



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 276

Registered liquidators: Registration, disciplinary actions and insurance requirements

January 2017

About this paper

This consultation paper seeks feedback from registered liquidators, professional advisers, insurance brokers and other interested parties on our proposed guidance on the registration of, disciplinary actions applicable to and insurance requirements for registered liquidators.

This paper attaches a draft of the proposed Regulatory Guide 000 *Registered liquidators: Registration, disciplinary actions and insurance requirements*.

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 19 January 2017 and is based on the Corporations Act as at 1 March 2017.

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.

Contents

The consultation process	4
A Guidance for registered liquidators	6
Introduction	6
B Registration as a liquidator	8
Registration process	8
Applying to be registered as a liquidator	8
C Renewal, annual liquidator returns and notification to ASIC	10
The requirements.....	10
Our approach to renewal, annual liquidator returns and notification guidance	10
D Disciplinary actions	12
Disciplinary framework.....	12
Our approach	12
E Insurance requirements	13
Introduction	13
A single regulatory guide	14
Level of professional indemnity insurance cover.....	14
‘Job-by-job’ fidelity insurance.....	15
When meeting the insurance requirements may be unnecessary	16
F Regulatory and financial impact	17
Key terms	18
List of proposals and questions	19

The consultation process

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 policy.

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.

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.

Your comments will help us develop our policy on the registration of, disciplinary actions applicable to and insurance requirements for registered liquidators. In particular, we would take account of any information about compliance costs, impacts on competition and other impacts, costs and benefits if we prepare a Regulation Impact Statement: see Section F, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous, we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 9 February 2017 to:

Mr Alan Ashford
Senior Accountant
Insolvency Practitioners
Australian Securities and Investments Commission
GPO Box 9827
Perth WA 6001
facsimile: (08) 9261 4227
email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	19 January 2017	ASIC consultation paper released
Stage 2	9 February 2017	Comments due on the consultation paper
Stage 3	1 March 2017	Regulatory guide released

A Guidance for registered liquidators

Key points

This consultation paper seeks your feedback on our proposals to issue guidance on changes enacted by the *Insolvency Law Reform Act 2016* (Insolvency Law Reform Act), elements of which take effect from 1 March 2017.

We propose to issue a new regulatory guide to:

- update our current guidance in [Regulatory Guide 186](#) *External administration: Liquidator registration* (RG 186) on the registration process;
- provide guidance to registered liquidators on renewing their registration and their obligations to lodge an annual liquidator return and notify ASIC of significant and other events;
- include an overview of the new disciplinary regime for registered liquidators under the amendments made by the Insolvency Law Reform Act; and
- update our guidance on insurance requirements, which is currently set out in [Regulatory Guide 194](#) *Insurance requirements for registered liquidators* (RG 194).

The new regulatory guide would then supersede RG 186 and RG 194.

Introduction

- 1 The *Insolvency Law Reform Act 2016* (Insolvency Law Reform Act) passed Parliament on 22 February 2016 and received Royal Assent on 29 February 2016. The related Insolvency Practice Rules (Corporations) 2016 and associated legislative instruments were registered in December 2016.
- 2 These reforms introduce a new registration and disciplinary regime for registered liquidators. Aspects of these reforms commence on 1 March 2017.
- 3 Key reforms commencing on 1 March 2017 include:
 - (a) the introduction of a three-person committee to consider and decide an individual's application to become registered as a liquidator;
 - (b) the introduction of a three-person committee to decide some disciplinary matters involving registered liquidators;
 - (c) amendments to remove the disciplinary role of the Companies Auditors and Liquidators Disciplinary Board (CALDB) for registered liquidators; and

- (d) increasing the maximum penalty where a registered liquidator fails to maintain adequate and appropriate insurance against the liabilities they may incur working as a registered liquidator.

4 We propose issuing revised regulatory guidance to reflect the new law that commences on 1 March 2017. We propose to do this by issuing a new regulatory guide that supersedes RG 186 and RG 194: see Attachment 1.

B Registration as a liquidator

Key points

We propose to update our guidance for individuals who wish to apply to be registered as a liquidator: see Section B of the draft regulatory guide at Attachment 1.

Registration process

- 5 The Insolvency Law Reform Act introduces a new process for individuals who wish to apply to be registered as a liquidator.
- 6 Key aspects of the new application process include the following:
 - (a) an individual may apply to ASIC to be registered as a liquidator in the form approved by ASIC;
 - (b) ASIC will no longer decide whether the applicant should be registered. ASIC must refer a properly made application to a three-person committee (comprised of ASIC, a registered liquidator chosen by a prescribed body and a person appointed by the Minister) for consideration. The committee will interview the applicant and may require that the applicant sit an exam;
 - (c) the committee will decide whether the applicant should be registered as a liquidator (and whether their registration should be subject to any conditions); and
 - (d) if the committee decides the applicant should be registered, ASIC must register the individual by entering their details on the register of liquidators if the applicant produces evidence in writing that they have taken out adequate and appropriate professional indemnity and fidelity insurance.

