



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 16

External administrators: Reporting and lodging

July 2008

About this guide

This is a guide for external administrators, i.e. liquidators (including provisional liquidators), voluntary administrators, administrators of a deed of company arrangement, receivers, receivers and managers, controllers and managing controllers.

It provides guidance to external administrators on their reporting obligations to ASIC under the *Corporations Act 2001* (the Act) and the effective lodgement of documents, including by electronic lodgement. However, it does not deal with the reporting obligations of liquidators involved in members' voluntary liquidations.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This regulatory guide was issued on 1 July 2008 and is based on legislation and regulations as at 1 July 2008.

Previous versions:

- Practice Note 50 rebadged as Regulatory Guide 16 on 5 July 2007
- Superseded Practice Note 50, issued 28 April 1994, updated 17 December 2002, Schedule B replaced 2 October 2006

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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Overview

Key points

External administrators have a range of obligations to report to, and lodge documents with, ASIC under the Act: see RG 16.2–RG 16.5.

Most external administrators enjoy qualified privilege against defamation liability for comments made in reports required to be lodged with ASIC: see RG 16.15.

Even unfunded external administrators must comply with all statutory obligations to prepare and lodge reports and other documents with ASIC: see RG 16.19–RG 16.21.

The fact that one external administrator may have reported in relation to the insolvent company does not relieve a concurrently or subsequently appointed external administrator of any of their reporting obligations: see RG 16.23.

ASIC may investigate matters to which reports lodged by external administrators relate and may take follow-up action: see RG 16.24.

The reporting obligations may be enforced by the court, or disciplinary action may be taken in the CALDB, on the application of ASIC: see RG 16.25–RG 16.30.

What are the reporting obligations?

- RG 16.1 External administrators have a range of reporting obligations under the Act. While this guide sets out some of the reporting obligations to clarify areas of uncertainty, it does not set out every reporting obligation.
- RG 16.2 Depending on the nature of the external administration, external administrators will, in many circumstances, have an obligation to lodge the following reports and documents with ASIC:
- (a) preliminary reports (s476)—see Section A and Schedule A;
 - (b) reports of possible misconduct (s422(1), 438D(1) or 533(1) when lodged in compliance with the external administrator’s statutory obligation, or s422(3), 438D(3) or 533(3) when lodged following a direction by the court)—see Section B and Schedule B;
 - (c) reports on an insolvent company where unsecured creditors may not receive more than 50 cents in the dollar (s533(1)(c))—see RG 16.41;
 - (d) supplementary reports (s422(2), 438D(2) or 533(2))—see Section C and Schedule C; and

- (e) other documents (including reports as to affairs, and accounts, notifications and resolutions)—see Section D.

RG 16.3 Schedules A, B, C and D set out the information external administrators should consider and provide when lodging particular reports electronically or in paper form.

What is the role of reports and other documents?

RG 16.4 External administrators are the front-line investigators of insolvent corporations. The Act requires external administrators to lodge statutory notices and other reports promptly, so that:

- (a) the information on ASIC public registers is accurate and up-to-date;
- (b) interested persons are able to determine the status of an external administration; and
- (c) ASIC is made aware of possible misconduct in connection with the management of the insolvent or failing company.

RG 16.5 These obligations of external administrators contribute to:

- (a) maintaining the integrity of the marketplace; and
- (b) promoting investor and consumer confidence.

How can reports and other documents be lodged?

Electronic lodgement

RG 16.6 Most external administration reports and other documents may be lodged electronically through the Registered Liquidators portal on our website at www.asic.gov.au/liquidators.

RG 16.7 Electronic lodgement allows ASIC to:

- (a) capture data in a consistent, structured and timely manner; and
- (b) quickly analyse information provided by external administrators, and initiate regulatory and enforcement responses where appropriate.

Note: For more information on electronic lodgement, see the '*For liquidators, Compliance*' section on our website at www.asic.gov.au, in particular the documents accessible from the link entitled '*How the registered liquidator portal works*'.

Paper form

RG 16.8 Electronic lodgement is not mandatory. External administrators may lodge reports and other documents in paper form in accordance with reg 1.0.07 of

the Corporations Regulations 2001 (regulations). Sections A to D set out where to post paper forms or lodge them in person.

- RG 16.9 External administrators can download paper forms from the Registered Liquidators portal at www.asic.gov.au/liquidators. A paper form that may be used for the preliminary report under s476 appears at Schedule A to this document. A paper form that may be used for the initial report of possible misconduct appears at Schedule B. The other two schedules contain ‘free format’ guidance.
- RG 16.10 Where a report or other document is able to be lodged with ASIC electronically but the external administrator chooses to lodge it in paper form, the paper form should include the same information as requested in the online form.

Late fees

- RG 16.11 We may levy late fees on reports and other documents that are lodged outside prescribed time limits, regardless of whether they are lodged electronically or in paper form. These fees are levied in accordance with the Corporations (Fees) Regulations 2001.

Urgent matters

- RG 16.12 Where a matter is serious and requires urgent action, we strongly urge the external administrator immediately to advise the Manager, Complaints, in the nearest state or territory ASIC office: see www.asic.gov.au/regionaloffices for contact information.
- RG 16.13 Examples of matters requiring urgent consideration include cases where:
- (a) assets of the insolvent company are at risk of unlawful dissipation; or
 - (b) the external administrator has reason to believe that a person who appears to have engaged in misconduct might be intending to leave the jurisdiction.
- RG 16.14 As soon as is practicable, the external administrator should lodge a report of possible misconduct about the matter: see Sections B and C.

Qualified privilege

- RG 16.15 In the absence of malice on their part, external administrators enjoy a statutory immunity from liability for defamation for comments made in reports to ASIC that might otherwise be actionable (qualified privilege): s426, 442E and 535. RG 16.58–RG 16.60 set out how qualified privilege applies to reports of possible misconduct.

