



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 96

Insurance requirements for registered liquidators

February 2008

About this paper

This consultation paper:

- sets out how ASIC proposes to administer the new insurance requirements for registered liquidators in s1284 of the *Corporations Act 2001*; and
- seeks the views of stakeholders including registered liquidators, creditors, insurers, and their professional advisers.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 29 February 2008 and is based on the Corporations Act as at 29 February 2008.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

In this paper we are consulting on how we will administer the new insurance requirements in s1284 of the *Corporations Act 2001* (Corporations Act).

Note: The previous s1284 was replaced by the *Corporations Amendment (Insolvency) Act 2007* (No. 132), which received Royal Assent on 20 August 2007 (the amending Act). For a copy of the amending Act, its Explanatory Statement and Regulatory Impact Statement (RIS), see <http://www.comlaw.gov.au>.

Under the new insurance requirements, a registered liquidator must hold adequate and appropriate professional indemnity (PI) insurance and fidelity insurance.

This paper explains how we plan to administer the new insurance requirements. Section A explains the content, purpose and inherent limitations of the new insurance requirements. Section B deals with commencement and transitional arrangements. Section C explains our role and some basic policy principles.

Our key policy proposals are set out in Sections D–F. These proposals are to help registered liquidators understand the decisions they need to make and how we propose to assess whether they comply with the new insurance requirements. In Section G, we discuss some further key issues about PI and fidelity insurance for your consideration and feedback. Section H sets out our proposed no-action position on registered liquidators for whom compliance with the new insurance requirements is unnecessary.

Your feedback

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final guidance.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives. Submissions on any part of the explanatory sections that you would like to comment on are also welcome.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the insurance requirements. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator Report and/or a Regulation Impact Statement: see Section I, 'Regulatory and financial impact'.

Making a submission

We will not treat your submission as confidential, and may make it publicly available, unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 14 April 2008 to:

Elliot Norton
 Senior Lawyer
 Regulatory Policy
 Australian Securities and Investments Commission
 GPO Box 9827
 Sydney NSW 2001

facsimile: 02 9911 5232

email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	29 February 2008	ASIC consultation paper released
Stage 2	14 April 2008	Comments due on the consultation paper
	April and May 2008	Consideration of submissions received and drafting of regulatory guide
Stage 3	June 2008	Regulatory guide released

A The new insurance requirements

Key points

Recent amendments to the Corporations Act require registered liquidators to maintain adequate and appropriate PI and fidelity insurance: see paragraph 1.

The purpose of the new insurance requirements is to reduce the risk that claims resulting from the failure of the liquidator to carry out their duties adequately and properly cannot be met by the registered liquidator out of their own resources: see paragraphs 3–5.

The new insurance requirements are not designed to cover all losses for which claims might be made against a registered liquidator: see paragraphs 6–11.

New professional indemnity and fidelity insurance requirements

- 1 The new s1284 of the Corporations Act requires a person registered as a liquidator, or as a liquidator of a specified body corporate, to maintain:
- (a) adequate and appropriate PI insurance (the PI insurance requirement); and
 - (b) adequate and appropriate fidelity insurance (the fidelity insurance requirement),
- for claims that may be made against them in connection with externally administered bodies corporate.

Note: See Appendix, paragraphs 96–98 for background on the previous legislative and regulatory position.

Purpose of the insurance requirements

- 2 The Explanatory Statement to the Corporations Amendment (Insolvency) Bill 2007 (the Explanatory Statement) indicates that the new insurance requirements in s1284 were proposed in the context of the existing practice of obtaining PI insurance in place of lodging a security with ASIC under the previous s1284.

Note: See paragraphs 6.13–6.15 of the Explanatory Statement and paragraphs 96–98 below.

- 3 We therefore consider that the underlying policy objective of the new insurance requirements is the same as that which underpinned the requirement in the previous s1284. This was to protect creditors and other persons, as far as possible, against financial loss suffered as a result of the inadequate or improper performance of duties or other legal obligations by registered liquidators or their staff.

Note: Regulation 9.2.05(1) of the Corporations Regulations 2001 (the Regulations) states that a security lodged by a registered liquidator may be applied by ASIC 'to compensate a person who has suffered pecuniary loss due to the failure of the liquidator... to carry out his or her duties adequately and properly'.

- 4 The new insurance requirements are not a mechanism for providing compensation directly to creditors or other claimants. Rather, they are a means of reducing the risk that a registered liquidator cannot, because of insufficient available financial resources, meet claims arising from work performed in connection with externally administered bodies corporate (referred to in this paper as the 'policy objective').
- 5 We will interpret and apply the new insurance requirements in a way that maximises their potential to achieve this policy objective, while minimising any divergence from existing industry practice.

Limitations of PI insurance and fidelity insurance

- 6 The ability of PI and fidelity insurance to achieve the policy objective of the new insurance requirements is subject to inherent practical limitations.

Note: See also paragraphs 85–88.

No cover for fraud by sole practitioner registered liquidator

- 7 We understand that PI and fidelity insurance policies do not indemnify a registered liquidator for losses caused by their own dishonest activity or fraud, as this is against public policy.
- 8 Where a registered liquidator appointed as external administrator to an insolvent company is a sole practitioner with no staff, and no other external administrators with joint and several obligations have been appointed to the insolvent company, there would be no other insured registered liquidator or firm who could be sued for creditor losses caused by fraud or dishonesty. Such losses would have to be met from other available financial resources of the fraudulent or dishonest sole practitioner external administrator.

Note: However, if the fraudulent or dishonest registered liquidator is part of a firm, creditors can generally claim against the firm and, as an innocent insured party, the firm will be indemnified under the fidelity insurance policy. The proceeds of the insurance indemnity can then be passed on to the claimants or those to whom the money lost

belongs. In this scenario, it is only the fraudulent or dishonest registered liquidator themselves who would not ultimately benefit from the insurance.

Insurance does not cover all losses by creditors

- 9 It is not the goal of the new s1284 to:
- (a) remove all risk of possible creditor losses relating to the provision of insolvency services; or
 - (b) guarantee, in effect, the recovery of funds to creditors of insolvent companies.
- 10 The new insurance requirements are not intended to cover claims for loss:
- (a) solely as a result of the business failure (e.g. through insolvency) of a liquidator or their firm; or
 - (b) because the return from the external administration of a company by the registered liquidator does not meet a creditor's expectations.
- 11 The new insurance requirements are only intended to cover losses that result from:
- (a) services falling below acceptable professional standards (e.g. breach of contract, or negligence);
 - (b) breaches of registered liquidators' professional, statutory or fiduciary duties or other obligations (e.g. non-compliance with the Corporations Act and the duties of an external administrator as determined by common law and equitable principles); and
 - (c) dishonest conduct by an insolvency practitioner's staff (e.g. fraud, misappropriation or embezzlement).

B Commencement and transitional arrangements

Key points

Newly registered liquidators have to comply with the new insurance requirements as soon as they are registered: see paragraphs 13–14.

The new insurance requirements do not apply to liquidators with existing registrations until 1 July 2008: see paragraph 15.

We propose a transitional arrangement for these registered liquidators to align the commencement of the requirements with existing insurance renewal cycles and reduce compliance costs: see paragraphs 17–19 and Proposal B1.

When did the new insurance requirements commence?

- 12 The new s1284 commenced on 31 December 2007.

New applicants seeking registration as a liquidator

- 13 Applicants for registration as a liquidator on or after 31 December 2007 need to have adequate and appropriate PI and fidelity insurance in place before ASIC will issue a certificate of registration: see s1282(6) and 1284(1).
- 14 If such insurance has not been arranged at the time of application, we will require details of how the applicant will ensure their compliance with the new insurance requirements. We will continue to assess the other aspects of the application in the meantime, and once this assessment has been completed, we may indicate that we are minded in principle to approve the application subject to receiving confirmation that insurance is in place. However, we will not finalise the registration until the requisite insurance has been obtained.

Note: See Proposal D1 for more details of the initial assessment process for applicants for registration as a liquidator.

Liquidators with existing registrations

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

Registered liquidators who have lodged a security

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

Please contact:

Liquidator Registration Team
 Australian Securities and Investments Commission
 GPO Box 9827
 Adelaide SA 5001

email: LiquidatorRegistration@asic.gov.au

Registered liquidators previously relying on RG 33

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

Proposal

- B1** We propose to allow registered liquidators previously relying on RG 33 whose existing PI insurance policies only come up for renewal after 1 July 2008 to wait until renewal time or 1 July 2009 (whichever is earlier), before they vary their insurance arrangements to comply with the obligation to have adequate and appropriate PI and fidelity insurance.

Your feedback

- B1Q1 Do you agree with our proposed transitional arrangements for registered liquidators with existing PI insurance?

Rationale

- 18 If a registered liquidator's existing PI insurance policy does not meet the requirements of the new s1284, renegotiation of their insurance cover to ensure it complies with the new s1284 while it still has some months to run may impose additional costs. We therefore propose to allow registered liquidators to wait until their existing PI policy comes up for renewal after 1 July 2008 before putting in place PI and fidelity insurance that complies with s1284(1). However, we will expect all registered liquidators to have insurance cover that complies with the new s1284 by 1 July 2009.
- 19 We have formulated this policy on the basis that:
- (a) the duration of most PI insurance policy periods is one year; and

- (b) one year from the date the new s1284 comes into operation is a reasonably sufficient amount of time for liquidators with existing registrations to comply with the new legislative requirements.

What if a registered liquidator cannot comply?

