ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

6 June 2024

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

By email: RG16.Feedback@asic.gov.au

Dear Sir/Madam

Consultation Paper 377: Guidance for reporting by external administrators and controllers: Updates to RG 16

Thank you for the opportunity to consider the proposed amendments set out in the draft Australian Securities and Investments Commission (**ASIC**) Regulatory Guide 16 (**RG 16**) and to participate in the roundtable discussion on 13 May 2024.

As the professional body representing around 85% of Australia's insolvency, turnaround and restructuring professionals, the Australian Restructuring, Insolvency and Turnaround Association (**ARITA**) is Australia's largest representative body of insolvency practitioners. More about ARITA is provided at the end of this submission.

As a general comment, ARITA supports the updating of RG 16 to provide greater clarity on ASIC's expectations for external administrators' and controllers' compliance with the reporting obligations and its approach to the reports received. That said, we have some fundamental concerns regarding a number of the positions taken in RG 16 as set out below.

1. Obligation on liquidators to lodge initial statutory report

We believe that the obligation on liquidators to lodge an initial statutory report as set out at RG 16.12 is not consistent with the requirements of section 533 of the Corporations Act.

RG 16.12 states that a 'liquidator of a company (other than a liquidator in a simplified liquidation process) must:

(a) lodge an initial statutory report with ASIC as soon as practicable (and in any event within six months) after **it appears that** ...' [emphasis added].

This contrasts with section 533(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) which states that '[i]f **it appears to the liquidator** of a company, in the course of a winding up of the company, that:…'

We believe it is important that the guidance note states that it is what is apparent to the liquidator that is the trigger, not what is apparent to other stakeholders, ASIC or more generally.

We also query the suggestion at Note 2 to RG 16.22 that encourages external administrators to have regard to ASIC's 'Allegations of possible misconduct – Substantiation guide' in reaching a 'genuine view'. We are concerned that 'genuine view' as used by ASIC in the note is different to 'genuinely held' in the context of comments made by the Court in *Murdaca v Australian Securities and Investments Commission* [2009] [178 FCR 119]:

> 100 … The liquidator is obliged to act bona fide and must not express views in such a report which are not genuinely held. Section 533 does not require that the liquidator have reasonable grounds for the views, opinions and statements expressed by him in such a report.
>
> 103 It must also be remembered that s 533 itself does not contemplate that concrete facts be presented to the liquidator before he is obliged to report. Nor does it require that the liquidator form a concrete opinion in relation to the topics addressed by the section.
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> 104 What is required is that it "... appears ..." to the liquidator that certain things "... may ..." have occurred or "... may ..." be the fact. Once one or more of the matters referred to in subs (1)(a), (b) or (c) appear to be the case in the mind of the liquidator, he or she must lodge a report. The report must be "... with respect to the matter ...". The report does not have to be "correct" in every respect, either at the time when it was lodged or subsequently when looked at with the benefit of hindsight.
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> 105 In our judgment, the liquidator is not required to express any particular views or conclusions in a s 533 report. If opinions or views on the part of the liquidator are expressed in the report, the liquidator is not required to set out the basis for such opinions or views. Nor is the liquidator obliged to have reasonable grounds for holding such opinions or views before articulating them. The function of the report is to alert ASIC to potential problems with particular corporations and to do so promptly after the potential problems have been identified by the liquidator. All that the liquidator is required to do is comply with subpars (d) and (e) of s 533(1).

We acknowledge that ASIC have removed the 'Allegations of possible misconduct – Substantiation guide' from the Appendices to RG 16, thereby placing a lessor emphasis on it. However, it may be more appropriate that note 2 be rephrased to:

> "External administrators may find the 'Allegations of possible misconduct – Substantiation guide' useful, but it is not necessary for external administrators to hold

ARITA

the evidence set out in the guide when reporting a matter, as long as the view expressed is genuinely held."

