

29 April 2024

RG 258 Consultation Feedback
Companies and Small Business
Australian Securities and Investments Commission
GPO Box 9827
Brisbane Qld 4001

By email: DL-C&SB-RG258.Feedback@asic.gov.au

Dear Sir or Madam

CP 376: Consultation on Registered liquidators: Registration, ongoing obligations, disciplinary actions and insurance—Updates to RG 258 and supporting documents and templates

Thank you for the opportunity to consult on CP 376.

This submission concerning CP 376 is made by the Insolvency and Restructuring Committee (the **IRC**) of the Business Law Section of the Law Council of Australia.

The IRC is made up of experienced senior legal practitioners working in the insolvency and restructuring field.

This response deals with CP 376 Part B (Structural changes), Part C (Application requirements to be a registered liquidator), Part D (Ongoing obligations of registered liquidators), and Part E (Disciplinary and other actions).

As a broad observation, the IRC welcomes the proposed changes to RG 258.

The IRC would be pleased to discuss any aspect of this submission. Please contact [REDACTED], Chair of the IRC, at [REDACTED] or on [REDACTED], if you would like to do so.

Yours faithfully

[REDACTED]

CP 376: Consultation on Registered liquidators: Registration, ongoing obligations, disciplinary actions and insurance—Updates to RG 258 and supporting documents and templates

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| Part B: Structural Changes | |
| B1 Q1: Is the overall guidance in RG 258 Sections B, C and D clear and comprehensive? If not, how can the guidance be better structured? | Yes, the IRC agrees that the overall guidance in RG 258 Sections B, C and D is clear and comprehensive and structured in a logical way. |
| B1 Q2: Is guidance needed on any other topic regarding liquidator registration, in particular the new category of restructuring practitioners (RG 258 Section C)? If so, what is needed? | <p>The IRC suggests that the following points are considered for guidance about the new category of restructuring practitioners:</p> <ul style="list-style-type: none"> • [RG258.111]—the phrase “external administration options” in (a) is broad. Consider listing the following as sub-categories: “advising corporations about external administrations pre-appointment”, and “external administration processes”; • [RG258.111] - consider the introduction of a new competency of “implementation of safe harbour restructuring plans” (given the relationship between a “restructuring practitioner” and safe harbour plans); • [RG258.111] - consider the introduction of a new competency of “small business restructuring processes” (given the relationship between a “restructuring practitioner” and small business restructuring processes). <p>The IRC considers that the guidance about other topics of liquidator registration is clear.</p> |
| B2 Q1: Is the restructure of the guide with separate Sections E (ongoing obligations) and F (disciplinary and voluntary actions) useful and easier to navigate? If not, please provide reasons. | Yes, the IRC agrees that the restructure of the guide into Sections E (ongoing obligations) and Sections F (disciplinary and voluntary actions) is useful and easier to navigate. |

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| <p>B2 Q2: Is guidance needed on any other topic across these two sections? If so, what other details are needed?</p> | <p>The IRC suggests that consideration be given to the following amendments to:</p> <ul style="list-style-type: none"> • [RG 258.200]—at the commencement of the paragraph, it would be helpful for ASIC to outline its overarching regulatory approach to assessing compliance and the selection of the conduct matters ASIC pursues; • [RG 258.216]—the grounds (a)–(n) on which ASIC may issue a show-cause notice are numerous and broad (particularly the wording of (f) ‘have contravened a provision of the Corporations Act’). It would be helpful for ASIC to issue guidance on how this provision has been interpreted and applied, in a similar manner to the detailed guidance provided in Table 8; • [RG 258.238]—at the conclusion of the paragraph, the IRC suggests ASIC provide guidance on whether questions may be asked of the practitioner outside of the interview only to clarify matters raised in the interview, or more generally as part of the conduct matter. <p>[RG 258.243]—It is the IRC’s view that consideration should be given to revising RG 258.243, including, most importantly, to publishing the reasons for non-publication of a committee’s decision. While ASIC must be directed by the committees to publish, ASIC also chairs the same committees.</p> <p>This accords with the strong public interest in the disciplinary committees, including the livelihood of the practitioner and any affected third parties, and the highly educative value of the committees to the profession and insolvency stakeholders. The case of Cameron Lindsay Duncan¹ highlights the negative impact non-publication without reasons can have upon ASIC, the individual disciplinary committee, and the integrity of the regulatory framework.² In this</p> |

¹ Australian Securities and Investments Commission, ‘23-065MR Liquidator disciplinary committee cancels registration of Cameron Duncan’ (Media Release, 15 March 2023).