- 20 Registered liquidators who are unable to obtain adequate and appropriate PI and fidelity insurance by the time their insurance comes up for renewal after 1 July 2008, or by 1 July 2009 (whichever is earlier), may need to cease operating.

Summary of what registered liquidators should do to comply

- 21 Table 1 sets out what registered liquidators will need to do to comply with the new insurance requirements.

Table 1: What registered liquidators should do to comply with the new insurance requirements

	What you should do	When
<p>New applicants for registration as a liquidator</p> <p>(Your registration commences after 31 December 2007)</p>	<p>Confirm in your application that you have, or shortly will have, PI and fidelity insurance cover that complies with the new insurance requirements and provide us with the details of the insurance that we request.</p>	<p>When you apply for registration as a liquidator.</p> <p>You will need to have the insurance cover in place by the date your registration commences.</p>
<p>Liquidators with existing registrations</p> <p>(Your registration commenced before 31 December 2007)</p>	<p>Obtain PI and fidelity insurance that complies with the new insurance requirements in time for 1 July 2008, unless you have an existing PI insurance policy that:</p> <ul style="list-style-type: none"> • does not meet the requirements of new s1284; and • does not come up for renewal in sufficient time to comply by 1 July 2008. <p>In such a case, we expect you to comply when your policy does come up for renewal after 1 July 2008, or by 1 July 2009, whichever is earlier.</p>	<p>Depending on your situation:</p> <ul style="list-style-type: none"> • by 1 July 2008; or • no later than 1 July 2009.

C Our approach to administering the insurance requirements

Key points

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

- consider applications for registration as a liquidator (see paragraphs 23–25);
- check on registered liquidators' compliance (see paragraph 26);
- decide whether to cancel or suspend a liquidator's registration (see paragraphs 27–28); and
- decide whether to refer a registered liquidator to the CALDB for disciplinary proceedings (see paragraphs 29–30).

We have identified five guiding principles for how we will administer the new insurance requirements: see Proposal C1.

ASIC's role

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

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

Circumstances	Explanation
1 Applications for registration as a liquidator	We must assess whether an applicant complies with the requirements of s1284 before registering them as a liquidator.
2 Ongoing compliance surveillance	We may carry out surveillance work to check that liquidators are complying with the new insurance requirements.
3 Unilateral cancellation	We have the power to cancel the registration of a liquidator on certain grounds under s1290A(1).
4 Referral to the CALDB for disciplinary proceedings	We may apply to the CALDB under s1292(2) to have a liquidator's registration suspended or cancelled for inadequate and improper performance of their duties or for not being a fit and proper person to remain registered as a liquidator.

Applications for registration as a liquidator

- 23 ASIC must consider and grant an application for registration as a liquidator if a number of conditions are met: s1282(2). If the applicant also holds adequate and appropriate PI and fidelity insurance, ASIC must issue the successful applicant a certificate confirming their registration: s1282(6). A liquidator's registration does not come into force until the applicant has complied with the new insurance requirements: s1282(6)(d) and (8).
- 24 We therefore need to assess whether an applicant has in place adequate and appropriate PI and fidelity insurance before their registration will come into force.

Applications received before our guidance is finalised

- 25 Until our final guidance is published, we will assess each application for registration on its merits. However, the guidance proposed in this consultation paper will guide our assessment of whether an applicant complies with the new insurance requirements.

Post-registration compliance

- 26 The Corporations Act requires registered liquidators to continue to comply with the new insurance requirements after their registration as a liquidator. We may undertake targeted or random surveillance to ensure that registered liquidators or their firms continue to maintain adequate and appropriate PI and fidelity insurance.

Note: Registered liquidators will have to confirm each year on Form 908 *Annual statement by a liquidator* that their policy cover meets the new insurance requirements.

Unilateral ASIC cancellation of liquidator's registration

- 27 ASIC may cancel a registered liquidator's registration if the registered liquidator does not maintain adequate and appropriate PI and fidelity insurance: s1290A(1).

Note: See Item 10 of Schedule 3 to the amending Act and paragraphs 6.19–6.20 of the Explanatory Statement, which also highlight our broad discretion to cancel the registration of an official liquidator under s1291.

- 28 In deciding whether to cancel the registration of a liquidator under s1290A(1), we will consider:
- (a) the seriousness of the breach of the new insurance requirements;
 - (b) whether the breach has been remedied;
 - (c) the impact on creditors and other claimants;

- (d) any factual circumstances that may explain or mitigate the registered liquidator's failure to maintain the required insurance;
- (e) whether the issue is more appropriately dealt with by the CALDB; and
- (f) any other matters we consider relevant.

Referral to CALDB for inadequate and improper performance or not being a fit and proper person

29 As an alternative to the unilateral cancellation procedure outlined in paragraphs 27–28, we may decide in certain circumstances to refer a registered liquidator to the Companies Auditors and Liquidators Disciplinary Board (CALDB) for disciplinary proceedings. The CALDB may cancel or suspend a liquidator's registration on application by ASIC if the CALDB is satisfied of the fulfilment of one or more of a number of separate and independent conditions, two of which are that:

- (a) the registered liquidator has failed to carry out or perform adequately and properly any duties or functions required by Australian law; or
- (b) the registered liquidator is otherwise not a fit and proper person to remain registered as a liquidator: s1292(2)(d).

30 Our decision to make an application to the CALDB to have the liquidator's registration suspended or cancelled may involve considering whether the registered liquidator is complying with their obligation to maintain adequate and appropriate PI and fidelity insurance. This is because compliance with statutory obligations (including those in s1284 of the Corporations Act) forms part of:

- (a) carrying out or performing adequately and properly the duties and functions that Australian law requires registered liquidators to carry out or perform; and
- (b) being a fit and proper person to remain registered as a liquidator.

Key policy principles

31 In assessing what is adequate and appropriate PI and fidelity insurance, we propose to be guided by five key policy principles.

Proposal

c1 The five key policy principles we propose to guide us in our administration of the new insurance requirements are the following:

- (a) Principle 1: It is the responsibility of each registered liquidator to determine what insurance arrangements are 'adequate and appropriate' in their circumstances.

- (b) Principle 2: 'Adequate and appropriate' broadly means that the insurance is fit for achieving the policy objective and is on usual commercial terms.
- (c) Principle 3: The insurance should be for an amount sufficient to cover claims against the registered liquidator reasonably anticipated in connection with the external administration of insolvent companies.
- (d) Principle 4: An element of adequacy and appropriateness is what insurance is reasonably available in the market at any given time.
- (e) Principle 5: A balance needs to be struck between the level of protection for creditors and other claimants afforded by the required insurance and the cost for registered liquidators of obtaining that insurance.

Your feedback

C1Q1 Do you agree with these proposed key principles? If not, please give reasons.

C1Q2 Are there other key policy principles that you think should guide us in our administration of the new insurance requirements? If so, please explain why they are important.

D Assessing and obtaining PI and fidelity insurance

Key points

Registered liquidators are primarily responsible for assessing what is adequate and appropriate PI and fidelity insurance and obtaining such insurance: see paragraphs 32–33.

This section explains:

- the initial assessment process for applicants for registration as a liquidator (see paragraphs 34–36 and Proposals D1–D2);
- the assessment process an existing registered liquidator should follow (see Proposals D3–D4);
- our expectations regarding ongoing compliance (see paragraphs 37–40); and
- from whom PI and fidelity insurance can be obtained (see Proposal D5).

Registered liquidator’s primary responsibility

- 32 Registered liquidators must determine what is adequate and appropriate PI and fidelity insurance to meet their obligations under s1284 and to obtain such cover (see Principle 1 at Proposal C1(a)). They must work out their insurance needs having regard to their own particular risk profile.
- 33 Whether a particular PI or fidelity insurance policy is adequate and appropriate depends on all of the facts and circumstances, including the nature, scale and complexity of the registered liquidator’s business, and their other financial resources. The registered liquidator is in the best position to assess what will be adequate and appropriate. However, we propose guidance in Proposals D1–D4 and Sections E–G in order to help registered liquidators assess their needs.

Process

- 34 Our guidance is intended to assist registered liquidators in determining what are adequate and appropriate insurance arrangements for them. However, we will not ‘approve’ a registered liquidator’s PI and fidelity insurance arrangements.

- 35 Whether they already have PI and fidelity insurance cover in place or not, applicants for registration as a liquidator and existing registered liquidators need to review their operations or intended operations to assess what type and amount of cover they need. In some cases they might find it helpful to engage external consultants, actuaries, brokers or advisers to undertake a risk assessment of their business and provide professional advice on the amount and type of cover they should obtain.

Initial assessment process for applicants

- 36 Applicants for registration as a liquidator should undertake their own analysis of what is adequate and appropriate PI and fidelity insurance cover.

