2 May 2024

RG 258 Consultation Feedback
Companies and Small Business
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

By email: DL-C&SB-RG258.Feedback@asic.gov.au

Dear Sir/Madam

CP 376 Registered liquidators: Registration, ongoing obligations, disciplinary actions and insurance - Updates to RG 258 and supporting documents and templates

Thank you for the opportunity to consider ASIC Consultation Paper 376 Registered liquidators: Registration, ongoing obligations, disciplinary actions and insurance - Updates to RG 258 and supporting documents and templates (**Consultation Paper**).

As the professional body representing around 85% of Australia's insolvency, turnaround and restructuring professionals, the Australian Insolvency, Turnaround and Restructuring Association (**ARITA**) is Australia's largest representative body of insolvency practitioners. More about ARITA is provided at the end of this submission.

For completeness, we note that ARITA has an incorrect meaning of 'Australian Turnaround, Insolvency & Restructuring Association' in the Key terms section of the Consultation Paper.

We provide the attached detailed responses to the proposals set out in the Consultation Paper on an exception basis, together with several other issues we believe require consideration. No response has been provided to proposals to which we have no feedback.

The key points of our submission are as follows:

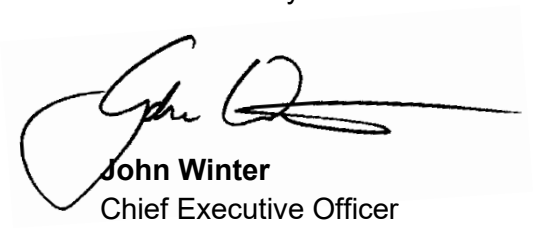
- ARITA has significant concerns regarding the entitlement of New Zealand insolvency practitioners to be registered in Australia and strongly believes that any notice to be registered by New Zealand practitioners must provide evidence of the ability to comply with the ongoing obligations applicable to all registered liquidators in Australia.

- Some concerns are noted and recommendations are made regarding guidance on the assessment of an applicant's experience and capacity.
- RG 258 should incorporate relevant guidance from the Administrative Appeal Tribunal where it is available.
- Some minor amendments are suggested to ensure that the guidance in RG258 fully reflects the underlying legislation.

On a more general level, we note that RG258 has a number of references to 'his or her' and suggest that the use of gender-neutral 'their' would be more inclusive.

Should you wish to discuss any aspect of our submission, please contact Narelle Ferrier, Technical & Standards Director, on 02 8004 4350.

Yours sincerely



John Winter
Chief Executive Officer

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have close to 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

We are a not-for-profit, incorporated professional association run for the benefit of our members.

Around 82% of Registered Liquidators and 86% of Registered Trustees choose to be ARITA members.

ARITA's ambition is to lead and support appropriate and efficient means to expertly manage financial recovery.

We achieve this by providing innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large. In 2022, ARITA delivered 82 professional development sessions to over 5,000 attendees.

ARITA promotes best practice and provides a forum for debate on key issues facing the profession.

We also engage in thought leadership and public policy advocacy underpinned by our members' knowledge and experience. We represented the profession at 14 inquiries, hearings and public policy consultations during 2022.

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1 Draft Regulator Guide 258 – Structural changes

ARITA does not have any specific feedback about the structural changes of the draft Regulator Guide 258 (**RG258**) but makes the following general comments about content not covered in other sections of the Consultation Paper to ensure that the guidance fully reflects the legislation:

- We note that the reference to notices by an industry body under s 40-100 at RG 258.21(f) fails to include circumstances where the body reasonable suspects that there are grounds for ASIC to give a registered liquidator a notice under section 40-40 (a show-cause notice) or to impose a condition on a registered liquidator under another provision of this Schedule.

