Australian Government
Australian Institute of Criminology

Research in Practice

REPORT No. 30 February 2013

Convictions for summary insolvency offences committed by company directors

Peter Keenan

Australia's national research and knowledge centre on crime and justice **www.aic.gov.au** ISSN 1836-9111

Introduction

The Australian Securities and Investments Commission (ASIC) investigates and prosecutes certain strict liability criminal offences by directors before local and Magistrates' courts across Australia. Until December 2011, ASIC made public the details of each successful case by periodically releasing conviction reports on its website and through media releases. In this paper, an analysis of the raw information in ASIC conviction reports for the five calendar years 2006 to 2010 is presented to provide statistical data on convictions and fines obtained by ASIC under its court-based enforcement activities, with an emphasis on insolvency offences. The analysis reveals that under its summary prosecution program, ASIC's focus turned almost exclusively to insolvency crimes committed by directors of collapsed, insolvent companies, where they have failed to assist liquidators. The analysis reveals a trend toward fewer convictions (except in New South Wales) and smaller fines for these 'fail-to-assist' offences between 2006 and 2010.

This paper also provides background information about the traditional role played by insolvency practitioners in detecting corporate crime and assisting with prosecution, as well as the character and significance of summary insolvency offences. It suggests that prosecution of these summary insolvency offences may be important to the integrity of Australia's regime of corporate insolvency law.

By arrangement with the Commonwealth Director of Public Prosecutions, ASIC is permitted to conduct its own prosecutions of what the Commonwealth Director of Public Prosecutions describes as minor regulatory offences against the *Corporations Act 2001* (Cth) (the Act). Under this arrangement, ASIC commenced an expanded summary prosecutions program in 2002 and as part of this, received special funding for a Liquidator Assistance Program.

ASIC's first report on the outcomes of these initiatives showed that most of the convictions achieved between 2002 and 2005 were in respect of offences relating to failure by company officers to assist insolvency practitioners (ASIC 2005). Analysis of similar ASIC reports since 2005 reveals that convictions for such insolvency offences now predominate. Further, analysis of these reports shows a reduction in the average fine being imposed by the courts, a fall in the actual number of defendants convicted and offence rates varying between jurisdictions.

The purpose of this scoping study is to analyse and document changes in the number of convictions achieved by ASIC for failure to assist-type insolvency offences identified during the liquidation process, to examine changes in the penalties awarded by the courts for such offences, to illuminate enforcement and prosecution action being taken in an area of white collar crime that is rarely discussed outside the insolvency industry and to point to the nature of the issues that should be examined through additional research.

Scope of the present study

The statistics and issues discussed in this paper relate principally to directors of small proprietary limited companies—often referred to as *private companies*—that have become insolvent and collapsed. The businesses that they once operated are commonly referred to as *small and medium enterprises* (SMEs). According to ASIC (2010a: 5):

> the majority of external administrations in Australia relate to small to medium proprietary limited companies. Statistics show that, in the majority of cases, minimal or no returns are being made to creditors.

This study concentrates on liquidations—that is, the process by which companies are wound-up and their assets and property redistributed. It will not examine other types of corporate external administrations (ie voluntary administrations, deed administrations, receiverships) because liquidations are the most common type of external administration. ASIC (2008a: 4) defines liquidations as:

> the orderly winding up of a company's affairs. It involves realising the company's assets, cessation or sale of its operations, distributing the proceeds of realisation among its creditors and distributing any surplus among its shareholders.

In the financial year 2010–11, liquidations comprised approximately 67 percent of all 14,566 insolvency appointments (ASIC 2011). Approximately 34 percent of the 9,780 liquidator appointments in 2010–11 were 'compulsory liquidations' ordered by a court. Liquidators appointed in this way are often called *court-appointed liquidators* or *official liquidators.*

Background

Detecting offences

During the life of a small, private, unaudited Australian company, breaches of company law by its directors usually go unnoticed by the regulator because nobody other than the offenders (the directors) and perhaps one or two employees are aware that offences have occurred. Moreover, there are often no immediate victims, so there is not likely to be a complaint as long as the company continues to pay its suppliers, employees and taxes.

However, when a company collapses and an external administrator is appointed, a supplementary branch of law enforcement comes into existence. The external administrator is required by the Act to make a formal report to ASIC about any alleged offences by a past or present director or other officer of the company that they detect. This requirement to report is not confined to offences under company law but relates to suspected violations under a law of the Commonwealth or a state or territory in relation to the company (ASIC 2008b). Where the suspected crime is not within ASIC's province—for example, restrictive trade practices or recklessly polluting the environment—the matter is referred to the appropriate regulatory authority.

External administrators, especially liquidators, are ideally positioned to uncover offences. They have the right to examine all the company's records, the right to question directors and employees, and the right to examine the directors and others under oath in court. They may also apply to a court for arrest warrants and for search and seizure warrants.

Offences of failing to assist

Most post-appointment insolvency offences may be described as failure to assist-type offences, where directors do not comply with their obligations to assist the external administrator by providing information. For example, in court-ordered liquidations, it is an offence under s 475 of the Act if the directors of the collapsed company refuse or fail to make out, verify and submit to the liquidator a statement of affairs of the company, known officially as a Report as to Affairs (or RATA). The Report as to Affairs is designed to be both a financial statement (like a balance sheet) and a disclosure statement. In it, the director is supposed to disclose, describe and value the company's assets and liabilities.

In addition, under s 530A of the Act, each officer of the company in liquidation has a statutory duty to:

- deliver to the liquidator all books in the officer's possession that relate to the company;
- tell the liquidator where other books relating to the company are;
- attend on the liquidator as the liquidator reasonably requires;
- give the liquidator such information about the company's business, property, affairs and financial circumstances as the liquidator reasonably requires;
- attend such meetings of the company's creditors or members as the liquidator reasonably requires; and
- do whatever the liquidator reasonably requires the officer to do to help in the winding up.

The reporting of offences

The requirement that an external administrator formally reports alleged offences to ASIC has existed for many years. In recent years, however, the reporting procedure has become far more efficient and sophisticated. Importantly, since 2002, the reporting of post-appointment, failure-to-assist offences has been supplemented by the Liquidator Assistance Program (LAP), which assists liquidators and ASIC to enforce these laws (ASIC 2012a).

Under LAP, ASIC takes action aimed at ensuring that directors of companies in external administration comply with their obligations to assist. Upon a director failing to comply, an external administrator may make a complaint to ASIC using model statements and model affidavits devised by ASIC. If compliance is not achieved after ASIC sends a warning letter to directors, it initiates a prosecution. It is this collaborative process, which is promoted and heavily relied upon by ASIC, that routinely results in a successful summary prosecution.

Because many of the companies that court-appointed liquidators are directed to wind up seem, prima facie, to have few or no valuable assets remaining, the support given to liquidators through LAP is important. So-called 'phoenix' companies, which are 'deliberately denuded of assets before going into liquidation' (Whelan & Zwier 2005: 14), have become of particular concern to ASIC in recent years, as well as to labour unions and the Australian Taxation Office (the main victim of insolvencies). As liquidators depend for their remuneration on being able to realise company assets (ie to convert assets into cash), a lack of assistance in getting information from directors is likely to result in reduced action on their part, which would defeat the liquidation scheme.

The liquidator's role in law enforcement

ASIC (2008b: 6), in its Regulatory Guide for external administrators, states that external administrators 'are the front-line investigators of insolvent corporations'. However, in the world of law enforcement, the role of liquidators is far from clear. They are not agents of ASIC and are not investigating officials as defined under the *Crimes Act 1914* (Cth). Liquidators may apply to the court for arrest warrants (s 486B of the Act) and for search and seizure warrants (s 530C), but to formally execute warrants, they must seek the assistance of sworn police officers.

A court-appointed liquidator may, on behalf of the court, exercise or perform certain powers and duties conferred or imposed on the court. When performing these duties, the liquidator becomes an officer of the court. Further, they have duties to the court and are

subject to supervision by the court when carrying out his or her duties as a court-appointed liquidator (eg see Davies & Nicol etc v Chicago Boot Co Pty Ltd [2011] SASC 27). In criminal proceedings against directors, liquidators perform the role of witness.