Proposal

- D1** We propose to ask applicants for registration as a liquidator questions about:
- (a) the identity of their insurer;
 - (b) whether the policy provides individual or firm cover;
 - (c) the respective per claim and aggregate limits of indemnity for the applicant's PI insurance and fidelity cover;
 - (d) if the policy contains excesses or deductibles:
 - (i) their level;
 - (ii) whether they are at a level that the registered liquidator or firm can confidently sustain as an uninsured loss;
 - (iii) the number of principals of the firm as at the beginning of the period of insurance; and
 - (iv) the total gross fee income of the registered liquidator and their firm for the financial year immediately preceding the beginning of the period of insurance;
 - (e) whether the fidelity cover is provided:
 - (i) as a stand-alone fidelity or crime insurance policy;
 - (ii) as a fidelity cover extension to the PI policy; or
 - (iii) in the form of fraud and dishonesty insurance covering money and similar assets as part of the PI cover;
 - (f) the policy premium;
 - (g) the scope of cover (e.g. whether the insurance covers claims relating to all of the services that the applicant wishes to provide in the course of their business in connection with externally administered bodies corporate);
 - (h) the policy period;
 - (i) the jurisdiction of the policy;
 - (j) whether the policy provides automatic run-off cover;

- (k) whether the policy provides retroactive cover and, if so, what the retroactive date is;
 - (l) whether defence costs are covered in addition to the policy limit of indemnity, or whether the cover is 'costs-inclusive';
 - (m) whether the policy is cancellable by the insurer for innocent non-disclosure or innocent misrepresentation by the registered liquidator, their employees or partners, or by employees, principals, or agents of the registered liquidator's firm;
 - (n) how many reinstatements are allowed under the policy; and
 - (o) whether there are specific ways in which the insurance does not conform with our proposed policy (e.g. significant exclusions).
- D2** We also propose to ask the applicant for a certificate of cover/currency for their insurance.

Your feedback

- D2Q1** Do you agree with our proposals regarding the application process? If not, please give reasons.
- D2Q2** Do you have any particular alternative suggestions regarding the process that ASIC should adopt for assessing the adequacy and appropriateness of PI and fidelity insurance upon application for registration?

Assessment process for liquidators with existing registrations

Proposal

- D3** We propose that registered liquidators should review the terms of their PI and fidelity insurance in accordance with s1284 (and our final guidance) at least annually (e.g. when their existing policy is due for renewal) to ensure it continues to be adequate and appropriate for them during each policy period.
- D4** We propose that registered liquidators will be asked to:
- (a) confirm each year in Form 908 *Annual statement by a liquidator* that their cover meets the new insurance requirements; and
 - (b) submit certain details relating to the insurance policy, such as those referred to in Proposal D1, if we request them.

Note: This reflects the recommendation in paragraph 7.51 on page 117 of the June 1997 Report of the Working Party on the *Review of the Regulation of Corporate Insolvency Practitioners*, which stated: 'professional indemnity insurance could be expressly recognised as an ongoing requirement of registration in legislation and facilities used to monitor compliance, for example, by requiring practitioners to submit details of insurance on the annual statement ...' (emphasis added).

Your feedback

- D4Q1** Do you agree with our proposals? If not, please give reasons.

D4Q2 Would it be helpful for us to include in our final guidance a table of suggested questions for registered liquidators to consider in assessing what is adequate and appropriate insurance cover?

D4Q3 Are there any other processes or procedures that you follow when obtaining and maintaining PI and fidelity insurance that we should include in our guidance?

D4Q4 Is the proposed guidance in this consultation paper, which we suggest registered liquidators follow in assessing their insurance, likely to directly result in any increase in registered liquidators' compliance costs? Please give details, including figures and reasons.

Ongoing compliance

- 37 From time to time, we may require registered liquidators to provide a copy of their PI and fidelity insurance policies, certificates of insurance cover/currency and other information about their insurance arrangements. For example, we may ask for these documents when:
- (a) we are conducting a practice or compliance review of a registered liquidator's firm; or
 - (b) as part of targeted or random audits of PI and fidelity insurance arrangements undertaken to ensure registered liquidators are complying with s1284.
- 38 We expect registered liquidators will take personal responsibility, or ensure that a senior officer or manager within their firm is accountable, for ensuring that:
- (a) their PI and fidelity insurance policy is renewed when required;
 - (b) premiums are paid on time; and
 - (c) their insurance continues to be adequate and appropriate.
- 39 Registered liquidators should also review the adequacy and appropriateness of their insurance arrangements in light of any major changes in their business (e.g. if they start providing new services or engage significantly more staff).
- 40 Registered liquidators will need to make provision in their complaints handling arrangements for ensuring that claims are brought to their attention and are promptly notified to insurers.

Who can provide the insurance cover?

Proposal

- D5 Generally, the insurance policy needs to be with an insurer regulated by APRA or operating under an exemption under the *Insurance Act 1973*.

Your feedback

- D5Q1 Should anyone other than an APRA-regulated insurer or an insurer operating under an exemption be able to provide PI and fidelity insurance cover for the purposes of the insurance requirements? Please give reasons.

Rationale

- 41 It is crucial to achieving the policy objective that:
- (a) any insurance cover in place is enforceable; and
 - (b) any indemnity under that insurance policy will indeed be provided by the insurance company in the event that the liability of the registered liquidator or their firm falls within the policy's terms and conditions.
- 42 Insurance policies maintained for the purposes of s1284 therefore need to be with a reputable and reliable insurance company that is subject to prudential regulation.

E Adequate and appropriate PI insurance

Key points

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

- the amount of the cover (see Proposal E1);
- the level of excesses/deductibles (see Proposals E2–E3);
- the scope of the cover (see Proposal E4);
- the treatment of defence costs (see Proposal E5–E6); and
- whether exclusions in the insurance undermine the overall effect (see Proposal E7 and paragraphs 56–58).

Adequacy: Level of insurance cover

ASIC's proposed approach regarding adequacy

- 43 To be adequate overall, a PI insurance policy must have an adequate insured amount. That is, the level of insurance cover up to which liability for a proved claim will be indemnified by the insurer, both 'per claim' (i.e. for each individual claim) and in the aggregate (i.e. for all claims in any one policy year) must be adequate.

Note: This level is called either the 'sum insured', 'insured amount', 'limitation amount', 'limit of indemnity' or 'level of insurance cover'.

- 44 Our proposed method for calculating the adequacy of PI insurance cover held by a registered liquidator is to adopt the approach taken by the Professional Standards Council (PSC) in relation to minimum PI insurance requirements in the recently approved NSW schemes of the Institute of Chartered Accountants in Australia (ICAA) and CPA Australia Ltd (CPAA).

Note 1: Both these PSC schemes commenced in New South Wales on 8 October 2007 (see <http://www.lawlink.nsw.gov.au/icaa> for the ICAA scheme, and <http://www.lawlink.nsw.gov.au/cpaa> for the CPAA scheme).

Note 2: The National Institute of Accountants' (NIA's) PSC scheme in New South Wales commenced on 30 January 2007 and has a different formula for calculating the minimum insured amount (see <http://www.lawlink.nsw.gov.au/nia>). We understand the NIA is updating its PSC scheme during 2008 to mirror the ICAA and CPAA schemes.

- 45 The 2007 ICAA and CPAA schemes are substantively identical, but the following proposal identifies the ICAA's NSW scheme as the PSC scheme whose wording will govern how the minimum insured amount should be

determined for a registered liquidator or their firm. We have selected the ICAA's NSW scheme as our reference point because:

- (a) we need to select one specific scheme to cater for the possibility that in the future the wording of the two schemes may diverge;
- (b) New South Wales was the first state to pass professional standards legislation, its PSC was the first to approve schemes, and the Secretariat to each of the states' and territories' PSCs is located within the NSW Attorney General's Department; and
- (c) the majority of registered liquidators (approximately 85%) are ICAA members.

Note: See Appendix 1, paragraphs 101–105 for some background on the ICAA PSC scheme.

Proposal

- E1** We propose to treat as adequate those PI insurance policies that meet the quantum requirement in clause 3.5(a) of the ICAA (NSW) PSC scheme (the Scheme).

Note: Consistent with the positive requirement in s1284(1)(a) and with clause 7PI.3.5(i) of Appendix R4: *Professional Indemnity Insurance* (Appendix R4) to the ICAA *Regulations Relating to Certificate of Public Practice* (ICAA Regulations), we do not propose to permit the use of business assets in lieu of insurance, regardless of the alternative criteria for liability capping set out in clauses 3.5(b) and (c) of the Scheme.

This means that the insured amount for each claim, and for all claims in the aggregate, made under the policy during one calendar year, must not be less than the amount of the Category 2 monetary ceiling. This monetary ceiling is calculated under clauses 3.6 and 3.1 of the Scheme, as amended in the following way:

- (a) the word 'participant' in clause 3.6 is replaced by 'registered liquidator';
- (b) the phrase 'the participant commences to provide the Category 2 services which are the subject of the proceeding against the participant' in clause 3.6 is replaced by 'the registered liquidator or their firm's insurance policy period commences'; and
- (c) the phrase 'the act or omission giving rise to the cause of action occurred' in clause 3.1 is replaced by 'the registered liquidator or their firm's insurance policy period commences'.

Note: Category 2 services (in effect, insolvency services) are defined in clause 4.2 of the Scheme. See Appendix 1, paragraphs 101–105 for some background on the Scheme and <http://www.lawlink.nsw.gov.au/icaa> for links to the Scheme itself.

Your feedback

- E1Q1 Do you agree with our proposal on the minimum adequate amount of cover per claim and in the aggregate? Please give reasons.

E1Q2 In particular, do you agree with the proposed formula in clauses 3.6 and 3.1 of the Scheme for determining the level of insurance cover required? If not, please give reasons for your view and suggest an alternative method of calculation with reasons why it should be adopted.

E1Q3 Would you prefer us to restate the formula in detail in our guidance, instead of referring to and amending the relevant clauses of the Scheme?

E1Q4 Do we need to define the 'fee' or 'fees' mentioned in clause 3.6 of the Scheme with a greater degree of specificity?