² See, e.g., Michael Murray, ‘Liquidator Discipline Outcome- Reasons Unknown’ (Murrays Legal Blog, 17 March 2023)

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| | case, the limited reporting of serious disciplinary action without context led to undue public speculation, including that the practitioner had been treated unfairly by ASIC and the Committee. ³ |
| Part C: Application requirements to be a registered liquidator | |
| C1 Q1: Is the guidance on notices to be registered by NZ insolvency practitioners at RG 258.12-RG 258.16 clear and comprehensive? If not, what additional information would be helpful? | The IRC makes no submission in respect of this question. |
| <p>C2 Q1: Are the experience requirements for an external administrator of companies, receiver, and receiver and manager at RG 258.34–RG 258.38 clear and Rationale 23 comprehensive? If not, what further clarification is needed for these categories?</p> <p>C2 Q2: Are the experience requirements for a receiver, and receiver and manager only at RG 258.120–RG 258.124 clear and comprehensive? If not, what further clarification is needed for these categories?</p> | <p>Background</p> <p>1. ASIC has proposed to provide updated guidance on the prescribed experience requirements⁴ of at least 4,000 hours of relevant employment at a senior level in the five years immediately prior to an application for registration as an insolvency practitioner, as it applies to:⁵</p> <p>a. external administrator of companies, receiver, and receiver and manager [RG 258.34-RG 258.38]; and</p> <p>b. receiver, and receiver and manager only [RG 258.120-RG 258.124].</p> |

https://murrayslegal.com.au/blog/2023/03/17/liquidator-discipline-outcome-reasons-unknown/?utm_source=rss&utm_medium=rss&utm_campaign=liquidator-discipline-outcome-reasons-unknown; and Peter Gosnell, 'KordaMentha Partner Stripped of Registration' (Insolvency News Online, 17 March 2023) <https://insolvencynewsonline.com.au/kordamentha-partner-stripped-of-registration/>.

³ Michael Murray, 'Liquidator Discipline Outcome- Reasons Unknown' (Murrays Legal Blog, 17 March 2023)

https://murrayslegal.com.au/blog/2023/03/17/liquidator-discipline-outcome-reasons-unknown/?utm_source=rss&utm_medium=rss&utm_campaign=liquidator-discipline-outcome-reasons-unknown.

⁴ Found in *Insolvency Practice Schedule (Corporations)* s20–20(4)(a) and *Insolvency Practice Rules (Corporations)* r 20–1(2)(c)-(d).

⁵ <https://asic.gov.au/regulatory-resources/find-a-document/consultations/cp-376-registered-liquidators-registration-ongoing-obligations-disciplinary-actions-and-insurance-updates-to-rg-258-and-supporting-documents-and-templates/>

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| | <p>2. The key changes are as follows:</p> <ul style="list-style-type: none"> a. [RG 258.35], [RG 258.121]: The Statement that “<i>The committee may determine that an applicant should be registered, even if the committee is not satisfied about this matter</i>” i.e. relevant employment, is moved from a ‘Note’ in the existing Guidance to the body of the draft Updated Guidance, thus elevating its prominence in the draft; b. [RG 258.36], [RG 258.122]: The draft Updated Guidance states that the discretion in [RG 258.35] / [RG 258.121] (see point 2.a. above) may be applicable where an applicant has had a career break or other leave of absence, yet they have experience beyond the five-year period; c. [RG 258.37] / [RG 258.123]: The draft Updated Guidance provides that relevant employment may include any other employment that the Committee considers relevant, which may include (at [RG 258.123(c)]): <ul style="list-style-type: none"> i. advice provided to directors and other advisers prior to a formal appointment; ii. corporate restructuring and advice that is not a formal external administration; iii. quality reviews; iv. template and internal process creation and maintenance; and v. preparing and delivering technical papers or training. <p>IRC Feedback</p> <p>3. The IRC welcomes the draft Updated Guidance as to experience requirements. The IRC considers the draft Updated Guidance to be sufficiently clear and comprehensive.</p> <p>4. In the IRC’s view, by providing a greater degree of flexibility to applicants, the draft Updated Guidance will mitigate the impact of (a) recent market dislocation events, such as COVID-19; and (b) parental/carer’s leave</p> |