Methodology

Sources of information

Between 2002 and 2011, ASIC released data on its summary prosecutions activities in the form of conviction reports, which contained the name and state of residence of each offender, the number and nature of each formal charge proved in respect of each offender and the penalty imposed by the court (ASIC called these reports *prosecution reports*, but as they only reported on successful prosecutions, the phrase *conviction reports* or *conviction lists* is used in this paper). A range of penalties for various summary offences were reported in this way. However, ASIC does not appear to have undertaken any comprehensive analysis of these data.

Due to a policy change by ASIC, the raw information that was analysed for this paper is no longer being published. In September 2012, ASIC (Danielle McInerney, Communications Manager, ASIC personal communication 24 September 2012) wrote:

> [W]e no longer publish periodic summary prosecution reports. This data is now bundled up into both the Enforcement and Annual reports. These reports are made available on our website and to those who subscribe to our media releases.

At the time of writing, there have been two ASIC Enforcement Outcomes reports covering the periods July to December 2011 (ASIC 2012b) and January to June 2012 (Danielle McInerney, Communications Manager, ASIC personal communication 24 September 2012). Unlike the summary conviction reports they replaced, these new reports do not supply details of the state of residence of offenders, the sections under which enforcement action was taken, or the fines that were imposed. Without that information, most of the statistical data shown in this paper could not have been produced.

For the purposes of this paper, conviction lists for the five calendar years 2006 to 2010 were selected for analysis. Unless otherwise stated, the source of the data in the Tables is ASIC official conviction lists. In addition, statistics released by ASIC on numbers of companies entering insolvency administration (ASIC 2011) have been used in order to examine any relationships present between prosecutions and the size of the regulated sector.

Offences examined

Each ASIC conviction report disclosed convictions under several sections of the Act. The majority of offences prosecuted between 2006 and 2010 were the post-appointment insolvency offences under ss 475 and 530A. On average, 80 percent of successful prosecutions over the five year period were for breaches of ss 475 and 530A.

The next most prevalent offence that was successfully prosecuted was for breaches of s 1314. This provides a penalty where there is continued failure to do a specified act. While this is not specifically an insolvency provision, it can be viewed as one in this study because the data indicate that most prosecutions under s 1314 relate to continuing or ongoing breaches of s 475.

Convictions under ss 475, 530A and 1314 have been selected for analysis. Convictions for violations of the 13 other types of corporate laws reported on by ASIC have been classified and recorded in Table 5 as 'other breaches'. They include offences such as failure to notify a change of address or directors, false or misleading statements, acting as a director while suspended, failure to keep minutes, failure to maintain registers and other failure to assist-type insolvency offences where the external administrator was a controller or an administrator rather than a liquidator.

Table 1 Successful summary prosecutions by ASIC of company officers (number of offenders)

	2006	2007	2008	2009	2010	Total
NSW	306	328	318	327	312	1,591
Vic	66	92	54	32	37	281
Qld	74	81	56	50	83	344
WA	19	6	8	1	6	40
SA	28	18	8	11	6	71
Tas, NT & ACT	5	2	3	1	5	16
Australia	498	527	447	422	449	2,343

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

Prosecutions

Number of offenders

In the five calendar years to and including 2010, ASIC successfully prosecuted 2,343 defendants Australia-wide (see Table 1). The actual number of defendants convicted in 2010 (n=449) was down by 10 percent on the number in 2006 (n=498) and down by 15 percent on the peak experienced in 2007 (n=527).

The majority of offenders (68%; n=1,591) resided in New South Wales; around 15 percent were from Queensland (n=344) and 12 percent (n=281) from Victoria. New South Wales appears to be overrepresented in these data, based on ASIC statistics on the domicile of companies that show that:

- at the end of December 2010, only 33 percent of all companies were domiciled in New South Wales;
- of all companies that entered external administration in the five financial years 2005–06 to 2009–10, only 46 percent were domiciled in New South Wales.
- of all companies that entered court-ordered liquidations in the five financial years 2005–06 to 2009–10, only 54 percent were domiciled in New South Wales.

Analysis of the number of offenders convicted annually per 1,000 court-ordered liquidations revealed that between 2006 and 2010, there was an increase of 29 percent in New South Wales, compared with decreases in the other jurisdictions (see Table 2). For example, there was a 34 percent decrease in the number of offenders in Victoria and a 19 percent decrease in Queensland over the same five year period.

Contraventions

A total of 4,429 contraventions of the *Act* were recorded against the 2,343 offenders (see Table 3). The number of contraventions decreased by 17 percent between 2006 (n=948) and 2010 (n=789), and by 27 percent from the peak in 2007.

Most of those convicted (more than 70%) were found to have committed two distinct criminal acts; one under s 475 and one under s 530A.

Penalties

Nature of penalties

Nearly all of the 4,429 contraventions resulted in fines (n=4,245; 96%; see Table 3); only two contraventions resulted in imprisonment. In 182 instances (4%), good behaviour bonds or community service orders were

Table 2 Successful summary prosecutions by ASIC of company officers (number of offenders per 1,000 court ordered liquidations)

	2006	2007	2008	2009	2010	% change[a]
NSW	207.5	222.2	227.6	197.8	267.4	29
Vic	101.4	161.7	91.5	53.5	67.8	(34)
Qld	213.9	217.7	180.6	119.9	173.6	(19)
WA	152.0	60.0	133.3	9.4	48.8	(67)
SA	318.2	187.5	98.8	122.2	83.3	(74)
Tas, NT & ACT	119.0	50.0	88.2	19.6	83.3	(36)
Aust	182.6	198.6	180.8	144.8	183.6	0.6

a: Between 2010 and 2006. Figures in parentheses refer to a percentage decrease

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

Table 3 Contraventions and fines imposed by ASIC following summary prosecutions of company officers

	All contraventions	All fines	Insolvency section fines	
	n	n	n	% of all fines
2006	948	906	661	73
2007	1,074	952	839	88
2008	849	849	774	91
2009	769	759	736	97
2010	789	779	760	98
Total	4,429	4,245	3,770	–

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

Table 4 Fines imposed by ASIC for summary prosecutions of company officers

	Fines (n)	Total fines ($)	Average fine ($)
2006	906	932,873	1,029.66
2007	952	1,005,634	1,056.34
2008	849	685,201	807.07
2009	759	528,575	696.41
2010	779	744,010	955.08
Total	4,245	3,896,293	917.85

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

Table 5 Average fines imposed for selected insolvency and other breaches against the Corporations Act 2001 (Cth), 2006–10 ($)

	2006	2007	2008	2009	2010
s 475	1,098.68	1,001.29	817.54	639.88	816.84
s 530A	1,097.23	941.11	732.82	670.35	876.89
s 1314	2,444.75	2,006.02	1,246.02	956.17	1,849.82
Insolvency breaches (above)	1,179.47	1,133.90	843.54	688.35	955.80
Other breaches	625.48	480.43	430.67	954.35a	926.32
All fines	1,029.66	1,056.34	807.07	696.41	955.08

a: In 2009, 2 unusually high fines were imposed for 'other' breaches. This had the effect of changing the downward trend that had been occurring in that category of offence to that point

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

given; although in the last three years (2008, 2009 and 2010), there were just 18 such outcomes, representing less than one percent of the contraventions in that period.

Amount of fines

The total amount of the 4,245 fines imposed between 2006 and 2010 was $3,896,293. Added to this were costs that were, on average, approximately 21 percent of the fine. Over the five year period considered, the average fine imposed for a summary offence prosecuted by ASIC decreased from $1,030 to $955 (-7%; see Table 4).

An analysis of all fines imposed in 2010 showed that:

- 40 percent were for less than $500;
- 28 percent were between $501 and $1,000;
- 20 percent were between $1,001 and $1,500; and
- 12 percent were greater than $1,500.

The largest single fine in 2010 was $6,000 (imposed twice in Queensland). The average Queensland fine in 2010 was $1,271, compared with $901 in New South Wales and $903 in Victoria.