Applying to be registered as a liquidator

Proposal

- B1** We propose to update our guidance on how an individual may apply to be registered as a liquidator.

Your feedback

- B1Q1** Is the information we propose to require of an applicant relevant and appropriate to assist a committee to decide whether an applicant should be registered as a liquidator? Please provide reasons for your view.

B1Q2 Is guidance needed on any other topic regarding liquidator registration? If so, why?

Rationale

- 7 ASIC will not assess an applicant's suitability to be registered as a liquidator. Rather, ASIC will refer an application to the committee when the application is complete and includes all of the information and documents required by the approved form.
- 8 The committee will decide whether the individual should be registered as a liquidator.
- 9 To ensure the committee decision-making process operates as well as possible, applications should provide the committee with relevant information sufficient to allow the committee to efficiently and effectively consider the applicant's suitability to be registered as a liquidator.

C Renewal, annual liquidator returns and notification to ASIC

Key points

We propose to include guidance dealing with the renewal of registration process, the obligation to lodge an annual liquidator return, and the obligation to notify ASIC of significant and other events: see Section C of the draft regulatory guide at Attachment 1.

The requirements

- 10 A registered liquidator's registration lasts for three years, and may be renewed. For liquidators who are registered immediately before 1 March 2017, transitional arrangements specify that registration lasts until the first anniversary of registration occurring on or after 1 March 2017.
- 11 ASIC must renew your registration as a liquidator if certain requirements are met.
- 12 If you are a registered liquidator during all or part of a liquidator return year, you must lodge an annual liquidator return within one month after the end of that return year: s30-1(1).
- 13 A registered liquidator must notify ASIC if any of the prescribed 'significant' or 'other' events occur.

Our approach to renewal, annual liquidator returns and notification guidance

Proposal

- c1 We propose to provide guidance on the renewal process for registered liquidators and the obligation to lodge an annual liquidator return and to notify ASIC of certain events: see Section C of the attached draft regulatory guide.

Your feedback

- C1Q1 Is there any additional guidance that would be useful to include in Section C of the draft regulatory guide? If so, please give details.

Rationale

- 14 The Insolvency Law Reform Act introduced requirements for registered liquidators to renew their registration, lodge an annual liquidator return that include evidence of adequate and appropriate insurance, and notify ASIC of certain events. These are new obligations.
- 15 We consider the guidance will assist registered liquidators to comply with these new obligations.

D Disciplinary actions

Key points

We propose including in our guidance an overview of the disciplinary and other actions that may affect a registered liquidator on or after 1 March 2017: see Section D of the draft regulatory guide at Attachment 1.

Disciplinary framework

- 16 If a registered liquidator does not meet their ongoing obligations, they may be subject to disciplinary or other action.
- 17 The Insolvency Law Reform Act introduces a new disciplinary framework for registered liquidators; including:
- (a) replacing the CALDB with a three-person committee (comprised of ASIC, a registered liquidator chosen by a prescribed body and a person appointed by the Minister) to consider whether an individual should remain registered as a liquidator;
 - (b) enhancing ASIC's powers to supervise the conduct of registered liquidators; and
 - (c) enhancing ASIC's powers to cancel or suspend the registration of an individual as a registered liquidator.

Our approach

Proposal

- D1 We propose that the guidance in Section D of the attached draft regulatory guide provide an overview of the new disciplinary framework for registered liquidators. We propose reviewing the guidance on our approach to the new disciplinary framework after its first 12–18 months of operation.

Your feedback

- D1Q1 Is there any other guidance on the disciplinary framework for registered liquidators that would be useful to include in the updated guide? If so, please give details.

E Insurance requirements

Key points

We propose updating the guidance currently set out in Regulatory Guide 194 *Insurance requirements for registered liquidators* (RG 194) and incorporating this into our new regulatory guide: see the draft regulatory guide at Attachment 1. The new regulatory guide would then replace RG 194 (and RG 186).

Introduction

- 18 A registered liquidator must maintain adequate and appropriate professional indemnity and fidelity insurance against the liabilities they may incur working as a registered liquidator.
- 19 A registered liquidator who fails to comply with this obligation commits an offence.
- 20 The Insolvency Law Reform Act provides that ASIC may, by legislative instrument, determine what constitutes adequate and appropriate professional indemnity and fidelity insurance. ASIC does not propose making such a legislative instrument at this time but it does intend to provide guidance about what is adequate and appropriate insurance.
- 21 We will consider making a legislative instrument determining adequate and appropriate insurance in the future, and will undertake separate consultation before doing so.
- 22 We do not propose significant changes to our existing guidance. However, we do propose changes to:
- (a) incorporate our guidance on the insurance requirements with our guidance on the registration and discipline of registered liquidators;
 - (b) how we assess the adequacy of the level of professional indemnity insurance;
 - (c) remove existing guidance about fidelity insurance under a fidelity bond arrangement; and
 - (d) repeal existing guidance on situations where maintaining insurance may not be necessary.