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| | <p>responsibilities, on achieving the 4,000 hours requirement.⁶</p> <p>5. As to (b), noting that the draft guidance proposes that registration may still be granted in circumstances where the applicant has <i>not</i> achieved the 4,000 hours of relevant experience in the immediate five-year period due to a career break or other leave, but <i>has</i> achieved that experience beyond the immediate five year period, the IRC considers that the immediate five-year experience requirement should be considered more broadly at the legislative level. While the draft guidance is a step in the right direction, it still leaves applicants with a degree of uncertainty as to the impact of a career break or period of leave on the exercise of the Committee’s overall discretion.</p> <p>6. It is notable that other comparable jurisdictions have adopted a procedure requiring less extensive hours, albeit sometimes in conjunction with a written examination. See for example:</p> <ul style="list-style-type: none"> a. United Kingdom: 600 hours relevant experience in prior three years, and passing the Joint Insolvency Examination Board exams or having satisfied the EC Qualifications Regulations;⁷ b. Hong Kong: 600 hours relevant experience in prior three years, or 750 hours relevant experience in prior five years;⁸ |

⁶ See further, Explanatory Statement to *Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020* under the heading ‘Insolvency Sector Capability’: <https://www.legislation.gov.au/F2020L01654/asmade/2020-12-21/es/original/pdf>

⁷ See experience requirements of Recognised Professional Bodies:
 Insolvency Practitioners Association: <https://insolvencypractitioners.org.uk/membership/membership-criteria/>;
 ICAEW: <https://www.icaew.com/regulation/insolvency/become-an-insolvency-practitioner-with-icaew/becoming-an-icaew-insolvency-licensed-practitioner>
 Chartered Accountants Ireland: https://www.charteredaccountants.ie/docs/default-source/about/insolvency-regulations-5-ian.pdf?sfvrsn=7f25af7c_2
 ICAS: https://www.charteredaccountants.ie/docs/default-source/about/insolvency-regulations-5-ian.pdf?sfvrsn=7f25af7c_2 (450 chargeable hours).

⁸ Official Receiver Panel A Scheme: Official Receiver Panel A Scheme
https://www.oro.gov.hk/eng/our_services/publications/panel_a_scheme_rules.html

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| | <p>c. New Zealand: (a) 1,000 hours relevant experience in prior three years, if also holding a Certificate of Public Practice; or (b) 2,000 hours relevant experience in prior three years, if not also holding a Certificate of Public Practice;⁹</p> <p>d. Singapore: Relevant experience in prior three years (no minimum hours);¹⁰</p> <p>e. Canada: 2,400 hours of relevant experience (no timeline), and passing the Competency-Based National Insolvency Examination.</p> <p>7. The IRC considers that the draft Updated Guidance at [RG 258.37] / [RG 258.123] helpfully serves to capture various forms of ‘non-formal work’ which would fall within the section of the ‘Senior Level Employment History Form’ (attachment 3) concerning “<i>Other relevant employment you may wish to draw to the attention of the committee</i>”. The IRC considers that, in addition to the examples provided in [RG 258.37] / [RG 258.123], the following relevant examples would be appropriate to include in the Updated Guidance:</p> <ul style="list-style-type: none"> a. Solvency reviews; b. Counterparty risk reports; and c. Expert reports relating to matters of solvency or liquidations or administrations. <p>8. It is also worth noting that, since the implementation of the <i>Corporations Amendment (Corporate Insolvency Reforms) Act 2020</i> and the <i>Insolvency Practice Rules (Corporations) Amendment (Corporate Insolvency Reforms) Rules 2020</i>, there have been a number of challenges to Committee decisions on registration.¹¹ This suggests a degree of perceived unfairness on the part of applicants for Registration. See, for example:</p> |