Limited disclosure of reports

- RG 16.16 Reports of possible misconduct lodged with ASIC are not made available on ASIC public registers.
- RG 16.17 However, reports and other documents that are not made available on ASIC public registers may be disclosed to persons outside ASIC in limited circumstances, for example:
- (a) during ASIC-initiated enforcement proceedings; or
 - (b) where compelled by compulsory notice (e.g. by subpoena).
- RG 16.18 We may also disclose information in accordance with s127 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) for the performance of our functions or for the exercise of our powers. In particular, we may release information to another government agency under s127(4) where the information will enable or assist that agency to perform its functions or exercise its powers.

Note: See Regulatory Guide 103 *Confidentiality and release of information* (RG 103).

What if an external administration has insufficient assets?

- RG 16.19 In some external administrations, there may be insufficient property available to pay the expenses and remuneration of the external administrator (an unfunded external administrator). An unfunded external administrator must still comply with their statutory obligations to prepare and lodge reports and other documents with ASIC.
- RG 16.20 Section 545(3) makes it clear that nothing in s545(1) relieves a liquidator of the obligation to lodge reports and other documents with ASIC, even if the liquidator is an unfunded external administrator. We consider that the purpose of s545(1) is to relieve the liquidator from the burden of incurring expenses other than those that must be incurred in order to carry out their statutory reporting and document lodgement obligations.
- RG 16.21 In determining whether an unfunded external administrator has satisfied their reporting obligations, we will consider a range of factors, including:
- (a) the type of appointment the external administrator is or was undertaking;
 - (b) the nature of any misconduct subsequently discovered that was not reported by the external administrator;
 - (c) any public interest considerations surrounding the company, its officers or the external administration;

- (d) the circumstances of the external administration, including whether members of the public have alerted the external administrator to any possible misconduct and the external administrator's response to those allegations;
- (e) any reports that have been lodged by an earlier-appointed external administrator; and
- (f) the level of funding available to the external administrator.

RG 16.22 An unfunded external administrator can consider applying to ASIC for funding under Regulatory Guide 109 *Assetless Administration Fund: Funding criteria and guidelines* (RG 109). If the unfunded external administrator's application for funding is approved, we may have specific requests regarding the content of their supplementary report (beyond our guidance in this guide), which we will discuss with them separately.

Note: See www.asic.gov.au/aafund for further details of the Assetless Administration Fund.

What about concurrent and subsequent appointments?

RG 16.23 More than one external administrator may be acting with respect to an insolvent company, either concurrently or by virtue of an earlier appointment. The fact that one external administrator may have reported in relation to the insolvent company does not relieve another external administrator of their reporting obligations under the Act.

What action may ASIC take?

RG 16.24 Under s13 or 15 of the ASIC Act, we may investigate matters raised in reports lodged by external administrators and may take one or more of the following actions:

- (a) institute enforcement proceedings against a person (by commencing appropriate civil, criminal or administrative proceedings);
- (b) release information to a more appropriate law enforcement agency in accordance with the provisions of s127 of the ASIC Act;
- (c) release (under s25 of the ASIC Act) copies of transcripts of relevant examinations conducted under s19 of the ASIC Act, and of related books, to the lawyer of an external administrator or another person who is conducting proceedings, or is contemplating them in good faith; or

Note: See RG 103.

- (d) having considered the report, inform the external administrator that the matter is one in respect of which we do not intend to institute proceedings or release information.

Note: An external administrator can take action under the general law and/or s534 by commencing legal proceedings in respect of misconduct. In addition, they may apply under Div 1 of Pt 9 (if they are an eligible applicant) for an officer or former officer of the insolvent company to which they have been appointed (or a person who may have been guilty of misconduct in relation to the company) to be examined in court about the company's examinable affairs.

How are the reporting obligations enforced?

RG 16.25 The court may, in certain circumstances, make orders that require the external administrator to remedy defaults concerning their duties, including requiring the lodgement of reports: s422(3), 438D(3) or 533(3).

RG 16.26 We may inquire into a matter where it appears to us that a controller, liquidator or provisional liquidator:

- (a) has not performed or is not performing their duties faithfully; or
- (b) has not observed or is not observing a requirement of the court or Australian law (s423(1) or 536(1)).

We may report to the court any matter that in our opinion is a misfeasance, neglect or omission on the part of the controller, liquidator or provisional liquidator: s423(2) or 536(2).

RG 16.27 In addition, we may conduct such investigations as we consider expedient where we have reason to suspect that a registered liquidator (appointed to any type of external administration) has not or may not have performed, or is not or may not be performing, their duties faithfully: s13(3) of the ASIC Act.

RG 16.28 We may refer to the Companies Auditors and Liquidators Disciplinary Board (CALDB) the failure of an external administrator to:

- (a) lodge reports, accounts, or notifications as required by the Act; or
- (b) submit reports of a sufficient standard.

The CALDB will make a determination as to whether the external administrator has discharged their duties properly and adequately: see s1292.

RG 16.29 We consider the failure of an external administrator to promptly report serious possible misconduct in relation to a company to be a serious matter.

RG 16.30 Under s1311 and 1315, we may prosecute an external administrator who fails, without reasonable excuse, to lodge documents or make reports as required.

If external administrators have queries about reporting to ASIC

RG 16.31 ASIC's Infoline (1300 300 630) is available for external administrators who have a query that is not addressed in this guide about:

- (a) their reporting obligations;
- (b) whether particular acts, errors or omissions constitute possible misconduct that is of interest to ASIC;
- (c) the likely evidence that ASIC will need to take action;
- (d) how to complete or lodge a Schedule A or Schedule B report; or
- (e) what to include in a Schedule C supplementary report.

Note: External administrators should ask for 'Liquidator Assistance' when they call the Infoline.

A Preliminary reports by court-appointed liquidators

Key points

Court-appointed liquidators must lodge a preliminary report with ASIC within two months after receiving a report as to affairs, unless an extension of time is granted by ASIC: see RG 16.32.

The preliminary report must address the amount of capital, the assets and liabilities of the company, the causes of the company's failure and whether further inquiry into the company's business is desirable: see RG 16.36.

Preliminary reports can be lodged electronically and are available for inspection on ASIC public registers: see RG 16.37–RG 16.39.

What are the reporting obligations?

