(a)(ii), and you have also completed:
- (i) a tertiary-level bridging course that we approve for this purpose, in either or both of accountancy and commercial law, depending on whether your qualification includes a course of study in either of those areas; and
 - (ii) 1–3 years (depending on the number and nature of the bridging courses you need to undertake for subparagraph (i)) of supervised, relevant practical experience;
- (b) *Non-standard overseas accounting qualification* — you hold a minimum 3-year full-time undergraduate accounting qualification (which includes commercial law subjects) from a university in a country with comparable accounting standards and practices to Australia, and you have also completed:
- (i) a conversion course in Australian accountancy and Australian commercial law that we approve for this purpose; and
 - (ii) 1 year of supervised, relevant practical experience in Australia.

A5 We will consider the equivalence of other combinations of qualifications and experience on a case-by-case basis.

Your feedback

A4Q1 Do you agree that these combinations should be considered equivalent to qualifications under s1282(2)(a)(i) or (ii)? If not, why not?

A4Q2 Are there any other combinations of qualifications and experience that we are likely to regularly encounter and that we should generally treat as ‘equivalent’? Please explain your answer.

A4Q3 What existing courses might be suitable for approval as bridging or conversion courses for the purposes of paragraphs (a)(i) and (b)(i), and why?

A4Q4 For paragraph (b), is there a need for us to provide specific guidance on countries that have comparable accounting standards and practices? If so, what should that guidance be and why?

Policy proposal

Experience: s1282(2)(b)

A6 We will only be satisfied as to your experience in winding up bodies corporate if your winding up experience has predominantly involved court windings up or creditors' voluntary windings up.

Capability: s1282(2)(c)

A7 We will only be satisfied that you are capable of performing the duties of a registered liquidator if we are satisfied about the adequacy of your:

- (a) personal capacities (see policy proposal paragraphs [A8]–[A9]); and
- (b) practice capacities (including resources, processes, procedures and systems) (see policy proposal paragraphs [A10]–[A11]).

Note: For the definition of practice, see 'Key Terms'.

Personal capacities

A8 When we assess your personal capacities, the factors we will take into account (in addition to your qualifications for s1282(2)(a) and your winding-up experience for s1282(2)(b)), include:

- (a) whether you have adequate corporate insolvency experience (see policy proposal paragraph [A9]);

Note: For the definition of corporate insolvency experience, see 'Key terms'.

- (b) whether you have successfully completed a specialist course in Australian corporate insolvency law and practice; and
- (c) the length and nature of any non-insolvency corporate management experience you may have.

Your feedback

A6Q1 Do you agree with this approach? If not, why not?

A8Q1 Are there any other personal capacities we should take into account? Please explain your answer.

Policy proposal

Corporate insolvency experience

A9 We will only be satisfied that you have adequate corporate insolvency experience if:

- (a) you have worked on external administrations for the full-time equivalent of at least 5 years over the last 8 years:
 - (i) under the supervision of a registered liquidator in Australia; or
 - (ii) as, or under the supervision of, an appropriately licensed corporate insolvency practitioner in a country where we consider the corporate insolvency laws and practices are comparable with those in Australia;
- (b) where all your corporate insolvency experience for paragraph (a) has not been gained in Australia, you have worked in Australia under the supervision of a registered liquidator for the full-time equivalent of at least 1 year over the last 2 years;
- (c) your experience for paragraphs (a) and (b) includes at least 3 of the different types of external administration in Ch 5 (other than arrangements under Part 5.1), of which 2 are:
 - (i) court windings up or creditors' voluntary windings up; and
 - (ii) external administrations under Pt 5.3A;
- (d) your experience for paragraphs (a) and (b) has been gained at a very senior level for the full-time equivalent of at least 3 years over the last 4 years;
- (e) your experience for paragraphs (a) and (b) includes dealing with a range of complex matters that typically arise in external administrations; and
- (f) you have demonstrated:
 - (i) skill and diligence over the course of gaining your experience; and
 - (ii) sound judgment in complex matters while working at a very senior level.

Your feedback

A9Q1 Do you agree with this approach? Please explain your answer.

A9Q2 For paragraph (a)(ii), is there a need for us to provide specific guidance on countries with comparable corporate insolvency laws and practices? If so, what should that guidance be and why?

A9Q3 For paragraph (a)(ii), should we also require the accounting standards and practices in the country to be comparable with those in Australia? Please explain your answer.

Policy proposal	Your feedback
<p>Practice capacities</p> <p>A10 We will only be satisfied that you have adequate practice capacities if you demonstrate that you have, or have reliable access to (as and when required):</p> <ul style="list-style-type: none"> (a) adequate human and technological resources to enable you to accept appointments as an external administrator from the time of registration and on a continuing basis; (b) appropriate processes for monitoring and ensuring the continuing adequacy of the human and technological resources available to you; (c) appropriate processes for ongoing supervision and training of staff; (d) appropriate operational procedures and manuals for conducting external administrations, including internal procedures for recording and handling genuine complaints about the performance of duties by you or staff who perform duties on your behalf; and (e) adequate systems for managing risks to your own practice and each entity to which you may be appointed. <p>A11 If you propose to accept appointments to entities located outside the State or Territory in which you reside, we will only be satisfied that you have adequate practice capacities to do so if you also demonstrate that your practice has appropriately qualified staff located in each relevant State or Territory, or has adequate arrangements for access to appropriately qualified and supervised staff in each relevant State or Territory, as and when required.</p>	<p>A10Q1 Does this approach raise any significant practical difficulties? If so, what are they and how should they be overcome?</p> <p>A10Q2 Is it appropriate to consider risk management systems for both the applicant's practice and entities they are appointed to? If not, why not?</p> <p>A10Q3 To what extent should we consider the financial resources of the practice? Please explain your answer.</p> <p>A11Q1 Does this approach raise any significant practical difficulties? If so, what are they and how should they be overcome?</p>

Policy proposal

Fit and proper: s1282(2)(c)

A12 We will only be satisfied that you are a fit and proper person to be registered as a liquidator if we are satisfied as to your honesty, integrity, good reputation and personal solvency. This is in addition to our being satisfied about your overall capability.

A13 When we assess whether you are a fit and proper person to be registered as a liquidator, current membership of a relevant professional body will be a factor in your favour but that membership will not be determinative.

Note: For the definition of relevant professional body, see 'Key terms'.

A14 We will consider that you are not fit and proper to be registered if any of the following apply to you:

- (a) in the last 10 years, you have been convicted of any offence of which one element is dishonesty, even though that conviction does not make you a disqualified person under Part 2D.6;
- (b) in the last 10 years, you have been found civilly liable for any breach of trust, breach of fiduciary duty, gross negligence or recklessness in the course of your professional duties;
- (c) you have:
 - (i) executed a debt agreement under Part IX of the Bankruptcy Act or an authority under s188 of that Act and the operation of the agreement or authority has not ended; or
 - (ii) property that is subject to control under s50 or Div 2 of Part X of the Bankruptcy Act.

Note: In this case, you may be within the s9 definition of an insolvent under administration, even though you are not a disqualified person under s206B(4).

Your feedback

A12Q1 Is there anything else we should take into account when we consider if a person is fit and proper to be a registered liquidator? Please explain your answer.

A13Q1 Is membership of this kind of body relevant to our decision about whether a person is fit and proper to be a registered liquidator? If not, why not?

A14Q1 Do you agree that these factors indicate that a person is not fit and proper to be a registered liquidator? If not, why not?

A14Q2 Are there any other factors we should consider as indicating that a person is not fit and proper to be a registered liquidator? Please explain your answer.

Policy proposal

- (d) you are a disqualified person under Part 2D.6; or

Note: In this case, we are specifically prohibited by s1282(4) from registering you as a liquidator.

- (e) we are not satisfied that you have full legal or mental capacity.

A15 We *may* consider that you are not fit and proper to be registered, depending on the particular facts and circumstances, if:

- (a) any legal or disciplinary action has been taken in the last 10 years against you by:
- (i) a relevant professional body of which you are, or have been, a member;
 - (ii) ASIC;
 - (iii) the CALDB;
 - (iv) the Australian Taxation Office; or
 - (v) ITSA;
- (b) in the last 10 years you have:
- (i) executed a debt agreement under Part IX of the Bankruptcy Act, an authority under s188 of that Act or a personal insolvency agreement under Part X of that Act;
- Note: This wording is based on amendments to the Bankruptcy Act that come into force on 1 Dec 2004.
- (ii) had property that was subject to control under s50 or Div 2 of Part X of the Bankruptcy Act;
 - (iii) been a disqualified person under Part 2D.6;
 - (iv) been refused membership by a relevant professional body; or
 - (v) made an application for registration as a liquidator or as an official liquidator that was refused for fitness and propriety reasons.

This list is not exhaustive.

Your feedback

A15Q1 Do you agree that these factors indicate that a person may not be fit and proper to be a registered liquidator? If not, why not?

A15Q2 Are there any other factors we should consider as indicating that a person may not be fit and proper to be a registered liquidator? Please explain your answer.

Policy proposal	Your feedback
<p>Disqualified persons: s1282(4)</p> <p>A16 Even if you have permission from us under s206F(5) or leave from the court under s206G to manage a particular corporation or corporations, we will consider you are:</p> <ul style="list-style-type: none"> (a) still a disqualified person for the purposes of s1282(4); and/or (b) not a fit and proper person to be registered, because you are not capable of managing all corporations. <p>Resident in Australia: s1282(5)</p> <p>A17 We will only consider that you are resident in Australia if we are satisfied that you are living in Australia on a permanent or long-term basis. We will generally refuse to register you as a liquidator if we do not consider you are resident in Australia.</p> <p>Security: s1284</p> <p>A18 We will continue to apply our policy in Policy Statement 33 <i>Security deposits</i> [PS 33] on how a registered liquidator may comply with s1284.</p> <p>Transitional arrangements</p> <p>A19 We propose to introduce our new policy on the criteria you must meet to become a registered liquidator without any transition period. Applications that we have received but not finally determined before we issue our new policy would be assessed under our new policy.</p>	<p>A18Q1 Do you agree with this approach? If not, why not?</p> <p>A19Q1 Does this approach raise significant practical difficulties? If so, what are they and how should they be overcome?</p>

Explanation

Our approach

1 Under Part 9.2, there are three categories for liquidator registration:

- (a) registered liquidator (s1279(1)(b) and 1282(2));
- (b) official liquidator (s1283); and
- (c) registered liquidator of a specified body corporate (s1279(1)(c) and 1282(3)).