Rationale

- 46 We propose to take the Scheme as the basis for our guidance:
- (a) because the Category 2 monetary ceiling in the Scheme reflects an independent actuarial assessment of an appropriate level of insurance cover for insolvency practitioners, based on the claims history of the professional accounting body's members;
 - (b) because most registered liquidators will already have PI insurance in place that satisfies the Scheme's quantum requirements;
 - (c) to ensure a level playing field between all members of the ICAA, CPAA and NIA, and any registered liquidators who are not members of any professional accountancy bodies; and
 - (d) to maintain high standards of practice for registered liquidators and uniform procedures across the insolvency services industry.
- 47 Unlike the PSC schemes, however, ASIC's proposed guidance does not limit the liability of registered liquidators.

Excesses and deductibles

Proposal

- E2 We propose that an excess or deductible should not exceed either of the following two amounts:
- (a) whichever is the greater of:
 - (i) the amount calculated by multiplying the number of principals of the firm as at the beginning of the period of insurance by \$10,000; or
 - (ii) 3% of the total gross fee income of the registered liquidator and their firm for the financial year immediately preceding the beginning of the period of insurance; and
 - (b) 5% of the total sum insured under the PI insurance policy.
- Note: This reflects the requirements of Appendix R4, clause 7PI.3.5(ii).
- E3 More generally, we propose that, even if the excess/deductible falls below this maximum amount, it should be at a level that the registered liquidator's business can confidently sustain as an uninsured loss taking

into account the financial resources of the registered liquidator and their firm.

Note: This is consistent with clause 9.2(d) of the PSC's *Policy Statement on PI Insurance* issued on 14 September 2007 (PSC Policy Statement), which refers to deductibles being set at reasonable levels having regard to, among other things, the apparent capacity of the member to meet the excess from other available assets: see http://www.lawlink.nsw.gov.au/lawlink/professional_standards_council/.

Your feedback

E3Q1 Do you agree with these proposals? If not, please give reasons.

Rationale

- 48 We understand that currently available PI insurance policies generally have an excess or deductible, the presence of which requires the insured to use their own funds to meet some of the liability for claims successfully made against them. The deductible or excess in a policy refers to the threshold amount of damages that the insured in essence self-insures.
- 49 We recognise that excesses that are too low may have the effect that the registered liquidator or their firm have insufficient incentive to manage risks. However, unreasonably high deductibles might mean the insurance policy is not adequate for s1284 purposes, because liability for claimants' losses may not be met.

Appropriateness: Scope of insurance cover

The legal requirement

- 50 Section 1284(1)(a) requires that the PI insurance must be 'appropriate' and must cover claims that may be made against a registered liquidator in connection with externally administered bodies corporate. The requirement therefore has a broad potential application.

Note: The breadth of the s1284 requirement reflects the breadth of the insurance requirements in the PSC schemes. The ICAA requires the insurance to cover 'either any civil legal liability or any act, error or omission of an insured who is providing the services for which a current Certificate of Public Practice is required' (clause 7PI.3.6(i) of Appendix R4) and states 'the insurance must cover all services offered by an insured' (clause 7PI.3.3 of Appendix R4). The CPAA requires 'indemnity to attach to any civil liability arising out of or in any way related to the provision of Public Accounting Services by the assured': by-law 9.5(b)(iii)(D).

- 51 The requirement appears to cover claims against registered liquidators for breach of professional, contractual, fiduciary or statutory obligations under legislative requirements or the general law. These obligations include duties to act:

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

Key insurance policy features

52 We consider that whether insurance is appropriate depends (among other things) on the terms and conditions of the insurance policy.

Proposal

E4 We propose that to be considered appropriate, the PI insurance policy should:

- (a) cover any civil liability for loss or damage suffered by creditors and other claimants because of acts, errors or omissions of the insured in the course of the provision of professional services, including, for example:
 - (i) breach of contract;
 - (ii) negligence;
 - (iii) misleading or deceptive conduct; or
 - (iv) breaches of professional, fiduciary or statutory duties and obligations under the Corporations Act, other legislative requirements and the general law;

Note: This is consistent with clause 9.2(a) of the PSC Policy Statement, which refers to a reasonably broad form of insuring clause: see http://www.lawlink.nsw.gov.au/lawlink/professional_standards_council/.

- (b) cover such losses caused by a registered liquidator or by employees, directors, officers, principals, partners, agents, consultants and sub-contractors of the registered liquidator or their firm;

Note: Although vicarious civil liability for the losses caused by such agents, consultants and sub-contractors is usually covered by the insurance policy, the agents, consultants and sub-contractors who committed the acts, errors or omissions causing the loss are generally not indemnified.

- (c) be on usual, ordinary commercial terms offered by insurers for this type of insurance at the time the insurance contract is entered into;
- (d) cover costs and expenses, including legal costs and expenses, of investigating, defending and settling claims against the insured;
- (e) not be cancellable by the insurer for innocent non-disclosure or innocent misrepresentation by the registered liquidator, their employees or partners, or by employees, principals or agents of the registered liquidator's firm; and
- (f) have a retroactive date that is:
 - (i) unlimited;
 - (ii) at least seven years before the beginning of the period of insurance; or
 - (iii) on or earlier than the date on which the insured registered liquidator started providing services in connection with externally administered companies.

Your feedback

E4Q1 Do you agree with our proposal on the key features that a PI insurance policy should contain for it to constitute appropriate PI insurance? If not, please give reasons.

E4Q2 Would the PI insurance policy need to contain other features for it to be appropriate? Please state what else you believe should be required and why.

Rationale

53 These requirements as a whole are consistent with the minimum acceptable terms of the PI insurance referred to in RG 33.9B, the PSC Policy Statement, and the minimum requirements of PI insurance cover prescribed by the ICAA and CPAA in their PSC schemes.

Defence costs

Proposal

- E5 We propose that there should be 'costs-in-addition' cover in place to cover defence costs in addition to the policy limit of indemnity (as opposed to having to pay for the defence costs out of the sum insured).
- E6 We propose that if registered liquidators have 'costs-inclusive' cover, the limit of indemnity must be not less than 25% greater than the insured amount set out in Proposal E1 above.

Your feedback

E6Q1 Do you agree with these proposals? If not, please give reasons.

Rationale

- 54 Proposal E5 is consistent with:
- (a) clause 9.3 of the PSC Policy Statement, which refers to defence costs in addition to the stated level of cover being preferred; and
- Note: see http://www.lawlink.nsw.gov.au/lawlink/professional_standards_council/.
- (b) the first paragraph of clause 7PI.3.5(iii) in Appendix R4.
- 55 Proposal E6 reflects the second paragraph of clause 7PI.3.5(iii) in Appendix R4. Most policies currently cover ‘costs in addition’, but policies on a ‘costs-inclusive’ basis may well be common in a future hard insurance market.

Exclusions

Proposal

E7 We propose that registered liquidators should ensure that the following exclusions do not appear in their PI insurance policies:

- (a) significant exclusions relating to the registered liquidator's compliance with their duties or to the nature of the work performed in connection with the external administration (such as those examples in paragraph 57); and
- (b) any other exclusion that undermines the policy objective.

Note: This is consistent with clause 9.2(b) of the PSC Policy Statement, which refers to minimal exclusions: see

http://www.lawlink.nsw.gov.au/lawlink/professional_standards_council/

Your feedback

E7Q1 Do you agree with this proposal? If not, please give reasons.

Rationale

- 56 Significant exclusions, such as those relating directly to the minimum scope of cover described above and exclusions that undermine the policy objective, may mean the PI insurance policy is not appropriate.
- 57 Examples of exclusions that we consider may undermine the policy objective include those that mean cover is not available for:
- (a) the registered liquidator's appointment as an officer of an insolvent or failing company by virtue of becoming the external administrator of the company;
 - (b) claims arising from incidents that have been notified to ASIC or to the creditors of the insolvent company to which the registered liquidator has been appointed (on the basis that, by making the notification, the

registered liquidator has admitted liability and as a result the insurance policy will not cover the claim);

Note: We are not proposing that the common condition that an insured must not admit liability should be deleted. We only propose that such a condition should be expressly limited so as to exclude any notification, in accordance with the law, of incidents to ASIC or to creditors, even if such notification might lead to claims.

- (c) trading debts or losses that are incurred after the appointment of the registered liquidator to the insolvent or failing company as external administrator, in respect of which they have not received an indemnity from another party; or
- (d) breaches of obligations (by a registered liquidator, their employees or partners, or their firm's employees, directors, officers, partners, agents, consultants or sub-contractors) while conducting certain aspects of the services provided in connection with the external administration of bodies corporate.

Note: The definition in the insurance policy of the professional services covered by the policy should be broad enough to cover the full scope of the activities carried out by employees, directors, officers, partners or agents of the registered liquidator or their firm in connection with externally administered bodies corporate.

- 58 It is the registered liquidator's responsibility to assess whether any exclusion in their PI insurance policy undermines the policy objective and therefore means the insurance is not appropriate.

F Fidelity insurance

Key points

Contemporary fidelity insurance varies in scope and structure: see paragraphs 59–63.

It is the ‘third party’ aspect of fidelity insurance that is most important for fulfilling the policy objective, i.e. providing indemnity for loss of third parties’ money and similar assets through the fraud and dishonesty of the employees, directors, officers, partners or agents of the registered liquidator’s firm, for which the registered liquidator is liable: see paragraphs 66–67.

Whether fidelity insurance is appropriate depends on two main factors:

- the scope of the cover (see Proposal F1); and
- exclusions in the insurance (see paragraphs 70–75 and Proposals F2–F5).

In order for it to be adequate, the level of fidelity insurance should be prudent and reasonable in the circumstances. In assessing their individual circumstances, registered liquidators should have regard to a number of specified factors: see Proposal F6.

What is fidelity insurance?

