

Our Ref: DS/NL

9 February 2017

Australian Securities and Investments Commission  
Attention: Mr Alan Ashford  
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insolvency  
turnaround  
forensics  
advisory

Dear Sir

## COMMENTS ON CONSULTATION PAPER 276: REGISTERED LIQUIDATORS [CP276]

CP276 was issued to the public on 19 January 2017 seeking industry comment on proposed ASIC regulatory guide on the new regime for External Administrators' [EAs] registration, disciplinary action and insurance requirements; enacted by *Insolvency Law Reform Act 2016* [ILRA] and *Insolvency Practice Rules (Corporations) 2016* [IPRs] [collectively known as the Law Reform].

The Law Reform relating to the registration and discipline of EAs on corporate appointments commences 1 March 2017 and as our regulator we welcome a regulatory guide that steps out the new regime [the draft RG].

### 1. Becoming a registered liquidator

Section 20-1(e) of the IPRs specifies how the applicant must demonstrate their ability to perform the duties of a registered liquidator. Section 20-20(4)(h) of the ILRA states what the committee must consider when referred an application, and amongst many defined criteria, if the applicant is a 'fit and proper' person.

What a fit and proper person is, varies across professions<sup>1</sup>. When this term is used in reference to fiduciaries, it is applied to provide the widest scope for judgment<sup>2</sup>. Common key criteria relate to the persons character (i.e. honesty, integrity), competency (which is held to the standard of that profession) and role that's being performed.

Matters heard by the Administrative Appeals Tribunals (AAT)<sup>3</sup> and Companies Auditors and Liquidators Discretionary board (CALBD)<sup>4</sup> (dissolved by ILRA) have held the suitability of the person to perform this fiduciary role (in addition to meeting professional standards) as the test for fit and proper.

As liquidators hold a unique position, entrusted with significant financial responsibilities and discretionary power, defining what a fit and proper person is when acting as a *registered liquidator* would increase public confidence. The draft RG refers to the Australian Prudential Authority Standard (APS) as the test for a fit and proper person (APS520)<sup>5</sup>.

The Accounting Professional and Ethical Standards Board professional code of conduct (APES 110) and the Australian Restructuring, Insolvency and Turnaround Association's (ARITA) code of professional practice both effectively state the objectives of integrity, professional standards and suitability for accountants and liquidators respectively.

<sup>1</sup> Auditors and Liquidators are currently held to this standard at ss.1282 and 1292 of Part 9.2 of the Corporations Act (Cth). The ILRA repeals these sections and many others in Part 9.2.

<sup>2</sup> *Hughes and Vale Pty Ltd v The State of New South Wales* [No 2][17], Dixon CJ, McTiernan and Webb JJ

<sup>3</sup> at 78 *Growden* [2008] AATA 604

<sup>4</sup> At 14,15,18 of *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23

<sup>5</sup> As recommended in the draft RG at RG 000.42 (note)

Additionally, the Tax Practitioners Board has a detailed explanatory Paper on what constitutes a fit and proper person<sup>6</sup>. Any of these examples are more closely aligned with EAs than APS 520.

B1 Q1.	Is the information ASIC proposes to require of an application relevant and appropriate to assist a committee to decide whether an applicant should be registered as a liquidator?	Yes.  Although the following forms referred to throughout have not been provided for review, therefore we cannot provide our comments. <ul style="list-style-type: none"> <li>• Form 903B <i>Application for registration as a liquidator</i><sup>7</sup></li> <li>• RG 000.22 <i>Liquidator registration: Senior level employment history</i></li> <li>• RG 000.26 <i>Liquidator registration: Practice capabilities</i></li> <li>• RG 000.48 <i>Liquidator registration: Pro forma referee report</i></li> </ul>
B1 Q2.	Is guidance needed on any other topic regarding liquidator registration? If so why?	RG 0000.42 states the use of APS520 should be referred to in determining the applicants fit and proper person criteria. We believe ARITA COPP or APES110 would be a more suitable reference.

## 2. Renewal, lodgment of annual liquidator return and ASIC notification

Key elements of this section relate to registration renewal every three years<sup>8</sup>. Annual returns lodged five business days prior to the anniversary of the registration and notification to occur when any significant event or other event occurs.