Fines for insolvency offences

Most of the fines imposed (and almost all fines imposed in recent years) were for breaches of the three insolvency offence sections—namely, ss 475, 530A and 1314. The maximum penalty, or statutory cap, provided by law for a s 475 offence is a fine of $2,750 or imprisonment for six months, or both; for a s 530A offence, it is a fine of $5,500 or imprisonment for one year, or both. A continuing offence (s 1314) can attract a fine of up to $55 per day until the relevant obligation is complied with. In 2006, the number of fines for insolvency offences represented 73 percent of the total fines imposed; by 2010, this had risen to 98 percent of all fines (see Table 3).

Over the five years, the average fine imposed for a summary insolvency offence fell by 19 percent (from $1,179.47 to $955.80; see Table 5).

For each of the three insolvency offence sections considered, decreases in the average fine imposed were as follows:

- 26 percent for a s 475 offence (from $1,098.68 to $816.84);
- 20 percent for a s 530A offence (from $1,097.23 to $876.89); and
- 24 percent for a s 1314 offence (from $2,444.75 to $1,849.82).

To determine why this decline is occurring would require additional research into other sources, such as analysis of court records and interviews with offenders, liquidators and prosecutors.

These data (presented above) on the average fines for specific insolvency offences should be treated with some caution for two reasons. First, Bird et al. (2003) identified a source of error in ASIC's conviction reports regarding the allocation of fine information to the proper section of the Act, especially under ss 475

and 530A. Although they reported that in 2001 ASIC installed a new system capable of producing more refined enforcement data, further research would be needed to determine if errors of this nature continued to exist after 2001. Second, fines recorded in ASIC conviction reports are, at times, shown as a combined single fine for two convictions under two different sections. This seldom occurs, but where it does, it is mostly in reports of Queensland convictions. In such cases, both convictions have been counted, with the amount of the fine divided between the two offence types.

Conclusion

This paper presents descriptive statistical information on the number and outcomes of prosecutions undertaken by ASIC for insolvency offences against ss 475, 530 and 1314 of the Act between 2006 and 2010. It was found that during this period, fewer convictions have, on average, been recorded each year and smaller fines imposed.

Further research would be required to reach a definitive view on why there has been an overall decrease in the number of defendants convicted of summary insolvency offences and why New South Wales and Queensland have gone against this trend. Of particular interest would be data on activities within ASIC's Liquidator Assistance Program. Specific research questions would include—does the program focus more on some states than on others? Have there been fewer complaints by liquidators? Have prosecution success rates fallen? Do success rates vary from state to state? Are directors becoming more compliant? Research interviews with officers in the LAP would help to answer these questions.

The average fine imposed for a summary insolvency offence decreased by 19 percent during the years 2006 to 2010. The reasons for this decline could be increased leniency by the courts, or due to the individual circumstances of the offence or the offender changing over time. Further analysis of court records and interviews with offenders would be required to reach a definitive view on which of these factors had the greatest influence.

There are many potential recovery actions, lawsuits and prosecutions that may be brought to bear against the directors of a failed company by its liquidator, its creditors, ASIC and other regulatory authorities. These include taking civil or criminal action for insolvent trading, as described in ASIC's regulatory guide *Duty to Prevent Insolvent Trading: Guide to Directors* (ASIC 2010b).

But if company records are not available and information is withheld by directors, the chances of lawsuits and prosecutions being brought or succeeding are greatly diminished. It is therefore possible that this benefit for directors of SMEs is a significant reason why breaches of failure-to-assist insolvency offences are committed. However, further research is needed into this issue and into whether increased penalties would reduce the number of these offences.

References

All URLs correct at December 2012

Australian Securities and Investments Commission (ASIC) 2012a. *Liquidator assistance program: Report as to affairs, books and records*. http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+assistance%3A+Books%2C+records+%26+RATA+?openDocument

Australian Securities and Investments Commission (ASIC) 2012b. *ASIC enforcement outcomes: July to December 2011*. Report 281. http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep281-published-29-March-2012-1.pdf/$file/rep281-published-29-March-2012-1.pdf

Australian Securities and Investments Commission (ASIC) 2011. *Insolvency statistics*. Series 2: July 2011. Sydney: ASIC.

Australian Securities and Investments Commission (ASIC) 2010a. *National insolvent trading program report*. Report 213. http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep213.pdf/$file/rep213.pdf

Australian Securities and Investments Commission (ASIC) 2010b. *Duty to prevent insolvent trading: Guide for directors*. Regulatory guide 217. http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg217-29July2010.pdf/$file/rg217-29July2010.pdf

Australian Securities and Investments Commission (ASIC) 2010c. 113 Company officers prosecuted in three months. *Media release* 29 April. http://www.asic.gov.au/asic/asic.nsf/byheadline/10-90AD+113+Company+officers+prosecuted+in+three+months?openDocument

Australian Securities and Investments Commission (ASIC) 2010d. Summary prosecutions of company officers—April to June 2010. *Media release* 12 August. http://www.asic.gov.au/asic/asic.nsf/byheadline/10-173AD+Summary+prosecutions+of+company+officers–+April+to+June+2010?openDocument

Australian Securities and Investments Commission (ASIC) 2010e. ASIC prosecutes 75 company officers. *Media release* 9 March 2011. http://www.asic.gov.au/asic/asic.nsf/byheadline/11-41AD+ASIC+prosecutes+75+company+officers?openDocument

Australian Securities and Investments Commission (ASIC) 2009a. ASIC prosecutes over 200 company officers arising from public complaints. *Media release* 13 February. http://www.asic.gov.au/asic/asic.nsf/byheadline/AD09-14+ASIC+prosecutes+over+200+company+officers+arising+from+public+complaints?openDocument

Australian Securities and Investments Commission (ASIC) 2009b. Summary prosecutions of company officers—1 January to June 2009. *Media release* 7 October. http://www.asic.gov.au/asic/asic.nsf/byheadline/AD09-191+Summary+prosecutions+of+company+officers+–+1January+to+June+2009?openDocument

Australian Securities and Investments Commission (ASIC) 2009c. Summary prosecutions of company officers—July–Sep 2009. *Media release* 17 November. http://www.asic.gov.au/asic/asic.nsf/byheadline/09-228AD+Summary+prosecutions+of+company+officers+-+July-Sep+2009?openDocument

Australian Securities and Investments Commission (ASIC) 2008a. *Insolvency: A glossary of terms*. Information Sheet 41. http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Insolvency_glossary.pdf/$file/Insolvency_glossary.pdf

Australian Securities and Investments Commission (ASIC) 2008b. *Regulatory guide 16: External administrators—Reporting and lodging (RG 16) and Schedules A, B, C and D*. http://www.asic.gov.au/asic/asic.nsf/byheadline/Regulatory+guide+16+-+External+administrators+-+Reporting+and+lodging?openDocument

Australian Securities and Investments Commission (ASIC) 2008c. ASIC prosecutes 132 company officers in response to public complaints. *Media release* 28 February. http://www.asic.gov.au/asic/asic.nsf/byheadline/08-34+ASIC+prosecutes+132+company+officers+in+response+to+public+complaints?openDocument

Australian Securities and Investments Commission (ASIC) 2008d. ASIC prosecutes over 100 company officers arising from public complaints. *Media release* 16 April. http://www.asic.gov.au/asic/asic.nsf/byheadline/08-77+ASIC+prosecutes+over+100+company+officers+arising+from+public?openDocument

Australian Securities and Investments Commission (ASIC) 2008e. ASIC prosecutes 139 company officers following public complaints (April–June 2008). *Media release* 23 July. http://www.asic.gov.au/asic/asic.nsf/byheadline/08-166+ASIC+prosecutes+139+company+officers+following+public+complaints+%28April+-+June+2008%29?openDocument

Australian Securities and Investments Commission (ASIC) 2007a. ASIC prosecutes 162 company officers in response to public complaints. *Media release* 10 January. http://www.asic.gov.au/asic/asic.nsf/byheadline/07-08+ASIC+prosecutes+162+company+officers+in+response+to+public+complaints?openDocument

Australian Securities and Investments Commission (ASIC) 2007b. ASIC prosecutes 144 company officers in response to public complaints. *Media release* 16 April. http://www.asic.gov.au/asic/asic.nsf/byheadline/07-99+ASIC+prosecutes+144+company+officers+in+response+to+public+complaints?openDocument