- RG 16.32 Under s476 of the Act, all court-appointed liquidators must lodge a preliminary report with ASIC. This report must be lodged within:
- (a) two months after receiving a report as to affairs under s475(1) or (2) of the Act; or
 - (b) a longer period if ASIC grants an extension of time.
- RG 16.33 We will not normally grant an extension of time if the report is already overdue.

How to apply for an extension of time

- RG 16.34 The liquidator must apply in writing, addressed to the Manager, Complaints, in the nearest state or territory ASIC office: see www.asic.gov.au/regionaloffices for the relevant postal address. Alternatively, the liquidator may submit their written application for an extension of time to <mailto:exadpreliminaryreports@asic.gov.au>.
- RG 16.35 The application should:
- (a) identify the date on which the report will be due if the extension is granted;
 - (b) set out appropriate reasons why the preliminary report cannot be provided sooner; and
 - (c) be accompanied by the applicable fee as prescribed in the Corporations (Fees) Regulations 2001.

What must be reported?

- RG 16.36 Section 476 of the Act specifies that the following information must be included in a preliminary report:
- (a) in the case of a company having a share capital—the amount of capital issued, subscribed and paid up;
 - (b) the estimated amounts of assets and liabilities of the company;
 - (c) if the company has failed—the causes of the failure; and
 - (d) whether, in the liquidator’s opinion, further inquiry is desirable in respect of a matter relating to the company’s promotion, formation or insolvency, or the conduct of the company’s business.

Note: Even if a court-appointed liquidator is the liquidator of a pooled group of companies, they must still lodge a report in respect of each company in the group, unless the court makes an order to the contrary. This is because the obligation in s476 to lodge a preliminary report refers to a company in the singular, not a pooled group of companies.

In what format should preliminary reports be lodged?

- RG 16.37 We consider that lodging a preliminary report by completing Form 564 (a copy of which appears at Schedule A of this guide) will meet the requirements of s476. However, liquidators may lodge a preliminary report in another format, as long as the information required to be provided to ASIC under s476 is contained within the report.
- RG 16.38 The preliminary reports we receive under s476 of the Act are available for inspection on ASIC public registers. This applies regardless of whether the reports are in Schedule A format or any other format.

How to lodge a preliminary report

- RG 16.39 Liquidators can lodge a preliminary report by:
- (a) lodging Form 564 electronically through the Registered Liquidators portal at www.asic.gov.au/liquidators; or
 - (b) downloading a paper version from ASIC’s website at www.asic.gov.au or printing a copy of the Form 564 that appears in Schedule A and lodging it by post, addressed to ASIC, PO Box 4000, Gippsland Mail Centre, VIC 3841.

B Reports of possible misconduct

Key points

Receivers, managing controllers, administrators and liquidators are required to report to ASIC if it appears to them that a relevant person may have engaged in misconduct: see RG 16.40 and RG 16.44–RG 16.45.

Liquidators must also lodge a report where the company may be unable to pay its unsecured creditors more than 50 cents in the dollar: see RG 16.41.

The Act does not specify precisely what information is to be included in a report of possible misconduct. However, Schedules B and D provide guidance on the content and on the types of information and supporting documents that liquidators could consider when investigating and reporting: see RG 16.48–RG 16.55.

Qualified privilege applies to a report of possible misconduct made under the Act: see RG 16.58–RG 16.60.

The Act requires external administrators to lodge reports of possible misconduct as soon as practicable. Liquidators are subject to an additional requirement to lodge reports in any event within six months after it appears to them that a relevant person may have engaged in misconduct.

In parallel, we request that receivers, managing controllers and administrators make a report within two months after their appointment, if possible, so that we can assess the matter promptly. We request that liquidators report within two months after the date of appointment if they are in possession of sufficient information, or if they are not, within six months after the date of appointment: see RG 16.61–RG 16.65.

We use the Schedule B information for statistical purposes: see RG 16.66–RG 16.67.

What are the reporting obligations?

RG 16.40 External administrators must lodge a report with ASIC—as soon as practicable (and in the case of a liquidator, in any event within six months) after forming an opinion—if it appears to the external administrator that a relevant person may have:

- (a) committed an offence in relation to the company;
- (b) been negligent; or
- (c) otherwise engaged in misconduct.

See s422(1), 438D(1) and 533(1)(a), (b) & (d). See also RG 16.44–RG 16.45.

RG 16.41 In addition, *liquidators* must lodge a report where the company may be unable to pay its unsecured creditors more than 50 cents in the dollar: s533(1)(c).

What should be reported?

RG 16.42 The external administrator must report to ASIC if it appears there may have been misconduct in relation to the company. This applies where:

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

RG 16.43 The Act does not specify precisely what information is to be included in the report other than to oblige the external administrator to give to ASIC such information, and such access to and facilities for inspecting and taking copies of any documents, as ASIC requires: see s422(1)(d), 438D(1)(d) and 533(1)(e). An additional obligation is placed on a liquidator, who must state in the report whether they propose to make an application for an examination or order under s597: see s533(1)(d).

Note: Even if the external administrator is the liquidator of a pooled group of companies, they must still lodge a report in respect of each company in the group, unless the court makes an order to the contrary. This is because the obligation in s533 to lodge a report on possible misconduct refers to a particular company in the singular, not a pooled group of companies.

Who must lodge reports?

RG 16.44 Under the Act, only certain external administrators are required to lodge reports of possible misconduct:

- (a) a receiver of property of a corporation (s422(1));
- (b) a managing controller of property of a corporation (s422(1));
- (c) an administrator appointed to a company (s438D(1)); and
- (d) a liquidator of a company (s533(1)).

- RG 16.45 The Act does not require the following external administrators to report possible misconduct to ASIC:
- (a) a controller who is neither a receiver nor a managing controller; or
 - (b) a provisional liquidator.
- RG 16.46 However, we consider it desirable that these external administrators make such a report if it appears to them that an offence may have been committed or that a relevant person may have been guilty of other misconduct. If they wish to do so, a controller (who is neither a receiver nor a managing controller) or a provisional liquidator should provide details to ASIC in writing, addressed to the Manager, Complaints, either:
- (a) by email to <mailto:exadreports@asic.gov.au>; or
 - (b) by post: see www.asic.gov.au/regionaloffices for the postal address of the nearest ASIC state or territory office.
- RG 16.47 External administrators should be aware, however, that a report of misconduct made when acting in these roles may in some circumstances not attract qualified privilege protection: see RG 16.58–RG 16.60.