Content of the report

ARITA members have consistently expressed concern about the length of the Initial Statutory Report and whether all the questions asked are necessary considering how ASIC uses the information. We suggest that in conjunction with the review of RG 16, the Initial Statutory Report questions be reviewed to determine whether all the questions are necessary, particularly given the above comments regarding substantiation.

This two-pronged approach would better fit with the recommendation of the Parliamentary Joint Committee on Corporations and Financial Services recommendation 19 in its report on "Corporate Insolvency in Australia" regarding timely changes to reporting thresholds having regard to the burden imposed on insolvency practitioners.

2. Voluntary reporting

We note the definition of 'external administrators and controllers' used in RG 16 and the list of appointments where the Corporations Act does not require reports of possible offences and misconduct to be lodge set out at RG 16.9.

The guidance at RG 16.9 states that ASIC encourages a controller, provisional liquidator or administrator of a Deed of Company Arrangement to lodge an initial statutory report with ASIC, when possible offences or misconduct is identified. Further guidance on this position is provided at RG 16.17 and RG 16.42.

We have serious concerns regarding this position.

As noted in RG 16.42 there is no statutory qualified privilege in relation to such lodgements, and we query the legal basis for the statement that the reports 'are not disclosed by ASIC unless required by law'.

Section 1274(2)(a) of the Corporations Act specifically notes that 'a person may inspect any document lodged with ASIC …not being a report made or lodged under section 422, 438D or 533 of the Corporations Act, or regulation 5.5.05 of the Corporations Regulations 2001'. The *Treasury Laws Amendment (2021 Measures No. 5) Act 2021* added reference to regulation 5.5.05 to this section specifically to clarify that 'ASIC may investigate offences identified in a report made under section 5.5.05 of the Corporations Regulations, and that this report is exempt from public disclosure'.[1]

The need for this amendment would indicate that any reports lodged regarding possible offences and misconduct that are not made under the specific sections of the Corporations Act or Corporations Regulations 2001, may not be subject to such exemption.

[1] Treasury Laws Amendment (2021 Measures No. 5) Act 2021 Explanatory Memorandum, p 27

ARITA

Alternatively, we note that section 127(1) of the *Australian Securities And Investments Commission Act 2001* stipulates that:

> ASIC must take all reasonable measures to protect from unauthorised use or disclosure information:
> (a) given to it in confidence in or in connection with the performance of its functions or the exercise of its powers under the corporations legislation (other than the excluded provisions); or
> (b) that is protected information.

If ASIC relies on this section for not disclosing any voluntary reporting on the basis that it is "protected information" as defined in section 127, then this should be included in RG 16.

As noted at RG 16.73, 'reports and other documents that are not made available on ASIC public registers may be disclosed to persons outside of ASIC in limited circumstances,' which is why qualified privilege is specifically provided in relation to the statutorily required reports.

Provisional liquidators

In addition to the above, the purpose of appointing a provisional liquidator is to preserve the assets of the company until the Court hears the winding-up application and decides whether to appoint a liquidator or not. While a provisional liquidator may exercise such functions conferred on them by the Act or as the Court specifies, we do not believe it is appropriate to suggest that provisional liquidators should lodge a report regarding possible offences or misconduct with ASIC in the absence of a specific order of the Court.

Definition of external administrator

We also note that the list at RG 16.9 fails to include the restructuring practitioner for the company or the restructuring practitioner for a restructuring plan that has been made in relation to the company. Given these roles are included in the definition of 'external administrator' in Schedule 2 – Insolvency Practice Schedule (Corporations) to the Corporations Act, they should be included for completeness.

3. Supplementary statutory reporting

Section 533(2) of the Corporations Act stipulates that '[t]he liquidator **may** also, **if he or she thinks fit**, lodge further reports specifying any other matter that, **in his or her opinion**, it is desirable to bring to the notice of ASIC' [emphasis added]. Similar wording is duplicated in sections 422(2) and 438D(2) of the Corporations Act and regulation 5.5.05(3) of the Corporations Regulations 2001.

