



5 June 2024

RG 16 Consultation Feedback
Companies and Small Business
Australian Securities and Investments Commission
GPO Box 9826
MELBOURNE VIC 3001

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

Dear Sir/Madam,

CONSULTATION PAPER 377 GUIDANCE FOR REPORTING BY EXTERNAL ADMINISTRATORS AND CONTROLLER: UPDATES TO RG 16

AIIP thank you for the opportunity to comment on the proposals as set out in the consultation paper.

The AIIP

The AIIP is an organisation that was established by insolvency practitioners to assist fellow practitioners meet the challenges prevailing in the profession. The AIIP was formed in 2016 and it now has in excess of 200 members, Australia-wide. It is the only professional insolvency practitioner association which requires its members to be either registered liquidators or registered trustees in bankruptcy. Its members primarily practise in the small to medium enterprise (SME) market, and many members are also members of ARITA.

Executive Summary

AIIP are of the view that the current version of RG 16 serves to deal with two distinct functions of an external administrator and/or controller, which we believe should be addressed individually, rather than viewed as one task. Those two distinct functions being: -

1. the obligation to investigate (pursuant to section 533(1(a)-(c), and then
2. the obligation to report to ASIC (pursuant to section 533((1)(d).

*The AIIP represents more than 200 liquidators and bankruptcy trustees across Australia.
More information about the AIIP can be found at www.aiip.org.au*



Investigations into the existence and/or possible misappropriation of company property, the recovery of same, and the reporting of offences and possible breaches, are all integral to the insolvency process.

ASIC should consider only implementing cosmetic changes to RG 16, pending the Government's response to the recommendations of the recent inquiry by the Parliamentary Joint Committee ('PJC'). This is in line with the PJC's emphasis that a comprehensive review is needed; starting with reporting on the appropriate principles and purpose of insolvency law, rather than a piecemeal approach.

AIP have addressed each of the questions raised in the consultation paper, as detailed below:-

B1Q1 – Is there any further guidance required in RG 16 to assist external administrators to meet their reporting obligations? If so, what additional guidance should we provide?

It is fair to assume that an initial statutory report ('ISR') will be lodged in the majority of creditor voluntary liquidations and court liquidations based on the parameters dictated by section 533(1) of the *Corporations Act 2001*.

AIP welcome the update to RG 16 to the extent that the guidance is simplified and includes current law to assist external administrators and controllers with their reporting obligations to ASIC.

However, in order to ensure the guidance accurately addresses all the requirements of section 533(1), it is important that the obligation of an external administrator and/or controller to investigate (section 533(1)(a) to (c)), is clearly distinguished from the obligation to report to ASIC the outcome of those investigations (section 533(1)(d)).

Stakeholders outside of ASIC, external administrators, and/or controllers will not have the same understanding of the practical level of investigations required to be conducted in order for an external administrator and/or controller to meet his/her obligations under the Corporations Act.

For example, as part of the Key Points, under section B of RG 16, the dot-points should include the requirement of an external administrator to also investigate if money or property has been misapplied or retained. This will more accurately describe the obligations of the external



administrator, and establish that some level (even if minimal) of investigation into a company is required before an external administrator is able to form an opinion.

B2Q1 – Is the proposed guidance in Section B of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.

The consultation paper makes a number of references to ASIC's regulatory experience in observing cases wherein external administrators are undertaking extensive investigations and incurring significant costs when lodging an ISR.

ASIC addresses this observation in the proposed RG 16 by providing a list of the expected base level of investigations to be conducted by external administrators at RG 16.21 (summarised below): -

- a) exercise professional judgement in deciding what investigations to undertake...;
- b) seek access to the books and records of the company;
- c) interview the director(s)....

AIP are concerned that ASIC's expectations do not align with the requirements of section 533(1), and the proposed guidance takes a piecemeal view of the external administrators' obligations.

B2Q2 – Is any further guidance required to assist the preparation of the initial statutory report? If so, what further guidance should we provide?

AIP consider that, in practice, compliance with the requirements of section 533(1)(a) - (d), involves more than that which is disclosed in RG 16.21 (above).