Scope of contemporary fidelity insurance

- 59 Contemporary fidelity insurance varies in scope, depending on the insurance provider. There is no one standard policy wording; each insurer develops their own policy wording.
- 60 Increased competition in the insurance market has resulted in some insurers now offering broad fidelity policies covering the risk of loss of money and similar assets:
- (a) belonging to the insured registered liquidator or firm (first party losses);
or
 - (b) in the care, physical custody or control of the insured, for which the insured is legally liable to account to third parties, e.g. creditors of the insolvent company to which the registered liquidator has been appointed as external administrator (third party losses),

where the loss is directly attributable to fraudulent or dishonest acts, errors or omissions by employees, directors, officers, partners or agents of the registered liquidator or their firm.

Note: By 'money and similar assets', we mean money, negotiable instruments, bearer bonds, coupons, stamps, bank notes, currency, cheques, bills of exchange and letters of credit. Some fidelity insurance clauses may specifically cover coins, bullion, local or foreign currency, postal orders, money orders, shares, preference shares, stocks, debentures, warrants, options, bonds, promissory notes and other equity or debt securities. Some clauses may also extend to other instruments (whether negotiable or not or whether matured or not), or securities or documentation evidencing title to or ownership of land or any other property, and any instruction, direction or use of electronic equipment, including but not limited to telephony or the internet, resulting in the unauthorised transfer, delivery or payment of, or dealing with, money, land or any other property.

- 61 Fidelity insurance only indemnifies innocent parties. It does not cover any persons committing or condoning the dishonest or fraudulent act, error or omission.

Structure of contemporary fidelity insurance

- 62 Fidelity insurance cover for a registered liquidator or their firm may either:
- (a) form part of the PI insurance policy that the insurer offers to them as a standard quotation;

Note: If conditions in the insurance market become harder, this is unlikely to be provided as part of a standard quotation.
 - (b) be incorporated as an additional 'extension' or 'optional extension' to that PI insurance policy if requested by the registered liquidator or their firm; or
 - (c) constitute a separate, stand-alone fidelity insurance policy (sometimes called a 'crime insurance policy').

Note: A stand-alone fidelity or crime insurance policy may provide a wider scope of insurance cover for loss of other goods in addition to money and similar assets, and a significantly higher limit of indemnity.

- 63 For the purposes of complying with s1284(1)(b), it does not necessarily matter what form the fidelity insurance maintained by the registered liquidator or their firm takes. What is important is that the fidelity cover provides adequate and appropriate indemnity for third party losses.

Fidelity insurance that is outside the scope of s1284

- 64 When a registered liquidator is appointed as external administrator of a failing or insolvent company, they take over responsibility for the running of that company. The company may not already have fidelity insurance in place. One decision the external administrator may have to make in

exercising their professional and commercial judgement is therefore whether, in order to protect the insolvent company's assets, the external administrator should enter into a form of temporary 'open cover' insurance, which includes fidelity insurance to cover the risk of fraud or dishonesty by officers, employees or agents of the insolvent company.

Note: Making such decisions forms part of a registered liquidator having adequate systems and processes in place for identifying and managing risks in each entity to which they may be appointed as external administrator: see Regulatory Guide 186 *External administration: Liquidator registration* (RG 186) at RG 186.20(e) and RG 186.65. If the external administrator is negligent, or breaches their duties, in deciding not to cause the insolvent company to enter into open cover insurance, then any liability arising out of that possible negligence or breach of duty would probably be covered under the registered liquidator's PI insurance policy.

- 65 However, we do not consider that having such fidelity insurance to cover the risk of fraud or dishonesty by officers, employees or agents of the insolvent company falls within the scope of the s1284 insurance requirements.

The purpose of the fidelity insurance requirement

- 66 Under s1284, fidelity insurance must be adequate and appropriate for *claims* that may be made against the registered liquidator in connection with externally administered bodies corporate.
- 67 Insurance against loss of money and similar assets belonging to *third parties*, which is attributable to fraud or dishonesty by employees, directors, officers, partners or agents of the insured and for which the registered liquidator is liable, is therefore more important in trying to meet the policy objective than *first party* insurance cover that merely protects the insured registered liquidator or their firm against loss of their own funds attributable to such fraudulent or dishonest conduct.

Note: See paragraphs 3–4 for an explanation of the policy objective underlying s1284.

Appropriateness: Scope of cover

Proposal

- F1 We propose that a registered liquidator or their firm should maintain either:
- (a) (as a standard part of, or as an optional extension to, their PI insurance policy) cover for civil liability for third party losses of money and similar assets through fraud and dishonesty of an employee, director, officer, partner or agent of the registered liquidator or their firm; or

- (b) fidelity cover for loss (resulting from fraud or dishonesty of an employee, director, officer, partner or agent of the registered liquidator or their firm) of money and similar assets belonging to a third party, in the insured's care, custody or control, for which the insured is legally responsible.

Note: This fidelity cover could be provided as a policy extension to the registered liquidator's PI insurance policy or as a separate fidelity or crime insurance policy.

Your feedback

F1Q1 Do you agree with our proposals on the appropriate scope of fidelity or fraud and dishonesty cover? If not, please give reasons.

F1Q2 Do you think the minimum required scope should extend to loss of physical property such as goods, chattels and equipment, in addition to money and similar assets?

Note: See the note to paragraph 60 regarding the meaning of 'money and similar assets' in this context.

Rationale

68 We propose to accept that, depending on the scope of the insuring clause wording and any relevant exclusions, fraud and dishonesty cover forming part of, or an extension to, PI insurance can serve a sufficiently similar function to third party fidelity cover in practice, and can, therefore, fulfil the fidelity insurance requirement in s1284(1).

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

- (a) fidelity cover for third party loss (resulting from fraud or dishonesty) of money and similar assets in the insured's care, custody or control, for which the insured is legally responsible; or
- (b) the liability insurance equivalent to such fidelity cover obtained through the fraud and dishonesty aspect of normal PI insurance, which should cover liability to third parties for losses of money and similar assets.

Note: If a registered liquidator or their firm already has in place PI insurance including dishonesty cover that complies with the requirements of the ICAA or CPAA, they might already have cover that would fulfil the fidelity insurance requirement. See Appendix 1, paragraphs 106–110, for a summary of these professional accounting bodies' dishonesty cover requirements.

Common exclusions

70 We understand that the following exclusions are common in fidelity insurance policies:

- (a) all criminal penalties and associated expenses imposed by the law;
- (b) loss arising from dishonesty or fraud committed by the insured sole practitioner registered liquidator themselves;

- (c) other matters uninsurable by law;
- (d) loss arising from a fraudulent act discovered after the expiration of a specified discovery period that runs from the date on which the dishonest act was committed;
- (e) loss arising after the insured discovers, or has reasonable cause for suspicion, that an employee, partner, director, officer or agent of the insured has engaged in fraudulent or dishonest activity;
- (f) further loss arising because the insured failed to take all reasonable steps to prevent such loss;
- (g) loss arising after the nature of the insured's business has changed; and
- (h) loss arising where any system of audit, supervision or checks stated in the proposal or correspondence has not been followed.

Criminal penalties

Proposal

- F2** We propose that the presence of the following blanket exclusions in a fidelity insurance policy would not render it inappropriate:
- (a) all criminal penalties and associated expenses imposed by the law; and
 - (b) more generally, matters uninsurable by law.

Your feedback

F2Q1 Do you agree with this proposal? If not, please give reasons.

Rationale

- 71 Fidelity insurance policies sometimes define the scope of cover by reference to losses suffered as a result of specific conduct that amounts to a crime. However, policies with this wording may not cover the actual *penalties* imposed on the insured themselves for dishonest, intentional or reckless statutory breaches that amount to a crime. We do not consider that the policy objective requires criminal penalties to be covered by fidelity insurance, as they do not comprise a civil claim for pecuniary loss suffered by a creditor or other person.

Discovery periods in 'claims made' fidelity policies

- 72 Fidelity insurance cover is normally restricted to loss arising from acts of fraud or dishonesty that are notified within the specified policy period. In addition, in order for it to be covered by the policy, the discovery of the loss will generally have to take place:
- (a) during the policy period;

- (b) within a specified time after the policy period ends; or
- (c) within a more limited period after the occurrence of the act or omission.

73 This limitation is designed to exclude cover for a series of losses suffered through systemic infidelity, fraud or theft going back over a long period of time through repeated but separate acts of dishonesty. Its intention is to give the insured an incentive to maintain effective internal controls, systems and procedures.

Proposal

F3 We propose that appropriate insurance may be in the form of a 'claims made' contract with reasonable discovery periods for the acts of fraud or dishonesty.

Your feedback

F3Q1 Do you agree with these proposals? If not, please give reasons.

Notification of losses to ASIC or the creditors

Proposal

F4 We propose that fraud and dishonesty cover or fidelity insurance should not exclude cover for claims arising from incidents or losses that have been notified to ASIC or to the creditors of the insolvent company to which the registered liquidator has been appointed (on the basis that, by making the notification, the registered liquidator has admitted liability and as a result the insurance policy will not cover the claim).

Your feedback

F4Q1 Do you agree with this proposal? If not, please give reasons.

Rationale

74 Notification of claims, incidents or losses to ASIC or to the creditors of the insolvent company may be in mandatory fulfilment of the registered liquidator's statutory or fiduciary duties. As a matter of public policy, the terms of an insurance contract should not undermine a person's compliance with the law.

Prior prosecution and indemnification

Proposal

F5 We propose that to be appropriate, a policy must not contain a condition requiring a successful criminal prosecution against the fraudulent or dishonest party before the indemnity is provided.