Note: For our proposed policy on when we will register you as an official liquidator or liquidator of a specified body corporate, see Section C.

2 Registered liquidators (who are not also official liquidators) can be appointed as any type of external administrator other than a court-appointed liquidator or provisional liquidator: see s411(7)(d), 418(1)(d), 448B, 532(1A) and 532(1)(a).

3 Our proposals in this policy proposal paper:

- (a) will replace our existing policy in [PS 40] on the experience we require an applicant to have for registration as a liquidator; and
- (b) set out our proposed policy on the other criteria for registration as a liquidator.

Note: For details on how to apply for registration as a liquidator, see Schedule 1.

Criteria in s1282(2)

4 Under s1282(2), an applicant for registration as a liquidator must:

- (a) have certain base level qualifications;
- (b) have experience in winding up bodies corporate;
- (c) be capable of performing the duties of a registered liquidator; and
- (d) be otherwise a fit and proper person to be a registered liquidator.

‘Standard’ qualifications: s1282(2)(a)(i) and (ii)

5 An applicant has ‘standard’ qualifications if they:

- (a) are a member of one of the Australian accounting bodies listed in s1282(2)(a)(i) or one of the overseas accounting bodies listed in reg 9.2.04; or
- (b) have a qualification from an Australian university or tertiary institution listed in reg 9.2.02 and those qualifications fall within s1282(2)(a)(ii).

6 Unless we have received a standing certification from an Australian university or institution referred to in s1282(2)(a)(ii) of all the combinations of subjects at that institution that represent a 3-year course of study in accountancy and a 2-year course of study in commercial law (including company law), applicants who are relying on s1282(2)(a)(ii) will need to provide us with individual certification from the institution that the subjects they have passed comprise those courses of study.

7 The content of courses of study described in s1282(2)(a)(ii) will usually have been determined in consultation with one or more of the professional accounting bodies. We expect that, as a minimum, these courses of study will include subjects (by whatever name) dealing with:

- (a) *for accountancy* — Australian accounting and auditing standards, financial and corporate accounting; cost and management accounting; and corporate finance; and
- (b) *for commercial law* — introductory contract law, torts and trust law; and introductory Australian business, corporations and taxation law.

‘Equivalent’ qualifications: s1282(2)(a)(iii)

8 If you do not have ‘standard’ qualifications, the onus is on you to satisfy us that your qualifications and experience have given you knowledge that is equivalent to the knowledge in accountancy and commercial law a person with the standard qualifications would have. When we consider non-standard qualifications, we will be guided by our expectations for the minimum content of courses of study that meet s1282(2)(a)(ii), as set out in paragraph 7 of this Explanation.

9 We consider that the experience relevant for s1282(2)(a)(iii) is experience that contributes to the acquisition of knowledge of accountancy and commercial law, particularly Australian accountancy and Australian commercial law. It need not be (and generally we expect it will not be) corporate insolvency experience. Specific corporate insolvency experience is a separate requirement under s1282(2)(b) and (c).

10 In policy proposal paragraph [A4], we have identified the non-standard qualifications that we think are most likely to arise for consideration under s1282(2)(a)(iii): see paragraphs 11–16 of this Explanation. We will consider the equivalence of other combinations of qualifications and experience on a case-by-case basis.

'Non-standard' Australian qualification

11 The more your qualifications match the content and level of courses of study that meet s1282(2)(a)(ii), the less emphasis we will need to place on bridging courses and on your experience in order to assess you as meeting the initial knowledge requirements for s1282(2)(a).

12 Bridging courses for the purpose of policy proposal paragraph [A4(a)(i)] must be assessable by examination and cover (typically in an accelerated format) the same minimum content that we expect for courses of study under s1282(2)(a)(ii), as set out in paragraph 7 of this Explanation.

13 The number and type of bridging courses and the length of experience that we will generally require before we consider that you have equivalent knowledge for the purposes of s1282(2)(a)(iii) depends on the subject matter covered in your qualification. For example:

- (a) if your qualification contains tertiary level courses of study in both accountancy and commercial law but does not fall within s1282(2)(a)(ii), we will require you to have at least 1 year's supervised, relevant practical experience. If your accountancy and commercial law subjects do not cover the minimum content set out in paragraph 7 of this Explanation, you will also need to do a bridging course to achieve that minimum knowledge;
- (b) if your qualification contains a tertiary level course of study only in accountancy, you will need to do a bridging course in commercial law, and we will require you also to have at least 1 year's supervised, relevant practical experience;
- (c) if your qualification contains a tertiary level course of study only in commercial law, you will need to do a bridging course in accountancy, and we will require you also to have at least 2 years' supervised, relevant practical experience; or
- (d) if your qualification does not contain a tertiary level course of study in either accountancy or commercial law, you will need to do bridging courses in both accountancy and commercial law, and we will require you also to have at least 3 years' supervised, relevant practical experience.

'Non-standard' overseas accounting qualification

14 If you have a 'non-standard' overseas accounting qualification, the onus is on you to satisfy us about the equivalence of the content and level of your qualification. We will also take into account the National Office of Overseas Skills Recognition guidelines when forming an initial assessment of the equivalence of your overseas qualification with

a ‘standard’ Australian qualification, particularly one under s1282(2)(a)(ii). The greater the comparability between:

- (a) your overseas qualification and a ‘standard’ Australian qualification; and
- (b) the accounting and legal regimes of the overseas country and Australia,

the less emphasis we will need to place on conversion courses and on Australian experience in order to assess you as meeting the initial knowledge requirements for s1282(2)(a).

15 For example, if you have a bachelor-level accounting qualification obtained from a university in a country with comparable accounting standards and practices to Australia, we will generally consider that you have ‘equivalent’ qualifications for the purposes of s1282(2)(a)(iii) if you have also completed a conversion course in Australian accounting and commercial law, and you have at least 1 year’s supervised, relevant practical experience in Australia.

16 We will require all overseas-qualified applicants with ‘non-standard’ qualifications to have practical Australian accounting experience regardless of how much overseas accounting or corporate insolvency experience they have. However, in the example in paragraph 15 above, if the minimum 1 year of Australian experience has been gained doing exclusively corporate insolvency work under the supervision of a registered liquidator, we will generally be prepared to count that period towards the corporate insolvency experience required under policy proposal paragraph [A9]: see also paragraph 23 of this Explanation.

Experience: s1282(2)(b)

17 The experience referred to in s1282(2)(b) is limited to experience ‘in connection with the winding up of bodies corporate’. We will give little weight to experience in members’ voluntary liquidations because members’ voluntary liquidations are not a form of insolvent external administration: see also paragraphs 20–25 of this Explanation.

Capability: s1282(2)(c)

18 We interpret ‘capability’ as referring to the overall capacities that enable a person to perform adequately and properly the duties and functions that a registered liquidator will have upon registration and when acting as an external administrator. Our interpretation of ‘capability’ includes both personal and practice capacities.

Personal capacities

19 Capacity to perform the duties of a registered liquidator ‘refers not simply to a person’s technical abilities but also to the more ephemeral quality of judgment’: *Re Lofthouse and ASIC* [2004] AATA 327 at paragraph 74. An applicant’s judgment is one of the factors we will consider in the context of their corporate insolvency experience.

Corporate insolvency experience

20 Given the range of appointments under Chapter 5 of the Act that a registered liquidator can accept, a person will not be capable of performing the duties of a registered liquidator unless they have broad corporate insolvency experience. In *Re Lofthouse and ASIC* [2004] AATA 327, the AAT held that the experience relevant for the purposes of registration as an official liquidator was not limited to experience in windings up, but included experience across a broad range of external administrations. We consider that this approach applies equally to the experience a person must have in order to demonstrate that they are capable of performing adequately and properly the duties and functions a registered liquidator has when acting as an external administrator.

21 Our proposed policy increases:

- (a) from 3 years to 5 years the period of corporate insolvency experience we require. This experience must now be gained over the last 8 years, in Australia or in a place that we think has comparable corporate insolvency laws and practices to Australia. If all this experience was not gained in Australia, at least 1 year’s experience must now have been gained in Australia over the last 2 years; and
- (b) from 2 years to 3 years the period of corporate insolvency experience that we require to have been at a very senior level. This experience must be gained over the last 4 years.

22 We think these increases are appropriate to reflect the increased complexity of and greater management responsibility involved in the work regularly being undertaken by registered liquidators, particularly under Part 5.3A. Appointments under that Part (as voluntary administrator, deed administrator, and liquidator under a creditors’ voluntary winding up) are now more frequent than any other type of appointment. This is partly the result of insolvency practitioners and directors becoming more familiar with Part 5.3A since its introduction. Our current policy on corporate insolvency experience for registered liquidators has not been substantively reviewed since the introduction of Part 5.3A. The increased requirements also support our proposed new policy for registering official liquidators: see Section C.

23 If an applicant needs to rely on equivalent qualifications and experience to meet s1282(2)(a), and the experience for s1282(2)(a)(iii) purposes has included a significant, continuous period of Australian corporate insolvency experience, we may be prepared to count some or all of that experience towards the corporate insolvency experience we require for s1282(2)(c). Whether, and the extent to which, we are prepared to do so will be affected by:

- (a) the content and level of the formal qualifications you hold and the country where those qualifications were obtained;
- (b) whether the Australian corporate insolvency experience was gained under the supervision of a registered liquidator; and
- (c) the length of the total supervised experience we require under policy proposal paragraph [A4].

24 For policy proposal paragraphs [A9(d)] and [A9(f)(ii)], we will only consider that your experience has been at a very senior level if:

- (a) you were a partner in the practice or at the level immediately below that of partner;
- (b) you reported directly to the relevant external administrator; and
- (c) you:
 - (i) formed opinions and made recommendations to the external administrator about the financial and potential legal position of the body corporate;
 - (ii) were directly involved in planning and managing on behalf of the external administrator the conduct of the external administration;
 - (iii) prepared draft reports to creditors on behalf of the external administrator;
 - (iv) instructed solicitors and evaluated legal advice as directed by the external administrator; and
 - (v) supervised staff who reported through you to the external administrator, and had responsibility for allocating other resources.