Section 533(1)(a)-(c) requires that an external administrator investigate whether: -

- a) ***a past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or***
- b) ***a person who has taken part in the formation, promotion, administration, restructuring, management or winding up of the company:***
 - i. ***may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or***



- ii. ***may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company; or***
- c) ***the company may be unable to pay its unsecured creditors more than 50 cents in the dollar;***

In practice: -

- it is rare for a past/present officer to simply self-disclose offences, negligence, misapplication or retention of money or property in an interview or through other enquiries. Furthermore, following the interview or other enquiries, the external administrator will likely be required to undertake additional investigations,
- having access to books and records of the company does not, of itself, result in the identification of offences, negligence, misapplication or retention of money or property. It is the investigation of the books and records which includes but is not limited to: -
 - review of at least 4 years prior to appointment of bank account statements;
 - investigation into the company's management accounts, and the transfer or dissipation of assets;
 - comparative review of the financial accounts for at least the 4 years prior to the appointment;
 - real property searches;
 - vehicle searches;
 - PPSR searches, and correspondence with any parties disclosed to identify if property has been fraudulently transferred or encumbered;
 - investigation into employee entitlements; and
 - investigation into director and/or related party loans.
- taking a sample of AIP members, we estimate that the investigations required to comply with sections 533(1)(a)-(c) will take an external administrator a full day (at a minimum) to complete. This is subject to the size and complexity of the appointment, the books and records being delivered, and the officers of the company co-operating with the external administrator and/or controller. If ASIC's assistance is required to collect the books and records or a prosecution statement is requested from ASIC, more time is spent in obtaining the books and records.

Ideally, the inclusion of the above practical investigations undertaken, and details regarding the time to conduct these by way of some benchmarking or best practice statement (based on ASIC's extensive observations), will be useful in the guidance for both external administrators and other stakeholders who may access RG 16.



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.

AIP welcome the inclusion of case law in Section B of the proposed RG 16, on the condition that the cases complement the requirement to comply with statutory law (see comments under B2Q1 and B2Q2).

In addition to the above, AIP comment that the inclusion of case law will, inevitably, require that the guidance is updated on an annual, or as needed, basis to ensure relevant case law is correctly reflected in RG 16.

B4Q1 – Is the proposed guidance in Section C of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.

AIP are surprised by ASIC's disclosure, at RG 16.45 (and also in 'Key points'), that in most cases ASIC do not expect that it will be necessary for an external administrator to lodge a supplementary report.

ASIC disclose that, based on their regulator experience, the effort and costs associated with undertaking further investigations and preparing a supplementary report is not required.

AIP believe that; leaving aside the exceptions of reporting under court direction or external administrators' own initiative, the majority of external administrators will lodge a supplementary report if requested to do so by ASIC, despite the guidance giving the external administrator and/or controller the discretion to use their judgement. This may be due to various reasons, such as: -

- external administrators do not know the reasons why ASIC have made the request, or what action ASIC is considering;
- external administrators are hopeful that their case is one on which ASIC take action; and/or
- external administrators will likely not challenge a request from ASIC. External administrators first reaction is to comply with a request by ASIC, rather than decline a request.



B4Q2 – Is there any further guidance required to assist in the preparation of the supplementary statutory report? If so, what further guidance should we provide?

In addition to the guidance at RG 16.49 and RG 16.52, AIP question whether a review and adjustment to ASIC’s AI technology or checklists is required, so that a request by ASIC for a supplementary report is only triggered when it is appropriate.

Supplementary reports lodged at the instigation of the insolvency practitioner are often done because additional information has been found as a result of further investigations, i.e. beyond those required to lodge the ISR. If ASIC does not expect that it will be necessary, in most cases, for an external administrator to lodge a supplementary report, AIP considers that this is likely to lead to either a belief that the supplementary reports will not be seriously considered, or a misunderstanding as to the level of additional information that should be provided with the supplementary report. Again, as in our response to B2Q2, it would be helpful to have some benchmarking or best practice statement as a guide to practitioners.

B5Q1 – Is the proposed guidance in Section D of the draft updated RG 16 helpful? If not, explain how we could improve the guidance.

AIP is concerned that the guidance does not follow the statutory timeframe as set out in section 533(1)(d), which is six months.