A single regulatory guide

Proposal

- E1 We propose incorporating our guidance on the insurance requirements for registered liquidators with our guidance on the registration and disciplinary framework for registered liquidators.

Your feedback

- E1Q1 Do you agree with this proposal? If not, please explain why not.
- E1Q2 Is there any reason why ASIC should not make a legislative instrument setting out the insurance requirements? Please provide reasons for your view.

Rationale

- 23 ASIC considers that a single regulatory guide covering the registration, discipline and insurance requirements of registered liquidators is preferable to multiple regulatory guides on the requirements to become, and remain, registered as a liquidator.

Level of professional indemnity insurance cover

- 24 ASIC's guidance in RG 194 on the adequacy of cover required for professional indemnity insurance refers to the requirement of the Institute of Chartered Accountants in Australia (New South Wales) (ICAA—now Chartered Accountants Australia and New Zealand (CA ANZ)) Professional Standards Council (PSC) scheme which started on 8 October 2007. At the time, the schemes for ICAA and CPA Australia Ltd (CPAA) were substantially identical. Both the ICAA and CPAA schemes have since been superseded by new schemes and the methods for calculating the quantum of the minimum professional indemnity insurance requirements under the replacement schemes of ICAA and CPAA are different.

Proposal

- E2 We propose that the minimum limit of indemnity for professional indemnity insurance will generally be adequate if registered liquidators use either of the methods set out in the limitation of liability schemes approved by the PSC for the members of CA ANZ or CPAA. Where a registered liquidator is not eligible for cover under one of these approved schemes, they must review their insurance requirements and ensure that their cover is adequate.

Your feedback

- E2Q1 Do you agree with this proposal? If not, please explain why not.

Rationale

- 25 We propose this approach because:
- (a) it is consistent with the approach taken for calculating the adequacy of cover under the PSC-approved limitation of liability schemes for both CA ANZ and CPAA;
 - (b) the majority of registered liquidators are members of either CA ANZ or CPAA and would be eligible for, and be covered by, an approved limitation of liability scheme that adopts these methods to determine the minimum amount of required cover; and
 - (c) for registered liquidators who are not members of either CA ANZ or CPAA, it guides and assists them to assess their professional indemnity insurance requirements.

'Job-by-job' fidelity insurance

- 26 RG 194 refers to 'job-by-job' basis under a fidelity bond arrangement as a means to fulfil the policy objective relating to fidelity insurance. However, ASIC understands that no current market for this insurance exists in Australia for registered liquidators.
- 27 A fidelity bond makes the surety (the insurer who issued the bond) jointly liable with the insolvency practitioner for losses in relation to the insolvent estate caused by the fraud or dishonesty of the insolvency practitioner or the fraud or dishonesty of any person committed with the connivance of the insolvency practitioner. The bond is not a form of professional indemnity insurance and does not provide cover against professional negligence. A suitable fidelity bond arrangement could overcome the limitations of professional indemnity and fidelity insurance and provide cover in circumstances where loss is caused by the dishonest conduct or fraud of a sole practitioner.

Proposal

- E3 We propose removing existing guidance about fidelity insurance under a fidelity bond arrangement.

Your feedback

- E3Q1 Do you agree with this proposal? If not, please explain why not.
- E3Q2 Alternatively, do you consider ASIC should require registered liquidators to hold fidelity insurance under a fidelity bond arrangement for registered liquidators who operate as sole practitioners (or all registered liquidators) if such arrangements were available in the market? If so, please explain why.

Rationale

- 28 Although a fidelity bond arrangement would fulfil the policy objective relating to fidelity insurance, ASIC understands that no current market for this insurance exists in Australia for registered liquidators.

When meeting the insurance requirements may be unnecessary

- 29 RG 194 currently identifies the following circumstances when we may take a 'no-action' position if a registered liquidator does not hold any professional indemnity or fidelity insurance provided they have the benefit of adequate and appropriate run-off cover:

- (a) the registered liquidator no longer accepts appointments, and no longer performs work, as an external administrator, receiver or receiver and manager (even as a consultant for other insolvency practitioners); or
- (b) the registered liquidator resides and works only overseas.

Proposal

- E4 We propose repealing existing guidance that sets out when maintaining adequate and appropriate professional indemnity and fidelity insurance may not be necessary.