This list is not exhaustive.

25 For policy proposal paragraphs [A9(e)] and [A9(f)(ii)], examples of matters that may be complex include:

- (a) public examinations;
- (b) investigations into insolvent trading, voidable transactions or breach of directors' duties;

- (c) large litigation matters;
- (d) trading-on a business with a view to selling it as a going concern; and
- (e) external administrations that concern listed companies, large-scale social or environmental issues, or matters concerning government policy.

Specialist corporate insolvency course

26 We will regard favourably completion by examination of a course in Australian corporate insolvency law and practice, particularly where you only have the minimum corporate insolvency experience. The course must deal with (at least) all the types of external administration under Ch 5 of the Act (other than arrangements under Part 5.1) and cover (at least) the following topics:

- (a) the duties, functions, powers and responsibilities of each type of external administrator;
- (b) conducting creditors' meetings;
- (c) conducting investigations and examinations;
- (d) recovery and realisation of assets;
- (e) adjudicating proofs of debt and distributing dividends;
- (f) reporting to creditors and to ASIC; and
- (g) professional ethics.

Non-insolvency corporate management experience

27 We will regard favourably any non-insolvency corporate management experience you may have, particularly where you only have the minimum corporate insolvency experience.

Practice capacities

28 You must satisfy us that you have a base level of practice capacities that will enable you to perform adequately and properly your duties as a registered liquidator. We will generally require applicants who work in large practices and are likely to be appointed to larger or more complex external administrations to demonstrate a more sophisticated level of practice capacities. It is up to each applicant to decide how they will demonstrate that their practice capacities are adequate.

29 In particular, you must satisfy us that your own resources, or the practice resources that will be available to you, are adequate to enable you to deal appropriately with a fluctuating workload, given the significant demands placed on resources at the beginning of each

appointment or if unexpected or urgent situations arise during the course of an external administration.

30 We do not expect that all the processes, procedures and systems in policy proposal paragraphs [A10(b)–(e)] will necessarily be documented. Whether any of them are, or should be, documented will depend on the size and structure of the applicant’s practice. However, if they are not documented, it may be more difficult to demonstrate to us that adequate processes, procedures and systems exist. In addition, documented operational procedures will usually be necessary for adequate risk management.

31 We consider that your practice capacities will not be adequate unless you have systems and processes in place for identifying and managing risks in:

- (a) your own practice; and
- (b) each entity to which you may be appointed as external administrator.

32 What is required to appropriately manage risks will depend on each practice and each appointment. However, as a minimum, we expect you to have explicit processes (dealing separately with your own practice and the external administrations you may be appointed to) for:

- (a) controlling internal fraud;
- (b) monitoring and minimising your exposure to personal liability;
- (c) monitoring and minimising the potential for conflicts of interest or breaches of other legal obligations; and
- (d) ensuring business continuity in the event of technological failure or other business interruption.

We expect that risk management processes will generally be documented.

33 We will require you to state in the application whether you propose to accept appointments to entities located outside the State or Territory in which you reside. If so, you will need to demonstrate that your practice has appropriately qualified staff located in each relevant State or Territory, or that your practice has adequate arrangements for access to appropriately qualified and supervised staff in each relevant State or Territory, as and when required.

Trustees in bankruptcy

34 If you are a registered trustee, we will take that status into account when we assess your practice capacities. Such status may operate on practice capacities in two ways. On one hand, a registered trustee will

already have resources, systems and procedures in place that may be easily adapted or supplemented for corporate insolvency work. On the other hand, the fact that both bankruptcy and corporate insolvency work will be undertaken may increase the level of practice resources required to perform both roles adequately and properly.

Fit and proper: s1282(2)(c)

35 We interpret the expression ‘fit and proper’ as referring to an applicant’s:

- (a) overall capability of performing their duties and functions; and
- (b) honesty, integrity, good reputation and personal solvency.

36 Our interpretation of fit and proper is consistent with *Hughes and Vale Pty Ltd v The State of NSW (No. 2)* (1955) 93 CLR 127 at 156–7; *Re Su and the Tax Agents’ Board of SA* (1982) 82 ATC 4284 at 4286; *Stasos v Tax Agents’ Board of NSW* (1990) 90 ATC 4950 at 4959; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 348; and *Davies v Australian Securities Commission* (1995) 131 ALR 295 at 305–7.

37 The reference to ‘otherwise’ in s1282(2)(c) reinforces our view that an applicant’s overall ‘capability’ is part of their ‘fitness and propriety’ to be registered as a liquidator. It also implies that a person who is not capable of performing adequately and properly the duties of a registered liquidator is not a fit and proper person to be a registered liquidator.

38 When we consider for s1282(2)(c) whether you are ‘otherwise’ a fit and proper person to be registered as a liquidator, we will specifically consider whether you have the honesty, integrity, good reputation and personal solvency that we think a registered liquidator must have in view of:

- (a) the fiduciary nature of a registered liquidator’s duties and functions when appointed as an external administrator;
- (b) the fact that registered liquidators as external administrators often have control of very large amounts of money, other property, financial facilities and financial obligations that belong to third parties; and
- (c) the need for a registered liquidator’s words and actions to be regarded with complete trust by all persons who deal with them in their capacity as an external administrator.

39 We will regard favourably current membership of a body that monitors the professional performance of its members and has

disciplinary functions. Such bodies usually require their members to be fit and proper persons, and therefore they will have also considered your honesty, integrity and reputation. However, your membership of such a body will not be determinative in our assessment of whether you are a fit and proper person to be a registered liquidator.

Trustees in bankruptcy

40 If you are a registered trustee, we will take into account your record and reputation as a registered trustee when we assess whether you are fit and proper to be a registered liquidator.

Disqualified persons: s1282(4)

41 A registered liquidator must be eligible to be appointed as an external administrator (and to undertake the management) of any body corporate. A person who is disqualified from managing corporations is ineligible to be a registered liquidator under s1282(4) and is not a fit and proper person to be registered as a liquidator because they are inherently incapable of performing the duties of a registered liquidator. In our view, a person who has specific permission to manage only one or more bodies corporate by way of a 'carve out' from a general disqualification under Part 2D.6 is still disqualified from managing corporations generally.

42 Section 206B sets out the reasons for disqualification that are potentially most relevant to applicants for registration as a liquidator. Under that section, a person is automatically disqualified from managing a corporation if they have been convicted of certain types of offences or if they are personally insolvent under Australian or foreign law.

Resident in Australia: s1282(5)

43 Under s1282(5), we have a discretion to refuse to register as a liquidator a person who is not resident in Australia. 'Resident' is a word that can be used in a variety of senses, and its meaning depends on its context: *Henry v Boehm* (1973) 128 CLR 482. In the context of liquidator registration, we interpret 'resident in Australia' as requiring a degree of permanence in the person's presence in Australia, but not necessitating continuous physical presence in Australia.

44 Our interpretation recognises that registered liquidators:

- (a) have obligations under Australian law and must be able to be directly supervised by ASIC, the CALDB and creditors (among others);

- (b) are appointed as external administrators under Australian law, and in that capacity will be applying Australian law;
- (c) must be subject to the jurisdiction and control of Australian courts;
- (d) are appointed to external administrations that often last a number of years; and
- (e) remain registered until their registration is cancelled or they die (see s1282(8)).

Security: s1284

45 If we grant an application for registration as a liquidator, you must lodge security for the due performance of your duties as a registered liquidator: s1284(1). This requirement provides a source of funds to compensate people who may suffer pecuniary loss if a registered liquidator fails to perform their duties adequately and properly: see reg 9.2.05(1).

46 We will not grant your application for registration as a liquidator unless we are satisfied that you comply (or will comply immediately upon registration) with our policy in [PS 33] on the security required under s1284. We do not propose to change [PS 33] at this time. Under [PS 33], you must:

- (a) lodge a performance bond of the kind specified in [PS 33]; or
- (b) meet the alternative compensation arrangements set out in [PS 33.9A]–[PS 33.9C] that we accept as the basis for adopting a no-action approach to non-compliance with s1284.

Note: These alternative arrangements are that you:

- (a) hold a public practice certificate from a professional accounting body (as defined in the 'Key terms') and undertake to maintain that public practice certificate; and
- (b) undertake to remain covered by insurance that meets the requirements for a public practice certificate and that satisfies [PS 33.9B]. The insurance must cover conduct of the registered liquidator (and staff acting on their behalf) in their capacity as an external administrator.

Transitional arrangements

47 All new applicants for registration would need to comply with our proposed new policy from the time it is issued. If we have received your application but not made a final determination when the new policy is issued, we will give you time to provide any additional information that may be necessary under the new policy.

B What must you do to remain a registered liquidator?