While ASIC Consultation Paper 377 Guidance for reporting by external administrators and controllers: Updates to RG 16 states that ASIC has observed that in some cases external administrators are 'preparing a supplementary report in circumstances where **we do not consider** this further work is required and ASIC is unable to take further action based on the

information in the report' [emphasis added], we respectfully note that the Corporations Act clearly places the decision with the appointee.

In addition, the guidance in RG 16.48 and RG 16.49 again makes reference to supporting evidence and we reiterate our comments regarding supporting evidence noted above.

In relation to RG 16.47, while we acknowledge that the decision of an appointee to prepare and lodge a supplementary statutory report may be informed by an ASIC request, we again note that the ultimate decision rests with the appointee and they may still form the opinion that it is not desirable to lodge a further report. On this basis, we believe that the 'Notice of intention not to lodge a supplementary report' should include the below option as a reason why they do not propose to lodge a supplementary report, with further information optional:

- Does not hold the opinion that lodging a further report with ASIC is desirable.

We believe that ASIC would have the ability to provide specific expectations on what is to be included, including supporting documentation, in a supplementary statutory report where funding for the report is provided from the Assetless Administration Fund (**AAF**).

Funding supplementary reports

ARITA believes that further consideration needs to be given to the process for applying to the AAF for the preparation of a supplementary statutory report where one is requested by ASIC and the liquidation is without funds.

We recognise that the AAF is currently regarded as a grants process (though we question the long-term appropriateness of this if work is directed vis the following contentions), however where ASIC has made a request for a supplementary report, ASIC has presumably determined that there is information which it requires, and that the liquidator is likely to be able to provide it. If the liquidator is without funds (due to the liquidation meeting the definition of assetless under the AAF guidelines), funding should be provided on the request of the liquidator and on confirmation of the financial status of the liquidation.

A streamlined grant application process should be possible.

Further, we are aware that there are significant instances of ASIC seeking supplementary reports where the appointed liquidator may not be aware of the basis of ASIC seeks such a report (ie additional information held by ASIC about the directors or the company or related entities). In this instance, it is clearly possible that the liquidator may not hold the view that a supplementary report is necessary and would be unable to properly make a request for funding or would make a decision to lodge a 'Notice of intention not to lodge a supplementary report'.

In assetless administrations, a complex grant application process, particularly for the provision of a supplementary statutory report that has been requested by ASIC, is a barrier to access. In the case of work directed/requested by ASIC we view that this is not a grant, but a direct engagement of the practitioner to conduct work on behalf of ASIC.

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4. Timeframe for lodgement

Initial statutory report

We do not believe that it is appropriate for ASIC to require a timeframe for lodgement of an initial statutory report earlier than one set by the Corporations Act.

The six-month timeframe after first forming an opinion that a possible offence or misconduct has occurred was added to the Corporations Act in 2007 as part of the *Corporations Amendment (Insolvency) Act 2007*. This timeframe was obviously considered appropriate and if a shorter timeframe is needed by ASIC, legislative change should be sought.

Supplementary statutory report

As noted at RG 16.60 there is no statutory timeframe for the lodgement of a supplementary statutory report and we do not believe that it is appropriate for ASIC to suggest one, particularly one that is driven off the lodgement of the initial statutory report, where the matters reported in the supplementary report may be unrelated to the content of the initial statutory report.

We believe that ASIC would have the ability to provide a lodgement timeframe for a supplementary statutory report where funding for the report is provided from the Assetless Administration Fund.

For both the initial statutory report and supplementary reports, we suggest that it would be more appropriate to encourage appointees to lodge reports as soon as practicable to ensure that ASIC is notified of the possible offences in a timely fashion and has the opportunity to consider remedial action.

