



**ASIC**  
Australian Securities &  
Investments Commission

## REPORT 793

# Response to submissions on CP 377 Guidance for reporting by external administrators and controllers

September 2024

### **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 377 *Guidance for reporting by external administrators and controllers: Updates to RG 16* ([CP 377](#)) and details our responses to those issues.

### 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.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the *Corporations Act 2001* and *Corporations Regulations 2001*, and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 16 *External administrators and controllers: Reporting of possible offences and misconduct* ([RG 16](#)).

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## A Overview

- 1 In Consultation Paper 377 *Guidance for reporting by external administrators and controllers: Updates to RG 16* ([CP 377](#)), we consulted on proposals to update Regulatory Guide 16 *External administrators: Reporting and lodging* (RG 16). We sought feedback from external administrators and controllers, professional bodies and other interested parties.
- 2 RG 16 outlines the obligation to report possible offences and misconduct to ASIC under s422, 438D, 500AE and 533 of the *Corporations Act 2001* (Corporations Act) and reg 5.5.05 of the *Corporations Regulations 2001*, referred to in this report as the ‘reporting obligations’. Our proposals in CP 377 included making general updates, setting expectations for the preparation of initial statutory reports and supplementary statutory reports, and providing guidance on timeframes for the lodgement of these reports with ASIC.
- 3 This report highlights the key issues that arose out of the submissions received on CP 377 and our response to those issues.
- 4 In addition to receiving written submissions, we engaged in roundtables with a number of stakeholders to give them the opportunity to raise questions and share their feedback, and to ensure that the process was transparent and involved a high degree of stakeholder input.
- 5 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 377. We have limited this report to the key issues.
- 6 We received one confidential and eight non-confidential responses to CP 377 from a range of stakeholders, including industry bodies, professional services firms and a former member of the profession. We are grateful to respondents for taking the time to send us their comments.
- 7 For a list of the non-confidential respondents to CP 377, see the appendix. Copies of their submissions are currently on the [CP 377](#) page on the ASIC website.

## Responses to consultation

- 8 All respondents were supportive of our intention to update RG 16 to provide greater clarity on ASIC’s expectations for compliance with the reporting obligations and our approach to the reports received.

- 9 The main issues raised by respondents related to:
- (a) a view that the guidance would benefit from further prescription on the steps required to prepare the initial statutory report and the supplementary statutory report;
  - (b) the need for a dedicated ASIC contact point for questions in relation to the preparation of reports and ASIC's assessment of reports;
  - (c) the preference to lodge multiple initial statutory reports instead of a supplementary statutory report; and
  - (d) concerns with ASIC mandating lodgement timeframes beyond the requirements of the Corporations Act.
- 10 We have considered the feedback and, where appropriate, have made changes to RG 16.
- 11 It should be noted, however, that we are unable to provide exhaustive guidance on the reporting obligations. We consider that an external administrator or controller will need to exercise professional judgement on the inquiries required to be undertaken and matters to report in each circumstance. We will continue to liaise with stakeholders and assess whether further guidance on specific matters is needed.
- 12 A number of respondents also provided feedback on the need for improvements to ASIC's internal processes for assessing statutory reports. We are separately conducting a review of our internal processes and will consider this important feedback in connection with this review.
- 13 In updating RG 16 and undertaking the separate review of our internal processes, we are proactively responding to the recommendations from the Parliamentary Joint Committee on Corporations and Financial Services inquiry into corporate insolvency in Australia (PJC Inquiry). The Committee recommended that, pending Government review, ASIC should consider whether any timely changes can be made to the regulations on reporting thresholds and ASIC's response to insolvency practitioner reports.
- 14 Our changes to RG 16 are focused on:
- (a) reflecting the relevant case law that has emerged; and
  - (b) outlining that extensive investigations and significant costs are not required in all cases to meet the reporting obligations.
- 15 We will monitor whether any further changes to RG 16 are required once the Government has released its response to the PJC Inquiry.

## B Initial statutory report

### Key points

In [CP 377](#), we proposed guidance on the preparation of an initial statutory report reflecting the body of case law that has developed.

This section outlines the responses we received on these proposals.

### Preparation of the initial statutory report.

- 16 In CP 377, we outlined that an external administrator or controller is not required to carry out extensive investigations prior to lodging the initial statutory report.
- 17 We set out our expectations for external administrators and controllers to carry out at least minimum inquiries, such as seeking access to books and records and interviewing company directors.
- 18 We also proposed to include references to relevant case law in our guidance to provide useful insights on the general expectations of investigation and work required for liquidators.
- 19 We estimated that the initial statutory report would take approximately one hour to complete once an external administrator or controller had undertaken their inquiries and prepared records of their findings.