Policy proposal	Your feedback
<p>Ongoing obligations</p> <p>B1 To remain registered as a liquidator, you must on an ongoing basis:</p> <ul style="list-style-type: none"> (a) perform adequately and properly the duties and functions of a registered liquidator (see policy proposal paragraph [B2]); (b) remain a fit and proper person to be registered (see policy proposal paragraphs [B3]–[B7]) (c) remain resident in Australia (see policy proposal paragraph [B8]); (d) lodge triennial statements under s1288 (see policy proposal paragraph [B9]); (e) maintain security that complies with our policy on s1284; and (f) not become disqualified from managing corporations under Part 2D.6. <p><i>Perform duties and functions adequately and properly</i></p> <p>B2 The obligation to perform adequately and properly your duties and functions as a registered liquidator means that you must comply with all the legal and equitable duties under the Act, other domestic legislation and the general law that apply to you in your capacity as a registered liquidator or as appointee to a particular external administration. This obligation includes adequately and properly managing absences: see also policy proposal paragraph [B11].</p>	<p>B2Q1 Is there any aspect of the obligation to ‘perform adequately and properly’ that is not captured by referring to compliance with legal and equitable duties? Please explain your answer.</p>

Policy proposal	Your feedback
<p><i>Remain fit and proper</i></p> <p>B3 We will consider that you are not fit and proper to remain registered as a liquidator if:</p> <p>(a) we consider that you are no longer capable of performing adequately and properly the duties and functions of a registered liquidator (see policy proposal paragraphs [B5]–[B7]); or</p> <p>(b) any of the circumstances or events referred to in policy proposal paragraph [A14] have occurred or apply to you.</p> <p>B4 We <i>may</i> consider that you are no longer fit and proper to remain registered as a liquidator if:</p> <p>(a) any of the circumstances or events referred to in policy proposal paragraph [A15] have occurred or apply to you; or</p> <p>(b) you have ceased to be a member of a relevant professional body.</p> <p>This list is not exhaustive.</p> <p>No longer capable of performing duties</p> <p>B5 We will consider that you are no longer capable of performing adequately and properly the duties and functions of a registered liquidator if we consider you do not have:</p> <p>(a) sufficiently current Australian corporate insolvency knowledge, skills and experience (see policy proposal paragraphs [B6]–[B7]); or</p> <p>(b) adequate practice capacities.</p> <p>B6 We will consider that you do not have sufficiently current Australian corporate insolvency knowledge, skills and experience if you have not undertaken any, or any substantive, work as an external administrator for a continuous period of 3 years.</p>	<p>B3Q1 Are there other circumstances that indicate a person is not fit and proper to remain a registered liquidator?</p> <p>B4Q1 Are there other circumstances that indicate a person may not be fit and proper to remain a registered liquidator?</p> <p>B6Q1 Does this approach raise any significant practical difficulties? If so, what are they and how should they be overcome?</p>

Policy proposal

B7 We *may* consider that you do not have sufficiently current Australian corporate insolvency knowledge, skills and experience if:

- (a) you have not undertaken any work as an external administrator for a continuous period of more than 12 months; or
- (b) we are not satisfied that you have kept up-to-date through relevant continuing professional education.

Note: See also policy proposal paragraph [B11].

Remain resident in Australia

B8 We will generally consider that you have ceased to be resident in Australia if you have lived outside Australia for a continuous period of more than 12 months.

Note 1: This does not imply that absence from Australia for more than 12 months is the only circumstance where we may consider you have ceased to be resident in Australia.

Note 2: See also policy proposal paragraph [B11].

Lodge triennial statements

B9 We will generally only extend the time for lodging a triennial statement under s1288 if:

- (a) you apply for an extension before the due date for lodgment; and
- (b) we are satisfied that exceptional circumstances beyond your control will prevent you lodging it within time.

Your feedback

B7Q1 Does this approach raise any significant practical difficulties? If so, what are they and how should they be overcome?

B8Q1 Does this approach raise any significant practical difficulties? If so, what are they and how should they be overcome?

B9Q1 Does this approach raise any significant practical difficulties? If so, what are they and how should they be overcome?

Policy proposal

Your feedback

Monitoring your compliance

B10 We will monitor your compliance with your ongoing obligations as a registered liquidator. When we assess your compliance, the factors we will take into account include whether:

- (a) you have contravened, or caused a body corporate of which you are external administrator to contravene, a provision of the Act or any other legal or equitable obligation;
- (b) you have complied with any guidance issued by ASIC on the adequate and proper performance of your duties; and
- (c) you have complied with professional conduct standards of a relevant professional body or an insolvency industry body of which you are a member.

This list is not exhaustive.

Extended absence

B11 We will generally not take regulatory action against you for failure to comply, during a period of extended absence, with the ongoing obligations in policy proposal paragraphs [B1(a)–(c)] if, before you commenced the extended absence, you gave us at least 2 months' written notice of:

- (a) your proposed extended absence, indicating approximate start and finish dates, reason for absence and the country or countries where the absence will be spent; and
- (b) the arrangements you have made in relation to:
 - (i) your continuing appointments (if any), including transfer of your files; and
 - (ii) maintaining your performance bond or insurance under [PS 33].

Note: For the definition of extended absence, see 'Key terms'.

B10Q1 Are there other factors that we should take into account? Please explain your answer.

B11Q1 Will the requirement for 2 months' notice raise any significant practical difficulties? If so, why and how should they be overcome?

Policy proposal	Your feedback
<p>Requests for cancellation of registration</p> <p>B12 We expect you to request cancellation of your registration under s1290(1) if:</p> <ul style="list-style-type: none"> (a) you cease to practise as a registered liquidator; (b) you have not undertaken any work as an external administrator for a continuous period of 3 years (see policy proposal paragraph [B6]); (c) you leave Australia permanently, or you have lived outside Australia for 12 months and you do not intend to return immediately (see policy proposal paragraph [B8]); (d) you become a disqualified person under Part 2D.6; or (e) you cease to be fit and proper to remain registered for any other reason. <p>B13 We will generally only cancel your registration under s1290(1) if:</p> <ul style="list-style-type: none"> (a) we are satisfied that you have made adequate arrangements for transferring your files, resigning from all your appointments and, if relevant, replacing you as appointee; and (b) there are no outstanding applications to the CALDB in relation to your conduct and we are not considering making such an application; and (c) there is no legal action pending against you or that otherwise involves you in your capacity as an external administrator. 	<p>B12Q1 Does this approach cause any significant practical difficulties? Please explain your answer.</p> <p>B13Q1 Will this approach cause any significant practical difficulties? Please explain your answer.</p>
<p>Transitional arrangements</p> <p>B14 We propose to introduce our new policy on what you must do to remain a registered liquidator without any transition period.</p>	<p>B14Q1 Will this approach raise any significant practical difficulties? If so, how should they be overcome?</p>

Explanation

Our approach

1 Under s1282(8), a person's registration as a liquidator lasts until it is cancelled or the person dies. A registered liquidator may ask ASIC to cancel their registration: s1290(1): see policy proposal paragraphs [B12]-[B13] and paragraphs 29–30 of this Explanation.

2 On an application by ASIC, the CALDB:

- (a) may cancel or suspend a registered liquidator's registration on the grounds set out in s1292(2) (breaches of specific and general obligations). The CALDB may also impose other sanctions under s1292(9); and
- (b) must cancel a registered liquidator's registration on the grounds set out in s1292(7) (disqualification under Part 2D.6 or mental infirmity).

Ongoing obligations

3 The CALDB's power to cancel or suspend the registration of, or otherwise sanction, a registered liquidator means that registered liquidators have ongoing obligations to conduct themselves and perform their duties and functions in a way that does not trigger the CALDB's powers.

4 Registered liquidators have legal and equitable obligations under the Act, other domestic legislation and the general law. Some of these obligations are express while others are inherent in, or necessarily implied from, express obligations.

Perform duties and functions adequately and properly

5 Under s1292(2)(d), the CALDB may cancel a registered liquidator's registration if the registered liquidator fails to perform adequately and properly their duties or functions. We may make an application to the CALDB if we consider that you have not performed your duties or functions adequately and properly. To perform adequately and properly the duties and functions of a registered liquidator, you must comply with all the obligations that apply to you in your capacity as a registered liquidator or as appointee in a particular external administration. Adequately and properly performing your duties and functions includes adequately and properly managing your absences: see policy proposal paragraph [B11] and paragraphs 25–28 of this Explanation.

6 These obligations include:

- (a) general law duties to exercise reasonable care, competence and skill, and to perform your duties and functions with the highest standards of honesty and integrity; and
- (b) statutory duties in s180–184 (including care and diligence and good faith).

7 Registered liquidators also have express statutory obligations under Part 9.2 to lodge (as applicable) various particulars about themselves and their practice.

Note: These obligations are to lodge:

- (a) within 21 days, particulars if you cease to practise as a registered liquidator, change your name, change your principal place of practice or change the name of your practice (s1287(2)): see Form 905A.
- (b) within 3 days, particulars if you become disqualified under Part 2D.6 from managing corporations (s1287(4)): see Form 906.

Implied duty to resign in certain cases

8 The obligation to perform adequately and properly your duties or functions as a registered liquidator may include an obligation to promptly take steps to resign from a particular appointment if an event occurs that disentitles you from continuing to hold that appointment: see *ASIC v Lockwood SC Vic*, No. 04/412, 21 May 2004.

9 You may become disentitled to remain as a particular external administrator because:

- (a) you have become disqualified under Part 2D.6;
- (b) your registration as a liquidator has been cancelled;
- (c) you have become an insolvent under administration;
- (d) of some other reason.

10 In certain cases, you may have a duty to resign if a conflict arises between your duties as external administrator and your own interests, or between the duties you owe as external administrator to different entities.

11 If you resign from one or more appointments, you must lodge with ASIC the appropriate notice of termination of appointment for each relevant appointment: see Form 505. Registered liquidators should note that their disqualification under Part 2D.6 or cancellation of their registration as a liquidator does not automatically result in a change to information on the public register about their status as external administrator of a particular entity.

12 We may issue further policy or other guidance on what we consider is required for adequate and proper performance of a registered liquidator's duties and functions.

Remain fit and proper

13 Under s1292(2)(d), the CALDB may cancel a registered liquidator's registration if they are not a fit and proper person to remain registered. We may make an application to the CALDB if we consider that you are not a fit and proper person to remain a registered liquidator. When we assess whether you are fit and proper to remain registered, one of the factors we will take into account is your relationship with a relevant professional body of which you are or have been a member since your registration. This includes whether you have been the subject of any disciplinary action or have ceased to be a member of the body and, if so, the reasons. Our view on whether you remain fit and proper to be registered will be negatively influenced by a decision of a relevant professional body that you are no longer fit and proper to be one of its members.

14 We consider that a person who is no longer capable of adequately and properly performing the duties and functions of a registered liquidator is no longer a fit and proper person to remain a registered liquidator: see also paragraph 37 of the Explanation in Section A.

