



Law Council
OF AUSTRALIA

Business Law Section

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**Via email: policy.submissions@asic.gov.au;
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16 February 2017

Dear Mr Ashford,

ASIC Consultation Paper 276 – Registered liquidators: Registration, disciplinary actions and insurance requirements

Thank you for the opportunity to comment upon ASIC's Consultation Paper 276 – Registered liquidators: Registration, disciplinary actions and insurance requirements

The attached submission has been prepared by the Insolvency and Reconstruction Committee of the Business Law Section of the Law Council of Australia.

If you have any questions in relation to the submission, in the first instance please contact the Chair of the Insolvency and Reconstruction Committee, Victoria Butler on (08) 9426 6694 or via email: vbutler@jacmac.com.au

Yours sincerely

Teresa Dyson, Chair
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ASIC Consultation Paper 276 – Registered liquidators: Registration, disciplinary actions and insurance requirements (CP 276)

Submission prepared by Insolvency & Reconstruction Law Committee of the Business Law Section of the Law Council of Australia (IRC)

1. The IRC refers to the questions outlined in CP276 and makes the following submissions.
2. The IRC also refers to ARITA's submissions contained in ARITA's letter dated 8 February 2017 (**ARITA submissions**).

B1Q1 Is the information we propose to require of an applicant relevant and appropriate to assist a committee to decide whether an applicant should be registered as a liquidator? Please provide reasons for your view.

3. Table 5 and RG 000.53 include the requirement to provide details of any legal or disciplinary action taken against the applicant in the previous 10 years **regardless of the outcome**. The IRC submits that it is not appropriate to require the disclosure of an action where there has been a completely successful defence, particularly where the suggestion is that the facts and circumstances would be considered again. In effect, a fresh judgment is being applied to a matter decided in favour of the individual. It is a double jeopardy. The IRC submits that only those actions where there has been an adverse finding or penalties imposed against the individual should require disclosure.
4. The IRC notes that, in some provisions, ASIC appears to prescribe what the committee may consider rather than outline the matters that it believes the committee may consider. Examples occur in RG 000.20, RG 000.21, RG 000.26 and RG 000.27. The IRC suggests a change in wording from:
 - a. *"The committee will consider..."* to *"ASIC believes the committee will consider..."*; and
 - b. *"The committee may consider..."* to *"ASIC believes the committee may consider..."*.

5. The IRC also endorses the ARITA submissions in response to this question.

B1Q2 Is guidance needed on any other topic regarding liquidator registration? If so, why?

6. The IRC makes no comment in response to this question.

C1Q1 Is there any additional guidance that would be useful to include in Section C of the draft regulatory guide? If so, please give details.

7. The IRC makes no comment in response to this question.

D1Q1 Is there any other guidance on the disciplinary framework for registered liquidators that would be useful to include in the updated guide? If so, please give details.

8. On the current wording of RG 000.113, RG 000.129(f) and RG 000.129(l), those provisions could be interpreted to mean that ASIC can determine whether a contravention or breach has occurred without reference to any Court determination. The IRC suggests that the wording in:
 - a. RG 000.113 and RG 000.129(f) be changed to, *"whether you have been found by a court to have contravened ..."*; and
 - b. RG 000.129(l) be changed to *"whether you have been found by a court to have failed to carry out adequately and properly..."*.

9. RG 000.113 refers to “any other legal or equitable obligation”. This could be construed too widely and might, for example, catch an estoppel upheld against a practitioner. The IRC suggests amending the wording to refer to “... a provision of the Corporations Act, or a breach of any other related legal or equitable duty or obligation.”
10. The IRC endorses the ARITA submissions in relation to RG 000.113(c), RG 000.151 and RG 000.199(b).
11. In relation to RG 000.201 and RG 000.202, some of the matters listed would require the registered liquidator to reach legal conclusions and is subject to the registered liquidator reaching the correct legal conclusion (or at least the same conclusion that would be reached by ASIC or the committee). In particular:
 - a. RG 000.202(c) requires that the registered liquidator determine that he or she has ceased to be fit and proper to remain registered for any other reason; and
 - b. RG 000.201(b) requires the registered liquidator to determine whether he or she ceases to have adequate and appropriate PI or fidelity insurance.

The IRC submits that it not appropriate that a registered liquidator could breach the Regulatory Guide by failing to request suspension or cancellation in such circumstances and those provisions should be removed. The registered liquidator should not be required to, in effect, reach the legal conclusion that an adverse determination would be made against him or her.

E1Q1 Do you agree with this proposal? If not, please explain why not.

12. The IRC agrees with the proposal to incorporate ASIC’s guidance on insurance requirements with ASIC’s guidance on the registration and disciplinary framework for registered liquidators.

E1Q2 Is there any reason why ASIC should not make a legislative instrument setting out the insurance requirements? Please provide reasons for your view.

13. We note ASIC’s comment in paragraph 21 of CP 276 to the effect that ASIC will undertake a separate consultation in relation to a legislative instrument. Subject to that consultation taking place, the IRC does not know of any reason why ASIC should not make a legislative instrument setting out the insurance requirements.

E2Q1 Do you agree with this proposal? If not, please explain why not.

14. The IRC makes no comment in response to this question.

E3Q1 Do you agree with this proposal? If not, please explain why not.

E3Q2 Alternatively, do you consider ASIC should require registered liquidators to hold fidelity insurance under a fidelity bond arrangement for registered liquidators who operate as sole practitioners (or all registered liquidators) if such arrangements were available in the market? If so, please explain why.

15. The IRC makes no comment in response to these questions.

E4Q1 Do you agree with this proposal? If not, please explain why not.

16. The IRC endorses the ARITA submission in response to this question.

E4Q2 If you consider there may be other instances where it may be unnecessary to maintain adequate and appropriate professional and fidelity insurance, please provide details.

17. The IRC makes no comment in response to this question.