- We suggest that the wording at RG 258.29 and RG 258.104 be rephrased to reflect the operation of the s 20-20(5) which ensures that a committee may not decide that an applicant be registered as a liquidator if it is not satisfied that the applicant:

  (b) will take out:
  (i) adequate and appropriate professional indemnity insurance; and
  (ii) adequate and appropriate fidelity insurance;
  against the liabilities that the applicant may incur working as a registered liquidator; and
  (c) has not been convicted, within 10 years before making the application, of an offence involving fraud or dishonesty; and
  (d) is not, and has not been within 10 years before making the application, an insolvent under administration; and
  (g) is not disqualified from managing corporations under Part 2D.6 of this Act, or under a law of an external Territory or a law of a foreign country; and
  (h) is otherwise a fit and proper person.

2 Application requirements to be a registered liquidator

2.1 Notice to be registered by New Zealand insolvency practitioners

ARITA has significant concerns regarding the entitlement of New Zealand insolvency practitioners to be registered in Australia under the *Trans-Tasman Mutual Recognition Act 1997*.

The below table compares the prescribed minimum standards for registered liquidators in Australia against those for licensed insolvency practitioners in New Zealand.

Australia	New Zealand
The committee must decide that the applicant should be registered as a liquidator if it is satisfied that the applicant: (a) has the qualifications, experience, knowledge and abilities prescribed; and (b) will take out: (i) adequate and appropriate professional indemnity insurance; and (ii) adequate and appropriate fidelity insurance; against the liabilities that the applicant may incur working as a registered liquidator; and (c) has not been convicted, within 10 years before making the application, of an offence involving fraud or dishonesty; and (d) is not, and has not been within 10 years before making the application, an insolvent under administration; and (e) has not had his or her registration as a liquidator under this Act cancelled within 10 years before making the application, other than in response to a written request by the applicant to have the registration cancelled; and (f) has not had his or her registration as a trustee under the *Bankruptcy Act 1966* cancelled within 10 years before making the application, other than in response to a written request by the applicant to have the registration cancelled; and	A natural person who applies to an accredited body to be issued with a licence under section 9 of the Insolvency Practitioners Regulation Act 2019 must meet the following minimum standards prescribed under section 22(1)(a): *Membership of accredited body* (a) The person: (i) is a member of the accredited body; or (ii) section 57 of the Act applies in respect of the person. *Experience in the provision of services* (b) The person: (i) has at least five years of experience undertaking: (A) work on insolvency engagements; or (B) work that in the accredited body's opinion is sufficiently similar to work on insolvency engagements; or (C) any combination of work described in paragraphs (A) and (B). (c) The person: (i) holds a CPP (or equivalent) and has completed at least 1,000 hours of work on insolvency engagements at a senior level within the 3 years immediately prior to applying for a licence under section 9 of the Act; or (ii) does not hold a CPP (or equivalent) and has completed at least 2,000

Australia	New Zealand
(g) is not disqualified from managing corporations under Part 2D.6 of this Act, or under a law of an external Territory or a law of a foreign country; and (h) is otherwise a fit and proper person; and (i) is resident in Australia or in another prescribed country. (5) [Approval even if not satisfied of certain matters] The committee may decide that the applicant should be registered even if the committee is not satisfied of a matter mentioned in paragraph (4)(a), (e), (f) or (i), provided the applicant would be suitable to be registered as a liquidator.	hours of work on insolvency engagements at a senior level within the 3 years immediately prior to applying for a licence under section 9 of the Act. (d) The minimum standards in paragraphs (b) and (c) do not apply if the person otherwise satisfies the accredited body that the person is competent to act as an insolvency practitioner.
Qualifications, experience, knowledge & abilities The Insolvency Practice Rules (Corporations) 2016 set out that the Committee must be satisfied that the applicant has each of the following qualifications, experience, knowledge & abilities (a) the applicant has completed the academic requirements for the award of a tertiary qualification that includes at least 3 years of full-time study (or its equivalent) in commercial law and accounting; (b) the applicant has completed the academic requirements for at least 2 course units accredited under the Australian Qualifications Framework Level 8 (or equivalent study) in the practice of external administrators of companies, receivers, receivers and managers, and trustees under the *Bankruptcy Act 1966*; (c) if the applicant wishes to be registered to practise as an external administrator of companies, receiver and receiver and manager—the applicant has, during the 5 years immediately preceding the day on which the application is made, been engaged in at least 4,000 hours of relevant employment at senior level;	Applicants must also "fit and proper" to hold a licence, however each is considered on its own merits and disclosure of matters that would prohibit registration in Australia does not necessarily prohibit an individual from holding a licence.