15 To remain capable of adequately and properly performing the duties and functions of a registered liquidator, we consider you must maintain:

- (a) the currency of your knowledge, skills and experience by:
 - (i) undertaking work as an external administrator on a continuing basis. We consider that your knowledge, skills and experience will not be sufficiently current if you have not undertaken any work, or any significant work, as an external administrator for a continuous period of 3 years. We may also consider that your knowledge, skills and experience are not sufficiently current if you have not undertaken any work as an external administrator for a continuous period that is shorter than 3 years; and
 - (ii) undertaking continuing professional education (CPE) relevant to your work as a registered liquidator, as appropriate to remain up-to-date with developments in accountancy, commercial law, and corporate insolvency law and practice. Registered liquidators who are members of a relevant professional body usually must meet specific CPE requirements to remain a member. Compliance with those CPE requirements may enable a registered liquidator to

remain sufficiently up-to-date for our purposes, provided the CPE they undertake is connected to their work as a registered liquidator. Otherwise, we expect registered liquidators to remain appropriately up-to-date, such as by attending professional development programs offered by the IPAA or other reputable education providers; and

- (b) the adequacy of your practice capacities. If your practice capacities have increased since your registration and as a result, you propose to accept appointments to entities located outside the State or Territory in which you reside, you should contact ASIC to ensure that we are able to note your current practice capacities and intentions. It is particularly important for registered liquidators whose practice undergoes changes or who move to a different practice to ensure that their practice capacities remain adequate.

16 We may issue further policy or other guidance on what we consider is required in order to remain capable of adequately and properly performing a registered liquidator's duties and functions.

17 We expect assistance from registered liquidators in ensuring that only persons who are fit and proper to be registered liquidators remain on the register. Therefore, even though there is currently no express obligation under the Act, we expect you to notify us within 21 days if any circumstance or event occurs or applies to you that means we will or may consider that you are no longer a fit and proper person to be registered. By this, we refer specifically (but not only) to a circumstance or event mentioned in policy proposal paragraphs [A14]–[A15]. We also expect registered liquidators to request cancellation of their registration if, under our policy, they are no longer fit and proper to remain registered, including for one of the reasons set out in policy proposal paragraph [B12] (see also paragraphs 29-30 of this Explanation).

Remain resident in Australia

18 Under s1292(2)(a)(ii), the CALDB may cancel a registered liquidator's registration if they cease to be resident in Australia. We may make an application to the CALDB if we consider that you have ceased to be resident in Australia. We will generally consider that you are no longer resident in Australia if you have lived outside Australia for a continuous period of more than 12 months.

Lodge triennial statements

19 Under s1292(2)(a)(i), the CALDB may cancel a registered liquidator's registration if they fail to lodge a triennial statement under s1288. Registered liquidators must lodge a triennial statement within

1 month after the third anniversary date of registration, and thereafter at 3-yearly intervals: see Form 908.

20 The information provided in a triennial statement is intended to help us monitor a registered liquidator's compliance with ongoing obligations. We will therefore not exercise our power under s1288(4) to extend the period for lodging a triennial statement unless we are satisfied that exceptional circumstances beyond the control of the registered liquidator, such as sudden injury or serious ill-health, will prevent the registered liquidator from lodging the statement within time. We do not consider that a heavy workload or preventable circumstances are exceptional circumstances beyond a registered liquidator's control.

Maintain security

21 Registered liquidators have an express obligation under s1284(1) to maintain the security required by that section. If you are relying for s1284 on alternative compensation arrangements under [PS 33.9A]–[PS 33.9C], you must comply at all times with that policy or immediately provide a performance bond that complies with [PS 33]. We will treat non-compliance with our policy in [PS 33] as grounds for applying to the CALDB to cancel or suspend your registration under s1292(2)(d) for failure to perform adequately and properly your duties as a registered liquidator.

Not become disqualified

22 A registered liquidator who becomes disqualified from managing corporations under Part 2D.6 of the Act is automatically no longer entitled to hold any appointment as an external administrator, and therefore has an inherent obligation immediately to take steps to resign from all the appointments held at that time. If they fail to do so, we may take action to compel removal. Depending on the type of appointments held at the time, we may also seek appointment of a replacement external administrator.

23 In our view, a registered liquidator who is no longer eligible to be appointed as any type of external administrator is no longer a fit and proper person to be a registered liquidator. If the registered liquidator does not request cancellation of their registration under s1290(1) immediately upon becoming a disqualified person (see policy proposal paragraph [B12] and paragraphs 29-30 of this Explanation), we will apply to the CALDB for cancellation of their registration under s1292(7) and/or 1292(2)(d).

Monitoring your compliance

24 We will monitor compliance by registered liquidators with their ongoing obligations as registered liquidators. Our direct disciplinary powers under Part 9.2 against a registered liquidator are to make an application to the CALDB for cancellation or suspension of registration, and/or for one of the lesser sanctions referred to in s1292(9). We also have power under various provisions of the Act to apply to the court in relation to conduct or proposed conduct by a registered liquidator in their capacity as a particular external administrator: see, for example, s423(2), 447E(3), 536(2), 1324 (1)–(2).

Extended absence

25 We consider that when registered liquidators take extended leave from work or are absent from Australia for an extended period, they potentially breach (at least) the ongoing obligations to:

- (a) perform adequately and properly their duties as a registered liquidator, particularly where they still hold an appointment. External administrators must personally attend to each external administration, even if they are appointed jointly and severally;
- (b) remain fit and proper to be registered. While a registered liquidator is on leave, they are not continuing to accept appointments and may not be sufficiently maintaining the currency of their knowledge, skills and experience, thereby potentially failing to remain capable of performing adequately and properly their duties and functions; and
- (c) remain resident in Australia. Whether this obligation is breached will depend partly on the length of time the registered liquidator is outside Australia.

26 However, we recognise that registered liquidators may have valid reasons for taking leave from work or for leaving Australia for a period longer than 3 months (e.g. to undertake further study, to gain complementary experience, or for family reasons).

27 Therefore, we consider it appropriate to indicate circumstances where we will generally not apply to the CALDB or take other regulatory action against a registered liquidator for failing to comply during a period of extended absence with the ongoing obligations in paragraph 25 of this Explanation: see policy proposal paragraph [B11].

28 Our ‘no-action’ approach will be limited to 12 months from the start of your absence and will only apply to non-compliance that occurs by reason of or during the period of extended absence. In the case of the obligation to remain fit and proper, it will only apply to the aspect of

fitness and propriety that relates to your maintenance of current knowledge, skills and experience.

Requests for cancellation of registration

29 You may ask us to cancel your registration as a liquidator under s1290(1) at any time. Requests should be made in writing. We have a discretion whether to grant the request and will not automatically grant it: see policy proposal paragraph [B13].

30 We expect you to request cancellation of your registration in the situations identified in policy proposal paragraph [B12], even though there is currently no express obligation under the Act to do so. This is so that the register contains only the names of persons who remain fit and proper to be registered. If you do not request cancellation of your registration in these situations, we have the power to apply to the CALDB for cancellation of your registration under s1292(2), and under s1292(7) in the case of disqualification under Part 2D.6.

Note 1: If you have ceased to practise for reasons other than because you have become a disqualified person under Part 2D.6, you should:

- (a) complete the section in Form 905A requesting cancellation of your registration and lodge Form 905A (notification of cessation for s1287(2)(a)) with the lodgment fee within 21 days of ceasing to practise. For example, you may have ceased to practise because you are no longer resident in Australia, because you are no longer able to comply with our policy on s1284 (security or alternative compensation arrangements) or because you wish to retire; or
- (b) complete the section in Form 908 requesting cancellation of your registration and lodge Form 908 by the due date with the lodgment fee, if you have ceased to practise within 21 days before the due date for lodgment of your Form 908 (triennial statement for s1288).

Note 2: If you have ceased to practise because you have become a disqualified person under Part 2D.6, you must lodge Form 906 (notification of disqualification for s1287(4)) within 3 days of becoming disqualified. Form 906 does not contain a section for requesting cancellation of your registration. We expect you to lodge a Form 905A (with the lodgment fee) at the same time as you lodge Form 906. You should also lodge a Form 505 for each terminating appointment: see paragraph 11 of this Explanation.

Note 3: If neither Form 905A nor Form 908 is appropriate to your circumstances, you should make your request by letter.

Transitional arrangements

31 We propose to introduce our new policy on what you must do to remain a registered liquidator without any transition period. We consider that our proposed new policy does not impose any undue additional costs or other burdens on currently registered liquidators.

C When will we register you as an official liquidator or liquidator of a specified body corporate?

Policy proposal	Your feedback
<p>Official liquidator</p> <p>C1 We will register a registered liquidator as an official liquidator if:</p> <p>(a) we receive from the registered liquidator:</p> <ul style="list-style-type: none"> (i) a written request for registration under s1283 that briefly states why registration as an official liquidator is sought; (ii) a written undertaking to ASIC that, if they are registered as an official liquidator, they will not refuse consent to act as liquidator in a court winding up solely because the company in question has no assets or otherwise appears to have insufficient funds to cover their anticipated professional costs of the liquidation; and (iii) the prescribed fee; and <p>(b) we are satisfied that there is no reason based on fitness and propriety why we should refuse the request.</p>	<p>C1Q1 Should we continue to require official liquidators to have more experience and resources than registered liquidators? Please explain your answer.</p> <p>C1Q2 Should we require the request to include reasons for making the application? If not, why not?</p> <p>C1Q3 Should we require the written undertaking in policy proposal paragraph [C1(a)(ii)]? If not, how should we ensure that there will always be someone the court can appoint to wind up assetless companies?</p>
<p>Transitional arrangements</p> <p>C2 We propose to introduce our new policy for registration of official liquidators without any transition period.</p> <p>C3 We will allow currently registered official liquidators to replace their existing declaration of consent with an undertaking referred to in policy proposal paragraph [C1(a)(ii)].</p> <p>Note: For discussion of the existing declaration of consent, see paragraph 7 of the Explanation.</p>	<p>C2Q1 Does this approach raise any significant practical difficulties? If so, what are they and how should they be overcome?</p> <p>C3Q2 Are there any practical reasons why current official liquidators will not provide the undertaking in policy proposal paragraph [C1(a)(ii)]? Please explain your answer.</p>

Policy proposal

Your feedback

Liquidator of a specified body corporate

C4 We will not register a person as liquidator of a specified body corporate if the body corporate is or may be insolvent.

