CS 49 Proposed guidance on ASIC's power to appoint reviewing liquidators

ASIC

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Introduction

I welcome the opportunity to comment on ASIC's proposed information sheet on its power to appoint reviewing liquidators.

The proposed information sheet is useful as far as it goes. It explains who may apply, how an application is made, what ASIC may consider, when ASIC is less likely to appoint a reviewing liquidator, how costs may be dealt with, and what happens if a reviewing liquidator is appointed.

However, the draft guidance should be strengthened.

The central issue is not merely whether the public is given clearer information about an existing power. The central issue is whether the power operates as a real accountability mechanism in practice.

A legal power is not an accountability mechanism merely because it exists. It becomes an accountability mechanism only if affected people know about it, can use it, can afford to use it, can understand the threshold for action, and can see that ASIC is prepared to act when the facts justify intervention.

ASIC should not confuse the existence of a discretionary power with the existence of an effective remedy. If the power is rarely used, slow to access, opaque in its thresholds, or commonly displaced by references to other avenues, then the proposed guidance risks giving affected creditors, officers, employees and shareholders the appearance of an accountability pathway without providing one in substance.

The guidance should disclose how the power works in practice

The draft information sheet explains the process for applying to ASIC. It does not explain whether the power has practical force.

This is a serious omission.

All the rules, forms and explanatory guidance in the world are of limited value if the power is rarely, if ever, exercised. An information sheet that explains how to apply for a remedy must also give potential applicants a realistic understanding of whether the remedy is likely to be available.

ASIC should therefore include practical information about the operation of the power since it commenced. At a minimum, ASIC should publish or include information about how many applications have been received, how many appointments have been made, how many applications have been declined, the average time taken to decide applications, the main categories of alleged misconduct raised, the most common reasons for refusal, how often the Assetless Administration Fund has been used, and what action has followed from reviewing liquidator reports.

This does not require ASIC to disclose confidential details. It requires ASIC to give the public enough information to understand whether this power is a genuine pathway to independent review or merely a discretionary power that is rarely deployed.

Discretion should not become opacity

The draft information sheet correctly states that ASIC's power is discretionary. That is not the problem. The problem is that discretion without transparent thresholds can become opacity.

The proposed guidance says ASIC will consider the nature of the alleged misconduct, the specific issues in the case, the stage of the external administration, and whether alternative avenues are available. Those categories are sensible, but they are not yet sufficiently concrete.

For example, the draft states that serious misconduct such as illegal phoenix activity is more likely to justify appointment. That is helpful, but it leaves other serious matters uncertain. Misconduct in an external administration may involve conflicts of interest, excessive or unjustified costs, failure to investigate properly, inadequate reporting, improper sale processes, questionable dealings with secured creditors, failure to identify or notify affected parties, or conduct by company officers and advisers that is not adequately scrutinised by the existing external administrator.

The final information sheet should give clearer examples of the types of matters that may justify appointment. It should also explain what level of supporting material is expected from an applicant who may not have access to the company's books, the

external administrator's working papers, or the information needed to prove the very issue that requires independent review.

An applicant should not be required to prove the full case before ASIC will appoint the person whose task is to review it. The threshold should be whether there is a credible basis for concern, sufficient seriousness, and a public or stakeholder interest in independent review.

ASIC should not overstate alternative avenues

The draft guidance says ASIC may decline to appoint a reviewing liquidator where alternative avenues are available. This should be treated with caution.

In theory, alternative avenues may include a misconduct report to ASIC, referral to another agency, court proceedings, creditor appointment of a reviewing liquidator, or funding through the Assetless Administration Fund. In practice, those avenues may not provide an effective remedy.

A report of misconduct to ASIC does not guarantee investigation, intervention or independent review. A referral to another agency may not address the insolvency administration itself. Court action may be practically unavailable to creditors, former directors, employees or shareholders who have already suffered financial loss. Creditor appointment may be unrealistic where creditors are dispersed, under informed, fatigued, economically rationally disengaged, or unable to organise and fund further action.

The final information sheet should not present theoretical alternatives as if they are equivalent practical remedies.

ASIC should amend the guidance to say that it will consider not only whether another avenue exists in theory, but whether that avenue is realistic, timely, affordable and capable of addressing the substance of the concern.