⁹ *Insolvency Practitioners Regulation Act (Prescribed Minimum Standards, Conditions, and Requirements for Ongoing Competence, for Licensed Insolvency Practitioners) Notice 2020*: <https://gazette.govt.nz/notice/id/2020-go1403>

¹⁰ *Insolvency, Restructuring and Dissolution (Insolvency Practitioners) Regulations 2020* <https://sso.agc.gov.sg/SL/IRDA2018-S617-2020?DocDate=20200728>

¹¹ See also *Duncan v A Committee Convened Under Section 40-45 Of The Insolvency Practice Schedule (Corporations)* [2024] AATA 609 on the issue of renewal of registration.

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| | <p>a. <i>Petrenko v Australian Financial Security Authority</i> [2024] AATA 448 (albeit an application for registration as a bankruptcy trustee); and</p> <p>b. <i>Mansfield and A Committee Convened Under Section 20–10 of The Insolvency Practice Schedule (Corporations)</i> [2018] AATA 1510.</p> |
| <p>C3 Q1: Are the personal capacity requirements for an external administrator of companies, receiver, and receiver and manager at RG 258–42 and in the Guide to personal and resource capacities clear and comprehensive? If not, can you suggest any changes?</p> <p>C3 Q2: Are the personal capacity requirements for a restructuring practitioner for a company, or a restructuring practitioner of a restructuring plan at RG 258.110 and in the Guide to personal and resource capacities clear and comprehensive? If not, can you suggest any changes?</p> <p>C3 Q3: Are the personal capacity requirements for a receiver, and receiver and manager at RG 258.128 and in the Guide to personal and resource capacities clear and comprehensive? If not, can you suggest any changes?</p> <p>C4 Q1: Are the resource capacity requirements in RG 258 and the Guide to personal and resource capacities clear and comprehensive? If not, what changes do you suggest to our updated guidance?</p> | <p>The IRC welcomes the draft Updated Guidance as to personal capacity and resource requirements.</p> <p>The IRC considers the draft Updated Guidance to be sufficiently clear and comprehensive. In addition, the Updated Guidance is a timely reflection of the commonalities of the personal capacity requirements for external administrators, receivers, receivers and managers, and restructuring practitioners despite the evident differences in the respective roles and functions of the various appointees. The IRC submits that the Updated Guidance’s insistence on a common professional skill-set is necessary where common professional and ethical standards across these roles already exist, particularly given the important public interest in deterring and combating illegal phoenixing activity and the involvement of illegitimate advisors in that activity.</p> <p>Having said this, consideration could also be given to ASIC giving weight to a candidate’s competencies in the following areas:</p> <ul style="list-style-type: none"> • Specialist professional and technical experience in a range of industries; • Particularly for the assessment of candidates seeking to become restructuring practitioners only—the extent of a candidate’s experience in “chief restructuring officer”-type roles (including as part of implementation of formal “safe harbour” restructuring plans). <p>Although the Guide refers to “stakeholder communication skills” as being relevant to the reference in RG 258 to interpersonal skills, proficiency in stakeholder management is more than just about excellent interpersonal skills, but rather extends to effectively reconciling often competing and fractious views and agendas of numerous interest groups (e.g. secured v unsecured creditors, management, employees, trade unions and regulators). Prominent recent external administrations of large corporate groups such as Arrium and Virgin Australia are cardinal examples of this. While it is acknowledged that this skill</p> |