Explanation

Official liquidator

1 Only an official liquidator may be appointed by the court to be a provisional liquidator or liquidator of a company: see s472(1)–(2) and 532(8). We have a discretion to register as official liquidators as many registered liquidators as we think fit: s1283(3). We also have a discretion under s1291 to cancel or suspend an official liquidator’s registration or restrict conduct by an official liquidator.

2 In [PS 24] we set out certain additional criteria, relating particularly to experience and organisational resources, that we require registered liquidators to meet before we will register them as official liquidators. We propose to replace [PS 24] and to no longer require registered liquidators to have additional experience or resources. This is because, under our proposals in Sections A and B of this policy proposal paper, registered liquidators will have the minimum experience and type of practice resources currently required for official liquidators.

3 We therefore propose to register as an official liquidator all registered liquidators who provide us with the items listed in policy proposal paragraph [C1(a)], unless we are satisfied that there is a reason based on fitness and propriety for refusing the request. We will accept any reason for seeking registration as an official liquidator, as long as it is reasonable on its face.

4 We consider it is appropriate to review an applicant’s fitness and propriety before we accept the written undertaking referred to in policy proposal paragraph [C1(a)(ii)]. If a person has been a registered liquidator for some time, refusal would be based on our assessment of the applicant’s conduct and reputation while a registered liquidator, including whether we may need to impose conduct restrictions through an undertaking under s1291(2).

5 We will accept concurrent applications for registration as a liquidator and as an official liquidator and, in this case, refusal of the official liquidator application will automatically follow refusal of the application for registration as a liquidator.

6 Our reasons for adopting a new approach include:

- (a) we consider that there is no significant policy justification for continuing to distinguish between the experience and resources required for registered liquidators who may be appointed by the court and those that may not. A similar view was expressed in *Review of the regulation of corporate insolvency practitioners*, the

report of a Working Party of the Ministerial Council for Corporations (June 1997);

- (b) particularly since the introduction of Part 5.3A, court-ordered windings up are not necessarily the largest, most complex or most frequent form of external administration that a registered liquidator may be involved in. In the 2003 calendar year, 33.6% of all appointments to a company entering external administration for the first time were court appointments that required an official liquidator. In the same year, 40.5% of all such appointments were of a voluntary administrator;
- (c) in *Re Lofthouse and ASIC* [2004] AATA 327, the Tribunal noted (at para 79) that the work done as liquidator in a voluntary liquidation or court-appointed liquidation and as an administrator or a receiver or receiver and manager is very similar. The Tribunal further noted (at para 84) that ‘the complexity of a matter handled by a registered liquidator is not determined by whether it is a liquidation ordered by a court or a voluntary liquidation or an administration or receivership. Complexity depends on the matter itself’;
- (d) in *Lofthouse*, the Tribunal also expressly disagreed with the requirement in [PS 24] that registered liquidators seeking registration as an official liquidator have additional experience in liquidations or experience specifically in court liquidations;
- (e) all registered liquidators appointed as external administrators have fiduciary duties and duties of care, impartiality and integrity. The performance of their duties and the exercise of their powers is subject to supervision by the court whether they are appointed by the court or not (see, for example, s423, 447E, 472(6), 536 and 1321).

7 We consider it is no longer appropriate to require a registered liquidator to make an advance declaration to us that they will consent to all appointments by a specified court, before we will register them as an official liquidator. We take this view because s532(9) is company-specific and because of current court practice. We understand that under current court practice nationally:

- (a) rotational appointments are no longer made from a court list of official liquidators; and
- (b) for the purposes of s532(9), the applicant for a winding-up order must file a consent to act for the particular company signed by the proposed official liquidator, before a liquidator or provisional liquidator is appointed.

8 However, it is essential that a potentially assetless company be able to be wound up by the court, and this can only be done if there is an official liquidator who will consent to act as liquidator of that company. Therefore, before we will register a registered liquidator as an official liquidator, we will require the registered liquidator to give us a written undertaking that they will not refuse consent to act as liquidator in a court winding up on the grounds that the company is assetless or appears to have insufficient funds to cover the liquidator's anticipated professional fees and expenses in the liquidation. We also consider that requiring such an undertaking may remind applicants of the special relationship between an official liquidator and the court that appoints them. We will treat a breach of this undertaking as grounds for using our powers under s1291(1) to cancel or suspend the person's registration as an official liquidator.

9 As at 31 August 2004, there were 753 registered liquidators, of whom 351 were also registered as official liquidators. Our proposed new approach will potentially increase the number of registered liquidators eligible to be appointed by the court.

Transitional arrangements

10 We propose to introduce our new policy for registration of official liquidators immediately and without any transition period. New applicants for registration as a liquidator and all currently registered liquidators would be entitled to apply under our proposed new policy.

11 We will encourage current official liquidators to provide the same undertaking that we propose to require from applicants for registration as an official liquidator.

Liquidator of a specified body corporate

12 Under s1282(3), we must (subject to s1282(4) and (5)) grant an application for registration as liquidator of a specified body corporate if we are satisfied that the applicant has sufficient experience and ability (and is a fit and proper person) to act as liquidator of the body given:

- (a) the nature of its property or business; and
- (b) the interests of its creditors and contributories.

13 We will not be satisfied about the matters set out in s1282(3) if the body corporate is or may be insolvent. In our view, it will never be in the interests of the creditors and contributories of an insolvent body corporate for the body to be wound up by a person who is not a registered liquidator.

14 A person registered as liquidator of a specified body corporate may only act as liquidator of the named body and not any other body. Nor may they act as any other type of external administrator: see s532(1)(b), 532(4) and 532(8).

Note: A person who is not registered under any category in Part 9.2 may act as:

- (a) a liquidator of a solvent proprietary company under a members' voluntary winding up (see s532(4)); or
- (b) a controller who is not a receiver or a receiver and manager (see s9 definition of 'controller' and s418(1)(d)).

Schedule 1: Application process for registration as a liquidator

This Schedule provides guidance on the process we intend to implement for liquidator registration and sets out details of the information we will require in an application. An application for registration as a liquidator must include sufficient information and documents to enable us to make an informed assessment of whether we should grant the application.

Due to the small number of applications we receive in a year for registration as a liquidator, we do not propose at this stage to accept electronic lodgment of applications. However, we do propose to publish a revised liquidator registration kit that reflects this Schedule and the guidance for referees in Schedule 2.

Your feedback

We have included some questions where we seek your specific responses. However, we welcome any other feedback you may have on the overall process and the information we will require, particularly if they raise any practical difficulties

APPLICATION PROCESS FOR LIQUIDATOR REGISTRATION

Form of application

1 Your application under s1279(1)(b) for registration as a liquidator must:

- (a) substantially comply with Form 903B;
- (b) include the documents referred to in Form 903B and other information and documents (see 'Supporting material') that we will need in order to decide whether you meet each of the criteria in policy proposal paragraph [A1];
- (c) be dated not more than 3 months before the date the application is lodged; and

Note: This applies to each document included in the application.

- (d) be accompanied by the prescribed fee.

Supporting material

2 You must give us information and documents that evidence each of the following matters:

- (a) your qualifications (see Table S1(a));
- (b) your experience in winding up bodies corporate (see Table S1(b));
- (c) your personal and practice capacities for performing the duties of a registered liquidator (see Table S1(c));
- (d) that you are a fit and proper person to be registered (see Table S1(d));
- (e) that you are not disqualified from managing corporations (see Table S1(e));
- (f) independent verification by referees of your corporate insolvency experience, and your overall capability and fitness and propriety (see Table S1(f));
- (g) that you are resident in Australia (see Table S1(g));
- (h) your arrangements for complying with s1284 (see Table S1(h)); and

- (i) whether you have made any prior applications for registration as a liquidator (see Table S1(i)).

Where should you send your application?

3 Applications will be processed by ASIC's South Australian office and should be posted to **Liquidator Registration Team, Financial Services, Australian Securities & Investments Commission, GPO Box 9827, Adelaide SA 5001.**

How will we deal with your application?

4 We will return your application without processing if it does not substantially comply with Form 903B or does not meet all the criteria under 'Form of application'.

5 We will verify at our discretion the information you provide in your application. We may contact the police, relevant professional and industry bodies, ITSA and your referees to verify the information you provide. We may contact both domestic and overseas authorities as appropriate.

6 We aim to form a preliminary view about whether to grant or refuse your application within 6 weeks of receiving a complete application. However, this time will be affected by various factors including:

- (a) whether we are waiting for further information from you about any aspect of the application; and
- (b) how quickly we receive from third parties confirmation that we may have requested about information in your application.

Proposed grant of registration

7 If our preliminary view is that we should grant your application, we will:

- (a) notify you of our preliminary view; and
- (b) publish a statement on ASIC's website that we have received an application from you for registration as a liquidator, and ask for any comments or objections to your registration to be made to us within 14 days.

Your feedback

S1Q1 Do you agree with our proposal to publish the fact that you have made an application? Please give your reasons.

8 We will take into account any objections we receive when we decide whether to grant your application. If, as a result of objections we receive, we change our preliminary view and propose to refuse your application, we will take the same steps as if our preliminary view had been that we should refuse your application.

Proposed refusal of registration

9 If our preliminary view is that we should refuse your application for registration, we must give you an opportunity to appear at a hearing, make submissions and give evidence on the matter: s1282(10).

We will send you a letter:

- (a) stating that we propose to refuse your application;
- (b) identifying the basis for our proposed refusal;
- (c) identifying two available dates for a hearing that are at least 28 days ahead;

(d) asking you to notify us within 7 days whether you wish to:

- (i) appear at a hearing and make submissions and give evidence; and
- (ii) if so, your choice of preferred hearing date.

10 We may refuse your application if you choose not to appear at the hearing or after holding the hearing. If we refuse it, we must notify you in writing of the refusal and give our reasons: s1282(11). A person whose application for registration has been refused may seek a review of our decision by the AAT: see s1317B.

Certificate of registration

11 If your application is successful, we aim to register you and issue your certificate of registration within 5 business days of being satisfied that you have complied (or will comply upon registration) with our policy on the security required under s1284: see s1282(6)(b).