What guidance is there for preparing reports of possible misconduct?

- RG 16.48 We consider that, in most cases, external administrators who lodge information in accordance with Schedule B of this guide will meet the requirements of s422(1) & (3), 438D(1) & (3) and 533(1) & (3). However, we consider that this information represents the *minimum* requirement only.
- RG 16.49 We also request that liquidators lodge information in accordance with Schedule B in order to meet the requirements of s533(1)(c), even if it does not appear to the liquidator that any misconduct may have occurred.
- RG 16.50 Where an external administrator considers that completing Schedule B is insufficient to satisfy the reporting requirements of the Act, the external administrator should provide supplementary information (preferably in Schedule C format): see Section C. After assessing information provided by an external administrator in Schedule B format, we may also request that further information be submitted using Schedule C.

How does an external administrator obtain the information necessary to prepare a report?

RG 16.51 External administrators have an overriding obligation to use their professional judgement in carrying out an investigation into the affairs of an insolvent company and fulfilling their reporting obligations under the Act.

RG 16.52 In this context, an *administrator* should bear in mind:

- (a) their statutory duty to investigate the company's business, property, affairs and financial circumstances set out in s438A(a);
- (b) the directors' duties to:
 - (i) deliver books relating to the company to the administrator under s438B(1);
 - (ii) give the administrator a statement (and other such information as the administrator may reasonably require) about the company's business, property, affairs and financial circumstances under s438B(2) and (3)(b); and
 - (iii) attend on the administrator at such times as the administrator may reasonably require under s438B(3)(a); and
- (c) the administrator's power to obtain the company's books under s438C.

RG 16.53 Similarly, a *liquidator* should bear in mind:

- (a) their duty to conduct an investigation (the level of which depends on the nature and circumstances of the appointment) into the history of the company and those associated with it and past activities connected with the company;

Note: See *Re Allebart Pty Ltd* [1971] 1 NSWLR 24 at 26–27.

- (b) the officers' duties to do whatever the liquidator reasonably requires to help in the winding up under s530A(3) and the other aspects of the general duty to cooperate upon reasonable demand in s530A;

Note: See *ERS Engines Pty Ltd v Wilson* (1994) 35 NSWLR 193 at 197–198; *Re Photosprint Australia Pty Ltd (rec and mgr apptd) (in liq)* (2004) 212 ALR 517 at 518.

- (c) their power to obtain the company's books under s530A, 530B and 530C and the general principle that it is their duty under the common law to get in and hold the books and records and to use them for the purpose of making such reasonable inquiries as they can;

Note: See *Clasquin SA v AAR International Pty Ltd & Anor* (1989) 15 ACLR 9 at 12.

- (d) their power to inspect the books of the company under s477(3) if they are a court-appointed liquidator; and
- (e) their duty under s478 or 501 to cause the company's property to be collected and applied in discharging the company's liabilities.

- RG 16.54 *Receivers* should bear in mind their broad powers under s420 in relation to the company, subject to the court order or instrument under which they were appointed. *Controllers* should in addition bear in mind:
- (a) their power under s430 to require a report about specified affairs of the company from company officers, employees, and persons involved in the company's formation; and
 - (b) their power to inspect the company's books under s431.
- RG 16.55 We have also provided additional guidance in Schedule D as to the types of information and supporting documents that could be considered by an external administrator when investigating possible misconduct and reporting to ASIC.
- RG 16.56 If an external administrator experiences difficulties in obtaining relevant information, for example, because the directors of a company have failed:
- (a) to provide a report as to affairs; or
 - (b) to deliver the books and records of the company to the external administrator,

we request that the external administrator consider exercising their powers in this regard, or seek our assistance before completing a Schedule B report. If assistance is needed, please notify ASIC in writing: see www.asic.gov.au/liquidatorassistance for details of how to put in a complaint.

How to lodge a report of possible misconduct

- RG 16.57 External administrators can lodge this report by:
- (a) lodging Form EX01 electronically through the Registered Liquidators portal at www.asic.gov.au/liquidators; or
 - (b) downloading a paper version from ASIC's website at www.asic.gov.au or printing a copy of the Form EX01 that appears in Schedule B and lodging it by post, addressed to ASIC, PO Box 4000, Gippsland Mail Centre, VIC 3841.

Qualified privilege

- RG 16.58 Reports of possible misconduct lodged with ASIC under s422, 438D or 533 (including supplementary reports), as well as reports relating to companies in liquidation that may be unable to pay their unsecured creditors more than 50 cents in the dollar, are not made available on ASIC public registers: s1274(2)(a)(iv). This applies regardless of whether the reports are in

Schedule B format, Schedule C format, or any other format. The fact that these types of reports may have been lodged is also not publicly available.

- RG 16.59 Where an external administrator is completing a report (e.g. in Schedule B format) for the purpose of satisfying the reporting obligations imposed by s422(1), 438D(1) or 533(1), the external administrator will have qualified privilege under s426, 442E or 535 of the Act (as the case may be) in respect of statements made or matters contained in the report.
- RG 16.60 Where a provisional liquidator, or a controller who is neither a receiver nor a managing controller, is providing the report outside the requirements of the Act (see RG 16.44–RG 16.45), however, they should be aware that there may in some circumstances be no statutory qualified privilege. Such reports will, however, not be made available on ASIC public registers: see RG 16.16–RG 16.18. The fact that these types of reports may have been lodged is also not made known publicly.