Australian Securities and Investments Commission (ASIC) 2007c. ASIC prosecutes 124 company officers following public complaints. *Media release* 4 July. http://www.asic.gov.au/asic/asic.nsf/byheadline/07-176+ASIC+prosecutes+124+company+officers+following+public+complaints?openDocument

Australian Securities and Investments Commission (ASIC) 2007d. ASIC prosecutes 140 company officers in response to public complaints. *Media release* 8 October. http://www.asic.gov.au/asic/asic.nsf/byheadline/07-265+ASIC+prosecutes+140+company+officers+in+response+to+public+complaints?openDocument

Australian Securities and Investments Commission (ASIC) 2006a. ASIC prosecutes 112 company officers following public complaints. *Media release* 12 April. http://www.asic.gov.au/asic/asic.nsf/byheadline/06-116+ASIC+prosecutes+112+company+officers+following+public+complaints?openDocument

Australian Securities and Investments Commission (ASIC) 2006b. ASIC prosecutes record number of company officers following public complaints. *Media release* 11 July. http://www.asic.gov.au/asic/asic.nsf/byheadline/06-235+ASIC+prosecutes+record+number+of+company+officers+following+public+complaints?openDocument

Australian Securities and Investments Commission (ASIC) 2006c. ASIC prosecutes 85 company officers in response to public complaints. *Media release* 10 October. http://www.asic.gov.au/asic/asic.nsf/byheadline/06-359+ASIC+prosecutes+85+company+officers+in+response+to+public+complaints?openDocument

Australian Securities and Investments Commission (ASIC) 2005. *Summary prosecutions of companies & directors*. http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/summary_prosecutions.pdf/$file/summary_prosecutions.pdf

Bird H et al. 2003. *ASIC enforcement patterns*. Melbourne: Centre for Corporate Law and Securities Regulation, The University of Melbourne. http://cclsr.law.unimelb.edu.au/research-papers/ASIC%20Enforcement.pdf

Whelan S & Zwier L 2005. *Employee entitlements and corporate insolvency and reconstruction*. http://cclsr.law.unimelb.edu.au/research-papers/Protection%20of%20employee%20entitlements%20_final_1.pdf

AN APPRAISAL OF THE REPORT AS TO AFFAIRS

Peter J Keenan
March 2012

Introduction

This paper reports on my written survey of official liquidators about their experiences and attitudes in relation to the Report as to Affairs form ("RATA") and to associated compliance issues. The survey was carried out in November and December 2011.

The RATA is a form which is prepared for the purpose of showing the financial position of a company at commencement of its entry into liquidation, controllership or administration. There are eight provisions in the External Administration chapter of the Corporations Act 2001 under which an obligation to prepare such a report is imposed or may arise. [1] In most circumstances the report is to be prepared by company directors. Since late 2004 sole responsibility for design and content of the form has resided with the corporate regulator, the Australian Security and Investments Commission ("ASIC"). [2]

Most of the results of the survey are shown in the body of this paper. However, some important information and documents that are discussed in the paper are attached to it:

Annexures	
1	Description of my methodology. Expanded statistical analysis of responses re role of RATA. Verbatim comments, criticisms and suggestions by liquidators concerning the Report as to Affairs.
2	Survey form sent to official liquidators.
3	Company Report as to Affairs (ASIC Form 507) (version 30-1-2012) that appears on the ASIC website.
4	Company Statement of Affairs under the Uniform Companies Acts of 1961.
5	ASIC "Guide: Report as to Affairs".
6	My reworking of the RATA, titled Overview of Report as to Affairs.
7	New Zealand's company statement of affairs in questionnaire style.

The survey focused on "official liquidators" – those registered liquidators who are permitted to act in Court-ordered liquidations. (It appears that about 75 to 80 per cent of registered liquidators are also registered as official liquidators. [3]) Official liquidators were selected for several reasons, but mainly because the RATA is really put to the test in the environment of compulsory liquidation rather than voluntary liquidation. In addition, official liquidators are far more likely to have witnessed first-hand the ASIC's enforcement work in this area.

At the time of the survey there were 523 official liquidators on the ASIC's database. Of these liquidators, 309 were selected randomly and asked to participate in the survey. Approximately one-third – 105 – of those selected chose to participate by returning a completed survey form.

Focal point

Of the many findings coming out of the survey there are two that stand out because they highlight a considerable disparity between what liquidators need and what they receive. The survey shows that liquidators rate receiving a properly prepared RATA – one with full particulars of the company's assets, liabilities and securities – as an important requirement for the efficient performance of their role in a court-ordered winding up. But they also rate the typical RATA that they receive as incomplete, inaccurate and unreliable.

The Report as to Affairs form

The main part of the RATA form is the part which serves as a summary of assets and liabilities and gives the estimated deficiency or surplus. The current summary page is reproduced in the following diagram (Figure 1). A complete copy of the form with schedules is provided as Annexure 3 to this paper.

Figure 1

ASIC Form 507 (pages 3 and 4 only)

REPORT AS TO AFFAIRS

Current Version (dated 30/1/2012)

2 Assets and liabilities

2.1 Assets not specifically charged	Valuation (for each entry show whether cost or net book amount) $	Estimated Realisable Value $
(a) interest in land as detailed in schedule A		
(b) sundry debtors as detailed in schedule B		
(c) cash on hand		
(d) cash at bank		
(e) stock as detailed in annexed inventory		
(f) work in progress as detailed in annexed inventory		
(g) plant and equipment as detailed in inventory		
(h) other assets as detailed in schedule C		
Sub Total		

2.2	Assets subject to specific security interests, as specified in schedule D	
	Less amounts owing as detailed in schedule D	
	Total assets	
	Total Estimated Realisable Values	
2.3	Less payable in advance of secured creditor(s) Amounts owing for employee entitlements as detailed in schedule E	
2.4	Less amounts owing and secured by debenture or circular security interest over assets	

2.5	Less preferential claims ranking behind secured creditors as detailed in schedule F
2.6	Balances owing to partly secured creditors as detailed in schedule G
	Total claims ($)
	Security Held ($)
2.7	Creditors (unsecured) as detailed in schedule H
	Amount claimed ($)
2.8	Contingent assets Estimated to produce as detailed in schedule I ($)
2.9	Contingent liabilities Estimated to rank as detailed in schedule J ($) ❑Estimated deficiency or ❑Estimated surplus ❑Subject to costs of administration or ❑Subject to costs of liquidation Share capital $ Issued $ Paid up $

In all fundamental respects today's RATA form is the same as the Statement of Affairs was when the Uniform Companies Acts were passed in 1961. (For a copy see Annexure 4.) [4] In fact, it appears that the form has remained almost the same since the 1890s. [5]

As did its predecessors, the current RATA form seeks to obtain details of a company's assets and liabilities and have them presented in a way that discloses:

- the cost or book value and estimated realisable value (assets) or the amount owing (liabilities);
- which assets are subject to specific or fixed charges as security for debts;
- which assets are not subject to specific or fixed charges;
- whether a floating charge over assets has been given and, if so, the amount owing under the floating charge; [6]
- the amount of any surplus that is expected to flow from realisation of assets that are subject to specific or fixed charges;
- the amount of any liability that is expected to arise due to a deficiency on realisation of assets that are subject to specific or fixed charges;
- whether there exists any unsecured liabilities that rank by law in priority to floating charge liabilities or in priority to other unsecured liabilities;
- whether there are any contingent assets or liabilities; and
- the "bottom line", that is, the estimated shortage/deficiency (or surplus) of funds resulting when liabilities are deducted from the amount that assets are estimated to produce.

Traditionally, one important aim of the RATA or Statement of Affairs has been to show the estimated amount available to meet the claims of unsecured creditors. But this feature has now disappeared from ASIC Form 507. [7]

There is no official guide to what the terms used in the RATA mean or how it should be completed. [8] The onus of providing instructions to directors is placed by the Court on the liquidator. [9] There are no official directions or principles as to what constitutes adequate instructions. [10]

Role and importance of the RATA

Liquidators were asked to indicate how much they agreed or disagreed with several statements relating to the role, importance and standing of the RATA /statement of assets and liabilities in an official liquidation.