Your feedback

- E4Q1 Do you agree with this proposal? If not, please explain why not.
- E4Q2 If you consider there may be other instances where it may be unnecessary to maintain adequate and appropriate professional indemnity and fidelity insurance, please provide details.

Rationale

- 30 The Insolvency Law Reform Act requires that a person applying to be a registered liquidator be resident in Australia and that registered liquidators periodically renew their registration if they wish to continue to accept appointments as an external administrator, receiver or receiver and manager.
- 31 Further, the Insolvency Law Reform Act requires a registered liquidator to provide evidence of their insurance when they lodge their annual liquidator return and when they lodge an application to renew their registration as a liquidator.
- 32 ASIC will consider a request from a registered liquidator setting out why they think they should not be required to maintain adequate and appropriate professional indemnity and fidelity insurance on a case-by-case basis, rather than take a general 'no-action' position.

F Regulatory and financial impact

- 33 In developing the proposals in this paper, we carefully considered their regulatory and financial impact. On the information currently available to us, we think they strike an appropriate balance between:
- (a) ensuring that a person registered as a liquidator:
 - (i) has an appropriate level of qualifications, experience and skill;
 - (ii) performs their duties and functions adequately and properly;
 - (iii) maintains adequate and appropriate insurance against the liabilities they may incur working as a registered liquidator; and
 - (b) not imposing unreasonable compliance costs on registered liquidators.
- 34 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:
- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
 - (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
 - (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).
- 35 ASIC submits all RISs to the OBPR for approval before making any final decision. Without an approved RIS, ASIC will not give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 36 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
CA ANZ	Chartered Accountants Australia and New Zealand
CALDB	Companies Auditors and Liquidators Disciplinary Board
Corporations Act	<i>Corporations Act 2001</i>
CPAA	CPA Australia Ltd
Insolvency Law Reform Act	<i>Insolvency Law Reform Act 2016</i>
PSC	Professional Standards Council
registered liquidator	A person registered by ASIC under s20-30
RG 186	An ASIC regulatory guide (in this example numbered 186)
s20-30 (for example)	A section of Sch 2 to the Corporations Act (in this example numbered 20-30)

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to update our guidance on how an individual may apply to be registered as a liquidator.</p>	<p>B1Q1 Is the information we propose to require of an applicant relevant and appropriate to assist a committee to decide whether an applicant should be registered as a liquidator? Please provide reasons for your view.</p> <p>B1Q2 Is guidance needed on any other topic regarding liquidator registration? If so, why?</p>
<p>C1 We propose to provide guidance on the renewal process for registered liquidators and the obligation to lodge an annual liquidator return and to notify ASIC of certain events: see Section C of the attached draft regulatory guide.</p>	<p>C1Q1 Is there any additional guidance that would be useful to include in Section C of the draft regulatory guide? If so, please give details.</p>
<p>D1 We propose that the guidance in Section D of the attached draft regulatory guide provide an overview of the new disciplinary framework for registered liquidators. We propose reviewing the guidance on our approach to the new disciplinary framework after its first 12–18 months of operation.</p>	<p>D1Q1 Is there any other guidance on the disciplinary framework for registered liquidators that would be useful to include in the updated guide? If so, please give details.</p>
<p>E1 We propose incorporating our guidance on the insurance requirements for registered liquidators with our guidance on the registration and disciplinary framework for registered liquidators.</p>	<p>E1Q1 Do you agree with this proposal? If not, please explain why not.</p> <p>E1Q2 Is there any reason why ASIC should not make a legislative instrument setting out the insurance requirements? Please provide reasons for your view.</p>
<p>E2 We propose that the minimum limit of indemnity for professional indemnity insurance will generally be adequate if registered liquidators use either of the methods set out in the limitation of liability schemes approved by the PSC for the members of CA ANZ or CPAA. Where a registered liquidator is not eligible for cover under one of these approved schemes, they must review their insurance requirements and ensure that their cover is adequate.</p>	<p>E2Q1 Do you agree with this proposal? If not, please explain why not.</p>
<p>E3 We propose removing existing guidance about fidelity insurance under a fidelity bond arrangement.</p>	<p>E3Q1 Do you agree with this proposal? If not, please explain why not.</p> <p>E3Q2 Alternatively, do you consider ASIC should require registered liquidators to hold fidelity insurance under a fidelity bond arrangement for registered liquidators who operate as sole practitioners (or all registered liquidators) if such arrangements were available in the market? If so, please explain why.</p>

Proposal	Your feedback
E4 We propose repealing existing guidance that sets out when maintaining adequate and appropriate professional indemnity and fidelity insurance may not be necessary.	E4Q1 Do you agree with this proposal? If not, please explain why not. E4Q2 If you consider there may be other instances where it may be unnecessary to maintain adequate and appropriate professional indemnity and fidelity insurance, please provide details.