Specific and timely information

- RG 16.61 We use reports of possible misconduct to decide whether or not further regulatory or enforcement action is required in relation to the affairs of an insolvent company. In order to carry out our assessment in an effective and timely manner, we need external administrators to provide information that is:
- (a) specific; and
 - (b) timely.
- RG 16.62 Schedule B lists the minimum information that we need to conduct an effective assessment of the relevant facts for an insolvent company. Electronic lodgement of information in Schedule B format (using the online Form EX01) allows us to collect such information in a consistent, structured and timely manner.
- RG 16.63 Although the Act *requires* receivers, managing controllers and administrators to lodge reports of possible misconduct as soon as practicable, we *request* that this information be provided within two months of the date of appointment, if possible. Lodgement of reports within this timeframe, and using the Schedule B format, will enable us to promptly examine any possible misconduct reported and, where appropriate, commence an investigation or institute civil or administrative proceedings.
- RG 16.64 Under s533(1)(d), liquidators are *required* to lodge reports of possible misconduct as soon as practicable and, in any event, within six months *after it appears to them that a relevant person may have engaged in misconduct*.

RG 16.65 While liquidators must comply with this statutory obligation, we also *request* that they lodge this information in Schedule B format wherever possible within the following timeframes:

- (a) within two months *after the date of appointment*, if the liquidator is in possession of sufficient information to complete Schedule B at that time; and
- (b) if the liquidator does not have this information after two months, in any event within six months *after the date of appointment*.

External administrators may lodge additional reports of possible misconduct for an insolvent company as more information becomes available.

ASIC's use of Schedule B information for statistical purposes

RG 16.66 We collate the Schedule B information we receive and use it for statistical purposes. This data is collated in an aggregated and anonymous form. We do not make Schedule B information concerning an individual company available on ASIC public registers.

RG 16.67 We particularly encourage all external administrators to use the Schedule B format (Form EX01) for reports of possible misconduct and to lodge reports in this format within the timeframes referred to in paragraphs RG 16.63–RG 16.65 so that the collated information can be useful for statistical purposes. We acknowledge that this requirement exceeds the reporting obligations imposed by the Act and the regulations. However, we are seeking the voluntary cooperation of external administrators in submitting forms for statistical, rather than reporting, purposes. Form EX01 allows for external administrators to indicate whether the form is being completed solely for statistical purposes.

C Supplementary reports

Key points

An external administrator may use supplementary reports to submit additional information to ASIC: see RG 16.68 and RG 16.69.

The court can direct an external administrator to lodge a supplementary report if it appears that misconduct may have occurred and the external administrator has not lodged a report on the matter: see RG 16.70.

Schedules C and D provide guidance to external administrators considering lodging supplementary reports: see RG 16.73–RG 16.74.

A supplementary report can only be lodged in paper form (not electronically): see RG 16.75.

What are the reporting obligations?

- RG 16.68 An external administrator may lodge supplementary reports specifying any other matter that, in the relevant external administrator's opinion, it is desirable to bring to ASIC's notice: s422(2), 438D(2) and 533(2).
- RG 16.69 An external administrator may use a supplementary report to submit further information to ASIC in addition to a report of possible misconduct submitted in Schedule B format. This may come about:
- (a) through the exercise of the external administrator's initiative; or
 - (b) where ASIC has conducted an assessment of the information provided in Schedule B and requested further information.
- RG 16.70 The court may also, on the application of an interested person, direct an external administrator to lodge a supplementary report if:
- (a) it appears to the court that a relevant person has engaged in misconduct in relation to the company; and
 - (b) the external administrator has not lodged a report with respect to the matter: see s422(3)–(4), 438D(3) and 533(3).

Qualified privilege

- RG 16.71 Supplementary reports lodged with ASIC under s422(2), 438D(2) or 533(2) are not made available on ASIC public registers: s1274(2)(a)(iv). The fact

that these types of reports may have been lodged is also not publicly available.

- RG 16.72 Where an external administrator is completing a supplementary report (e.g. following the guidance in Schedule C) under s422, 438D or 533, the external administrator will have qualified privilege under s426, 442E or 535 of the Act (as the case may be) in respect of statements made or matters contained in the report: see RG 16.58–RG 16.60.

What guidance is there for preparing supplementary reports?

- RG 16.73 Schedule C of this guide provides guidance to an external administrator considering lodging a supplementary report. It outlines the type of information that we will need when considering specific enforcement action in response to an external administrator notifying us that it appears to them that misconduct may have occurred: see also RG 16.58–RG 16.60.
- RG 16.74 Schedule D sets out additional guidance on the types of information and supporting documents that an external administrator could consider when investigating possible misconduct and reporting to ASIC in a supplementary report.

How to lodge a supplementary report

- RG 16.75 The supplementary report is a free-format report and cannot be lodged electronically as a form through the Registered Liquidators portal, or downloaded in paper form from ASIC's website. External administrators should lodge this report:
- (a) by emailing it as a signed, scanned PDF attachment to <mailto:exadreports@asic.gov.au>; or
 - (b) by post, addressed to the Manager, Complaints, in the nearest state or territory ASIC office: see www.asic.gov.au/regionaloffices for the relevant postal address.

If you do not intend to lodge a supplementary report

- RG 16.76 It is our policy to follow up on outstanding supplementary reports we have requested but not received. If an external administrator intends not to provide a supplementary report requested by ASIC, and that intention is not connected with an application for funding from the Assetless Administration Fund (see www.asic.gov.au/aafund for details), we therefore request that the external administrator put their reasons to ASIC in writing, addressed to the Manager, Complaints.
- RG 16.77 This notification may be sent:

- (a) by email to <mailto:exadreports@asic.gov.au>; or
- (b) by post: see www.asic.gov.au/regionaloffices for the postal address of the nearest ASIC state or territory office.

D Other documents

Key points

Depending on the form of the appointment, an external administrator may be required to lodge other documents with ASIC: see RG 16.78–RG 16.80.

This section summarises the requirements for reports as to affairs that must be:

- provided to and lodged by liquidators (see RG 16.81–RG 16.87);
- provided to and lodged by controllers (see RG 16.89–RG 16.96);
- prepared and lodged by managing controllers (see RG 16.98–RG 16.99); and
- given to voluntary administrators (see RG 16.100–RG 16.102).

This section also summarises the lodging requirements for:

- reports in relation to creditors' voluntary liquidations (see RG 16.103–RG 16.105); and
- pooling determinations and variations (see RG 16.106–RG 16.107).

Depending on the form of the appointment, external administrators may also be required to lodge periodic accounts or various other documents with ASIC: see RG 16.108–RG 16.109 and Table 1.