On the assumption that ASIC insists with its request that the ISR be lodged within four months, AIP believe that the wording in RG 16.57 should be replaced with the following: -

“Notwithstanding the statutory timeframes, we consider that external administrators should be in a position to lodge the initial statutory report within four months of the date of appointment, following the lodgement of the three-month statutory report to creditors, but this is a guide to practitioners only.”

B5Q2 – Do you think the four-month timeframe for lodgement of the initial statutory report is appropriate? If not, what alternative timeframe do you think should be adopted and why?

AIP do not believe the four-month timeframe is appropriate.



AIP understands the logic behind the four-month timeframe for the lodgement of the ISR arises from the statutory three-month report to creditors, pursuant to section 70-40 (IPR) Corporations 2016.

Whilst in many cases, AIP consider that the lodgement of the ISR can follow shortly after the statutory three-month report, external administrators should be afforded the ability to exercise professional judgement in deciding when the ISR should be lodged.

AIP believe the time frame to lodge the ISR should remain consistent with section 533(1) in the guidance.

AIP believe that additional guidance at RG 16.58, per below examples, may encourage external administrators to lodge the ISR earlier if they are able to do so: -

- include information about the timeframe for prosecution action to be taken;
- include some examples where delayed receipt of information may cause some actions to become redundant; and
- include some examples where receipt of timely information has resulted in positive results.

AIP disagree with RG 16.59, unless ASIC is able to provide evidence/examples whereby 'timely lodgement' has directly impacted the costs of investigation and reporting.

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?

AIP agree with the three-month timeframe, following the lodgement of the ISR, or within three-months following a request by ASIC to lodge a supplementary report. AIP, however, consider that there should be some clarity in RG 16 on the ability of external administrators to lodge more than one supplementary report on their own volition, if circumstances warrant that. In some instances, investigations can be extensive – for example, a public examination often takes four to six months to actually commence, and it is often from these activities that sufficient information is derived to properly report on offences, misuse of company property, etc.

General Comments

In addition to the specific questions raised, AIP further comment as below: -



- ASIC openly discloses that the reporting obligations of external administrators are an important ‘front line’ information source for ASIC on possible offences or misconduct by companies, and in monitoring phoenix activity. AIP believe that the wording in RG 16 guidance should be consistent with this statement, and the following, for example, should be removed: -
 - *RG 16.20: “external administrator is not required to carry out extensive investigations”, and*
 - *RG 16.26: “We do not expect that an external administrator will identify possible offences or misconduct in every appointment”,*
- RG 16 is a public document and should be written with the expectation that its contents will be reviewed and considered by other stakeholders. For example, creditors may rely on RG 16 in assessing the external administrators’ remuneration. Consequently, AIP believe that RG 16.24 will be taken out of context, adds no value, and should be removed,
- The obligations of the external administrator as disclosed in RG 16 should be comparable to other documents released by ASIC. For example, in Information Sheet 45 *“Liquidation: A guide for creditors”*, the role of a liquidator is, amongst other things, to:
 - investigate and report to creditors about uncommercial transactions, possible claims against company officers, and illegal phoenix activity,
 - inquire into the failure of the company – and possible offences – and report to ASIC.

The above obligations are inconsistent with RG 16.6, wherein investigative obligations are disclosed in a limited capacity as reporting possible offences and misconduct.

- At RG 16.34, AIP consider that the words *“Where there is finite property available”* should be removed, and replaced with *“Where there is finite property available and there is sufficient evidence available for ASIC to consider an actionable offence or misconduct”*. The requirement to comply with section 533(1) should not be linked to the amount of property available, to avoid the possible (unwanted) interpretation that where there is property, it’s acceptable to undertake more detailed level of inquiries, and
- At Section E of the proposed RG 16, ASIC discloses the actions that they may take in respect of matters raised in the report of possible misconduct. These include, but are not limited to:
 - releasing information to other law enforcement;
 - instituting enforcement proceedings; and
 - identifying future targets for surveillance and inspection.



AIP considers that external administrators will, given the above possible outcomes, be required to undertake investigations beyond that which is dictated in RG 16.21, to ensure their report has sufficient evidence. Please refer to comments in B1Q2.

We thank ASIC for the opportunity to make comments on the consultation paper and look forward to further opportunities to provide input into this process.

If you wish to discuss these points further, please contact [REDACTED] [REDACTED]
[REDACTED]

Yours faithfully

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