Table S1: Full details of supporting material

(a) Qualifications	
<i>If relying on s1282(a)(i)</i>	<p>1 You should give us:</p> <ul style="list-style-type: none"> (a) a certified copy of a membership certificate for the relevant body, indicating on its face that the membership is current; or (b) a letter from an authorised person in the relevant body confirming that your membership is current. <p style="text-align: center;">Note: Alternatively, this evidence may be provided in the document you provide under ‘(d) Fit and proper/ (e) Not a disqualified person’.</p>
<i>If relying on s1282(a)(ii)</i>	<p>2 You should give us:</p> <ul style="list-style-type: none"> (a) a certified copy of your statement of academic record from each institution that has given you a qualification on which you rely, which identifies the subjects you have undertaken for that qualification; (b) if the statement of academic record in paragraph (a) does not state the name of your qualification, a certified copy of your qualification; and (c) if we do not have a standing certification from the institution where you obtained the relevant qualification, a letter from an authorised person at the institution certifying that the subjects shown on your academic record (that you have passed) comprise a 3-year course of study in accountancy and a 2-year course of study in commercial law (including company law).
<i>If relying on s1282(a)(iii)</i>	<p>3 You should give us:</p> <ul style="list-style-type: none"> (a) a statement setting out the qualifications and experience you rely on for your knowledge of accountancy and commercial law (including company law) and the reasons we should treat those qualifications and experience as equivalent to a qualification under s1282(2)(a)(i) or (ii); (b) a certified copy of your statement of academic record from each institution that has given you a qualification on which you rely, which identifies the subjects you have undertaken for that qualification; (c) if the statement of academic record in paragraph (b) does not state the name of your qualification, a certified copy of your qualification; and (d) a referee report from the person or people who supervised the experience set out in your statement under paragraph (a) which verifies that experience.
(b) Experience in windings up	
	<p>4 You should include specific information about your experience in winding up bodies corporate in the details you provide on your corporate insolvency experience under ‘(c) Capability’.</p>

Table S1: Full details of supporting material (cont.)

(c) Capability	
<i>Personal capacities</i>	<p>5 To substantiate your personal capacities, you should provide, as a minimum:</p> <ul style="list-style-type: none"> (a) a summary of your employment history for the last 8 years (including names of employers, positions held and dates); (b) full details of your relevant corporate insolvency experience (see below); (c) (if applicable) a certified copy of your certificate of completion of an Australian specialist corporate insolvency course; and (d) (if applicable) details of any non-insolvency corporate management experience you have. <p><i>Corporate insolvency experience</i></p> <p>6 You must provide information about your corporate insolvency experience that is sufficiently detailed to enable us to assess whether you satisfy our requirements in policy proposal paragraph [A9].</p> <p style="padding-left: 40px;">Note: For calculating years of experience, we consider that 1 full-time year equates to 1725 hours (being 46 weeks x 37.5 hours). This allows 6 weeks for annual leave and public holidays.</p> <p>7 As a minimum, you will need to:</p> <ul style="list-style-type: none"> (a) identify the years during the immediate past 8 years when you gained the corporate insolvency experience on which you rely, specifying: <ul style="list-style-type: none"> (i) the name and location of each firm you worked at; (ii) the name of the external administrators you worked for at each firm; (iii) each position you held at the firm and your level of responsibility in that position; (iv) sufficient information about your duties in the more senior positions to demonstrate that your experience has been at a very senior level for the full-time equivalent of at least 3 years over the immediate past 4 years (see paragraph 24 of the Explanation in Section A); and (v) the total number of years of corporate insolvency experience (calculated on a full-time basis) that you believe you have; and (b) identify the external administrations you worked on at a very senior level, the period you worked on those administrations and the aspects of your work on those administrations that best demonstrate your skill, diligence and judgment. This must include some external administrations you worked on in the immediate past 4 years. You should specifically identify: <ul style="list-style-type: none"> (i) complex matters that you were directly involved in, how you were involved, and why those matters were complex (see paragraph 25 of the Explanation in Section A); and

Table S1: Full details of supporting material (cont.)

	<p>(ii) how your experience in those particular external administrations demonstrates that you have the specific competencies your referees will report on (see the pro forma referee report in Schedule 2).</p> <div style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p>Your feedback</p> <p>S1Q2 Do you agree with this new approach to setting out corporate insolvency experience? Please explain your answer.</p> </div>
<p>Practice capacities</p>	<p>8 You must provide information that is sufficiently detailed to enable us to assess whether you satisfy our requirements in policy proposal paragraph [A10]. To substantiate your practice capacities, provide as a minimum:</p> <p>(a) a description of your practice's resources that are or will be available to you for conducting insolvency administrations, including:</p> <ul style="list-style-type: none"> (i) the number and seniority of specific insolvency staff; (ii) the corporate insolvency experience of that staff; (iii) the internal processes for ongoing staff supervision and training; (iv) the general business processes, procedures and manuals for the practice, including complaints-handling procedures and risk management systems; and (v) whether you propose to accept appointments to entities located outside the State or Territory in which you reside. If so, you should specify the location of your practice's offices in each relevant State or Territory, and the number, seniority and corporate insolvency experience of your specific insolvency staff in the offices in those States or Territories. Alternatively, you should provide details of the arrangements your practice has with practices in each relevant State or Territory for access to appropriately qualified and supervised insolvency staff as and when required (see also paragraph (c)); <p>(b) if you are an employee or consultant, a letter signed by an authorised person in the practice confirming that the practice's resources will be made available to you for external administrations if you are registered as a liquidator;</p> <p>(c) if you will be relying at all on staff and/or resources from another practice:</p> <ul style="list-style-type: none"> (i) details of the extent of that reliance; and (ii) an unconditional written consent signed by an authorised person in the other practice that the relevant staff or other resources of that practice will be made available to you as and when required; <p>(d) (if applicable) a copy of your certificate of registration as a trustee under the Bankruptcy Act.</p>

Table S1: Full details of supporting material (cont.)

(d) Fit and proper/ (e) Not a disqualified person
<p>9 If you are, or have been at any time in the last 10 years, a member of a relevant professional body, you should provide a letter from an authorised person in each such body specifying:</p> <ul style="list-style-type: none"> (a) whether your membership is current; (b) when your membership began; (c) if applicable, when and why your membership ceased; (d) particulars of any disciplinary action taken against you by the body; and (e) particulars of any complaints received by the body about your personal or professional conduct, and whether or not the body took disciplinary action as a result. <p>10 You must provide a signed statement as to:</p> <ul style="list-style-type: none"> (a) whether any of the matters in policy proposal paragraphs [A14]–[A15] apply to you, and, if so, give full particulars. You must also tell us if there are any legal or disciplinary proceedings pending against you and if so, give full particulars; and (b) whether you are, or have been at any time in the last 10 years, a person disqualified from managing corporations under Part 2D.6, and, if so, give full particulars. <p>11 We may issue a pro forma statement to assist applicants in providing this information.</p>
(f) Referee reports
<p>12 You must name at least two referees in Form 903B and provide us with referee reports by them. These reports will help us decide if you:</p> <ul style="list-style-type: none"> (a) have the personal capacities (particularly adequate corporate insolvency experience) to perform the duties of a registered liquidator; and (b) are otherwise a fit and proper person to be a registered liquidator. <p>13 We will also use referee reports to verify information you provide in your application about your experience.</p> <p>14 At least one referee report must be from a registered liquidator (or an appropriately licensed corporate insolvency practitioner in a country referred to in policy proposal paragraph [A9(a)(ii)]) who has directly supervised your corporate insolvency work for the full-time equivalent of at least 3 years over the last 5 years. If the nature of your experience means that you do not have a referee who meets those requirements, you should contact our Liquidator Registration Team.</p>

Table S1: Full details of supporting material (cont.)

	<div data-bbox="594 247 1230 470" style="border: 1px solid black; padding: 5px;"> <p>Your feedback</p> <p>S1Q3 Are there any special difficulties for Australian regional applicants in providing at least one referee report from a registered liquidator? If so, how might these be overcome?</p> </div> <p>15 The other referee must be a person who is able to verify your professional knowledge, skill, experience, diligence and judgment, as well as attest your honesty, integrity and reputation.</p> <p>16 To improve the reliability, comparability and usefulness to us of referee reports, we have prepared new guidance for referees and a pro forma referee report: see Schedule 2. We expect you to give your referees a copy of your application and the supporting material about your corporate insolvency experience, so that the referees can attest and comment on that experience. The pro forma referee report includes a series of specific competency-based questions. Referees who have directly supervised your work are expected to provide detailed responses to these competency-based questions. Other referees are expected to respond to the competency-based questions to the extent they are in the position to do so.</p>
(g) Resident in Australia	
	<p>17 You must provide particulars of your current address and each address you have lived at during the last 10 years, indicating the approximate dates between which you lived at those addresses.</p> <p>18 If your addresses show that you have not resided continuously in Australia for the last 3 years, we may require additional evidence that you are resident in Australia on a long-term basis.</p>
(h) Security	
	<p>19 You must provide information and documents demonstrating that, if you are registered, you will have in place immediately upon registration:</p> <ul style="list-style-type: none"> (a) a performance bond that complies with [PS 33]; or (b) alternative compensation arrangements that comply with our policy in [PS 33.9A]–[PS 33.9C].
(i) Prior applications	
	<p>20 You must tell us if you have made any prior applications for registration as a liquidator and if so, provide details.</p>

Schedule 2: Guidance on referee reports

This Schedule provides guidance on the information we expect referee reports to contain. We welcome any general feedback you may have.

Your feedback

S2Q1 How might we obtain better information from referees about an applicant's corporate insolvency experience, capability, and fitness and propriety without imposing an undue burden on referees or the applicant?

APPLICATION FOR LIQUIDATOR REGISTRATION — GUIDANCE FOR REFEREES

What is the purpose of this document?

You have been asked by an applicant for registration as a liquidator under Part 9.2 of the *Corporations Act 2001* (Act) to provide a referee report for that application. This document will help you provide a referee report in a form that is appropriate for ASIC's assessment of the application.

What must you do before you sign a referee report?

Before you sign a referee report, you should:

- (a) be given by the applicant a copy of their application for registration and the supporting material they intend to give ASIC about their corporate insolvency experience; and
- (b) read Section A of ASIC's Policy Statement [xxx] *External administration: Liquidator registration*, 'What criteria must you meet to become a registered liquidator?'