What are the reporting obligations?

- RG 16.78 Depending on the nature of the external administration, external administrators must lodge other documents with ASIC including:
- (a) reports as to affairs;
 - (b) reports in relation to creditors' voluntary liquidations;
 - (c) pooling determinations and variations of pooling determinations; and
 - (d) accounts, notices, returns, orders, directions, statements and minutes.
- RG 16.79 Information relating to these reports, determinations, accounts, notices, returns, orders, directions, statements and minutes is placed on ASIC public registers and is available for public inspection.
- RG 16.80 External administrators lodging this information electronically should note that ASIC's electronic lodgement system is linked to, and updates, ASIC public registers. Therefore, administrators should ensure that confidential information is not included in these documents.

Reports as to affairs

Liquidators

- RG 16.81 Under s475(1) of the Act, a report as to affairs of a company must be made out, verified and submitted to a court-appointed liquidator by those who, at the date of the winding-up order or an earlier date if the liquidator so specifies, were the directors and secretary of the company. The report must be submitted not later than 14 days after the company is wound up: s475(4).
- RG 16.82 In addition, a court-appointed liquidator (including a provisional liquidator) may require other past and present officers and employees of the company to report on specified affairs of the company: see generally s475(2).
- RG 16.83 A liquidator in a creditors' voluntary liquidation that follows a voluntary administration or a deed administration may require an officer or former officer of the insolvent company to submit and verify a report on specified affairs of the company: s446C(1) and (2). The report must be submitted not later than 14 days after the liquidator gives the officer or former officer the notice requiring the report or a longer period if the liquidator so allows: s446C(4).
- RG 16.84 Liquidators must lodge with ASIC, within seven days of receipt, a certified copy of any reports they receive under s446C(2) or under s475(1) or (2): s446C(7) and 475(7)(a).
- RG 16.85 A liquidator or a provisional liquidator may extend the statutory period within which the reports must be submitted to them by giving written notice to the applicant granting an extension of time until a specified day: s446C(5) and 475(6). As soon as practicable after granting an extension of time, a court-appointed liquidator or a provisional liquidator must lodge with ASIC a copy of the notice granting the extension: s475(7)(b).
- RG 16.86 The period within which reports must be submitted should only be extended where:
- (a) the liquidator believes there are special reasons for granting the extension: s446C(6) and 475(6); and
 - (b) the request for the extension has been made before the end of the time specified by s446C(4)(a) or by s475(4) or (5) respectively: s446C(5) and 475(6).
- RG 16.87 The liquidator or provisional liquidator may seek ASIC's assistance to obtain a report required under s446C or 475 by notifying ASIC in writing: see <http://www.asic.gov.au/liquidatorassistance> for details of how to put in a complaint.

- RG 16.88 The liquidator or provisional liquidator may notify ASIC of a continuing possible offence (by including this information in a Schedule B or C report, as applicable) if:
- (a) they do not obtain a report as required under s446C or 475; and
 - (b) they have made every effort to obtain a report (including seeking ASIC's assistance); and
 - (c) there is no reasonable excuse under s475(11) or 446C(9) for it not being provided.

Controllers

- RG 16.89 A report as to affairs under s429(2)(b) of the Act must be submitted to a controller within 14 days after the company receives notice of the controller's appointment.
- RG 16.90 A controller may extend the statutory period within which the report must be submitted: s429(3). A controller should not extend this period unless they believe that there are special reasons for doing so. As soon as practicable after granting an extension of time, a controller must lodge with ASIC a copy of the notice granting the extension: s429(4).
- RG 16.91 If a controller does not obtain a report as required under s429(2)(b), and they have made every effort to secure the report (including seeking ASIC's assistance: see RG 16.87), then they may notify ASIC of a continuing possible offence by including this information in a Schedule B or C report, as applicable.
- RG 16.92 Within one month of receiving the s429(2)(b) report as to affairs, the controller must lodge the report with ASIC together with a notice: s429(2)(c).
- RG 16.93 The notice under s429(2)(c) of the Act should include:
- (a) the control day (as defined under s9 of the Act) and the date on which the s429(2)(b) report was received; and
 - (b) the controller's comments on the report as to affairs, including the controller's opinion as to whether the report fairly reflects the affairs of the company. Any inaccuracies in the report as to affairs should be brought to the attention of ASIC.
- RG 16.94 If the controller does not comment on the report as to affairs, then they must specifically state that they do not consider it necessary to include any comment: s429(2)(c)(i).
- RG 16.95 The notice under s429(2)(c) will be placed on ASIC public registers and the controller will have qualified privilege in respect of a comment made in the notice: s426(b). A controller who is also a receiver or a managing controller

should lodge a separate report of possible misconduct if it appears to them that a relevant person may have engaged in misconduct in relation to the company: see Section C.

- RG 16.96 We request that controllers who are neither receivers nor managing controllers also lodge a separate report of possible misconduct if it appears to them that a relevant person may have engaged in misconduct in relation to the company: see RG 16.45 and also RG 16.58–RG 16.60.
- RG 16.97 If under s430 a controller requires a report about specified affairs of the company from company officers, employees, or persons involved in the company's formation, the controller is required to lodge the report with ASIC within seven days of receiving it: reg 1.0.03B.

Managing controllers

- RG 16.98 Managing controllers are required to prepare and lodge a report on the affairs of the company in accordance with s421A of the Act. The report must be lodged within two months after the control day.
- RG 16.99 Managing controllers should also lodge with ASIC copies of any reports received or notices given under s429.

Voluntary administrators

- RG 16.100 Within five business days after the administration of a company begins or such longer period as the voluntary administrator allows, directors and officers must prepare and give to the administrator a statement about the company's business, property, affairs and financial circumstances: s438B(2). This statement assists the voluntary administrator to identify the financial circumstances of the company early in their appointment and to report to creditors under s439A.
- RG 16.101 However, s439A(4) reports do not need to be lodged with ASIC and should only be sent to us if:
- (a) ASIC is a creditor of the company; or
 - (b) we have requested a copy of the report.
- RG 16.102 The administrator may notify ASIC of a continuing possible offence (by including this information in a Schedule B or C report, as applicable) if:
- (a) they do not obtain a report as required under s438B(2);
 - (b) they have made every effort to obtain a report (including seeking ASIC's assistance: see RG 16.87); and
 - (c) there is no reasonable excuse under s438B(6) for it not being provided.