5. Additional comments

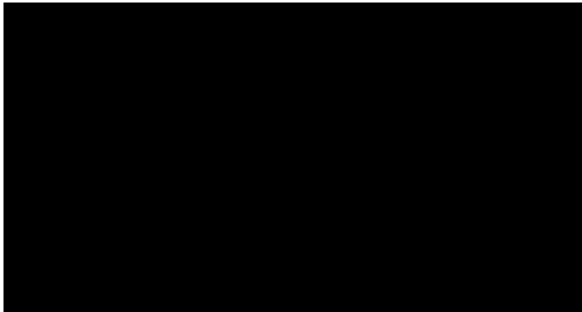
Our additional comments in relation to the proposed changes can be summarised as follows:

- Information should be provided to reconcile ASIC's regulatory approach and the revised RG 16.
- Guidance needs to be provided on steps that can be taken by external administrators and controllers to object to the outcome of ASIC's review of the initial statutory report.
- ASIC should consider offering an training webinar for practitioners and their staff once RG 16 is finalised.
- Guidance should be provided on be reporting obligations when an appointee is replaced by an appointee from the same firm.
- ASIC needs to provide a list of questions to be answered in the initial statutory report.
- External Administrators should be able to lodge additional initial statutory reports where additional offences are identified, rather than lodging a supplementary statutory report.
- ASIC should have a KPI for responding to requested supplementary statutory reports.

ARITA’s detailed responses to the consultation questions are attached as an Appendix.

Should you wish to discuss any aspect of our submission, please contact [redacted], ARITA’s Policy & Education Director, on [redacted].

Yours sincerely



About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have more than 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

We are a not-for-profit, incorporated professional association run for the benefit of our members.

Around 85% of Registered Liquidators and Registered Trustees choose to be ARITA members.

ARITA's ambition is to lead and support appropriate and efficient means to expertly manage financial recovery.

We achieve this by providing innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large. In 2023, ARITA delivered 94 CPE events with over 5,000 attendees.

ARITA promotes best practice and provides a forum for debate on key issues facing the profession.

We also engage in thought leadership and advocacy underpinned by our members' knowledge and experience. We represented the profession at 11 inquiries, hearings and public policy consultations during 2023.

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Appendix: Questions from CP 377

Question	ARITA's response
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?	ARITA believes it would be useful if further information were provided reconciling the proposed changed guidance under RG 16 with ASIC's regulatory approach to the level of investigations expected of liquidators, having regard to the effect of s545 on obligations beyond statutory lodgements. It may be that this information is better provided outside of RG 16 (for example as an article in the Corporate Insolvency Update published by ASIC). Guidance should also be provided on the steps that external administrators and controllers (collectively referred to as external administrators) can take where they disagree with ASIC decision to take no action in relation to an initial statutory report (**ISR**). We recognise that ASIC utilises digital tools to make an initial assessment of the ISR. At times, this may result in an outcome which an external administrator wishes to question. ASIC should have in place a process where an external administrator can apply, with reasons, for a reassessment of response to the ISR by an ASIC officer. Consideration should be given to offering a training webinar for practitioners and their staff on their obligations under the relevant reporting provisions and RG 16 once it is finalised.
B2Q1 Is the proposed guidance in Section B of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.	***Timeframe*** Members have expressed concern that draft RG 16 states that the ISR takes on average, approximately one hour to complete. They state that the ISR, when printed, is 22 pages long and takes longer to complete than one hour. This timeframe may also be misleading to stakeholders who do not understand the types of questions asked and the work that must be done before the ISR can be completed. We recognise that the suggested average time to complete the ISR excludes the investigatory time, however, the ISR cannot be completed without the investigatory work being done. We suggest the timeframe to complete the ISR be removed. ***Questions asked*** Members have expressed concern about the length of the ISR (22 pages when printed) and whether all the questions asked are necessary considering how ASIC uses the information. We