### Stakeholder feedback

- 20 Most respondents requested that ASIC include additional guidance on the investigations external administrators and controllers will need to undertake to prepare the initial statutory report. Suggestions included a checklist of the steps required to be completed, examples of different administration scenarios, or benchmarking of the time and steps required.
- 21 Some respondents submitted that the guidance did not reflect the work that was required, in practice, to be undertaken in preparing an initial statutory report. This included that the minimum inquiries outlined did not cover a number of additional inquiries that are relevant to complete.
- 22 Many respondents requested that the estimated timeframe for completing the initial statutory report be removed. The respondents suggested that this underestimated the amount of work required.

- 23 Most respondents outlined that they supported the inclusion of relevant case law in the guidance. Some respondents highlighted the references would need to be reviewed and updated by ASIC.

*ASIC's response*

Given the broad range of businesses and possible circumstances that could arise across different types of external administrations, it would be impractical for ASIC to apply a prescriptive approach in guiding external administrators and controllers. We will continue to liaise with stakeholders and assess whether further guidance is required on specific matters.

ASIC expects external administrators or controllers to use their reasonably formed, professional judgement when determining the level of inquiries to undertake and the information to report. We recognise that, in some circumstances, it may be appropriate to undertake more detailed inquiries. Our guidance is not intended to be exhaustive.

We have taken on board feedback received and removed the reference to the estimated timeframe for completing the initial statutory report.

We have maintained the references to case law noting the positive feedback received. We will periodically review these references to ensure they remain current.

## Replacement appointees

- 24 In our draft guidance attached to CP 377, we outlined that each external administrator or controller appointed must ensure compliance with the reporting obligations. For joint and several appointments at the same firm, the external administrators or controllers can report jointly and severally.

### Stakeholder feedback

- 25 Some respondents requested further guidance on the requirements to lodge a report in the case of a replacement appointment. It was submitted that an incoming replacement appointee should be able to rely on the prior report lodged by the former appointee and that the need for a further report to be lodged is duplicative.

*ASIC's response*

We have clarified in the guidance that an incoming appointee has an individual obligation to form their own view and, if appropriate, lodge a report. We have considered the feedback received but remain of the view that this is necessary to satisfy the obligations under s422(1), 483D(1) and 533(1), or s500AE(3(f) and reg 5.5.05.

The relevant provisions apply to each external administrator or controller as appointed and do not specify a carve-out for reporting conducted by prior appointees.

We consider it is appropriate for the incoming appointee to take into account the information in any prior report submitted and any available work papers as a starting point for their reporting to ASIC. The incoming appointee should then exercise their discretion to determine whether any further inquiries are necessary, or would be duplicative or costly.

## Voluntary reporting

- 26 In our draft guidance attached to CP 377, we outlined that the reporting obligations do not apply to a controller (who is neither a receiver nor a managing controller), a provisional liquidator, or an administrator of a deed of company arrangement (collectively, excluded administrators and controllers). We encouraged excluded administrators and controllers to voluntarily lodge an initial statutory report with ASIC if it appears to them that an offence or misconduct has occurred. We noted that qualified privilege may not apply to voluntary reporting.

### Stakeholder feedback

- 27 Many respondents suggested that ASIC's guidance that encourages voluntary reporting by excluded administrators and controllers should not be included in the published guidance. The respondents submitted that this guidance extended beyond the reporting obligations of the Corporations Act. They also submitted that requesting voluntary lodgement does not properly recognise the implication that the report will not have the benefit of qualified privilege under the Corporations Act.

#### *ASIC's response*

We have taken on board feedback received and removed guidance that encouraged voluntary lodgement of an initial statutory report by excluded administrators and controllers. We agree that our guidance should not create an impression that excluded administrators and controllers need to comply with the reporting obligations.

## ASIC's processes for submitting and assessing initial statutory reports

- 28 In our draft guidance attached to CP 377, we outlined that ASIC has a form (also referred to as a 'transaction') available on the ASIC Regulatory Portal that external administrators and controllers must use to complete the initial statutory report.



- 29 We also outlined that ASIC uses an automated process to assess the initial statutory report. Depending on our assessment, we may then request that a supplementary statutory report be lodged.
- 30 In our guidance, we highlighted that ASIC is unable to act on every report of possible offences or potential misconduct. Our ability to take further action is subject to the nature and circumstances of the alleged misconduct.

### **Stakeholder feedback**

- 31 Some respondents strongly submitted that there should be a dedicated ASIC contact point for questions related to preparing a report and ASIC's assessment of the report, and for feedback on ASIC's decision to take no further action.
- 32 Some respondents submitted that the ASIC form for the initial statutory report should be streamlined. They also recommended that ASIC publish a list of the questions that are required to be completed.
- 33 Some respondents submitted that there should be more transparency in relation to ASIC's processes and decision making.
- 34 Some respondents stated that ASIC's automated assessment of initial statutory reports should be reviewed, so that a request by ASIC to lodge a report is only triggered when it is appropriate. They also stated that ASIC should provide details on how often the automated assessment parameters are reviewed and updated by ASIC.

