FEEDBACK and SUBMISSION

By Peter J Keenan, Seaford, Vic

To Australian Securities and Investments Commission (ASIC)

Re PROPOSED REGULATORY GUIDE 16 OF APRIL 2024 (RG 16) - "EXTERNAL ADMINISTRATORS AND CONTROLLERS: REPORTING OF POSSIBLE OFFENCES AND MISCONDUCT"

Referred to in Consultation Paper 377 of April 2024

1. INTRODUCTION

I am Peter J Keenan, a retired chartered accountant.

During my career I was engaged in the insolvency profession in Melbourne for approximately 30 years. I obtained registration as a liquidator in 1995. I have also worked as an income tax assessor (ATO), a tax agent, an accountant in a small business enterprise and a financial investigator (DPP). I retired several years ago, but ever since have maintained my interest in corporate insolvency law and procedure, and in corporate crime. I have written several papers and essays on these subjects.

This submission tends to focus on those parts of proposed RG 16 that I consider the most important.

2. MY MAIN INTEREST IN PROPOSED RG16

What interests me most about RG16 is the commentary about "*available information", "available funds", "available resources", "company property", "insufficient assets", "the extent of company property", "insufficient property available", "finite property available*" and what inquiries are required. ASIC uses these phrases, and places considerable emphasis on them, in presenting its views on the degree of investigation and reporting required by external administrators and controllers.

My thoughts and concerns about these propositions are best illustrated by a fairly common situation in voluntary liquidations of small and medium sized corporations.

Illustration

- A liquidator is appointed to a corporation. (The *"simplified liquidation process"* is not used.) The corporation has little property of the conventional type, such as land, buildings, vehicles, trade debts, cash at bank, et cetera.

- But information the liquidator obtains indicates, or perhaps establishes, that substantial property exists in another form, such as unfair preferences, uncommercial transactions, unreasonable director-related transactions, voidable transactions or insolvent trading. For example, as is often the case, the corporation may have entered into a payment arrangement with the Australian Taxation Office and made several repayments. *Note: "Property" is defined in Sec 9 of the Act as "legal or equitable – state or interest (whether present or future ...) in real or personal property of any description and includes a thing in action ...", plus additional property described in several of its sub-sections.*

- Before the liquidator becomes aware of this other property, he or she forms the opinion that no offence or misconduct has occurred. In forming that opinion the liquidator only carries out a cursory investigation. He or she *"constrains"* the investigation after taking into account *"the extent of company property", "the available resources"*, and carefully considering the use of available funds against the use of funds for other purposes. (RG16.21 and RG16.22 on pages 9 and 10)

- Before the liquidator becomes aware of this other property, he or she lodges an initial statutory report stating only that it appears the corporation may be unable to pay its unsecured creditor more than 50 cents in the dollar (S.533(1)).

- After the liquidator becomes aware of this other property, he or she recovers a substantial sum of money.
- The liquidator does not carry out any further investigations into the corporation's affairs, and does not lodge a supplementary statutory report.

- A comprehensive investigation would have revealed the existence of offences, that property of the corporation had been misapplied, and that directors had breached their duties.

I believe that ASIC should develop (and insert in RG 16) a policy which takes into account the set of circumstances I have illustrated.

I'm sure ASIC, the business community and the general community recognize the importance of reporting apparent offences under the Act. . That's why the Act has grown to include many provisions aimed at penalising officers of corporations for inappropriate, unfair, unconscionable, fraudulent, unscrupulous (et cetera) behaviour in relation to corporations. The Act alone lists 343 penalty provisions (Schedule 3). ASIC emphasises that "*The reporting obligations are an important source of 'front line' information for ASIC about possible breaches of the Corporations Act and the ASIC Act by persons involved with the company. If other breaches of the law are identified, we can also share this information with relevant agencies, as appropriate."* (RG 16.3 on page 4). Rules, laws and regulations are meaningless if they are not enforced.

3. THE INVESTIGATION PROCESS: TAKING INTO ACCOUNT AVAILABLE INFORMATION

Closely linked to my comments under heading 2 are my thoughts and concerns about the meaning of "available information", and the decision on what matters should be examined.