The greatest degree of approval was given for one statement which played down the importance of directors correctly categorizing and portraying assets and liabilities, but affirmed the need for a RATA that contained full particulars of assets, liabilities and securities:

Statement: *"It does not matter that the assets and liabilities appearing in a RATA that I receive are correctly categorized and portrayed. What matters is that the RATA contains full particulars of the company's assets, liabilities and securities, including locations, relevant dates, names and addresses."*

Eighty-nine per cent of respondents said they agreed with this statement. Nine per cent said they neither agree or disagreed, while only 2 per cent said they disagreed.

	Per cent
Strongly agree	21.9
Agree	66.7
Neither agree not disagree	9.5
Disagree	1.9
Strongly disagree	0.0

Other statements in a similar vein – stressing the importance of the RATA - received high levels of support. All other statements considered and responses given can be seen below (Figure 2):

Figure 2			
Statement	Agree	Neither agree nor disagree	Disagree
"Failure to submit a RATA results in a liquidator expending additional time and expense in identifying the company's assets and liabilities."	81.9%	14.3%	3.8%
"When lodged with the ASIC the RATA should give creditors and the public visibility as to the position of the company at the date of winding up."	75.2%	17.1%	7.7%
"The lack of a properly prepared RATA from directors is a serious impediment to the efficient and satisfactory fulfilment of the official liquidator's function."	71.4%	18.1%	10.5%
"A RATA is required to ensure a proper preliminary examination of the affairs of the company."	66.7%	22.9%	10.4%
"A RATA is required in order that the liquidator may identify, collect, secure and protect the assets of the company."	60.0%	24.8%	15.2%
"A RATA is the most important information required by a liquidator to commence winding up the company's financial affairs."	44.8%	37.1%	18.1%
Note: The "agree" responses shown here are an amalgamation of the "strongly agree" and "agree" responses. Similarly, the "disagree" responses are amalgamations of "disagree" and "strongly disagree". For a breakdown into all five grades of response, see Annexure 1, Table 3.			

Quality of RATAs received

Liquidators were asked to consider several statements to do with the inclusion, appropriate valuation and proper classification of assets and liabilities. The resultant data shows that liquidators rate the typical RATA that they receive as significantly defective.

The questions/statements put to liquidators referred only to those RATAs that had been completed by directors without any participation by the liquidator or his or her staff. [11]

The highest rating in each outcome category could be given by a response of "always". From that level the rating fell, first to "often" then to "sometimes" then to "rarely" and then to "never". As will be seen below, the mid to low ratings of "sometimes" and "rarely" predominated.

On the broad question of whether the RATAs received were of a reasonable and acceptable standard, 59 per cent of respondents said "sometimes" and 33 per cent said "rarely". On another broad question of whether the RATAs provided all the

required information about assets and liabilities, 56 per cent said "rarely" and 26 per cent said "sometimes".

It is also worth noting that the adverse rating of "rarely" was at its highest in questions about "proper classification". Sixty-three per cent said the classification of liabilities was rarely correct, and 58 per cent said the classification of assets was rarely correct.

The statements (in the order in which they were put) and the results are shown in Figure 3:

Figure 3

Statement	Always	Often	Sometimes	Rarely	Never
"All assets that should be in the RATA are included."	1.9	25.7	52.4	20.0	0.0
"All liabilities that should be in the RATA are included."	1.9	7.6	50.5	39.0	1.0
"The classification of assets (1) *is correct."*	0.0	4.8	29.5	58.1	7.6
"The classification of liabilities (2) *is correct."*	0.0	3.8	28.6	62.9	4.7
"Assets are included in the RATA at appropriate values."	0.0	3.8	53.4	39.0	3.8
"Liabilities are included in the RATA at appropriate values."	0.0	20.0	55.2	22.9	1.9
"All the information required about assets and liabilities (3) *is provided."*	0.0	8.6	25.7	56.2	9.5
"The RATA that is received is of a reasonable and acceptable standard."	0.0	6.7	59.0	33.3	1.0

Note: The following explanatory text was included in the relevant remark:
(1) "e.g., assets not specifically charged, assets subject to specific charges, contingent".
(2) "e.g., preferential, secured, partly secured, ordinary unsecured, contingent".
(3) "e.g., location, names and addresses of debtors and creditors".

Explain, modify or switch?

Prior to conducting this survey, my own experience and discussions in insolvency circles suggested that RATAs prepared by directors were often materially defective, and that one reason for this was that the form being used was hard to understand. It was occasionally suggested that a better outcome would be achieved if the RATA was converted into a questionnaire.

Therefore the following questions were raised in the survey: is there something wrong with the RATA; would a questionnaire be better?

Replacement by a questionnaire?

When asked: *"Would you like to see the RATA changed from its present layout (i.e., as a financial statement) to that of a set of questions seeking information about the*

company's assets and liabilities?", most liquidators (60 per cent) said "yes". Of the others, 22 per cent said "no" and 18 per cent said they were undecided.

Several respondents (21) offered reasons for their views. Their comments have been reproduced in Annexure 1 at Table 4.

Most of those in favour of switching to a questionnaire regarded the existing RATA as difficult to complete. But one cautioned against a one-size-fits-all design approach which would see directors of small companies being asked questions relevant only in the case of large companies. On the other side, opponents considered that a questionnaire would be too cumbersome, or that existing questionnaires, designed and issued by liquidators, were adequate. Some who favour a questionnaire praised the one designed by the Insolvency Trustee Service Australia (ITSA) for use in personal bankruptcy.

In the personal bankruptcy regime – which is governed by the Bankruptcy Act 1966 and administered by the ITSA – the equivalent form, a Statement of Affairs ("SOA") under section 54, was changed from a financial statement to a questionnaire over ten years ago. [12]

Improvements and changes to the RATA

When asked: *"What suggestions for improvements or changes to the RATA would you like to make (if any)?"*, 57 of the 105 liquidators (54 per cent) made suggestions and/or criticised the form. Their comments have been reproduced in Annexure 1 at Table 5.

The most common criticism was that the form is difficult for directors to understand, because of its layout (illogical, confusing), its complexity, and the lack of explanations and guidance. A frequent complaint was that directors are expected to know unfamiliar rules about the priority of employee and creditor claims and the difference between types of secured creditors.

Given these criticisms, it is no surprise that the most common suggestion was that the form should be made easier to understand, or more user-friendly. The need for detailed instructions in plain language rates very highly. But other specific suggestions included "walking" the director through the process, giving examples for different categories of assets and liabilities, removing the categories of assets and liabilities; and making specific reference to leases and hire purchase agreements. In several instances sections 2.2 to 2.6 of the summary page (see Figure 1) have been singled out for criticism. [13]

Belief in the need for a questionnaire was evident in many suggestions. Some said that the RATA should incorporate questions about asset disposals, payments to creditors, signs of insolvency, other persons involved in management, what records were kept, the location of records, personal guarantees, fixed and floating charges, and real property mortgages.

Other suggestions were that the RATA:

- require additional details of assets;
- require attachment of the most recent balance sheet;
- be made investigative in nature;
- be made more similar to a balance sheet;
- provide separate schedules for wages, leave entitlements and superannuation owing; and
- allow room for comments.

What happens to defective RATAs?

When a RATA is submitted to an official liquidator under section 475 of the Corporations Act 2001 the liquidator must file a copy of it with the Court and lodge a copy with the ASIC. [14] In other forms of external administration lodging RATAs with the ASIC is also obligatory. [15] In this way the information in the RATA become a matter of public record. The main idea behind this procedure is to give creditors, other interested parties and the public visibility as to the position of the company at the date of winding up. [16] For a fee anyone may obtain a copy of a RATA from an ASIC information broker.

But what happens if the RATA submitted to the liquidator is defective? Does such a RATA go on the public record as a statement as to the position of the company at the date of winding up? [17]

What constitutes a defective RATA is, of course, a matter of opinion. In the survey I described a defective RATA as one which is "only partially completed or is otherwise not completed to an acceptable standard". I asked liquidators:

> *"When a director submits a RATA to you under section 475 but the RATA is defective – i.e., only partially completed or is otherwise not completed to an acceptable standard – what do you do? (Select all that apply.)"*

The options that I thought might be chosen, and the results of the survey, are shown in the table below (Figure 4).