#### *ASIC's response*

This feedback generally goes beyond the content of our guidance and is focused on our internal processes. We appreciate that stakeholders have also provided feedback for process improvements.

We are currently reviewing our internal processes relating to requesting and assessing both initial statutory reports and supplementary statutory reports. The feedback provided on internal processes will be considered in connection with this review. We will update stakeholders as this separate work progresses.

We have taken on board feedback received and introduced a dedicated email address for external administrators or controllers to contact ASIC if they have questions on preparing and lodging an initial statutory report. This will operate as an important communication resource between external administrators and controllers and ASIC in relation to the reporting obligations.

To provide further insights into the factors that are relevant to our assessment of initial statutory reports, we have included additional content in the guidance. We have outlined that ASIC considers a range of factors, such as the nature of the possible

offences and misconduct reported, the amount of liabilities, the deficiency suffered, the availability of evidence and any prior misconduct by directors.

We are committed to providing greater transparency to stakeholders on our assessment and decision making for reports received. This must be balanced against ensuring that we do not release information that may impede our ability to take further action or that will promote opportunistic non-compliance.

## C Supplementary statutory report

### Key points

In [CP 377](#), we proposed guidance on the preparation of a supplementary statutory report.

This section outlines the responses we received on these proposals.

### Preparation of the supplementary statutory report

- 35 In CP 377, we proposed that the supplementary statutory report should focus on providing additional information and evidence on possible offences and misconduct that may support ASIC taking further action.
- 36 We outlined that in most cases we did not expect that it would be necessary for an external administrator or controller to prepare a supplementary statutory report. This does not mean that ASIC does not take the reports received seriously. Based on our experience, these reports are commonly prepared at ASIC's request. It is not necessary for a supplementary statutory report to be lodged in every administration or that a report be lodged simply to provide an overview of the general work that has been undertaken. A report should be lodged where the external administrator or controller has formed an opinion that there is further information about offences and misconduct that should be reported to ASIC, whether influenced by a request from ASIC or other factors.
- 37 If ASIC requests a supplementary statutory report and an external administrator or controller does not agree with the request, we proposed that they should submit a notice of intention not to lodge a supplementary report transaction through the ASIC Regulatory Portal. If there is no funding available to prepare a report, an external administrator or controller should consider whether it is appropriate to apply for a grant under the Assetless Administration Fund.

### Stakeholder feedback

- 38 Many respondents suggested that the guidance would benefit from a checklist or more specific expectations for external administrators and controllers to understand the steps required to prepare a supplementary statutory report.
- 39 Some respondents expressed that, similar to existing ASIC guidance, the guidance should accommodate the lodgement of additional initial statutory reports rather than a supplementary statutory report. It was submitted that preparing a supplementary statutory report takes much more time and is less flexible than preparing and lodging an additional initial statutory report.

- 40 Some respondents outlined that the guidance did not adequately reflect that an external administrator or controller may form a view that it is necessary to lodge a supplementary statutory report given their broader obligations, the expectations of creditors and wider public interest.
- 41 Some respondents outlined that, notwithstanding ASIC guidance that they can object, if ASIC requests a supplementary statutory report an external administrator or controller will feel obliged to prepare a report.

#### *ASIC's response*

Given the broad range of businesses and possible circumstances that could arise across different types of external administrations, it would be impractical for ASIC to use a prescriptive approach in guiding external administrators and controllers on preparing supplementary statutory reports. We will continue to liaise with stakeholders and assess whether further guidance is required on specific matters.

We have updated the guidance to reflect that even if ASIC does not request a supplementary statutory report, we recognise that an external administrator or controller may form a view that it is necessary to lodge a report to meet their obligations. Our guidance does not preclude the lodgement of the report.

We have maintained the position that the report should focus on further information and available evidence of possible offences and misconduct. We are unable to take action on every report of possible offences and misconduct and focusing the report on this content will assist our assessment and potential for further action.

We will continue to communicate to stakeholders through our stakeholder liaison, that, if ASIC requests a supplementary statutory report and an external administrator or controller does not agree that the report should be prepared, then they should notify ASIC.

We have taken on board feedback received and reinstated guidance that external administrators and controllers can lodge multiple initial statutory reports rather than a supplementary statutory report.

## **ASIC's processes for assessing supplementary statutory reports**

- 42 In our draft guidance attached to CP 377, we outlined that, after the supplementary statutory report is lodged, it will be assessed by ASIC's Misconduct and Breach Reporting team. Following our assessment, we may advise that we propose to take no further action or use the information in the report for purposes such as enforcement or regulatory action, or intelligence.