Your feedback

F5Q1 Do you agree with this proposal? If not, please give reasons.

Rationale

75 Registered liquidators and their firms should be aware of prior prosecution clauses and negotiate their removal from the insurance policy. The presence of such a clause may mean that significant civil liability to third parties is not covered under the policy and that the policy objective is not met. This is because the higher standard of proof in criminal cases than civil liability cases means that the registered liquidators or their firm may be liable to third parties for the loss of the money stolen, embezzled or misappropriated, but either:

- (a) no criminal prosecution is undertaken owing to insufficient evidence; or
- (b) the criminal prosecution is unsuccessful because the onus of proof of guilt 'beyond a reasonable doubt' in criminal proceedings is not discharged at trial.

Adequacy: Level of cover**Proposal**

F6 We propose that a registered liquidator or their firm should obtain levels of fidelity insurance or fraud and dishonesty cover that are prudent and reasonable, having regard to:

- (a) all the circumstances of the registered liquidator and their firm;
- (b) the claims history of the registered liquidator and their firm;
- (c) the liabilities that have, realistically, some potential to arise from claims that may be made against the registered liquidator in connection with the externally administered body corporate to which they have been appointed as external administrator;
- (d) the number of claims that might be expected during the policy period, e.g. considering:
 - (i) the number of insolvent companies to which the registered liquidator is likely to be appointed as external administrator during the period of cover;
 - (ii) the volume of insolvency business the registered liquidator and their firm has in terms of expected billings during the period of cover (based on recent historical data, as in sub-clauses 3.6(b) & (c) and clause 3.1 of the ICAA (NSW) PSC scheme for PI insurance as amended in Proposal E1);
 - (iii) the number of claims that could arise from a single event (i.e. potential for multiple claims);

- (e) their exposure in each external administration ('loss scenarios' per insolvency appointment), e.g. by considering:
 - (i) the number and kind of creditors of the companies to which the registered liquidator is usually appointed as external administrator;
 - (ii) the nature and risk profile of the kinds of businesses to which the registered liquidator is usually appointed as external administrator;
 - (iii) the nature, geographical scope, and complexity of the insolvency services work performed by the registered liquidator and their firm's insolvency practice during the period of cover;
 - (iv) the amount of funds controlled by the registered liquidator or their staff; and

Note: In this regard, a good rule of thumb is to obtain fidelity insurance with a limit of indemnity of twice the amount of money to which the registered liquidator and their staff are likely to have access during the policy period (on the basis that many policies charge the cost of investigation and prosecution against the insured amount).

- (f) internal aspects of the registered liquidator's firm, e.g.:
 - (i) the number of employees and partners the registered liquidator or their firm has;
 - (ii) the quality of internal controls and compliance systems in place in the registered liquidator's firm; and
 - (iii) the assets of the registered liquidator and their firm.

Your feedback

F6Q1 Do you agree with our proposals on the relevant factors to consider when assessing the individual circumstances of the registered liquidator and their firm for the purposes of determining an adequate level of fraud and dishonesty cover or fidelity insurance? Please give reasons.

F6Q2 Does our approach provide registered liquidators with sufficient certainty when they seek to comply with the new insurance requirements? If not, what further guidance should we give?

Rationale

76 The *impact* of any fraud or dishonesty on an individual insolvency is potentially high, because of:

- (a) the level of control that external administrators and their staff exercise over the funds, other property, financial facilities and financial obligations of insolvent companies; and
- (b) the potentially large sums involved.

- 77 Despite the high potential impact, however, the *likelihood* of claims arising under fidelity insurance cover is low, i.e. registered liquidator fraud or dishonesty is rare. This, combined with a competitive market, means that the cost of fidelity insurance cover is currently low.
- 78 However, we recognise that the insurance market for PI and fidelity insurance is currently ‘soft’ and that, bearing in mind its cyclical nature, market conditions may well change. We are therefore reluctant to mandate a minimum amount of cover for fidelity insurance.
- 79 We recognise that imposing a minimum requirement and implementing a ‘one size fits all’ scheme for fidelity insurance would be potentially problematic, especially in light of:
- (a) the diverse size and type of potential fraud or dishonesty risks to which registered liquidators are exposed; and
 - (b) the difference in the size, revenue and activities of the firms in which registered liquidators work.
- 80 We therefore propose to adopt a principle-based approach focusing on prudence and reasonableness in determining an adequate level of fidelity insurance cover, combined with consideration of a series of suggested factors to consider in making this assessment: see Proposal F6.

G Key issues relating to both PI and fidelity insurance requirements

Key points

In achieving the policy objective of the PI and fidelity insurance requirements, it is important to consider:

- the scope of losses for which PI insurance is likely to provide indemnity (see paragraphs 81–83 and Proposal G1); and
- whether PI and fidelity insurance will be available to registered liquidators as a source of funds when it is needed to cover a loss by creditors or other claimants (see paragraphs 84–88 and Proposals G2–G6).

Partners' or principals' previous business

Proposal

- G1 We propose that PI and fidelity insurance cover should be provided in relation to civil liability claims made against:
- (a) partners, directors, officers, employees, agents, consultants and sub-contractors of a new firm, of which the registered liquidator is a partner or principal, formed by the merger or consolidation of two or more firms, or by one firm acquiring another (or more than one other), in relation to the work performed in the predecessor businesses, i.e. the previous firms;
 - (b) partners, directors and officers, in relation to work that they carried out at another firm before joining the registered liquidator's current firm, if such insurance is not maintained by that other firm; and
 - (c) former partners, directors, officers and employees who have left the insured registered liquidator's firm.

Your feedback

G1Q1 Do you agree with this proposal? If not, please give reasons.

Rationale

81 We understand most policies provide cover for the partners, directors, officers, employees and agents of firms that were predecessors in business of the insured registered liquidator's firm. This means that if the insured registered liquidator's firm is a new firm formed by:

- (a) the merger or consolidation of two or more firms; or

(b) one firm acquiring another (or more than one other),

then the insurance policy of the new firm should cover claims arising from work performed in the predecessor businesses, i.e. the previous firms.

82 However, even in the event of there having been no merger, consolidation or acquisition, the registered liquidator or their firm should ensure that cover is also provided for claims made against new partners or principals who join the registered liquidator's current firm, in relation to work that they carried out at their previous firm. If the registered liquidator has cause to believe that the previous firm from which the new partner or principal has moved is no longer maintaining its own PI and fidelity insurance, then this may be provided by means of:

- (a) endorsement; or
- (b) naming the new partner or principal in the policy schedule; or
- (c) obtaining a 'partner's previous business extension'.

83 Given the 'claims made' nature of PI policies, cover should be provided in relation to former partners, principals and employees who have left the insured registered liquidator's firm. We understand this is called 'former partners'/principals' cover.

Reinstatements

Proposal

G2 We propose that it would be good industry practice for a registered liquidator to negotiate an unlimited reinstatement of the limit of indemnity.

G3 We propose that, if it is not reasonably commercially feasible to obtain an unlimited reinstatement clause, a registered liquidator should in any event ensure that their insurance policy provides for at least one reinstatement.

Note: This is consistent with clause 9.2(c) of the PSC Policy Statement, which refers to at least one reinstatement being preferred: see http://www.lawlink.nsw.gov.au/lawlink/professional_standards_council/.

Your feedback

G3Q1 Do you agree with these proposals? If not, please give reasons.

Rationale

84 Under many policies there is a reinstatement clause. This allows the sum insured to be reinstated if the original amount should become exhausted by a claim, or a series of claims, with an amount that equals or exceeds the original limit of indemnity. Depending on the number of reinstatements

provided for in the insurance policy, the reinstatements can provide indemnity for multiple claims during the policy period where no one single payment by the insurer would exceed the original limit of indemnity but the total amount of those claims would exceed that limit.

Run-off cover

Stand-alone run-off cover

Proposal

G4 We propose that if the registered liquidator retires or ceases practice, or their firm is consolidated with, merged into or acquired by, another entity, and that registered liquidator will not be covered by future insurance policies of their firm or the future merged firm, then they should ensure that insurance is maintained to provide cover for a reasonable, commercially available period of time (i.e. run-off cover), e.g. a minimum of:

- (a) seven years for PI insurance; and
- (b) three years for fidelity insurance or fraud or dishonesty cover.

Note: This is consistent with clause 9.2(f) of the PSC Policy Statement, which refers to reasonable run-off cover for at least traditional statutory limitation periods: see http://www.lawlink.nsw.gov.au/lawlink/professional_standards_council/.

Your feedback

G4Q1 Do you agree that a typical reasonable period of time for run-off cover would be three years in the case of fidelity insurance (in contrast to the seven years for PI insurance)? If not, please give reasons.

G4Q2 Do you agree with our proposals regarding stand-alone run-off cover more generally? If not, what do you suggest as an alternative to ensure that appropriate cover is available for losses that are only identified some time after the original loss-causing incident (e.g. the fraudulent or dishonest act)?

Automatic run-off cover

Proposal

G5 We propose that, to deal with the possibility of the registered liquidator or their firm becoming insolvent, registered liquidators should use their best endeavours to obtain automatic run-off PI and fidelity cover for as long as reasonably practicable. In any event, their insurance policy should contain run-off cover for at least one year.

G6 We propose that registered liquidators should also ensure that an event of insolvency does not terminate the insurance policy.

Note: We understand that most policies will continue until the end of the policy period regardless of the insolvency of the registered liquidator or their firm. However, registered liquidators should check to ensure that no clause has been inserted terminating the policy in the event of the insolvency of the registered liquidator or firm, or their entering into any form of external administration.