Reports in relation to creditors' voluntary liquidations

- RG 16.103 Under s508(1)(b) of the Act, the liquidator in a creditors' voluntary winding up that continues for more than one year must either:
- (a) convene a meeting of the creditors: s508(1)(b)(i); or
 - (b) prepare a report that complies with s508(3) and lodge a copy of the report with ASIC: s508(1)(b)(ii),
within three months after the end of the first year (which begins on the day on which the company resolved that it be wound up voluntarily) and within three months after the end of each succeeding year.
- RG 16.104 If the liquidator chooses the second option, under s508(1)(b)(ii) the report must, in accordance with s508(3), set out:
- (a) an account of:
 - (i) the liquidator's acts and dealings; and
 - (ii) the conduct of the winding up,
during that first year or that succeeding year, as the case may be;
 - (b) a description of the acts and dealings that remain to be carried out by the liquidator in order to complete the winding up; and
 - (c) an estimate of when the winding up is likely to be completed.
- RG 16.105 The report is an important means of keeping ASIC, the creditors and other stakeholders of the insolvent company informed of the progress of the liquidation.

Pooling determinations and variations

- RG 16.106 Under s573(1), the liquidator or liquidators of the two or more companies in a pooled group must lodge a copy of a pooling determination with ASIC within seven days after the pooling determination comes into force, i.e. within seven days after it is approved by the eligible unsecured creditors of each of the companies in the pooled group: s578(1).
- RG 16.107 Under s573(2), the liquidator or liquidators must lodge a copy of a variation of a pooling determination with ASIC within seven days after the variation comes into force, i.e. within seven days after it is approved by the eligible unsecured creditors of each of the companies in the group: s578(2).

Accounts, notices, returns, orders, directions, statements and minutes

RG 16.108 Depending on the nature of the external administration, the external administrator may be required to lodge periodic accounts with ASIC: s432, 438E, 445J or 539.

RG 16.109 External administrators must also lodge various other documents with ASIC during the external administration, as summarised in Table 1.

Table 1: Other documents that external administrators must lodge with ASIC

Section of the Act or Regulation	Relevant documents
s427(1)–(4)	Notice of a controller's appointment, of their office address and any change in address, and of their ceasing to be a controller
s445FA(1)	Notice of termination of a deed
s450A–D	Notice of an administrator's appointment, a copy of a deed, notice that the company has failed to execute a deed, or a notice of termination of a deed
s496(7)	Notices relating to a meeting of creditors
s509(3)–(4)	Return about a final meeting or of an inquorate meeting duly convened
s537(1)–(2)	Notice of a liquidator's appointment, of their office address and any change in address, and of their resignation or removal from office
s568A(1)	Notice of any disclaimer of property
s579E(13)	Pooling order of the court
s579G(8)	Ancillary order or direction of the court
s579H(5)–(6)	Variation of an ancillary order or direction
s1288(3) & (5)	Annual statements of a registered liquidator, or statements required by ASIC of a liquidator of a specified body corporate
reg 5.6.27(3)	Copy of the minutes of a meeting
reg 5.6.62(5)	Statement in writing that notice of their inclusion was given to each person placed on a list or supplementary list of contributories

How to lodge other documents

- RG 16.110 External administrators can lodge the reports, determinations, variations, accounts, notices, returns, orders, directions, statements or minutes that are mentioned in Section D of this guide by:
- (a) lodging the relevant online form electronically through the Registered Liquidators portal at www.asic.gov.au/liquidators; or
 - (b) downloading a paper copy of the relevant form from ASIC's website at **www.asic.gov.au** and lodging it:
 - (i) in person at an ASIC Service Centre or with your local ASIC representative; or
 - (ii) by post, addressed to ASIC, PO Box 4000, Gippsland Mail Centre, VIC 3841.

Key terms

Term	Meaning in this document
Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of the Act
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASIC public registers	the prescribed registers ASIC maintains under the Act, including registers of companies, auditors, liquidators and company charges, which are accessible by the public
Australian law	A law of the Commonwealth or a state or territory
CALDB	The Companies Auditors and Liquidators Disciplinary Board
Ch 5 (for example)	A chapter of the Act (in this example, numbered 5)
controller	As defined in s9 of the Act in relation to property of a corporation, this means: <ul style="list-style-type: none"> • a receiver, or receiver and manager, of that property; or • anyone else who (whether or not as agent for the corporation) is in possession, or has control, of that property for the purpose of enforcing a charge
Div 1 (for example)	A division of a part of the Act (in this example, numbered 1)
external administration	An external administration under Ch 5 of the Act, other than a members' voluntary liquidation
external administrator	A controller, managing controller, receiver, receiver and manager, voluntary administrator, administrator of a deed of company arrangement, and liquidator (including a provisional liquidator)
Pt 5.9 (for example)	A part of a chapter of the Act or, if expressly stated, of the ASIC Act (in this example, numbered 5.9)
reg 1.0.07 (for example)	A regulation in the Corporations Regulations 2001 (in this example, numbered 1.0.07)
Regulations	Corporations Regulations 2001
registered liquidator	A person registered by ASIC under s1282(2)
RG 16 (for example)	A regulatory guide (in this example, numbered 16)
s422 (for example)	A provision of the Act (in this example, numbered 422)

Related information

Headnotes

external administrators, reporting obligations, lodging reports and documents, preliminary reports, reports of possible misconduct, supplementary reports, reports as to affairs, accounts, notifications, determinations and resolutions, controllers, managing controllers, receivers, receivers and managers, voluntary administrators, administrators of a deed of company arrangement, liquidators, provisional liquidators, qualified privilege, Schedule A, Schedule B, Schedule C, Schedule D, ASCOT, ASIC public registers, CALDB