ARITA

Question	ARITA's response
	suggest that the ISR questions are reviewed to determine whether all the questions are necessary. ***Replacement appointees*** Guidance has been provided on concurrent appointments, but it would useful if guidance could be provided on reporting obligations when an appointee is replaced by an appointee from the same firm – this may be a single appointee replaced or one from a joint and several appointment replaced. Practically, a further report by such a replacement practitioner would not provide any value to the appointment where the appointee is from the same firm. Further lodgement would be duplicative in most cases. If a report has been provided already, then the section should be taken as complied with. However, we appreciate ASIC may have particular views on what is required to comply with the various sections. Either way, clarification in the guide would assist.
B2Q2 Is any further guidance required to assist the preparation of the ISR? If so, what further guidance should we provide?	It would be useful to provide the list of questions that the liquidator is required to respond to in respect of the ISR. This could be provided as a schedule to RG 16. A list of questions would assist external administrators and their staff to ensure that they have the necessary information available before commencing the form.
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.	Yes, ARITA believes that this information is helpful in clarifying the Court's current expectations regarding the ISR and external administrators' investigatory obligations. As discussed at the roundtable, the inclusion of relevant case law, although helpful, will mean that ASIC will need to have in place procedures to manage changes to case law, or decisions which are outside the norm.
B4Q1 Is the proposed guidance in Section C of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.	ARITA believes that further consideration needs to be given to the process for applying to the AAF for the preparation of a Supplementary Statutory Report (**SSR**) where one is requested by ASIC and the liquidation is without funds. Please refer to our comments in section 3 of our covering letter. We note that when an external administrator or controller lodges the Notice of Intention not to lodge a SSR for the reason of inadequate funds, a prompt is given regarding making an application to the AAF where one has not been

Question	ARITA's response
	made. Again, we note that a complex grant application process is unlikely to encourage an application to be made. If the application for the AAF is not able to be streamlined in these circumstances, then where Notice of Intention not to lodge a SSR for the reason of inadequate funds is given where there is not a pending AAF application, it should be automatically accepted.
B4Q2 Is any further guidance required to assist the preparation of the supplementary statutory report? If so, what further guidance should we provide?	Refer to ARITA's concerns in section 3 of its covering letter. ***Additional ISRs*** We are advised by members that currently they are able to lodge multiple ISRs for a company. The current RG 16 (at 16.65) allows multiple misconduct reports to be lodged. The proposed draft RG 16 (at 16.40) says a supplementary report should be lodged if further instances of possible misconduct become known, but the appointee has already lodged an initial statutory report. The status quo is helpful as instances of misconduct don't typically come to an appointee's attention "all in one go". In cases where there has been significant misconduct, directors are usually unco-operative, don't deliver up adequate books & records and it can be a slow process pulling information together from varying third party sources. In the PJC Report, the general consensus was $5,000 to prepare and lodge an ISR. A SSR on the other hand is usually more complex. There is no template, and we are advised that the AAF Grants given to unfunded liquidators to prepare a supplementary report are generally at least $10,500 + GST which supports our members' views that they are more time consuming to collate and prepare. If an appointee has formed an opinion as to some instance of possible misconduct and duly lodged their report, it would be preferable, in circumstances where more information becomes available and the appointee subsequently forms a further opinion as to additional misconduct, that they can simply lodge another ISR. Requiring the additional information to be provided in a more expensive SSR format is uneconomical. Supplementary reporting should, in our members' view, be confined to situations where ASIC are actively considering further action.

ARITA

Question	ARITA's response
B5Q1 Is the proposed guidance in Section D of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.	Refer to ARITA's concerns in section 4 of its covering letter. ***Timeframes for ASIC to respond*** Timeframes are imposed on external administrators to provide the ISR and may be imposed where ASIC requests a SSR. Members advised that there can be significant delays for ASIC to respond to the SSR as to whether further action will be taken. We suggest that a KPI be provided for the timeframe for ASIC to respond to a requested SSR and advise the external administrator whether further action will be taken.
B5Q2 Do you think the four-month timeframe for lodgement of the ISR is appropriate? If not, what alternative timeframe do you think should be adopted and why?	Refer to ARITA's concerns in section 4 of its covering letter.
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?	Refer to ARITA's concerns in section 4 of its covering letter.