Your feedback

- G6Q1 What is the market availability of automatic run-off insurance cover for registered liquidators?
- G6Q2 Would our proposal require substantial additional costs to be incurred by registered liquidators or their firms?
- G6Q3 Do you agree with these proposals more generally? If not, what do you suggest as an alternative to ensure appropriate cover is available for losses that are identified some time after the insolvency of the registered liquidator or their firm?
- G6Q4 Would insurance policies permitting creditors and other claimants to deal directly with the insurers be a viable alternative (e.g. permitting the creditors to notify claims directly to the insurer and pay any necessary excess where the registered liquidator is unwilling or unable to notify claims and pay excesses)?
- Note: For example, this could be achieved by defining creditors of the insolvent company to which the registered liquidator is appointed as a class of third party beneficiaries under the policy.
- G6Q5 Can you suggest any further options for improving the effectiveness of PI and fidelity insurance for protecting creditors and other claimants in the event of registered liquidators' insolvency?

Rationale

- 85 We are concerned about possible limitations in the ability of PI and fidelity insurance to provide a source of available funds to meet claims if a registered liquidator or their firm becomes insolvent. We understand that PI insurance generally operates on a 'claims made' rather than 'claims incurred' basis and only covers claims notified within the policy period. An insolvent firm is unlikely to:
- (a) notify claims promptly; or
 - (b) be in a position to continue to renew the policy for a further period.
- 86 Insurance policies have a limit of indemnity, which can be rapidly exhausted in the event of numerous claims resulting from the same incident that might have contributed to the firm's insolvency. In addition, most policies have an excess, which an insolvent firm may not be able to pay.
- 87 Because most negligence claims are 'long tail' (i.e. claims arise two to seven years after the negligent act), there is a risk that the registered liquidator

might have gone bankrupt or their firm been dissolved and the period for notifying claims to the insurer might have passed before the creditor or other claimant realises they have suffered a loss.

- 88 Ideally, insurance policies would continue to cover the registered liquidator or their firm after they have become insolvent, for as long a period as is reasonably practicable. We encourage the development of policies that provide some period of automatic run-off cover to, in effect, extend the policy period in the event of insolvency so that liabilities crystallised by claims made after this time will be covered. This would maximise the potential of the insurance requirements to meet the policy objective.

H No-action positions

Key points

There are certain registered liquidators for whom compliance with the new insurance requirements is unnecessary: see paragraphs 89–91 and Proposals H1–H2.

Registered liquidators who no longer perform external administration work in Australia or have immunity

Proposal

- H1** We propose to take a no-action position in relation to registered liquidators who do not hold any PI or fidelity insurance if:
- (a) they no longer take on any Ch 5 appointments or perform work in connection with the external administration of bodies corporate; or

Note: Those registered liquidators who no longer take on appointments as external administrator, but act as consultants for other insolvency practitioners in relation to their external administration appointments, will still be performing work *in connection with* the external administration of bodies corporate.
 - (b) they reside and work (even as insolvency practitioners) only overseas,
- on condition that either:
- (i) their previous firm (or any firm that their previous firm may have consolidated or merged with or acquired) continues to maintain adequate and appropriate PI and fidelity insurance in respect of the work in connection with the external administration of bodies corporate in Australia that they performed while at that firm; or
 - (ii) if they were a sole practitioner, they maintain run-off cover for a reasonable, commercially available period (e.g. a minimum of seven years for PI insurance and three years for fidelity insurance) after they ceased performing work in connection with the external administration of bodies corporate in Australia or moved overseas; or
 - (iii) their previous firm maintains such run-off cover for a reasonable, commercially available period (e.g. a minimum of seven years for PI insurance and three years for fidelity insurance) in the event that the firm ceases to operate.
- H2** We propose to take a no-action position in relation to registered liquidators who do not hold any PI or fidelity insurance if they are:
- (a) employees of state, territory or Commonwealth government departments or agencies where a statutory immunity applies or the employee is indemnified from liability by the government; or

- (b) retired registered liquidators who do not take on any external administration appointments but act as expert witnesses in court proceedings,

on condition that either:

- (i) their previous firm (or any firm that their previous firm may have consolidated or merged with or acquired) continues to maintain adequate and appropriate PI and fidelity insurance in respect of the work they performed while at that firm in connection with the external administration of bodies corporate in Australia for which they have no immunity from civil suit; or
- (ii) if they were a sole practitioner, they maintain run-off cover for a reasonable, commercially available period (e.g. a minimum of seven years for PI insurance and three years for fidelity insurance) after they ceased performing work in connection with the external administration of bodies corporate in Australia for which they have no immunity from civil suit; or
- (iii) their previous firm maintains such run-off cover for a reasonable, commercially available period (e.g. a minimum of seven years for PI insurance and three years for fidelity insurance) in the event that the firm ceases to operate.

Your feedback

H2Q1 Do you agree with these proposals? If not, please give reasons.

H2Q2 Are there any unidentified risks to third party claimants from ASIC taking a no-action position in relation to these registered liquidators not holding any PI or fidelity insurance?

Note: RG 186 contains guidance on circumstances in which ASIC will consider that a registered liquidator is no longer capable of performing adequately and properly the duties and functions of a registered liquidator, including if they no longer have sufficiently current Australian corporate insolvency knowledge, skills and experience: see RG 186.87–RG 186.90 and RG 186.112–RG 186.113. A registered liquidator seeking to rely on this no-action position should consider the guidance in RG 186. While these registered liquidators may not be required to maintain PI and fidelity insurance, they may still be referred to the CALDB for cancellation or suspension of their registration under s1292(2)(d). Similar considerations apply to registered liquidators who have moved overseas: see s1292(2)(a)(ii) and RG 186.91.

Rationale

- 89 Although s1284 applies even to registered liquidators who do not perform work in connection with the external administration of bodies corporate in Australia, there are no relevant potential claims that may be made against them in that connection. In accordance with the policy objective of s1284 and with principle 3 in Proposal C1 above, it is not necessary for such registered liquidators to maintain PI and fidelity insurance. We consider that

requiring compliance with the new insurance requirements would impose costs on these registered liquidators with no concomitant benefit to creditors or other claimants.

90 Similar considerations apply to:

- (a) employees of state, territory or Commonwealth government departments or agencies who choose to maintain their registration as a liquidator; and
- (b) retired registered liquidators who do not take on any external administration appointments but act as expert witnesses in court proceedings where expertise regarding insolvency practice is required.

91 Again, although s1284 applies to these registered liquidators, if any potential claims were made against them in connection with the external administration of bodies corporate in Australia, they would be entitled to indemnification or immunity from liability:

- (a) under state, territory or Commonwealth legislation creating a statutory immunity for public servants, e.g. the immunity afforded to ASIC staff in relation to acts done or omitted in good faith in the performance of their functions by s246 of the *Australian Securities and Investments Commission Act 2001*; or
- (b) because in instances where state, territory or Commonwealth legislation does not provide a specific statutory immunity, government policy or ministerial directions will generally provide for employees of government departments or agencies to be indemnified by the respective government against liability incurred when carrying out their statutory duties and official powers or functions in good faith; or
- (c) under the common law principles of witness immunity against civil suit.

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

I Regulatory and financial impact

- 92 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) substantially achieving the underlying policy objective of the legislation of reducing the risk that successful claims by creditors and other claimants cannot be met by the registered liquidator due to the lack of available financial resources; and
 - (b) facilitating business activity in the insolvency services industry, including not unreasonably burdening registered liquidators.
- 93 Before settling on final guidance, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:
- (a) considering all feasible options;
 - (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
 - (c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
 - (d) conducting the appropriate level of regulatory analysis, i.e. completing a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).
- 94 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC Report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 95 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits,
- of our proposals or any alternative approaches: see ‘The consultation process’ on p.4 of this paper.

Appendix 1: Background

Previous legislative and regulatory position

- 96 The new insurance requirements replace the previous s1284, which required registered liquidators to lodge and maintain with ASIC a security for the due performance of their duties as a liquidator.
- 97 However, in RG 33, we stated that we would not take enforcement action for a failure to lodge and maintain a security under the previous s1284 where:
- (a) a registered liquidator holds a public practice certificate from either the ICAA, CPAA or NIA; and
 - (b) the liquidator provides to ASIC, and complies with, an undertaking that the liquidator will maintain certain PI insurance and maintain a public practice certificate (see RG 33.9A).
- 98 Most registered liquidators have chosen to avail themselves of this conditional no-action position and obtain PI insurance with at least those minimum acceptable terms. There was no specific requirement regarding fidelity insurance under the previous regime.

The current market for PI and fidelity insurance

- 99 Our informal discussions with insurers, insurance brokers and the professional accounting bodies suggest that the ability of PI and fidelity insurance to put registered liquidators or their firms in funds to meet claims from creditors and other claimants may be limited by what the insurance market is prepared to provide, especially if market conditions worsen.
- 100 Our understanding is that:
- (a) current policies do not cover the full range of breaches of registered liquidator's obligations (e.g. there is generally no cover available for fraud by the registered liquidator themselves);
 - (b) the PI and fidelity insurance premium market is currently 'soft', i.e. highly competitive, but may not be so in the future;
 - (c) the level of fidelity insurance or fraud and dishonesty cover is not uniform because of differing excesses and sub-limit levels (insured amounts); and
 - (d) PI and fidelity insurance policies are generally 'claims made' policies, which means that, in order to be covered, the claim must:

- (i) be first made against the insured during the policy period;
- (ii) arise from acts that took place on or after the policy's retroactive date (if it has one);
- (iii) be in relation to acts that were unknown to the insured at the inception date of the policy; and
- (iv) be notified to the insurer within the policy period, regardless of the date of the negligent or dishonest act.