Regulatory guides

RG 103 *Confidentiality and release of information*

RG 109 *Assetless Administration Fund: Funding criteria and guidelines*

Legislation

Corporations Act, Part 5.9, s9, 421A, 421A(3), 422, 422(1)–(3), 422(1)(d), 423, 426, 427(1)–(4), 429, 429(2)(b)–(c), 429(4), 432, 438B(2), 438D, 438D(1)–(3), 438D(1)(d), 439A, 442E, 446C, 450A–D, 475(1)–(2), 475(4), 475(7), 476, 496(7), 509(3)–(4), 533, 533(1)–(3), 533(1)(c), 533(1)(d)–(e), 534, 535, 536, 537(1)–(2), 539, 545(1), 545(3), 568A, 597, 1274(2)(a)(iv), 1288, 1292, 1311, 1315, regulations 1.0.07, 5.6.62, ASIC Act s1(2), 13, 15, 19, 25, 127, 127(4)

Cases

Re Allebart Pty Ltd [1971] 1 NSWLR 24

Clasquin SA v AAR International Pty Ltd & Anor (1989) 15 ACLR 9

ERS Engines Pty Ltd v Wilson (1994) 35 NSWLR 193

Re Photosprint Australia Pty Ltd (rec and mgr apptd) (in liq) (2004) 212 ALR 517

ASIC forms

564 *Preliminary report to ASIC under s476 of the Corporations Act 2001*

EX01 *Report to ASIC under s422, 438D or 533 of the Corporations Act 2001 or for statistical purposes*

507 *Report as to affairs*

Schedule A: Preliminary report by court-appointed liquidator under s476

RG 16.111 Schedule A is a form (Form 564) that may be completed by court-appointed liquidators and lodged as their preliminary report in order to meet the requirements of s476: see Section A for further details.

RG 16.112 Liquidators can lodge Form 564:

- (a) electronically through the Registered Liquidators portal at www.asic.gov.au/liquidators; or
- (b) by post (see RG 16.39), having printed a paper version downloaded from ASIC's website at www.asic.gov.au or using the link to Schedule A below.

Download Schedule A:

www.asic.gov.au/RG16scheduleA

Schedule B: Report of possible misconduct by receiver or managing controller under s422, by voluntary administrator under s438D, or by liquidator under s533

RG 16.113 Schedule B is a form (Form EX01) that may be completed by receivers or managing controllers, administrators or liquidators and lodged as their initial report of possible misconduct under:

- (a) s422(1), 438D(1) or 533(1) (when lodged in compliance with the external administrator's statutory obligation); or
- (b) s422(3), 438D(3) or 533(3) (when lodged following a direction by the court): see Section B for further details.

RG 16.114 External administrators can lodge Form EX01:

- (a) electronically through the Registered Liquidators portal at www.asic.gov.au/liquidators; or
- (b) by post (see RG 16.57), having printed a paper version downloaded from ASIC's website at www.asic.gov.au or using the link to Schedule B below.

Download Schedule B:

www.asic.gov.au/RG16scheduleB

Schedule C: Supplementary report by receiver or managing controller under s422(2), by voluntary administrator under s438D(2), or by liquidator under s533(2)

- RG 16.115 Schedule C contains a sample layout of a supplementary report under s422, 438D or 533: see Section C for further details. It is intended for the use of receivers, managing controllers, administrators and liquidators.
- RG 16.116 This sample format is *not* a prescribed format, and is provided merely as a guide to the information that ASIC would be interested in receiving, particularly if the external administrator is recommending that ASIC take action against a director or officer of the company.
- RG 16.117 We are aware that, in many cases, the external administrator may not have the information available to provide all of the information set out in this schedule, or the external administrator may have insufficient funds available to prepare a detailed report (if the external administration is assetless, please see www.asic.gov.au/aafund for details of the Assetless Administration Fund).
- RG 16.118 ASIC staff are available to discuss with external administrators, or their staff, any issues involving the preparation of a supplementary report. In the event of queries, insolvency practitioners may contact ASIC's Infoline on 1300 300 630 and ask for 'Liquidator Assistance'.

Download Schedule C:

www.asic.gov.au/RG16scheduleC

Schedule D: Allegations of possible misconduct— Substantiation guide

- RG 16.119 In bringing possible offences (or other misconduct) to ASIC's attention, the external administrator should take into account the extent of the material they may need to gather or consider in order for it to appear to them that an offence or other misconduct may have been committed.
- RG 16.120 The external administrator should be aware that this material might form evidence that may establish the offence or misconduct in subsequent legal proceedings.
- RG 16.121 Schedule D is intended to serve as a guide for external administrators on the types of information and supporting documents that could be considered when investigating possible misconduct and reporting to ASIC. It is set out in the form of a series of tables, each listing the elements of commonly reported possible breaches of civil obligations or possible offences and, for each element, the likely sources of evidence or information that will need to be considered to prove the element if a formal investigation into the possible offence is commenced by ASIC.
- RG 16.122 By providing guidance on the types of information and supporting documents that could be considered when investigating possible misconduct and reporting to ASIC, we are not asking external administrators to form or request a legal opinion as to whether an offence or other misconduct has occurred. The guidance in Schedule D is simply to alert external administrators to the evidence that may be useful in supporting formal action in respect of a possible offence reported by an external administrator. If the external administrator does not possess or is unaware of *any* available evidence to support an allegation, the external administrator should consider whether it does, in fact, appear to them that an offence or other misconduct may have been committed and whether the allegation should, in fact, be made.
- RG 16.123 Schedule D is provided solely for the purpose of providing information to assist external administrators and their staff and is not intended to serve as a definitive list of:
- (a) the facts that may amount to an offence or other misconduct;
 - (b) the sources of material that may support allegations of possible offences or misconduct; or
 - (c) the searches, inquiries or sources of information that ASIC may rely on in the conduct of an investigation.

- RG 16.124 External administrators are encouraged to make their own inquiries into any possible misconduct from the material available to them.
- RG 16.125 The most credible and useful sources of evidence will generally be the books and records that a company is required to keep under the Act. A list of the books and records that a company is required to keep under the Act can be obtained from our website at www.asic.gov.au/companyrecords. These documents may provide a contemporaneous record or account of the relevant act or matter.

Download Schedule D:

www.asic.gov.au/RG16scheduleD