

5 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 or Madam

CP 377: Guidance for reporting by external administrators and controllers: Updates to RG 16 ('CP 377')

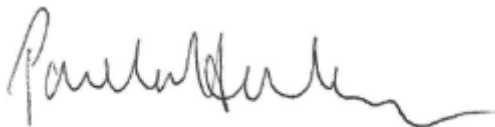
This submission concerning CP 377 is made by the Insolvency and Restructuring Committee of the Business Law Section of the Law Council of Australia (the **IRC**).

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

In general, the IRC welcomes the proposed new guidance in the revised RG 16 and considers that the revised guide better reflects the state of the case law and the expectations on practitioners. In a schedule to this letter, we have included some more detailed comments, dealing with CP 376 Issue B1 (General Updates), Issues B2 and B3 (Initial Statutory Report), Issue B4 (Supplementary Statutory Report) and Issue B5 (Timing for Lodgement).

The IRC would be pleased to discuss any aspects of this submission. Please contact the Chair of the IRC Natasha Toholka at natasha.toholka@nortonrosefulbright.com if you would like to do so.

Yours faithfully



Dr Pamela Hanrahan
Chair
Business Law Section

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

Question	Feedback
Issue B1: General Updates	
<p>[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?</p>	<p>The IRC considers that it would be helpful to provide guidance on the application of client legal privilege in this context (noting that there is proposed guidance on the application of qualified privilege). See, for example the discussion in <i>Bolton v ASIC</i> [2018] AATA 4640.</p>
Issue B2 and B3: Initial Statutory Report	
<p>[B2Q1]: Is the proposed guidance in Section B of draft updated RG 16 helpful? If not, explain how we could improve the guidance.</p> <p>[B2Q2]: Is any further guidance required to assist the preparation of the initial statutory report? If so, what further guidance should we provide?</p> <p>[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.</p>	<p>When is an initial statutory report required to be lodged with ASIC?</p> <p>The IRC considers that the proposed guidance on the circumstances for filing an initial statutory report is helpful and sufficiently clear, namely:</p> <ul style="list-style-type: none"> - Obligation on liquidators [RG 16.12—RG 16.13] - Obligation on external administrators and controllers [RG 16.14] - Court direction for lodgement [RG 16.15] - Voluntary lodgement [RG.16.16—RG 16.17] <p>Guidance for preparing the initial statutory report</p> <p><i>What inquiries are required?</i></p> <p>The IRC considers that the proposed guidance is helpful and sufficiently clear, namely:</p> <ul style="list-style-type: none"> - Extent of inquiries [RG 16.20] - Expected steps [RG 16.21] <p>The IRC considers that the case law references in [RG 16.22] are helpful and sufficiently clear.</p>

Question	Feedback
	<p>The IRC further considers that the following additional cases and statement of principle could be considered for inclusion in the updated RG 16:</p> <ul style="list-style-type: none"> - The decision in <i>Re Joubert and Members of the Companies Auditors and Liquidators Disciplinary Board</i> [2018] AATA 944 could also be cited in [RG 16.22(a)]. - A proposed additional statement of principle could be considered as a new [RG 16.22(e)]: <p style="text-align: center;"><i>“A failure to observe the requirements of s 533 of the Corporations Act may give rise to a Court inquiry under sections 423, 447E or 536 of the Corporations Act, where there is sufficient cause to conduct an inquiry i.e. there is a prima facie case that there is something which requires inquiry: see ASIC v McDermott Re Conalpin Pty Ltd (in liq) [2016] FCA 1186; Djordjevich v Rohrt [2021] VSC 178”</i></p> <p><i>How do I complete the initial statutory report?</i></p> <p>The IRC considers that the proposed guidance in [RG 16.23]—[RG 16.25] is helpful and sufficiently clear.</p> <p><i>What if no possible offences or misconduct are identified (or if the only issue is that the company may be unable to pay unsecured creditors more than 50 cents in the dollar)?</i></p> <p>The IRC considers that the proposed guidance in [RG 16.26]—[RG 16.28] is helpful and sufficiently clear.</p> <p><i>What if there are no company books?</i></p> <p>The IRC considers that the proposed guidance in [RG 16.29]—[RG 16.32] is helpful and sufficiently clear.</p>

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	<p><i>What if there are insufficient assets?</i></p> <p>The IRC considers that the proposed guidance in in [RG 16.33]—[RG 16.34] is helpful and sufficiently clear.</p> <p><i>What if there are concurrent appointments?</i></p> <p>The IRC considers that the proposed guidance in [RG 16.35]—[RG 16.36] is helpful and sufficiently clear.</p> <p><i>What happens after an initial statutory report is lodged?</i></p> <p>The IRC considers that the proposed guidance in [RG 16.37]—[RG 16.40] is helpful and sufficiently clear.</p> <p><i>Qualified privilege</i></p> <p>The IRC considers that the proposed guidance in [RG 16.41]—[RG 16.42] is helpful and sufficiently clear.</p> <p>Should ASIC wish to provide a relevant case reference, the IRC considers that the decision in <i>Bolton v ASIC</i> [2018] AATA 4640 at [11]–[12] could be cited in [RG 16.41].</p>
<p><i>Issue B4: Supplementary Statutory Report</i></p>	
<p>[B4Q1]: Is the proposed guidance in Section C of draft updated RG 16 helpful? If not, explain how we could improve the guidance.</p> <p>[B4Q2]: Is any further guidance required to assist the preparation of the supplementary statutory report? If so, what further guidance should we provide?</p>	<p>The IRC considers that ASIC may wish to address the issue of potential for disclosure of section 533 reports in release and deregistration applications, noting the provisions in the various Corporations Rules requiring identification of section 533 reports in conjunction with Court Rules as to the production of documents mentioned in an affidavit e.g. <i>Federal Court Rules 2011</i>, rule 20.31. See for example:</p> <ul style="list-style-type: none"> - Court Procedure Rules 2006 (ACT), Schedule 6, Part 6.7: rule 7.5(3)(h) - Supreme Court (Corporations) Rules 1999 (NSW): rule 7.5(3)(h) - Uniform Civil Rules 1999 (Qld), Sch 1A, Part 4: rule 7.5(3)(h)

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	<ul style="list-style-type: none"> - Supreme Court (Corporations) Rules 2003 (SA): rule 7.5(3)(h) - Supreme Court (Corporations) Rules 2023 (VIC): r 7.5(3)(h) - Supreme Court (Corporations) (WA) Rules 2004, r 7.5(3)(h) <p>External Administrators and ASIC may prefer this risk not arise.</p>
<i>Issue B5: Timing for Lodgement</i>	
[B5Q1]: Is the proposed guidance in Section D of draft updated RG 16 helpful? If not, explain how we could improve the guidance.	See our comments below.
[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?	We defer to our registered liquidator colleagues with experience completing the reports to make any comment.
[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?	<p>There may be a need to link the timeframe to both the timing of a request and also the timing of any response to an application for funding.</p> <p>Practitioners should be given a sufficient amount of time after the request and any such determination to lodge the supplementary statutory report.</p> <p>We defer to our registered liquidator colleagues with experience completing the reports to make any comment on whether or not three months would otherwise be sufficient.</p>