This distinction is essential. A pathway that exists only for those with money, legal support and organisational capacity is not an adequate accountability mechanism for ordinary creditors or affected stakeholders.

The receivership gap should be stated plainly

The draft information sheet says ASIC cannot appoint a reviewing liquidator where the company only has a receiver, receiver and manager, or controller appointed.

That limitation should be made more prominent.

The proposed guidance should state plainly that ASIC's reviewing liquidator power is not a general insolvency accountability mechanism. It is a narrow power directed to companies in external administration where the statutory preconditions are met. It does

not provide a comparable pathway for scrutiny of receivers, receiver managers or controllers.

That gap matters.

The practical harms experienced by directors, guarantors, employees, shareholders, unsecured creditors and other affected parties may be similar whether control of the company is exercised by a liquidator, receiver manager or controller. Concerns may arise about asset sales, fees, delay, reporting, conflicts, communications, appointment documents, creditor information, and the effect of the external controller's conduct on the company and its stakeholders.

If ASIC's answer is that the reviewing liquidator power does not apply in those circumstances, the information sheet should say so clearly and should identify what practical pathway is available instead.

It is not enough to point affected people to misconduct reporting, private litigation or court review if those pathways do not provide timely, affordable and independent scrutiny.

My experience with ASIC complaint pathways

My concern is not theoretical.

In prior matters involving external control, creditor information, alleged misconduct, appointment related documents and the conduct of professional advisers, I have experienced the practical limits of ASIC complaint pathways. ASIC may receive a report, record it, decline further action, and point the affected person to private rights or court action.

That may be administratively convenient, but it is not the same thing as providing an effective accountability pathway.

This experience is relevant to the proposed information sheet because the draft relies heavily on the idea that other avenues may be available. ASIC should not rely on those other avenues unless it is prepared to assess whether they are real in practice.

A financially exhausted affected person who is told to go to court has not necessarily been given a remedy. A person who reports misconduct to ASIC but receives no substantive intervention has not necessarily been given a remedy. A person who cannot organise creditors, fund proceedings, or obtain access to the relevant records has not necessarily been given a remedy.

The final guidance should reflect that reality.

Reports should not disappear into process

The draft information sheet explains that the reviewing liquidator will prepare a report, that ASIC will receive it, and that creditors may be able to request a copy from the external administrator.

That is not enough.

The final guidance should explain what ASIC does with reviewing liquidator reports. If a report identifies misconduct, poor practice, inadequate investigation, excessive costs, conflict concerns or possible breaches of duty, ASIC should explain how it will assess that report and what regulatory consequences may follow.

Otherwise, the process risks becoming circular. An applicant seeks review because there are concerns. ASIC appoints a reviewing liquidator. The reviewing liquidator reports. Then the public is left without any clear understanding of whether the report led to enforcement, further inquiry, referral, disciplinary action, public warning, guidance improvement or no action.

The final information sheet should state that ASIC will consider each report for regulatory action, practitioner oversight, referral, surveillance, enforcement, and systemic learning. It should also explain what affected creditors and applicants will be told, subject to confidentiality and legal constraints.

A reviewing liquidator report should not be treated as a document that merely completes an administrative process. It should be treated as an accountability document.

External administrators should be required to cooperate fully

The draft guidance says the external administrator must assist and comply with reasonable requests from the reviewing liquidator and should not claim remuneration for that time.

That is appropriate, but it should be strengthened.

The final information sheet should make clear that cooperation must be prompt, complete and constructive. The external administrator should not be able to frustrate the review through delay, narrow document production, excessive confidentiality claims, incomplete explanations or defensive conduct.

ASIC should also state what it will do if an external administrator fails to cooperate properly.

A review is only as good as the reviewing liquidator's access to records, explanations and working material. If the current or former external administrator controls the relevant information, then the duty to cooperate is central to the integrity of the process.

Independence and conflicts should be more visible

ASIC proposes to appoint reviewing liquidators from its Reviewing Liquidator Panel. The draft says the selected registered liquidator must provide a conflict declaration.

That is necessary, but not sufficient.

