

4, June 2024

RG 16 Consultation Feedback
Companies and Small Business
Australian Securities and Investment Commission
GPO Box 9827
MELBOURNE VIC 3001

Via Email Only: RG16.Feedback@asic.gov.au

Dear Sir/Madam,

We are pleased to provide our submission regarding the draft *Regulatory Guide 16: External administrators and controllers: Reporting of possible offences and misconduct* (RG 16) and wish to thank you for the opportunity to comment on the draft regulatory guide.

Our responses to the questions ASIC have raised in the Consultation Paper 377 (CP377) are in the attached table. In addition to those responses, we would also like to highlight an issue that in our opinion needs to receive careful consideration and review to better assess misconduct reports (i.e. *initial statutory reports* lodged via your ASIC Regulatory Portal) submitted by Registered Liquidators. At paragraph 22 of CP377 it is stated that "ASIC uses an automated process to assess the *initial statutory report* and request that a *supplementary report* be lodged."

Whilst we do acknowledge that ASIC cannot prosecute every matter that is reported via misconduct reports, we are concerned about the low percentage of matters that are being chosen for further review through this automated process. Paragraph 2 of CP377 states that only 778 *supplementary reports* (or 13%) were requested by ASIC from a total population of 5,775 *initial statutory reports* in the financial year ended 30 June 2023.

We are concerned that ASIC's automated process may lead to matters that should be investigated not being investigated and culpable directors may therefore not sufficiently be held to account and prosecuted. In our opinion this could lead to directors repeating their earlier misconduct in various company scenarios in the future. The number of directors banned pursuant to s206F is, in our view, indicative of this propensity by many culpable directors to repeat behaviours that have gone unpunished.

We would also comment that, in our own collective experiences at Deloitte, it appears that the knowledge of ASIC's approach to and the small percentage of matters that are investigated further has become well known in the marketplace which in turn encourages unscrupulous directors and unregulated "pre-insolvency" advisors to take advantage of the current system. It is our opinion that this issue requires remediation as a matter of priority.

We thank you for the opportunity to make this submission. If you have any queries, please contact [REDACTED] at [REDACTED].

Yours faithfully

[REDACTED]

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Glossary:

Act	Corporations Act 2001 (Cth)
Administrator	An External Administrator as defined in Schedule 2 of the IPS together with a Controller as defined in s9 of the Act
ASIC	Australian Securities & Investment Commission
ATO	Australian Taxation Office
IPS	Corporations Act Schedule 2: Insolvency Practice Schedule (Corporations) Parliamentary Joint Committee on Corporations and Financial Services report on Corporate insolvency in Australia dated July 2023
PJC Report	Parliamentary Joint Committee on Corporations and Financial Services report on Corporate insolvency in Australia dated July 2023
ROCAP	Report on Company Activities & Property
RL	Registered liquidator

Attachment:

Table 1 – Responses to proposals and questions

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Question	Response
<p>B1Q1 Is any further guidance required in RG 16 to assist external administrators to meet their reporting obligations? If so, what additional guidance should we provide?</p>	<p>As noted in our cover letter, we are concerned about the digital tools and the extent to which they are relied upon for reviewing and responding to initial statutory reports. The extremely low rate of response to the thousands of reports submitted by RL’s concerns the insolvency industry as a whole and this was raised in the PJC Report (in particular, Chapter 10). In our own experience, we have reported many instances of serious misconduct that has not been responded to by ASIC. This creates a clear perception that directors are not being held to account for their misconduct. Recommendation 19 in the PJC Report does call for a review on these issues and acknowledges the burden imposed on RL’s. While it may take some time for this review to be finalised, we submit that better guidance be given in RG 16 about factors that <u>may contribute to</u> the digital tool’s parameters without specifically disclosing information ASIC wishes to keep confidential. This will help inform RL’s whether instances of misconduct are more likely to be actioned, or not, and in turn, will assist RLs to better manage the time they invest in their initial investigations. For example, if matters that are at the forefront of ASIC’s current regulatory efforts are relevant to the digital tool’s parameters, that would be useful information for RL’s who are generally well informed about ASIC’s regulatory focus, yet it does not require ASIC to make direct disclosures which could be mis-used by dishonest directors or unregulated ‘pre-insolvency’ advisers to circumvent regulatory action.</p> <p>Further, it would be helpful if RG 16 explained how often the digital tool’s parameters are reviewed by ASIC and, if necessary, updated. RL’s typically rely on checklists and firm policies and procedures to help guide them and their staff in the efficient management of insolvent administrations. Being aware of the regularity with which ASIC updates its digital tool parameters for assessing misconduct reports will assist RL’s to determine how regularly they too should review their own checklists or policies in this regard.</p> <p>We would also like to submit that there may be an opportunity to further help alleviate the costs of reporting by reviewing the template form ASIC uses for an <i>initial statutory report</i> to identify opportunities to streamline it.</p>
<p>B2Q1 Is the proposed guidance in Section B of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.</p>	<p>We take this opportunity to raise three items:</p> <ol style="list-style-type: none"> 1. Replacement appointees <p>We do not agree with the guidance at RG 16.36 regarding replacement appointees. If a first appointee has lodged an initial statutory report and is subsequently replaced, the first appointee is obligated to deliver up his/her engagement files, which will include all working papers, file notes and records created in relation to the administration/controllership, to the subsequent appointee. The guidance at RG 16.36 requiring a subsequent appointee to also lodge an initial statutory report, even if it only reports the same matters reported by the first appointee, merely results in a duplication of the work already undertaken by the first appointee. The duplicated effort is more likely to be detrimental to the creditors by adding to the costs of the insolvent administration and unnecessarily diminishing available funds for creditors.</p>