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| | <p>may assume more visible public prominence in more complex external administrations and receiverships, the IRC submits that this skill remains equally integral to the successful conduct of both external administrations and small business restructuring processes of SME businesses and thereby warrants separate discussion within RG 258.</p> |
| <p>C5 Q1: Is the guidance on the committee process for interviewing applicants at RG 258.84- RG 258.85 clear and comprehensive?</p> | <p>In the view of the IRC, the current guidance at RG 258.84–85 is not sufficiently comprehensive. The IRC considers that there are several matters that should be made clearer to potential applicants, for example:</p> <ul style="list-style-type: none"> • the maximum length of the interview; • location of the interview (i.e. confirmation that the interview can be conducted virtually); • the key topics covered, and the expected level of each answer—for example, whether specific references to legislation are required; • that key topics may include: <ul style="list-style-type: none"> ○ ethics; ○ independence and potential conflicts in appointments; ○ key duties; ○ problem solving and decision making under pressure; ○ technical questions; and ○ further questions arising from the application; and • the process to deal with any perceived independence issues: i.e. if a person on the committee is known to the interviewee. <p>Anecdotal evidence suggests that larger organisations have built up an ability to prepare and train applicants for the interview, which would not be available to those who are part of smaller firms. More transparency regarding the process could potentially provide a more level playing field.</p> |

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| | Alternatively, a preparation course could be offered to potential applicants to best prepare them for the experience, in a similar fashion to a bar readers' course. |
| Part D: Ongoing obligations of registered liquidators | |
| D1 Q1: Is the guidance about maintaining the qualifications, experience, knowledge and abilities required of a registered liquidator at RG 258.133-RG 258.140 clear and comprehensive? If not, provide reasons. | Yes, the IRC agrees that the guidance at RG 258.133 to RG 258.140 is clear and comprehensive. |
| D1 Q2: Do you agree with our proposed additional guidance at RG 258.134 and RG 258.138? If not, provide reasons | Yes, the IRC agrees with the proposal additional guidance at RG 258.134 and RG 258.138. |
| D2 Q1: Is the updated guidance about remaining a fit and proper person at RG 258.165-RG 258.168 clear and comprehensive? If not, provide reasons. | The IRC considers that the use of the phrase "adequately and properly" at RG258.167 and RG 258.168 ought be expressly linked to the clarification of the phrase in RG258.155 and RG258.156. The IRC suggests this clarification is made by way of a note at the end of RG258.168 in the following terms: 'Note: RG258.155 and RG258.156 clarify the meaning of the phrase "adequately and properly"' |
| Part E: Disciplinary and Other Actions | |
| E1 Q1: Is our additional guidance on maintaining the currency of knowledge at RG 258.216-RG 258.218 clear and comprehensive? If not, provide reasons. | There has only been a minimal addition to RG 258.216-RG.218 as reflected in Table 8 with the insertion of a new area "maintain knowledge". In the IRC's view, this new provision is clear and straightforward. It is the IRC's view that it would be beneficial for ASIC to provide practical guidance for practitioners in relation to circumstances where they have been unable to demonstrate knowledge, skills, and experience within the <i>three consecutive years</i> requirement as stipulated in 'Corporate insolvency appointments'. |

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| E2 Q1: Is our guidance on interaction with industry bodies RG 258.248- RG 258.255 clear and comprehensive? If not, what further details would be helpful on this topic? | At present, neither the IRC nor the Business Law Section of the Law Council of Australia (or indeed the Law Council itself) are prescribed as an 'industry body' in the <i>Insolvency Practice Rules</i> , and consequently we provide no comment in response to this question. ¹² |
| E3 Q1: Is the guidance on a voluntary cancellation or suspension of registration at RG 258.281-RG 258.288 clear and comprehensive? If not, what additional details would be helpful? | The IRC notes that, in accordance with RG 258.284, ASIC has broad discretion to 'assess these matters on a case-by-case basis'. ASIC might consider inserting a paragraph outlining the right of review or appeal (if any) in the event practitioners are dissatisfied with ASIC's decision. |

¹² Noting *Insolvency Practice Rules (Corporations) 2016*, [40-1] lists the following industry bodies: ARITA, CPA Australia, Chartered Accountants Australia and New Zealand, the Institute of Public Accountants, the NSW Bar Association, the Law Society of New South Wales, the Victorian Legal Services Commissioner, the Victorian Legal Services Board, the Bar Association of Queensland, the Queensland Law Society, the Legal Practice Board of Western Australia, the Law Society of South Australia, the Legal Profession Conduct Commissioner of South Australia, the Law Society of Tasmania, the Law Society of the Australian Capital Territory, the Law Society Northern Territory.