Why does ASIC require referee reports?

ASIC uses referee reports to help it decide if the applicant:

- (a) has the personal capacities (particularly adequate corporate insolvency experience) to be capable of performing the duties of a registered liquidator; and
- (b) is otherwise a fit and proper person to be a registered liquidator.

ASIC also uses referee reports as a means of verifying information provided by the applicant about their experience.

Who can provide a referee report?

An applicant for registration as a liquidator must provide at least two referee reports. At least one report must be from a registered liquidator (or other appropriately licensed insolvency practitioner) who has directly supervised the applicant's work on external administrations for the full-time equivalent of 3 over the last 5 years.

The second report must be from a person who is able to attest the applicant's:

- (a) knowledge, skill, experience, diligence and judgment in insolvent external administrations; and
- (b) honesty, integrity and good reputation.

We will not accept a referee report from an employee or fellow employee of the applicant. We will generally not accept a referee report from a relative of the applicant, unless we are satisfied that the relative is the only registered liquidator realistically in a position to provide the supervising registered liquidator's report.

Opinions expressed by referees about the applicant must be based on the referee's personal knowledge of the applicant and their direct observation of the applicant's conduct.

An applicant who does not have the standard accounting qualifications referred to in s1282(2)(a)(i) or (ii) of the Act and is seeking registration under s1282(2)(a)(iii) on the basis of the equivalence of their qualifications and experience, must also provide a referee report from a person who has directly supervised the work experience they are relying on for s1282(2)(a)(iii).

PRO FORMA REFEREE REPORT

Applicant's name:

SECTION A: Referee's details

1 Provide your full name, address and contact details.

2 Are you a registered liquidator?

3 What is your professional and (if relevant) personal relationship to the applicant?

4 How long have you known the applicant in each of these relationships?

5 Provide details of when, how long and to what extent you have directly supervised the applicant's work in:

- (a) external administrations; and
- (b) general accounting.

SECTION B: Applicant's corporate insolvency experience and competencies

Referees who have directly supervised the applicant's corporate insolvency work are expected to provide detailed responses to the following questions. Other referees are expected to respond to the questions to the extent they are able, and to explain in their response any limitations on their ability to respond more fully.

When responding to the following competency-based questions, please use concrete examples from identified external administrations to illustrate your responses. Where possible, the examples you give should relate to the external administrations that the applicant has identified as involving complex matters.

6 In the context of a 'trade-on', is the applicant able to:

- (a) control cash flow and formulate realistic cash flow projections?
- (b) quickly analyse available information and assess whether the business is a going concern?
- (c) respond to unexpected events and carry out a progressive assessment of commercial risks?
- (d) efficiently manage staff in their own practice and in the insolvent entity?

7 In the context of identifying and realising assets, is the applicant able to:

- (a) secure and maintain assets?
- (b) market an asset to achieve an optimal commercial outcome?
- (c) negotiate the sale of an asset of substantial value?

8 In the context of conducting an investigation, is the applicant able to:

- (a) apply a sceptical and critical approach to situations?
- (b) appreciate legal responsibilities involved in insolvency work?
- (c) instruct lawyers in complex matters and respond appropriately to legal advice?

9 In the context of managing large and complex matters, is the applicant able to:

- (a) apply relevant law to practical problems?
- (b) design solutions and strategies for complex problems and situations?
- (c) manage large amounts of complex information, competing priorities and multiple administrations?

10 In the context of communicating with creditors, is the applicant able to:

- (a) write reports that are informative and meaningful?
- (b) clearly communicate complex information to an audience?

11 Is the applicant able to:

- (a) recognise and assess circumstances that might give rise to a conflict of interest for the applicant?
- (b) respond appropriately when faced with ethical dilemmas?

12 In relation to the applicant's examples of complex matters they have been involved in, do you agree:

- (a) that they were complex matters?
- (b) with the applicant's description of their role in those matters?

13 Do you agree with the other information stated in the applicant's application about their corporate insolvency experience?

SECTION C: Concluding opinions

Where possible, support your responses to the following questions with examples.

14 In your opinion:

- (a) does the applicant have adequate knowledge, skill and experience in insolvent corporate external administrations, and the diligence and good judgment, to be capable of performing the duties of a registered liquidator?
- (b) will the applicant have adequate practice resources to be capable of performing the duties of a registered liquidator?
- (c) is the applicant:
 - (i) honest, and a person of integrity and good reputation?
 - (ii) in all other respects a fit and proper person to be registered as a liquidator?

15 Are there any matters or information about the applicant not already identified in your report that you think ASIC should be aware of when considering whether to register the applicant as a liquidator?

(Please attach separate sheets if needed.)

SECTION D: Referee's declaration and signature

16 I declare that:

- (a) before signing this report:
 - (i) the applicant gave me a copy of their application and the supporting material relating to their corporate insolvency experience; and
 - (ii) I read Section A of ASIC's Policy Statement [xxx] *External administration: Liquidator registration*, 'What criteria must you meet to become a registered liquidator'; and
- (b) my opinions in this report are based on my personal knowledge of the applicant and direct observation of the applicant's conduct and work.

Date:

Signed:

Regulatory and financial impact

We have considered the likely regulatory and financial impact of the policy proposals in this paper. Based on the information currently available to us, we believe that the implementation of our proposals will strike an appropriate balance between facilitating the provision of corporate insolvency services and consumer protection.

Important details sought from you

In order for us to fully assess the financial and regulatory impact of our proposals, we invite you to comment on:

- (a) the likely financial impact of the proposals on prospective and existing registered liquidators and official liquidators. Where possible, give consideration to the costs and benefits of these proposals. We are seeking both quantitative and qualitative information; and
- (b) whether the proposals provide sufficient consumer protection.

Development of policy proposal

We have developed this policy proposal paper by considering:

- (a) *Review of the regulation of corporate insolvency practitioners*, the report of a Working Party of the Ministerial Council for Corporations, June 1997;
- (b) *Report No. 45, General Insolvency Inquiry*, Australia Law Reform Commission, 1988 ('the Harmer Report');
- (c) *Study of the Professions—Accountancy*, final report of the Trade Practices Commission, July 1992;
- (d) *Corporate Insolvency Laws: A Stocktake*, report of the Parliamentary Joint Committee on Corporations and Financial Services, June 2004;
- (e) the CLERP 9 Act, the Explanatory Memorandum to the CLERP 9 Act and ASIC policies relevant to the registration of Australian company auditors;
- (f) ASIC policies relevant to the licensing of Australian financial services providers under the Act;
- (g) the requirements in other jurisdictions for registration or licensing of corporate insolvency practitioners; and
- (h) the requirements under the Bankruptcy Act for registration of trustees in bankruptcy.

Key terms

In this policy proposal paper, the following terms have the following meaning:

Act The *Corporations Act 2001* (Cth).

administrator Has the same meaning as in s9.

ASIC The Australian Securities and Investments Commission.

Bankruptcy Act The *Bankruptcy Act 1966* (Cth).

CALDB The Companies Auditors and Liquidators Disciplinary Board.

CLERP 9 Act The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).

controller Has the same meaning as in s9.

Note: It therefore includes ‘managing controller’, ‘receiver’ and ‘receiver and manager’.

corporate insolvency experience Experience in a range of external administrations of the type referred to in Chapter 5 of the Act (other than arrangements under Part 5.1).

DCA Deed of company arrangement.

deed administrator Administrator of a DCA.

extended absence A period of leave from work or absence from Australia that is longer than 3 months.

external administration Where an external administrator is appointed.

external administrator Scheme administrator, voluntary administrator, deed administrator, controller, provisional liquidator or liquidator.

ICAA The Institute of Chartered Accountants in Australia.

IPAA The Insolvency Practitioners Association of Australia.

ITSA The Insolvency and Trustee Service of Australia.

liquidator A person appointed to wind up the affairs and distribute the property of a body corporate.

managing controller Has the same meaning as in s9.

NIA The National Institute of Accountants.

Part 9.2 (for example) A Part of the Act (in this example, numbered 9.2).

practice The firm or other business structure (whether incorporated or unincorporated) through or by means of which a person conducts or intends to conduct their work as a registered liquidator.

professional accounting body ICAA, CPA Australia or NIA.

provisional liquidator A person appointed by the court under s472(2).

receiver A person appointed under an instrument or by the court to receive property of a body corporate, who does not manage, and under the terms of the person's appointment does not have power to manage, affairs of the body corporate.

receiver and manager Has the same meaning as in s9.

reg 9.2.01 (for example) A regulation in the *Corporations Regulations 2001* (in this example, numbered 9.2.01).

registered liquidator A person registered by ASIC under s1282(2) who, as a result of that registration, is eligible to be appointed as any type of external administrator (subject to s472(1), 472(2) and 532(8)).

relevant professional body A body that, in relation to its members (whether generally in their capacity as a member, or specifically in relation to performance of their duties as corporate insolvency practitioners):

- (a) sets standards for professional competency and ethics (including independence and management of conflicts of interest); and
- (b) monitors professional performance and exercises disciplinary functions.

s1282 (for example) A section of the Act (in this example, numbered 1282).

scheme administrator A registered liquidator appointed to administer an arrangement under Part 5.1.

voluntary administrator An administrator of a company but not of a DCA.

What will happen next?

Stage 1

October 2004

ASIC policy proposal paper released

Stage 2

30 November 2004

Written comments due on the policy proposal paper

Stage 3

May–June 2005

Policy statement released

Your comments

You are invited to comment on the proposals and issues for consideration in this paper, including the explanation sections.

Comments are due by 30 November 2004 and should be sent to:

Belinda Neilson
Regulatory Policy
Australian Securities & Investments Commission
GPO Box 9827
Sydney NSW 2001
email: belinda.neilson@asic.gov.au

You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

Related papers

Policy Statement 24 *Registration of official liquidators* [PS 24]

Policy Statement 33 *Security deposits* [PS 33]

Policy Statement 40 *Registration of liquidators—experience criteria*
[PS 40]

Copies of papers

Download them from the ASIC home page:

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