Australia	New Zealand
(d) if the applicant wishes to be registered to practise only as a receiver, and receiver and manager—the applicant has, during the 5 years immediately preceding the day on which the application is made, been engaged in at least 4,000 hours of relevant employment at senior level; (e) the applicant has demonstrated the capacity to perform satisfactorily the functions and duties of a registered liquidator; (f) the applicant is able to satisfy any conditions to be imposed under the Insolvency Practice Schedule (Corporations) if the applicant is registered as a liquidator.	

Given the fundamental variations in the minimum standards for registration and, noting that the ongoing obligations applicable to all registered liquidators also apply to New Zealand insolvency practitioners, we **strongly** believe that any notice to be registered by New Zealand practitioners must provide evidence that they:

(a) have the qualifications, experience, knowledge and abilities required of an Australian registered liquidator;
(b) has or will take out and maintain adequate and appropriate professional indemnity insurance;
(c) has or will take out and maintain adequate and appropriate fidelity insurance;
(d) are able to satisfy or comply with any condition imposed on their registration;
(e) can demonstrate the capacity to comply with the provisions of the Corporations Act and other relevant laws;
(f) can demonstrate the capacity to carry out adequately and properly the duties of a liquidator and any other duties or functions required under the law; and
(g) are a fit and proper person.

While the committee registration requirements in Sections B, C and D are not proposed to apply to New Zealand insolvency practitioners, we suggest that the guidance in Section B regarding the substantiation of the above matters for Australian registrants should also apply to New Zealand insolvency practitioners.

More specifically, we note that New Zealand practitioners would not be afforded a limitation of liability under the Australian indemnity schemes and this is likely to present significant insurance challenges reinforcing the need for evidence that they have or will have the necessary insurance to be included with their application.

It is untenable that New Zealand insolvency practitioners would have a lower entry gateway to registration in Australia than Australian professionals who comply with the set minimum standards.

The current more stringent application process was implemented as part of the *Insolvency Law Reform Act 2016* (**ILRA**) to promote 'a high level of professionalism and competence of practitioners' which was seen 'as essential to retaining confidence in the insolvency system as a whole'[1].

We hold significant concerns that enabling New Zealand insolvency practitioners to register without providing evidence of compliance with ongoing obligations could undermine the intention of the government evidenced by the ILRA changes.

2.2 Experience requirements (RG258 Section B & RG258 Section D)

Exposure to processes

We believe that including the following guidance concerning the meaning of 'exposure to processes,' as provided by the Administrative Appeal Tribunal (**AAT**),[2] would be beneficial to the applicant's assessment of their relevant employment in sections RG258 Section B and RG258 Section D.

> "62. While the expression 'exposure to processes' is somewhat unhelpfully vague, it is nonetheless broad in its terms. I am therefore not persuaded that this criterion requires direct involvement or involvement in all bankruptcy processes but rather exposure to or experience in the range of bankruptcy processes at a general level. I do not consider it necessary to read in words … that the relevant exposure is only to those bankruptcy processes that are relevant to external administrations. I agree the expression must be taken to cover the range of bankruptcy processes but the ordinary English meaning does not require direct involvement in all bankruptcy processes… Exposure to a broad range of processes under the Bankruptcy Act at a general level would not only be sufficient to fall within the definition but is consistent with the object of the IPS Corporations."

Senior level experience

We disagree with the proposition at RG 258.38 and RG 258.124 that when deciding whether employment was at a senior level. A committee should consider whether the experience was gained when they were a principal in the firm or a level immediately below that of a principal.

[1] Insolvency Law Reform Bill 2015, Explanatory Memorandum, Paragraph 2.6
[2] *Mansfield and a committee convened under section 20-10 of the Insolvency Practice Schedule (Corporations)* [2018] AATA, 5 June 2018

ARITA is absolutely of the view that the 'relevant employment at senior level' requirement applies to the nature of the work undertaken, not the position or job title held and believes that paragraphs RG 258.38(a) and RG 258.124(a) should be removed from RG258.