Under the heading *What inquiries are required?,* proposed RG16.21(a) (on page 9) states, relevantly, that ASIC expects external administrators and controllers to undertake an investigation that

> *"... (takes) into account available information on the size and nature of the company's business and the extent of company property."*

I suggest that the words "*on the size and nature of the company's business"* be deleted, because in the minds of some external administrators and controllers the words might suggest or imply that available information on other matters – such as the size of the deficiency and the composition of liabilities – are to be disregarded.

I think guidance as to the meaning of *"available information"* is also required. An external administrator or controller sometimes receives information from employees, company outsiders (e.g., creditors, customers, lessors, bankers, landlords) and company insiders (e.g., solicitors, auditors, tax agents). Often the information will be verbal in nature, in which case best practice would call for it to be recorded in writing. Does ASIC regard such information as "*available information"*? If so, I think it should say so.

4. GUIDANCE CLAUSES THAT I PARTICULARLY LIKE

I particularly like the following clauses (underlining mine):

> RG 16.22(a) It is not necessary for a liquidator to form a 'concrete opinion' before reporting—only to report if it appears certain things may have occurred. Further, it is not necessary to express any view or opinion in the report, or to set out the basis for the view or opinion expressed. Nor is the liquidator required to have reasonable grounds for holding the opinions or views....
>
> RG 16.30 An external administrator or controller should take steps to obtain and conduct preliminary investigations into the company's books and affairs before lodging an initial statutory report that alleges possible offences or misconduct. However, it is not necessary to have reviewed all of the books and records prior to reporting.

(The above clauses might change the opinion/stance of those liquidators who use these purported or hypothetical constraints as a way out of reporting possible offences.)

> RG 16.28 Even if no possible offences or misconduct are identified (or there is no obligation as a liquidator to report based on the company being unable to pay unsecured creditors more than 50 cents in the dollar), if external administrators and controllers choose to lodge an initial statutory report with us, this can provide useful information for intelligence and statistical purposes: see Section E
>
> RG 16.32 Any failure of the company to maintain adequate books and records is an offence and should be reported to ASIC in the initial statutory report.
>
> Note: A person commits an offence if they fail to keep written financial records that record and correctly explain the company's transactions and financial position and performance and would enable true and financial statements to be prepared and audited: see s286

On the topic of books and records, I suggest an additional note to RG 16.32, to point out that a person commits an offence if they have *"engaged in conduct that resulted in the fraudulent parting with ..., or being privy to fraudulent parting with, ... any book affecting or relating to affairs of the company; or engaged in conduct that prevented the production to the appropriate officer of any book affecting or relating to affairs of the company":* see Ss. 590(1)(c)(iii) and 590(1)(f). In small and medium corporations facing liquidation such conduct is not uncommon.

5. REPLACE THE WORD "WHEN" IN HEADING

The heading that appears mid-way down page 7 – i.e., just before RG 16.12 - begins with the word "When". In my submission that word should be replaced with "In what circumstances", so that the heading reads: "In what circumstances is an initial statutory report required to be lodged with ASIC".

I recommend this for the following reasons:

(a) "When" has two meanings, i.e., "at what time" (or "how soon") and "in what circumstances" (or "in which situation"). So its use will probably cause reader confusion.

(b) Another clause, namely RG 16.56 (on page 17), speaks about the applicable timeframes. Therefore it answers the question "at what time/how soon?"

6. THE BIG DIFFERENCE

As ASIC says, proposed RG16 is completely different from the existing version because the new one *"is only about the obligation to report to ASIC on possible offences and misconduct"* (RG16.6).

This has resulted in removal from the guide of several insolvency administration types, which, along with other changes, has turned a guide that had 29 Headnotes and was 37 pages long into a guide which has, at present, 15 Headnotes and 23 pages.

In my view it would be helpful if the proposed guide described the difference between the two in more detail. I think proposed RG16.6 (on page 5) is not adequate for this purpose.

Signed: Peter J Keenan

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5 June 2024