Each policy year stands alone, and when the period of insurance expires, no claims will be met under the policy unless they were notified during the currency of the policy.

Note: Creditors and other claimants might bring claims against registered liquidators years after the conduct on which the claim is based occurred, by which time the policy might have expired. In these circumstances, the claims will not be covered by the policy.

The Professional Standards Council scheme

- 101 The 2007 ICAA (NSW) PSC scheme (the Scheme) limits the maximum civil liability for damages arising out of a cause of action for occupational liability that may be awarded against accountant members of the ICAA who have the benefit of an insurance policy and/or business assets to meet claims made against them up to the level of the limitation of liability. Insurance policies must comply with the ICAA's standards of insurance.

Note: These standards of insurance are set out in Appendix R4. Clause 7PI.3.5(i) of Appendix R4 states that the sum insured for a practice must be not less than either the limitation amount or monetary ceiling set out in the ICAA PSC scheme current at the time of renewal of the PI policy.

- 102 The Scheme was approved under the *Professional Standards Act 1994* (NSW) on the basis of:

- (a) extensive research and investigation;
- (b) an independent actuarial assessment process; and
- (c) public consultation.

Note: Newly implemented multi-jurisdictional arrangements have created, through mutual recognition, a national framework for the development and improvement of professional standards and protection of consumers. Professional Standards Councils have now been fully constituted in all states and territories.

- 103 The PSC is responsible for determining the level of limitation of liability having regard to the need to adequately protect consumers: see s26(2)(b) of the *Professional Standards Act 1994* (NSW).

- 104 Before approving a scheme, a PSC considers, among other things:

- (a) the nature, number and level of claims relating to occupational liability made against members of the applicant association;
- (b) the association's standards of insurance; and
- (c) the cost and availability of insurance.

105 In assessing the Scheme, the claims history of accountants generally (including some registered liquidators) was considered. The Scheme therefore provides an appropriate basis for setting an insured amount that would represent adequate cover.

Professional accounting bodies' dishonesty cover requirements

106 The membership requirements of both the ICAA and the CPAA refer to insurance against dishonesty. Such insurance, like fidelity cover, is usually limited to indemnifying innocent insured parties: see paragraph 61 above.

ICAA requirement

107 All ICAA members in public practice are required by the ICAA to comply with the ICAA Regulations. These ICAA Regulations include maintaining PI insurance to specified standards.

108 A form of dishonesty cover is mandated as part of this PI insurance. Appendix R4 states in clause 7PI.3.6(iii), entitled 'Cover', that:

The insurance must cover the insured against claims arising out of a dishonest act or omission of an insured (notwithstanding any misrepresentation or non-disclosure of such acts or omissions when effecting the insurance) but the insurer need not promise to indemnify any person committing, making or condoning any such dishonest act or omission or misrepresentation or non-disclosure in relation to it.

CPAA requirement

109 All CPAA members providing public accounting services are required by the CPAA to comply with the CPAA By-Laws. These CPAA By-Laws include holding a current, enforceable PI insurance policy that satisfies at least certain specified minimum requirements.

Note: See CPAA by-law 9.5(a), 'Professional indemnity insurance'.

110 A form of dishonesty cover is one of these minimum requirements of the PI insurance. CPAA by-law 9.5(b)(iii)(C) states that one of the minimum requirements is: 'cover with respect to losses arising out of the dishonesty of the Member or any Affiliate'.

Key terms

Term	Meaning in this document
administrator	Has the same meaning as in s9 Note: It therefore includes both deed administrators and voluntary administrators.
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	The holder of an AFS licence
aggregate	The total amount of coverage that the insured has under the insurance policy, irrespective of the number of separate claims that may occur
Appendix R4	Appendix R4 to the ICAA Regulations
APRA	Australian Prudential Regulation Authority
APRA-regulated insurer	An entity permitted by the <i>Insurance Act 1973</i> to write insurance business in Australia
ASIC	Australian Securities and Investments Commission
CALDB	Companies Auditors and Liquidators Disciplinary Board
Ch 5 (for example)	A chapter of the Corporations Act (in this example, numbered 5)
'claims incurred' policy	A liability policy for claims arising out of incidents that occur during the policy period, regardless of whether the policy is still in effect at the time the claim is made. Also called a 'claims occurring' or 'occurrence based' policy, it continues to provide cover after expiry for incidents that occurred during the period of insurance.
'claims made' policy	A contract that provides cover for claims made against the insured and notified to the insurer during the period of cover, even though these may have arisen from acts or omissions that occurred before the acquisition of the policy, as long as they took place on or after the policy's retroactive date, if it has one (see 'retroactive cover' below)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of the Act
CPAA	CPA Australia Ltd

Term	Meaning in this document
deductible or excess	The first part of a loss, which is borne by the insured, so that the insured in essence self-insures this amount. The insured is responsible for payment of the loss out of their own financial resources up to the threshold amount of damages payable, i.e. the deductible, and the insurer pays the remainder of the loss, up to the policy limit.
deed administrator	An administrator of a DOCA
DOCA	A deed of company arrangement
employee	A past or present employee of the registered liquidator or their firm
exclusion	A provision of an insurance policy that precludes coverage in particular circumstances; it specifically sets out occurrences that are not covered by the policy
external administration	The corporate insolvency that the external administrator has been appointed to administer
external administrator	An insolvency practitioner appointed as a liquidator, a provisional liquidator, a voluntary administrator or a deed administrator under Ch 5 Note: Members' voluntary liquidators, receivers (including receivers and managers), and scheme administrators appointed to administer an arrangement under Pt 5.1 are excluded from this definition.
firm	The partnership or other business structure (whether incorporated or unincorporated) through or by means of which an insolvency practitioner conducts or intends to conduct their work as a registered liquidator
ICAA	Institute of Chartered Accountants in Australia
ICAA Regulations	ICAA <i>Regulations Relating to Certificate of Public Practice</i>
insolvency practitioner	A generic term to describe registered liquidators generally, regardless of whether they have been appointed to one or more specific external administrations
insured amount	The maximum liability for damages arising out of a cause of action for occupational liability that may be awarded against a person. Also called the 'limitation amount', 'limit of indemnity' and 'sum insured'.
insuring clause or policy wording	The core clause or essential part of an insurance policy that states the extent of the cover that the insurer provides to the insured and sets out the specific agreement for the insurer to protect the policyholder against the particular risk for which the insurance is purchased

Term	Meaning in this document
liquidator	An insolvency practitioner appointed under Ch 5 to wind up the affairs and distribute the property of a body corporate
NIA	National Institute of Accountants
policy objective	Is explained in paragraphs 3 and 4 of this paper
professional accounting bodies	The CPA, the ICAA and the NIA
provisional liquidator	An insolvency practitioner appointed by the court under s472(2)
PSC	Professional Standards Council
PSC Policy Statement	The PSC's <i>Policy Statement on PI Insurance</i> issued on 14 September 2007
Pt 5.1 (for example)	A part of the Corporations Act (in this example, numbered 5.1)
quantum requirement	the requirement in clause 3.5(a) of the Scheme regarding the amount payable under the insurance policy in respect of occupational liability.
receiver	An insolvency practitioner appointed under an instrument or by the court to receive property of a body corporate
receiver and manager	Has the same meaning as in s9
reg 9.2.05 (for example)	A regulation in the Regulations (in this example, numbered 9.2.05).
registered liquidator	A person registered by ASIC under s1282(2)
Regulations	Corporations Regulations 2001
reinstatement	If the limit of indemnity in the policy is exhausted before the end of the policy period, the policy is 'refreshed' and the limit of indemnity is reinstated for the balance of the period to cover any new claims that may arise. The number of reinstatements refers to the number of times the limit of indemnity may be reinstated
RG 33 (for example)	An ASIC regulatory guide (in this example numbered 33)
RG 33.9A (for example)	A paragraph of an ASIC regulatory guide (in this example numbered 33.9A)
retroactive cover	Where a 'claims made' policy extends cover into the past to cover acts, errors or omissions that occurred or were committed during a period of time before the policy was obtained (but after the retroactive date)

Term	Meaning in this document
retroactive date	<p>A date on a 'claims made' policy that triggers the beginning of the period of insurance coverage, i.e. on or after which acts or omissions are covered. If the policy has a retroactive date, any claim made during the policy period will not be covered if the circumstances from which it arises occurred before the retroactive date.</p> <p>The date may be a specified date, or be 'unlimited' or 'inception'. If the policy is 'unlimited', this means there is no retroactive date in the policy, so the policy covers claims arising from acts or omissions that occurred at any time before the start of the period of insurance. If the retroactive date is 'inception', this means there is no retroactive cover, i.e. the policy only covers claims for acts or omissions that occurred after the inception of the policy</p>
run-off cover	<p>Insurance cover in respect of claims made after the insurance policy has ended that have arisen from the acts or omissions of the insured during the period of insurance cover. In a 'claims made' policy, run-off cover extends the period for reporting covered claims beyond the normal policy period. Run-off cover can be provided as a standard term of a PI policy, but is more commonly a stand-alone policy that a policyholder can buy when they cease to operate their business.</p>
s1284 (for example)	<p>A section of the Corporations Act (in this example, numbered 1284)</p>
Scheme	<p>The 2007 ICAA (NSW) PSC scheme</p>
voluntary administrator	<p>An administrator of a company but not of a DOCA</p>