Senior level employment history form

We make the following observations regarding the 'Senior level employment history form':

- The 'Total Hours' row in 'Table 1: Total hours relevant employment at a senior level in past five years' of Part A should refer to '(sum of all appointments/advice)'.
- 'Table 2.1: Relevant employment at a senior level in the past five years – appointment details' of Part A should more accurately refer to 'appointment/advice details'
- It may be appropriate to include a note for Table 2.1 of Part A and Part B highlighting that applicants may need to consider confidentiality issues associated with disclosure of specific company details for assignments related to 'safe harbour', advisory or other services.
- 'Table 3: Direct or indirect exposure to processes under the Bankruptcy Act in the past five years' of Part A should include space to include 'exposure to or experience in the range of bankruptcy processes at a general level' consistent with the AAT decision referenced above.

2.3 Capacity (RG258 Section C)

RG 258.108 refers to the committee needing to "consider whether the applicant has the capacity to satisfactorily perform the functions and duties …." However, Rule 20-2(2)(b) specifies that the committee must be satisfied that "the applicant has ***demonstrated*** the capacity to satisfactorily perform the functions and duties…"

This is a somewhat different requirement and we suggest that RG258 be updated to reflect this.

Guide to personal and resource capacities

We note that a receiver and manager is not required to deal with creditor requests for information and we suggest that the 'Reporting to and interactions with creditors: Managing requests by creditors for information' personal capacity included in 'Table 3: Personal capacity for receivers and managers only' should be removed.

2.4 Resident in Australia or another prescribed country

RG258 correctly notes that no other countries have, to date, been prescribed and that a committee may determine to register an applicant even if they are not resident in Australia, however, a definition of 'resident in Australia' is not included or noted.

We suggest that the inclusion of a definition of 'resident in Australia' in the Key terms or by way of a note would be beneficial.

Additionally, we believe that it would be relevant for applicants to be aware of the decision in *Mansfield and a committee convened under section 20-10 of the Insolvency Practice Schedule (Corporations)* [2018] AAT, 5 June 2018 and suggest that a note about the decision be added to RG258.

2.5 Committee interview process

For completeness, we note that the requirement to pay a registration fee if the applicant's registration is approved[3] is not included in the note to RG 258.90.

2.6 Other feedback

Otherwise a fit and proper person: Referee reports

While we understand the preference for a referee to not be associated with an applicant's current firm, we query the narrow reference to 'a former employer' at RG 258.67. We suggest amending this to refer to a second referee being 'external to your current firm'. This provides for additional circumstances where the applicant was not 'employed' by the referee and/or where the referee changed firms rather than the applicant.

Technical corrections

For completeness, we suggest that:

- an 'and' be added to the end of the RG 258.37(a)(iv) to be consistent with Rule 20-1(3) and (4). We note that is has been included in RG 258.123 restating the requirements for applications to be registered to act only as a receiver and receiver and manager (RG258 Section D).

- RG 258.62 be amended to note the expectation that where they are appointed without funds, a registered liquidator is still required to adequately and properly perform their duties and functions ***as required by the Corporations Act***.

  We believe that this distinction is important given s 545 of the Corporations Act specifically notes that, with the exception of lodging a statutory report with ASIC, a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property.

- The reference to s20-2(3) at RG 258.106 should be a reference to Rule 20-2(3).

[3] In accordance with Item 13 of Schedule 1 of the Corporations (Fees) Regulations 2001

3 Ongoing obligations of registered liquidators

3.1 Maintaining the qualifications, experience, knowledge and abilities

We agree that work in 'technical roles in an insolvency professional organisation' is a way to maintain experience, knowledge and abilities. However, we suggest that reference to 'technical roles in industry bodies' given industry bodies is statutorily defined and their technical capabilities are recognised by their ability to lodge s. 40-100 notices with ASIC.

Given its fundamental cross-section with corporations and insolvency, it is suggested that specific reference to personal property securities legislation be included in the reference to 'other legislation' at RG 258.138(d).