Figure 4	
What do you do with a defective RATA?	Per cent
"Lodge a copy of the defective RATA with ASIC."	61.9%
"Return the RATA to the director for rectification"	57.1%
"Offer assistance to the director to prepare the RATA to an acceptable standard."	53.3%
"Make a report about the defective RATA to ASIC (section 533)."	23.8%
"Lodge a complaint about the defective RATA with ASIC (Liquidator Assistance Program)."	21.9%
"Other (Please describe)."	3.8%

As can be seen, the survey found that 62 per cent of liquidators lodge copies of defective RATAs with the ASIC.

On one view it is surprising that this figure is not 100 per cent, since the law does not appear to allow liquidators any choice in the matter. [18] Also, liquidators would be eager to avoid the late lodgement penalty that is imposed automatically if a copy of the RATA is not lodged as stipulated.

Perhaps some liquidators consider that a RATA that is *"*only partially completed or is otherwise not completed to an acceptable standard" does not qualify as a RATA at all and, that being so, there is no obligation to lodge it. [19]

In the bankruptcy regime the Official Receiver has advised that he or she may refuse to accept a Statement of Affairs for filing if it is, inter alia, "incomplete". The meaning of "incomplete" is described as: "If the debtor has not reasonably attempted to answer all the questions on the statement of affairs …. The Official Receiver will assess whether the unanswered question/s is critical to an understanding of the debtor's affairs and whether the information provided is sufficient, for example: An indication that the debtor owns assets without details of the location or estimated value would not constitute a reasonable attempt, and/or An indication by the debtor that they have creditors other than the petitioning creditor without identifying them would not constitute a reasonable attempt." [20]

There is at least one reported case – concerning the banning of a director – in which the ASIC has expressed a view about when a RATA fails to be of an acceptable standard. The ASIC spoke then of the absence of "full disclosure". [21] But it is doubtful that it would apply that view generally to issues arising under section 475.

The ASIC has the power to refuse to receive a document and request an amended, fresh or supplementary document where the document has, for example, not been duly completed because of an omission or misdescription. But without amendment this law is unlikely to be of any use in the case of an incomplete or defective RATA because it is aimed at the person attempting to lodge the document, who would be the liquidator, and not the author of the RATA, which is the director. [22]

Compliance issues - Background

The requirement that directors make out and submit a RATA gives rise to several compliance issues which are central to the proper functioning of the Court-ordered liquidation system.

It has long been an offence for directors to refuse or fail to make out, verify and submit a RATA to the official liquidator. [23] The frequent breach of this law (and of other laws requiring directors to assist liquidators) led in 2002 to establishment by the ASIC of a specially funded Liquidator Assistance Program (LAP) to assist liquidators and the ASIC enforce these laws. [24]

If a director breaches section 475 and the official liquidator lodges a complaint with the ASIC under the LAP, the ASIC will send the director a warning letter [25]. If the director still fails to submit a RATA, the ASIC will initiate a summary prosecution, bringing the matter before a Local or Magistrates Court, where a conviction may be recorded and a fine imposed. Referring to this process the ASIC said in its submission to the 2010 Senate Inquiry [26] that "since July 2006 ASIC has prosecuted 1,955 officers in respect of 2,317 contraventions". [27]

The ASIC advised the Senate Inquiry that complaints of failure to provide a RATA or books and records to an external administrator ranked at the top if its list of the most common of all complaint issues raised during 2008-09. [28]

Besides making a complaint to the ASIC under the LAP, liquidators and other external administrators must report all apparent offences by directors – including failing to prepare a RATA – to the ASIC. [29] Statistics published by the ASIC show that in the three years from July 2008 to June 2011 external administrators reported 3,033 alleged cases of "post-appointment criminal conduct" by directors failing to prepare a RATA. [30]

It seemed appropriate to include questions in the survey concerning attitudes to the performance of the ASIC in pursuing directors for RATAs and concerning the amount of the fines that are imposed for breaches of section 475. It also seemed opportune to inquire into practices regarding the reporting of section 475 offences.

Reporting alleged offences

Liquidators were asked how they reported alleged offences under sections 475(1) or (2) to the ASIC. The precise question was:

> *"When a director fails to submit a RATA to you as required by section 475(1) or (2), HOW do you report the alleged offence to the ASIC?"*

Three well-known methods were shown. More than one method could be selected. The responses are shown below (Figure 5):

Figure 5	
Ways Section 475 Offences are Reported	Per cent
"By lodging a complaint with ASIC (e.g., under its Liquidator Assistance Program)."	91.4%
"By making a report under section 533(1) (e.g. Regulatory Guide 16, Schedule B, Form EX01)."	60.0%
"By making a report under section 533(2) (e.g. Regulatory Guide 16, Schedule C)."	12.4%
"Other (Please describe)."	0%

It is interesting to note that 8.6 per cent of liquidators said they do not lodge a complaint with the ASIC under the LAP. This is odd, because not only does the

ASIC advocate use of the LAP, [31] but that process appears to be the only way in which compliance and prosecution action concerning a RATA can be initiated.

Just as interesting is the fact that only 60 per cent of liquidators said that they reported the breach of section 475 to the ASIC in their initial section 533 report. This suggests that the ASIC's statistics on the number of alleged breaches of laws requiring preparation of a RATA may be significantly understated. [32]

Getting a RATA after reporting an alleged offence

In an attempt to gauge how successful the LAP procedure is, liquidators were asked:

> *"At some stage after reporting a breach of section 475 to ASIC, do you receive a RATA?".*

Five per cent of the liquidators chose the highest rating of "always". Thirty-seven per cent said "usually". However, 55 per cent said "sometimes", and 3 per cent said "never".

These ratings may be compared with figures published by the ASIC on its LAP activities. It has reported that in 2010/11 there were 406 "compliance outcomes" from 1,386 requests for assistance to obtain a RATA or delivery of books and records. "Compliance outcomes" are said to "generally involve activities (including court proceedings) that result in voluntary compliance by directors in submitting Reports as to Affairs and/or producing books and records to the RLs." Out of the 1,386 requests for assistance there were also 575 charges issued and 425 "successful individual prosecutions (761 offences)". [33] Unfortunately figures on the number of RATAs obtained are not given.

ASIC convictions and penalties imposed

Of the liquidators surveyed, 53 per cent (i.e., 56 liquidators) said they knew of at least one occasion when the ASIC had obtained a section 475 conviction against a director of a company to which they had been appointed.

The question put to liquidators was:

> *"In respect of any of the companies to which you have been appointed official liquidator, has ASIC obtained a conviction against a director for a breach of section 475?"*

As mentioned 53 per cent replied in the affirmative. Of the remaining 47 per cent, 31 per cent said "No" and 15 per cent said "Don't know/can't say".

Under the Corporations Act the maximum penalty for an offence under section 475 is currently 25 penalty units (total $2,750) or imprisonment for 6 months, or both. [34] The government recently proposed that the maximum penalty be doubled to bring it in line with the maximum prescribed under bankruptcy law. [35] Research carried out by me, independently of this study, shows that the average amount of fine imposed by magistrates for a section 475 offence prosecuted by the ASIC over the 5 calendar years 2006 to 2010 was $875. [36]

The 56 liquidators who were aware that a conviction had been obtained against a director of a company over which they had been appointed were asked to rate the penalty imposed by the court as either "very light", light", "fitting/appropriate", "heavy", or "very heavy". If they were unable to give an opinion because they didn't know what penalty had been imposed, they could choose the further option of "don't know: not informed of the penalty imposed". (Some respondents changed this answer to "don't know: can't recall".)

Forty-five of these 56 liquidators (i.e., 80.4 per cent of them) rated the penalty imposed as either "very light" or "light". The results are depicted below in Figure 6:

Figure 6

Question:	*"… how would you rate the penalty that was imposed by the court? (If you have had this experience more than once, rate the penalties generally.)"*
Responses:	
41.1%	Light
39.3%	Very light
8.9%	Don't know …
7.1%	Fitting/appropriate
1.8%	Heavy
1.8%	Very heavy

In the section of the survey dealing with the role and importance of the RATA (discussed on pages 4 and 5 of this paper) liquidators were asked how much they agreed or disagreed with the following statement:

> *"Failure to submit a RATA without reasonable excuse should be treated as a contempt of court".*

Seventy-four per cent of the 105 respondents said they agreed with this statement. Nineteen per cent said they neither agree or disagreed, while 7 per cent said they disagreed.