Question	Response
	<p>We expect that in the event ASIC’s digital tool has already analysed and rejected (for further action) the first appointee’s initial statutory report, it would do the same with the report lodged by the second appointee.</p> <p>It is our concern that RL’s are incurring significant costs administering assetless and low-asset estates for which they are not remunerated, and we would like to see this decrease.</p> <p>In our view, it should only be instances where the subsequent appointee considers the initial statutory report was lacking, or where further investigations by the subsequent appointee have revealed additional matters that require reporting, should there be a requirement that a subsequent appointee lodge an initial statutory report.</p> <p>2. Qualified privilege</p> <p>The draft RG 16.42 explains the absence of qualified privilege for certain types of controllers, provisional liquidators and deed administrators. While this is a statement of fact pertaining to the prevailing laws, we submit that there will be a significant reluctance by these appointees to lodge a discretionary initial statutory report because, firstly, there is no statutory obligation and secondly, the absence of qualified privilege merely exposes those appointees to unacceptable legal risks from directors that are not prosecuted by ASIC. If ASIC would like to encourage more of this discretionary reporting, we suggest ASIC ought to ask for changes to the law so that qualified privilege is extended to all appointees who report pursuant to the various provisions (ss422, 438D, 500AE and 533).</p> <p>3. Multiple initial statutory reports</p> <p>The current edition of RG 16, at 16.65 provides that external administrators may lodge additional misconduct reports as more information becomes available. This is helpful guidance as it is common for an RL to identify instances of possible misconduct at varying times and not ‘all in one go’. Common factors that cause this include:</p> <ul style="list-style-type: none"> – Unco-operative directors who fail to complete a ROCAP within the statutory time limits and/or give incorrect information in the ROCAP – Not being able to access all the company’s books and records and obtaining information from other sources, such as the ATO, banks, external accountant (if any), in which case, this information is rarely received collectively – Receiving intelligence in a piecemeal manner from creditors or others who had dealings with the company <p>Accordingly, although we may submit an initial statutory report believing it accurately details all instances of possible misconduct at the time of lodgement, it is not unusual for new information to arise which reveals additional matters involving possible misconduct. The ability to quickly lodge an additional initial statutory report is an efficient solution to this common occurrence. The efficiencies of lodging an initial statutory report over a supplementary report are another reason we prefer the status quo, and these efficiencies are elaborated upon in response to B4Q2 below.</p> <p>The new draft RG 16 does not give similar guidance. Instead, it suggests (at para 16.40) that a supplementary report be lodged if there are others matters arising, after the initial statutory report has been lodged. Preparing a supplementary report is generally more time-</p>