3.2 Remaining a fit and proper person

While we agree that complaints received can be indicative of whether a person is fit and proper, we suggest that the guidance at RG 258.166(b) should refer to 'the number, seriousness and legitimacy of any complaints ….' Making an assessment based on the number of complaints made and the allegations they contain, without reference to whether the complaint was valid, would not be appropriate and open to abuse.

We also query whether it is appropriate to assess whether a person remains fit and proper based on complaints received about their staff. While legitimate complaints about staff may reflect whether an appointee is adequately and properly performing their duties, we do not believe they should be used to assess whether a person has 'good character, diligence, honesty, integrity and judgement' as noted at RG 258.165.

4 Disciplinary and other actions

4.1 ASIC direction to comply

It is not evident to ARITA why the note to RG 258.208 is not included as further points (d) and (e) to the paragraph, consistent with s40-15(1). We do not believe that any distinction should be drawn between the circumstances in s40-15(1)(a)-(c) and s40-15(1)(d)-(e).

4.2 Cancellation or suspension of registration

Automatic cancellation

We note that RG 258.211 fails to include a reference to the automatic cancellation of registration if the liquidator dies as noted in s 40-20(1)(b) and suggest that this should be included for completeness.

Cancellation or suspension by ASIC

We note that RG 258.212(c) fails to refer to circumstances where a liquidator's registration as a trustee under the Bankruptcy Act is ***suspended***, other than by their written request, in accordance with s40-25(1)(c) and suggest that this should be included for completeness.

Not resident in Australia or other prescribed country

The guidance provided at RG 258.225 – 258.227 is silent regarding New Zealand insolvency practitioners registered under the *Trans-Tasman Mutual Recognition Act 1997*. It is our understanding that residence in Australia is not to be a prerequisite for or a factor in entitlement to the grant, renewal or continuation of registration on this basis[4] and suggest a note to this effect is included in RG 258.

4.3 Court supervision

For completeness, we suggest that 'Court' be added to Key terms with a reference to the definition at s58AA of the Corporations Act. We also note that there is mixed use of 'court' and 'Court' in RG258 and suggest it be reviewed to ensure consistency and clarity.

We also suggest that RG 258.261 be amended to specify that it is 'an officer of the company' rather than the company that has standing to apply. Additionally, we suggest that the paragraph should specifically note that a creditor, on behalf of a committee of inspection (**COI**), also has standing to apply if the COI (if any) resolves.

[4] section 36 *Trans-Tasman Mutual Recognition Act 1997*

4.4 Liquidator initiated actions

The guidance included at RG 258.286 refers to the list of notifiable prescribed events and states that ASIC 'would general expect [the liquidator] to request cancellation or the suspension of [their] registration' if they occur. It goes on to state that ASIC considers it 'reasonable and appropriate for a registered liquidator … to consider requesting cancellation or suspension … in these circumstances even though there may be no express obligation under the Corporations Act to do so.'

We have significant concerns regarding the possible future implications of this expectation, particularly where the individual may seek reregistration. Should a registered liquidator have voluntarily requested the cancellation of their registration, the restriction under s20-20(4)(e) would not be triggered. It may be more appropriate for ASIC to take action to cancel or suspend the registration in accordance with its powers in such circumstances.

5 Insurance requirements

While ARITA is unable to comment on specific technical aspects of insurance, we believe that the commentary regarding the inability of sole practitioners to indemnify themselves for dishonest conduct at RG 258.300 may be inappropriately interpreted as suggesting that fraud would be less egregious if the practitioner is part of a firm. Simple commentary noting that a registered liquidator is unable to insure themselves for their own dishonest conduct may be more suitable.

Staff who leave a firm

We suggest that it would be more appropriate to refer to 'Registered liquidators who leave a firm' rather than staff, as the insurance requirements apply to their registration rather than their employment.

Notwithstanding the guidance at RG 258.294, we believe it would be beneficial to include guidance in this section on the requirement for registered liquidators maintain PI and fidelity insurance where they leave a firm and do not immediately commence with a new firm.