C1 Q1.	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><u>Registration</u></p> <p>Guidance on what ASIC require in the circumstances where the applicant has applied to Court for an extension of time to lodge the renewal of their registration and the renewal date lapses [s.20-70(3) ILRA]. The consequences of a timing error may result in the replacement of the EA [s.40-111(2) of ILRA].</p> <p><u>Registration renewal</u></p> <p>For registration renewals of ‘old Act’ registrants, the draft RG states the requirements to renew as follows:</p> <ul style="list-style-type: none"> <li>• RG 000.85 if registration date is immediately before 1 March 2017 then on 1 March 2017, ‘old Act’ registrants are taken to be registered under the new provisions [s.1553 ILRA]; and</li> <li>• RG 000.87 if registration date is on or after 1 March 2017 then renewal must be provided on the anniversary of your existing registration [s.20-70 ILRA].</li> </ul> <p>We understand these requirements allow for liquidators that hold a current registration to continue to accept appointments until their original registration date, at which time a renewal request is submitted for the next three years.</p> <p>In the circumstances where the original registration date is between 1 January and 28 February 2017, we seek clarity that the renewal form, for the next three years, would be lodged in 2018 [1 Jan 18 to 28 Feb 18], prior to that anniversary date passing.</p>
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<sup>6</sup> TPB (EP) 02/2010 [https://www.tpb.gov.au/sites/g/files/net1481/f/fit\\_and\\_proper.pdf?v=1469691085](https://www.tpb.gov.au/sites/g/files/net1481/f/fit_and_proper.pdf?v=1469691085)

<sup>7</sup> We assume the current Form 903B will be updated

<sup>8</sup> The prescribed form – RL05 Application for renewal of registration as a liquidator

C1 Q1.	Continued	<p><u>Annual returns</u></p> <p>The EAs obligation pertaining to which prescribed form to complete in the initial year commencing 1 March 2017 under the transitional arrangements at RG 000.99 to RG 000.101 are unclear.</p> <p>The use of the old or new Form 908 is dependent on the individual EA’s registration date, however, it is unclear for what periods they should be used for. Based on the example at RG 000.87 where original registration date is 17 July 2001, would this liquidator:</p> <ul style="list-style-type: none"> <li>• Lodge old Form 908 for the period 18 July 2016 to 1 March 2017 by 1 April 2017 and lodge the new Form 908 for the period 2 March 2017 – 17 July 2017 by 17 August 2017; <b>OR</b></li> <li>• Lodge old Form 908 for the period 18 July 2016 to 17 July 2017 by 17 August 2017 and use the new Form 908 for the following annual periods.</li> </ul> <p><u>ASIC notifications</u></p> <p>The transitional aspects relating to old Act registrants outlined in s.1562 of ILRA are not mentioned in notification of significant events. Further, s.35-1(h) of the ILRA states notifications extend to ‘any other event prescribed’. Guidance on what type of event might be considered an ‘other event’.</p> <p>For example, if a notice pursuant to s.30 of the ASIC Act is outstanding as at 1 March 2017 for an old Act registrant, would this constitute ‘any other event prescribed’?</p> <p><u>Other</u></p> <p>The following forms referred to throughout have not been provided for review, therefore we cannot provide our comments.</p> <ul style="list-style-type: none"> <li>• RL05 <i>Application for renewal of registration as a liquidator</i></li> <li>• Form 908 <i>Annual statement by a liquidator</i> [1 March 2017 onwards]</li> <li>• Notice of significant events – yet to be released</li> <li>• Form 905A <i>Notification of details of a liquidator</i></li> </ul>
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### 3. Disciplinary and other actions

The Law Reform abolishes CALDB and provides powers directly to ASIC to ensure Liquidator compliance. These powers provide ASIC with the ability to issue a direction or a show cause notice and refer a matter to the committee for review. The consequences of disciplinary actions, if founded, can result in a conditional, suspended or cancelled registration for the Liquidator.