Question		Response
		consuming and inefficient and accordingly, we would prefer the current practice be continued. It supports RL's to furnish timely reports when there are significant matters of possible misconduct to report early, but allows them time to complete their investigations in an orderly manner, knowing any further issues can be quickly and simply reported via another initial statutory report.
B2Q2	Is any further guidance required to assist the preparation of the initial statutory report? If so, what further guidance should we provide?	<p>Yes. The current RG 16, at 16.12 enables an RL to bring serious or urgent matters to ASIC's attention by reporting directly to the Manager of ASIC's Complaints section. However, the draft RG 16 does not provide RL's with any avenue to bypass the digital tool. We consider that there will be circumstances where serious misconduct may go unnoticed due to the digital tool's programmed criteria, yet that serious misconduct should, in our professional opinion, be properly reviewed and considered by an ASIC representative.</p> <p>We recommend that there should be an email address made available where RL's can bring, to an ASIC officer's attention, matters they deem to be of a very serious or indeed of an urgent nature. The examples provided at 16.13 of the existing RG 16 are relevant to this issue.</p>
B3Q1	Is the proposed guidance on relevant case law in Section B of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.	We consider the case law references a valuable and very useful improvement to your draft RG 16. We also consider it to be adequate.
B4Q1	Is the proposed guidance in Section C of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.	The guidance in Section C is helpful, however we refer our submission to question B4Q2 below in relation to additional guidance we believe is required in this section of RG 16.
B4Q2	Is any further guidance required to assist the preparation of the supplementary statutory report? If so, what further guidance should we provide?	<p>The current version of RG 16 (at RG 65.65) allows RL's to lodge more than one initial statutory report. The draft RG does not give similar guidance. In addition to our response to question B2Q1, we would like to add that, for the purpose of Section C, supplementary reporting should be confined to situations where ASIC are actively considering an initial statutory report for possible action, but where ASIC requires further and better particulars from the RLs to assist with this review. We recommend that the current practice which allows multiple initial statutory report lodgements should be maintained.</p> <p>The reason for this is primarily time and cost related. Preparing a supplementary report is generally more labour intensive than an initial statutory report which is predominantly a tick-a-box exercise together with some simple freeform statements in the spaces provided in your online template. A supplementary report, on the other hand, is often a much more detailed document which follows no prescribed template, it may involve the RL compiling a timeline of significant events and collating documents which evidence and support the allegations of misconduct that have been made. The time required to adequately prepare a supplementary report can be significant. Based on our review of recent Assetless Administration Funding (AAF) grants, when ASIC funds an unfunded RL to prepare a supplementary report, the amount provided is typically \$11,550 (being \$10,500 + GST). By comparison, the time and therefore cost to complete an initial</p>

Question		Response
		<p>statutory report is approximately \$5,000 (excl GST)¹. Accordingly, we submit that the draft RG 16.46 should not require a supplementary report merely because the appointee has determined there is an additional matter(s) to bring to ASIC's attention. We suggest this should continue to be done by way of a further initial statutory report.</p> <p>If ASIC is agreeable to maintaining the status quo, we believe the digital tool could be effectively deployed to review additional initial statutory reports together with all previous initial statutory reports already lodged for that entity to determine whether the pre-programmed thresholds or criteria have now been met in order for further action to be taken.</p> <p>As already explained at question B2Q1, the current practice where an appointee can lodge multiple initial statutory reports is helpful and contributes to a more efficient running of an insolvent engagement. Information about possible misconduct does not always come to an appointee's attention 'all in one go'. Hence, the ability to lodge several initial statutory reports, as and when matters do come to the appointee's attention, is our preference.</p> <p>In addition, we are concerned that if an <i>initial statutory report</i> has already been lodged but your digital tool has archived it for no further action, requiring a more time intensive <i>supplementary report</i> to be prepared unnecessarily adds to the costs of the administration, particularly when there is no guarantee the new information supplied in the <i>supplementary report</i> format will be sufficient to meet ASIC's criteria for further action. Instead, a further <i>initial statutory report</i> should be lodged, and that would allow your digital tool to assess that additional information, together with the information already supplied in the earlier <i>initial statutory report(s)</i>, to determine whether the matter now meets the required thresholds for further investigation. And if the additional information does meet that threshold for further action, that should be the moment when ASIC requests a <i>supplementary report</i>.</p>
B5Q1	Is the proposed guidance in Section D of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.	<p>We agree with ASIC's preference that initial statutory reports be lodged within four months and the reasoning you have provided at RG 16.58 and 16.59 is sound.</p> <p>Similarly, the three-month time frame for a supplementary report is sensible guidance as most circumstances where supplementary reporting is undertaken usually involves misconduct that is of a more serious nature (such as fraud and misapplication of company property) and therefore, timeliness is important as most avenues for litigation have a statutory limitation period.</p>
B5Q2	Do you think the four-month timeframe for lodgement of the initial statutory report is appropriate? If not, what alternative timeframe do you think should be adopted and why?	Yes, see above.

¹ PJC Report, paragraph 10.26

Question		Response
B5Q3	Do you think the three-month timeframe for lodgement of the supplementary statutory report is appropriate? If not, what alternative timeframe do you think should be adopted and why?	Yes, see above, however, the guidance should be qualified such that the three-month limit commences from the time ASIC requests the supplementary report. In our experience, there can sometimes be a significant delay between lodging an initial statutory report and receiving a request from ASIC for a supplementary report. In situations where, say, more than three months have expired following the initial statutory report before ASIC makes its request, it will not be possible to comply with the guidance as drafted. We suggest therefore the three-month timeframe commence not from the date of the initial statutory report, but from the date ASIC makes its request for the supplementary report.