

# ASIC'S DEREGULATORY INITIATIVES: REPORT 391 OF MAY 2014

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## ATTENTION:

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## 1. INTRODUCTION

Thank you for the opportunity to respond to Report 391, 'ASIC's Deregulatory Initiatives'.

My main interest in ASIC's initiative to cut "red tape" concerns the impact it could or should have upon the liquidation and external administrations of insolvent companies.

I am a Chartered Accountant and a Fellow of CPA of Australia. I entered the insolvency profession in 1979, obtained registration as a liquidator in 1995 and remained as such until 2013. I continue to take a close and active interest in insolvency practice and insolvency law.

## 2. ASIC RED TAPE SENTIMENTS

I agree with many of the sentiments expressed in Report 391, particularly statements like *"increasing the clarity of regulatory requirements to ensure regulation is more effective by being easier and less costly to comply with"* [Report 391, paragraph 5]; *"our regulatory guidance helps businesses comply with their obligations"* [paragraph 8]; *"engaging with the regulated population to improve our guidance and communication"* [paragraph 10]; *"streamlining ASIC forms"* [paragraph 11]; and *"through our regulatory guidance we try to provide clear and consistent messages to the people we regulate about how we will apply the law and how businesses can ensure they are meeting their compliance obligations. We will update and produce guidance in consultation with stakeholders as needed"* [paragraph 39].

## 3. RESEARCH INTO REPORT AS TO AFFAIRS (ASIC FORM 507)

In March 2012 I published a detailed research report entitled "An Appraisal of the Report as to Affairs". The paper reported on my written survey of official liquidators about their experiences and attitudes in relation to the Report as to Affairs form ("RATA") and to associated compliance issues. The research was aided by a scholarship received from the Insolvency Practitioners Association of Australia.

Over 300 official liquidators were selected at random and sent a survey form. All told 105 official liquidators returned completed survey forms, which were subjected to analysis. My full report was sent to ASIC and published on the University of Melbourne Law Department website in about April 2012. Extracts from my report were published in the IPAA's Australian Insolvency Journal of April-June 2012, and I made a presentation on the subject at the IPAA's 2012 Conference.

## **Is ASIC planning changes to the RATA and a Regulatory Guide?**

The main recommendation in my report was the following:

*"The ASIC should make the RATA the subject of an inquiry through a Consultative Paper, in the way it did in 2009/2010 in relation to insolvent trading. The ultimate aims of the consultation would be to produce a new or redesigned form, a Regulatory Guide to the form, and an information sheet for directors. The inquiry should consider, for example, what constitutes an acceptable standard for a RATA – i.e., when does a professed RATA qualify as a valid RATA – and how the receipt of a RATA that fails to meet that standard should be handled." [PAGE 15]*

After publication of my research report I received verbal feedback from ASIC to the effect that it was going to conduct a comprehensive review of the RATA's design.

So, I was surprised on reading ASIC's Report 391 that the RATA Form 507 has not been identified as a form to be considered for "simplification". (I take this phrase to include the processes of streamlining and modifying.)

No doubt the many liquidators who responded to my survey with criticism of the RATA's design, the official neglect of it and the absence of any guide to its terms and usage would also be surprised - especially the many who took the extra step of suggesting changes.

Hopefully what has occurred is simple oversight by ASIC in preparing Report 391, rather than a change of mind and relegation of the RATA to low priority.

I note also that of the forms already identified by ASIC as targets for removal, three concern extensions of time for preparation of RATAs (Forms 555, 558 and 562). Again, I hope that this is not a sign that ASIC considers the RATA unimportant.

### **To reiterate some research findings and comments**

Looking back over my research report I thought the following statements were worth repeating in the context of reducing external red tape to improve efficiency:

- *"Of the many findings coming out of the survey there are two that stand out because they highlight a considerable disparity between what liquidators need and what they receive. The survey shows that liquidators rate receiving a properly prepared RATA – one with full particulars of the company's assets, liabilities and securities – as an important requirement for the efficient performance of their role in a court-ordered winding up. But they also rate the typical RATA that they receive as incomplete, inaccurate and unreliable."*
- *"Since late 2004 sole responsibility for design and content of the (RATA) form has resided with ASIC"*
- *"There is no official guide to what the terms used in the RATA mean or how it should be completed. The onus of providing instructions to directors is placed by the Court on the liquidator. There are no official directions or principles as to what constitutes adequate instructions."*