## Stakeholder feedback

- 43 Similar to the feedback on initial statutory reports, some respondents strongly submitted that there should be a dedicated ASIC contact point for questions, including feedback on ASIC's decision to take no further action.
- 44 Some respondents provided feedback that ASIC's internal processes for supplementary statutory reports should be reviewed. The feedback included suggestions for ASIC to adopt a key efficiency indicator for responding to requested reports and to provide further information about its decision making. The feedback also included suggestions that the process for funding under the Assetless Administration Fund should be streamlined.

### *ASIC's response*

This feedback generally goes beyond the content of our guidance and is focused on our internal processes. We appreciate that stakeholders have also provided feedback for process improvements.

We are currently reviewing our internal processes relating to requesting and assessing both initial statutory reports and supplementary statutory reports. The feedback provided on internal processes will be considered in connection with this review. We will update stakeholders as this separate work progresses.

We have taken on board feedback received and introduced a dedicated email address for external administrators or controllers to contact ASIC if they have questions on preparing and lodging a supplementary statutory report. This will operate as an important communication resource between external administrators and controllers and ASIC in relation to the reporting obligations.

## D Lodgement timeframes

### Key points

In [CP 377](#), we proposed adding timeframe expectations for the lodgement of the initial statutory report and supplementary statutory report with ASIC.

Timely reporting is important. These timeframes would optimise ASIC's ability to either request a supplementary report be lodged, commence an investigation or take further action where appropriate. They are also intended to guide external administrators and controllers to finalise matters and avoid unnecessary costs in keeping a matter open, where possible.

This section outlines the responses we received on these proposals.

### Timing for lodgement

- 45 In CP 377, we proposed to introduce guidance requesting that external administrators and controllers lodge:
- (a) the initial statutory report within four months of appointment; and
  - (b) a supplementary statutory report within three months of lodging the initial statutory report.
- 46 We considered it was appropriate to introduce more specific timeframes for reporting based on our regulatory experiences and to give clarity in relation to the 'as soon as practicable' references in the Corporations Act. The proposed timeframes would also assist us to take further action where appropriate. This is because the passage of time since the misconduct occurred is a relevant factor for ASIC in determining whether to take further action.

### Stakeholder feedback

- 47 Some respondents supported the proposed timeframes for lodgement of the reports.
- 48 Most respondents, however, did not support the proposed timeframes. These respondents expressed that the timeframes were not imposed by the Corporations Act. Further, they suggested that the guidance should 'encourage'—not 'request' or 'expect'—lodgement within a specified period.
- 49 Respondents that were not in support of the timeframes noted that there are circumstances where it may not be possible to satisfy the proposed timeframes. For example, there may be ongoing public examinations or litigation that result in the need to report additional information at a later date.

50 Some respondents stated that where ASIC requests the report, or the report is prepared with funding under the Assetless Administration Fund, the guidance should clarify when the timeframe commences.

*ASIC's response*

We maintain the view that it is necessary to include timeframes for lodgement in the guidance to promote timely reporting. This is because the timing of reporting impacts our ability to take action where appropriate.

In deciding whether to investigate or take further action in relation to a report, relevant considerations are the passage of time since the misconduct occurred, the availability of witnesses to give evidence and whether documentary evidence is in our possession or is likely to become available to prove the alleged misconduct. The ability to access crucial evidence such as witnesses and books and records can diminish over time. There are also limitation periods for commencing proceedings.

We have taken on board feedback received that the timeframes should not be mandated and need to be flexible. We have amended references in the guidance to outline that we 'encourage' lodgement within the timeframes.

For the initial statutory report lodgement, we consider that the four-month timeframe should generally be achievable. Specifically, for liquidators there is a separate obligation to report to creditors within three months which requires completion of inquiries that would assist with the timely preparation of the initial statutory report.

For the supplementary statutory report lodgement, we have taken on board feedback received that there may be factors that delay lodgement. We have acknowledged in the guidance that there may be circumstances, such as public examinations or litigation, which mean the report cannot be lodged in the suggested timeframe.

We have also taken on board feedback received that if ASIC requests a supplementary statutory report, any proposed timeframe for lodgement should commence from ASIC's request. Further, we have now clarified that reports prepared with grant funding from the Assetless Administration Fund should be lodged within the timeframe specified in the grant agreement.

## Appendix: List of non-confidential respondents

- Association of Independent Insolvency Practitioners
- Australian Restructuring Insolvency and Turnaround Association
- Chartered Accountants Australia and New Zealand
- CPA Australia
- Deloitte
- KPMG
- Law Council of Australia
- Peter J Keenan