Satisfaction with process

Liquidators were asked about their level of satisfaction with the process that follows after they report to ASIC that a director has breached section 475. They were asked to choose either "very satisfied", "satisfied", neither satisfied nor dissatisfied", dissatisfied", or "very dissatisfied".

The majority (39 per cent) said they were "neither satisfied nor dissatisfied", while slightly less (37 per cent) said they were "satisfied". The results are depicted below in Figure 7.

Figure 7	
Question:	*"After reporting a breach of section 475, which one of the following best describes your usual level of satisfaction with the process that follows?"*
Responses:	
39.0%	Neither satisfied nor dissatisfied
37.1%	Satisfied
20.0%	Dissatisfied
2.9%	Very dissatisfied
1.0%	Very satisfied

Proposed changes to enforcement process

Late in 2011 the government proposed changes to the way in which the requirement to submit a RATA is enforced. [37] If adopted the new regime would see the ASIC "empowered to issue information gathering notices requiring the former directors or officers to complete the RATA within a stipulated timeframe". Failure by a director to comply with such a notice would, or could, result in a "notice of suspension" being issued and placed on a public record. [38] Such a suspension – which "(is) not full disqualification" – would ban the director from managing any company for a period. The duration of the ban would depend on several factors such as the period of non-compliance and the time it takes for the external administration to be completed. [39]

Conclusion

A number of recommendations and additional observations can be made with respect to this survey of liquidators.

(a) Discontent with RATA form

Clearly our corporate doctors believe that the RATA needs urgent treatment. The survey has shown that there is considerable dissatisfaction with the inadequate information that they receive in many RATAs. There is a tendency to blame the form for this, and also to blame the form for the fact that many directors fail to prepare a RATA. There is also a strong desire to have the form made more user-friendly or to have it replaced by a questionnaire. Many liquidators feel that the requirement that directors classify assets and liabilities according to insolvency rules regarding priorities is not necessary and is a frequent cause of problems in getting a properly prepared RATA.

(b) To be or not to be a questionnaire

In this country the statement of affairs required in personal bankruptcy has been changed from a financial statement to a questionnaire. [40] In view of the vote for change expressed by many liquidators, and in the context of a broader desire for harmonisation of personal and corporate insolvency regulation, a move to a questionnaire-style RATA ought to be seriously considered. However, an inquiry into the pros and cons should look first into:

- whether the change of style that occurred in personal bankruptcy has, alone, led to a measurable improvement in the standard of information received and in greater compliance with the requirement to prepare a statement of affairs;
- whether bankruptcy trustees have found that, because of the change, they can administer the affairs of bankrupts more efficiently and effectively;
- whether bankrupts have appreciated the change; and
- whether creditors have appreciated the change.

In New Zealand the company statement of affairs is in the style of a questionnaire – see Annexure 7 for a copy of this form. But in England [41] – and many other places - including Scotland, [42] Ireland, [43] Hong Kong, [44] and India [45] – a form in the traditional style of a financial statement, very similar to our RATA, is used. An inquiry into whether Australia should move to a questionnaire-style RATA should take into account the thoughts and experiences of liquidators and regulators in New Zealand and in the countries that have not changed.

Input from company directors, especially those in small enterprises, should also be sought. A common criticism of the present RATA is that it is too complicated for the average company director to understand. If that is a valid point, then a central issue will be whether directors find it easier to prepare a RATA in questionnaire style than one in financial statement style.

(c) An improved form

Obviously it is desirable that the RATA form be user-friendly, whatever style it comes in. [46] But as the RATA is a multi-user form – for directors, liquidators, secured creditors, preferential creditors and general creditors – consideration must be given to the needs of all users.

There is a tendency to aim for a very simple form that almost anyone could complete. However, such a move may be counterproductive. The financial position of a company can be complex. Arguably it is better for liquidators, creditors and the public that directors be required to provide comprehensive information.

The present RATA form could be improved by making its course and objectives clear once again. In recent years petty or perhaps accidental changes made to the summary page – altering borders, columns and rows, and removing sub-total areas– have made the form more difficult to fathom. (For an example of what I mean by making its course and objectives clear, see “Overview of Report as to Affairs” at Annexure 6.) Reinstating borders, columns, rows, and sub-totals would not be a cure, but would be a simple, partial remedy.

(d) Greater official guidance, education and help

The standard of the average RATA submitted to external administrators would almost certainly improve if company directors were given a helping hand.

The ASIC ought to issue a detailed guide or information sheet about the RATA. This guide should be available free online from the ASIC website, and a copy should be sent to directors whenever a RATA is required. A telephone help service, provided

by the ASIC, should also be available. Such services are provided by other government regulatory agencies, the model probably being the Australian Taxation Office.

The ASIC says that it "regard(s) failure to provide a RATA or to disclose and deliver up books and records as a serious breach of the Act." [47] But even though it rates the duty to prepare a RATA as important, the ASIC does not appear to do anything to help directors fulfil that duty as soon as it arises. On its website at present the ASIC has approximately 220 Regulatory Guides (RG) and 150 Information Sheets (INFO), for the purpose, inter alia, of "explaining how ASIC interprets the law", "giving practical guidance" and "provid(ing) concise guidance on a specific process or compliance issue". [48] Yet none of these guides or information sheets provides information about how to prepare a RATA. [49] It is surprising, to put it mildly, that a form like the present RATA – one which is unusual, complex and important – does not at least have an official guide to what its terms mean and how it should be completed.

(e) Enforcement

The proposed amendment to double the maximum penalty for failure to submit a RATA [50] would be supported by most liquidators, and may lead to improved compliance rates if the doubling is reproduced in the actual fines imposed by magistrates. But greater follow-up action by the ASIC after it accomplishes an initial prosecution success seems to be required.

If enacted the proposal to empower the ASIC to issue information gathering notices requiring directors to submit a RATA and suspend their right to manage companies if they fail to do so, [51] should improve compliance with the duty to submit the form. But as long as there is no rule as to what constitutes a valid RATA, these measures – and those designed to increase fines – are not likely to remedy the principal complaint.

(e) Consultation with relevant parties

This survey of liquidators has brought to light substantial criticisms and concerns about the RATA and a desire for change. It coincides with moves towards harmonisation of personal and corporate insolvency regulation, and with the start of the Personal Property Securities Act, which makes significant changes to priority rules for secured parties as well as introducing a new vocabulary. All this suggests that it's time the RATA form was revisited and overhauled.

The ASIC should make the RATA the subject of an inquiry through a Consultative Paper, in the way it did in 2009/2010 in relation to insolvent trading. [52] The ultimate aims of the consultation would be to produce a new or redesigned form, a Regulatory Guide to the form, and an information sheet for directors. The inquiry should consider, for example, what constitutes an acceptable standard for a RATA – i.e., when does a professed RATA qualify as a valid RATA – and how the receipt of a RATA that fails to meet that standard should be handled.

ENDNOTES

[1] A Report as to Affairs (ASIC Form 507) is required under sections 421A(1), 429(2)(b), 475(1), and 497(5) of the Corporations Act 2001. The Form 507 may also be used in relation to Sections 438B, 446C, 475(2) and 496(4).

[2] On 23 December 2004 regulations came into effect removing some insolvency forms – including the Report as to Affairs (Form 507) – from the list of forms prescribed by Corporations Regulations 2001. See Corporations Amendment Regulations 2004 (No.9). From then on the RATA ceased being a statutory form and became instead an ASIC Approved Form. In announcing this change the ASIC said: "The point of this change is so that ASIC can begin improving the forms over time to make them more user-friendly and facilitate their electronic lodgement, and to enable information to be collected more effectively. It would be difficult for ASIC to make these improvements if the forms continued to be prescribed under the regulations.". See ASIC Information Sheet, "Insolvency forms removed from regulations: impact on external administrators", 17 December 2004.