From 1 March 2017, ASIC will effectively be co-regulating with sixteen other prescribed industry bodies [PIB] from the accounting, insolvency and law professions<sup>9</sup>. This aims to provide ASIC with notice of possible Liquidator misconduct quicker and make delinquent Liquidators accountable. However, our concern is that PIBs are not required to be a model litigant, unlike a regulator, and members of these PIB may use this as a vehicle to report unfounded claims of misconduct to achieve leverage in negotiations.

We acknowledge s.40-105 of the ILRA which states a PIB is not liable for providing a notice to ASIC as long as they act in good faith and hold a reasonable suspicion of misconduct; and that at RG 000.177 of the draft

<sup>9</sup> Listed at 40-1 of IPR

RG an Information Sheet [153] on *How ASIC deals with reports of misconduct* is to be provided. To eliminate vexatious claims, we recommend ASIC develop guidance for PIB outlining reporting obligations, how to determine EA misconduct and the standard of reasonable suspicion.

D1 Q1.	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>RG 000.140(a) reflects the requirement of CPE hours, being 40 hours per year, 10 of which must be capable of being objectively verified by a competent source [s.20-5 IPR]. Guidelines are needed on what is required to record the 30 hours of non-verified CPE development, such as signed attendance register for internal technical training.</p> <p>RG 000.170(h) reflects the obligation imposed on ASIC by s.40-55(1)(h) of the ILRA in relation to what information to publish pertaining to the committees decision. The timing of when this information is to be made public is unclear. As the EA has a right of appeal in the form of a review by the AAT within twenty-eight days of receipt of the committee's report, the result of the disciplinary action should not be published until after this time has expired.</p> <p>In addition to Information Sheet 153 we recommend ASIC develop a RG for PIBs outlining reporting obligations, how to determine EA misconduct and the standard of reasonable suspicion.</p>
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#### 4. Insurance requirements

E1 Q1.	Do you agree with the proposal of incorporating guidance on insurance requirements for registered liquidators with guidance on registration and disciplinary framework?	Yes
E1 Q2.	Is there any reason why ASIC should not make a legislative instrument setting out the insurance requirements? Please provide reasons for your view.	N/A
E2 Q1.	Do you agree with the proposal that the minimum limit of indemnity for PI insurance will be adequate if use methods set out in the limitation of liability schemes provided by PSC for the members of CA ANZ and CPAA	Yes
E3 Q1.	Do you agree with the proposal of removing existing guidance about fidelity insurance under a fidelity bond arrangement?	Yes
E3 Q2.	In the alternative to E3 Q1. Do you consider ASIC should require liquidators to hold fidelity insurance under a fidelity bond arrangement for IPs that operate as sole practitioners (or all registered liquidators) if such arrangements were available in the market. If so, explain why.	No

#### 5. Guidance on other aspects of Law reform due to commence 1 March 2017

##### 5.1 ASIC register of liquidators

It is our understanding that Liquidator details currently held with ASIC will be automatically transferred onto the register of liquidators. Our queries in relation to the register are:

##### Q1. What information is required for the register about the registered liquidator's practices?

The question relates specifically to section 15-1(2) (c) and (d) of the IPR which requires the address of the principal place and of each other place, where the person practices as a registered liquidator. As a group, we have sixteen registered liquidators who accept joint appointments across nine practice locations.

In order to comply, we seek clarity on:

- Are all nine locations required to be recorded for each registered liquidator?; and
- What timeframe do we have to ensure the details on the register are correct?

**Q2. What would ASIC define as 'other information'?**

Section 15-1(3) of the IPR states that ASIC may include 'other information' on the register if it is relevant to the registration of a person as a liquidator or a person's practice as a liquidator.

We seek clarity on:

- What would constitute other information; and
- Pursuant to section 15-1(5) what type of other information would be made publically available?

**5.2 Lodgment of Declaration of Independence, Relevant Relationships and Indemnities [DIRRI]**

A DIRRI will be required to be lodged with ASIC (as soon as practical after making the declaration) when appointed as a voluntary administrator, replacement administrator and a liquidator in a creditors' voluntary liquidation from 1 March 2017 onwards. In order to comply we seek clarity on:

- If ASIC have developed a prescribed DIRRI form?;
- A way to lodge this through the Liquidator portal?; and
- When communication will be provided to liquidators?

If you have any queries regarding this submission, please contact:



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Yours faithfully



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