- *81.9% of official liquidators surveyed agree with the statement that "Failure to submit a RATA results in a liquidator expending additional time and expense in identifying the company's assets and liabilities." [page 5, figure 2] 39% "strongly agreed" and 42.9% "agreed". Only 3.8% disagreed. [Annexure 1, Table 3]*
- *"This survey of liquidators has brought to light substantial criticisms and concerns about the RATA and a desire for change. It coincides with moves towards harmonisation of personal and corporate insolvency regulation, and with the start of the Personal Property Securities Act, which makes significant changes to priority rules for secured parties as well as introducing a new vocabulary. All this suggests that it's time the RATA form was revisited and overhauled."*
- *"The ASIC ought to issue a detailed guide or information sheet about the RATA. This guide should be available free online from the ASIC website, and a copy should be sent to directors whenever a RATA is required. A telephone help service, provided by the ASIC, should also be available. Such services are provided by other government regulatory agencies, the model probably being the Australian Taxation Office."*
- *"On its website at present the ASIC has approximately 220 Regulatory Guides (RG) and 150 Information Sheets (INFO), for the purpose, inter alia, of "explaining how ASIC interprets the law", "giving practical guidance" and "provid(ing) concise guidance on a specific process or compliance issue". Yet none of these guides or information sheets provides information about how to prepare a RATA. It is surprising, to put it mildly, that a form like the present RATA – one which is unusual, complex and important – does not at least have an official guide to what its terms mean and how it should be completed."*

### **Copy of research paper**

For the sake of completeness a pdf copy of the full report is attached to this paper. It comprised 21 pages, plus an annexure of 7 pages of expanded statistical analysis and verbatim comments, criticisms and suggestions by official liquidators, plus about 30 pages in other annexures.

### **4. RED TAPE AND THE REPORT AS TO AFFAIRS**

It's been said that one of the most serious problems of red tape is that it wastes organizational resources and detracts from the accomplishment of legitimate organizational objectives and that it imposes significant costs on managers, workers, customers, clients, and other stakeholders (Bozeman 2000).

The existence of complicated and confusing and badly drafted forms, and the lack of clear guidance as to how to complete them, wastes resources and detracts from legitimate objectives, just like "red tape" does. If a RATA is sub-standard, liquidators are distracted from their main objective, which is to realise assets and distribute the proceeds. They have extra costs imposed on them by the need to provide information, give instructions and or perform investigations which would not otherwise be required. They, or creditors, must bear such costs. ASIC incurs costs by the need to chase directors and bring prosecutions.

Time spent now simplifying forms and producing clear instructions is likely to reduce costs in the medium to long term through improved efficiency.

#### **5. FORM 313**

Form 313 is listed in Appendix 1 of Report 391 to be removed because the "information (is) available from the company". At present the form is required for notification of address in Australia of information relating to financial records kept outside Australia. It is linked to section 289 of the Corporations Act 2001, which states "if financial records about particular matters are kept outside the (Australian) jurisdiction, sufficient written information about those matters must be kept in this jurisdiction to enable true and fair financial statements to be prepared (and) the company must give ASIC written notice in the prescribed form of the place where the information is kept".

In my view form 313 and section 289 should be retained. In recent years the uptake of cloud computing services by Australian businesses has increased dramatically, and one common characteristic of cloud computing is that business books and records are held outside the Australian jurisdiction. Surely the statement that the information may be obtained from the company is true only for officers of ASIC. As liquidators frequently have difficulty locating and accessing financial records, particularly where they are located outside Australia, the requirement to give ASIC written notice of the place within Australia where financial information is kept is likely to assist efficiency in the liquidation process.

#### **6. FORMS 201 AND EX01**

I note that in response to Report 391 a submission has been to ASIC by Associate Professor Helen Anderson, Professors Ian Ramsay and Ann O'Connell, Melbourne Law School, and Associate Professor Michelle Welsh, Department of Business Law and Taxation, Monash University.

I'd like to add my support to their suggestions on changes to Form 201 to help combat fraudulent phoenix company activity. I also support a change to paragraph 4.4 of Form EX01 Schedule B of Regulatory Guide 16 to improve reporting of suspicions regarding fraudulent phoenix activity.

Should you wish to discuss these comments, please feel free to contact me.



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