The final information sheet should explain how ASIC manages independence in a relatively small professional market where insolvency practitioners, secured creditors, banks, lawyers, accountants and advisers may have repeated dealings with each other.

The public needs confidence that a reviewing liquidator is not merely another practitioner from the same professional ecosystem reviewing a colleague, prior referrer, repeat counterparty or commercial associate.

The final guidance should explain how ASIC assesses actual conflicts, potential conflicts and perceived conflicts. It should also explain whether applicants may raise concerns about a proposed appointee before the appointment is finalised.

Visible independence is essential. Without it, the process may fail even where the formal conflict declaration is technically adequate.

Timing is critical

The draft information sheet says there is no statutory timeframe for ASIC to decide an application, but that ASIC will endeavour to deal with applications as soon as it can.

That is too weak.

External administrations move quickly. Assets can be sold, records can become harder to obtain, funds can be distributed, companies can be deregistered, creditors can disengage, and practical remedies can disappear. Delay can defeat the purpose of the power.

ASIC should include indicative decision timeframes in the final guidance. If ASIC cannot commit to a fixed timeframe, it should at least identify an ordinary target period and a process for urgent cases.

The guidance should also explain what an applicant should do where there is an imminent asset sale, impending deregistration, pending distribution, or other step that may make later review pointless.

A slow accountability mechanism is often no accountability mechanism at all.

The guidance should be applicant centred

The draft information sheet is written largely from the perspective of ASIC's process. The final version should be more applicant centred.

An applicant may be a creditor, employee, shareholder or former director with limited resources, limited access to records, and limited understanding of insolvency procedure. The information sheet should therefore explain the process in a way that helps an applicant make a focused and useful application.

ASIC should include a practical checklist of the information an applicant should provide. It should also explain that applicants may not have all documents and that ASIC will consider credible explanations, correspondence, inconsistencies, public records, creditor reports, sale information, fee information and other material that may raise a legitimate concern.

The applicant should not be expected to frame the matter with the precision of a lawyer or insolvency practitioner before ASIC will treat the application seriously.

Recommendations

Recommendation 1

ASIC should release the information sheet, but only after strengthening it to explain how the power operates in practice and not merely how the application process works.

Recommendation 2

ASIC should publish practical data on the use of the power, including applications received, appointments made, applications refused, average decision times, common reasons for refusal, use of the Assetless Administration Fund, and regulatory outcomes following reports.

Recommendation 3

ASIC should clarify that the existence of alternative avenues will not be treated as sufficient reason to decline an application unless those avenues are realistic, timely, affordable and capable of addressing the substance of the concern.

Recommendation 4

ASIC should state more prominently that the reviewing liquidator power does not apply where the company only has a receiver, receiver and manager or controller appointed, and should identify what practical accountability pathway is available in those circumstances.

Recommendation 5

ASIC should provide clearer examples of the kinds of misconduct or concern that may justify appointment, including conflicts, inadequate investigation, questionable asset sales, excessive costs, failure to report, poor creditor communication, and concerns about current or former external administrators.

Recommendation 6

ASIC should include indicative decision timeframes, including a process for urgent cases where delay may defeat the purpose of the review.

Recommendation 7

ASIC should explain how it manages independence, actual conflicts, potential conflicts and perceived conflicts when selecting a reviewing liquidator from the panel.

Recommendation 8

ASIC should explain what it does with reviewing liquidator reports, including how reports are assessed for enforcement, surveillance, referral, practitioner oversight and systemic regulatory learning.

Recommendation 9

ASIC should strengthen the guidance on cooperation by external administrators and explain what action ASIC may take where cooperation is delayed, incomplete or obstructive.

Recommendation 10

ASIC should make the final information sheet more applicant centred, including practical guidance for applicants who have credible concerns but limited access to records.

Conclusion

The proposed information sheet is a useful start, but it does not yet answer the real accountability question.

The issue is not whether ASIC can describe its power. The issue is whether affected people can rely on that power as a meaningful pathway to independent scrutiny.

ASIC should not present the reviewing liquidator process as a practical remedy unless it is prepared to show that the power is used, that applications are assessed transparently, that alternatives are not treated as theoretical excuses for inaction, that reports have consequences, and that the process can operate quickly enough to matter.

The final information sheet should be strengthened accordingly.