[3] In its March 2010 submission to the Senate Economics References Committee (Inquiry into the Conduct of Insolvency Practitioners and ASIC's Involvement) the ASIC advised that there were 662 registered liquidators – see page 4 of Submission 69. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/liquidators_09/submissions.htm. In September 2011 I found that there were 523 official liquidators on the ASIC's database.

[4] Companies Act Regulations, Form 56. See, for example, Victoria Gazette, number 64, 22 June 1962, page 2181. The form was then called a Statement of Affairs. The name change occurred in 1981 (Companies and Securities Legislation (Miscellaneous Amendments) Act 1981).

[5] Long before the Uniform Companies Acts of 1961, officers of companies entering liquidation had to supply the liquidator with a Statement of Affairs. It appears that laws requiring this were introduced in all States (then colonies) in the 1890s – see "The Law of Company Liquidation" by B H McPherson, first edition,1968, pages 21 to 23, or third edition, 1987, pages 20 to 22. For an example of such legislation see section 131 of the Companies Act 1896 (Victoria), available at http://www.austlii.edu.au/au/legis/vic/hist_act/ca1896107/. The earliest illustration of a company Statement of Affairs that I have been able to trace is in "Advanced Accounting – Volume 1", by Yorston, Smyth and Brown, Law Book Company, 1949, page 194. Although the layout in the 1949 Statement of Affairs is different than today's RATA (with a "Deficiency Account" required as well), its concepts, its use of schedules and many of its phrases are very similar to the modern version. It is also worth noting, that the 1949 Statement of Affairs for a company follows closely the kind of Statement of Affairs that was being used twenty years earlier in bankruptcy law: see "Australian Bankruptcy Law and Practice", by McDonald, Henry and Meek, Law Book Company,1928, pages 544 to 551. So if the Statement of Affairs for bankrupts remained the same between 1890s and 1928, the Statement of Affairs for companies entering liquidation probably did too.

[6] The phrase "floating charge" is becoming obsolete. Since the Personal Property Security Act 2009 commenced on 1 February 2012, the Corporations Act 2001 refers to a floating charge as a "circulating security interest", or a security interest in a circulating asset. See, for example, sections 51C, 433 and 561 of the Corporations Act 2001. In the current on-line version of the ASIC's RATA Form 507, dated 30/1/2012, (replacing the previous version dated 17/1/2011) the phrase "floating charge" has been replaced by "circular security interest", the phrase "specific charges" has been replaced by "specific security interests", and the word "charge" has been replaced by "security interest".

[7] This feature has also gone from the "Presentation of Summary of Affairs", ASIC Form 509.

[8] A so-called "Guide: Report as to affairs" is issued by the ASIC as part of Form 507. However, although it claims that it will "assist you in completing and lodging the Form 507", it only refers to the lodgement period, late fees, and the manner in which additional information should be attached. (See Annexure 5 to this paper). At the beginning of the Form 507 there is a small section headed "Directions"; but it only refers to dates, verification and lodgement.

[9] . Under Court rules liquidators must give the person required under section 475 to submit a RATA "instructions for the preparation of the report". See, for example, Federal Court (Corporations) Rules 2000, Div 7, rule 7.3(1).

[10] The instructions given to directors vary from liquidator to liquidator. Those who subscribe to the precedent letters, forms and checklists available from specialist publishes – such as CORE Australia, MYOB Insolvency and CCH's *Australian Insolvency Management Practice* – would probably use the RATA instructions form released by the publisher, or perhaps an edited version of that form. Others would, of course, use forms devised in-house. In the current edition of CCH's *Australian Insolvency Management Practice* the RATA instructions have approximately 310 words. The RATA instructions document published by CORE Australia has approximately 720 words (or at least it did when I had access in 2007). In its February 2012 submission to the Treasury, insolvency practitioners PPB Advisory (NSW) said that "our instructions precedent is presently 9 pages long" (see http://www.treasury.gov.au/documents/2333/PDF/PPB_Advisory.pdf).

[11] Sometimes liquidators choose to become closely connected with the preparation of a RATA by directors. However, whether that practice is good policy – for the liquidator or for the director – is questionable. Furthermore, in Re Reiter Brothers Exploratory Drilling Pty Ltd (1994) 12 ACLC 430, Zeelman J said (in refusing to approve remuneration) that: "It was not part of the provisional liquidator's functions or duties to prepare the report. The Law, s 475(1) imposed the duty of making out and verifying the statement of affairs upon the directors. In the present case, whilst the applicant referred to assisting the directors, in fact the reports were prepared by him. It is completely inappropriate for a liquidator or provisional liquidator to be involved in preparing the report. It is a report to him. In the case of a winding up he is to prepare a report under s 476 after receiving the directors' statement and it may be assumed that he is to have regard to it. The inappropriateness of a liquidator or provisional liquidator preparing the report is recognised by s 475(8) which permits him to allow some amount to be paid out of the property of the Company in relation to costs incurred by a director in preparing the report."

[12] The process of change to the bankruptcy SOA began in 1987 when the law was amended to give the Inspector-General in Bankruptcy the authority to revise and simplify the SOA with the intention of developing a SOA which would "give the trustee a reasonable initial overview of the debtor's affairs, whilst being reasonably free from legal terms": see Bankruptcy Amendment Bill 1987 – Explanatory Memorandum – pages 43, 44, 57 & 58. It was approaching a questionnaire style in 1997, as can be see in Commonwealth Government Gazette GN 25, 25/6/1997, page 1610. It still had a Summary of Assets and Liabilities near the front, cross referenced to several schedules (similar to those that still appear in the company RATA), but they were followed by parts in which questions were asked about income, business activities, interests in companies, etc. The SOA seems to have completed its transformation to a questionnaire by about 1999. The current version does not contain a financial statement. The ITSA designed SOA in bankruptcy (Form 3) is often updated, and the latest change (version 7) was made in December 2010.

[13] Personally, I consider it remarkable that the form does not request any details – other than the amount owing – in relation to the holders of floating charges (now called "circular security interests"), who are frequently present in corporations as predominant creditors.

[14] Section 475(7) of the Corporations Act.

[15] Managing Controllers and Controllers have obligations under sections 421A(2) and 429(2)(c) respectively. In a creditors' voluntary liquidation, the legal position is complicated. Since 2007 – as a result of "an unintended anomaly introduced by the 2007 insolvency reforms" (see Options Paper, "*A modernization and harmonisation of the regulatory framework applying to insolvency practitioners in Australia"*, June 2011, paragraph 709) – there has been no specific requirement to lodge a RATA with the ASIC in the case of a creditors' voluntary liquidation. However, if current reform proposals become law, the specific requirement will be reinstated (see Proposals Paper, "*A modernization and harmonisation of the regulatory framework applying to insolvency practitioners in Australia"*, December 2011, paragraph 301). Even so, there is a view (to which I subscribe) that where a RATA is tabled at the meeting of creditors (as usually occurs), it becomes, if the general law of meetings is followed, part of the minutes of the proceedings, and would, therefore, be lodged with the ASIC when the minutes are lodged in compliance with Corporations Regulation 5.6.27(3). In a creditors' voluntary liquidation

section 497(2)(c) requires lodgement of a Presentation of Summary of Affairs (ASIC Form 509), which is essentially the same as the RATA's summary page.

[16] In Re: Harris Scarfe Ltd (In Liq) (no 2) (2007) SASC 211, Debelle J said: "The purpose and intent of s 475 is to equip the liquidator and the creditors with knowledge of the affairs of the company and thereby to assist the orderly and efficient administration of the winding up. Shortly put, its object is to provide information for the purpose of the winding up: re New Pars Consol Ltd [1898] 1 QB 573 at 576." In this regard His Honour also spoke about section 476, which requires the official liquidator to lodge a report with the ASIC as to the capital of the company, the estimated assets and liabilities of the company, the causes of failure, and whether further inquiry is desirable into certain matters. This report also becomes a matter of public record. His Honour said: "Section 476 provides the means by which the information gained by the liquidator is made available to the public. Section 475 and 476 … are steps of a procedural nature intended to elicit information as to the affairs of the company and to provide that information to creditors and contributories." In another case - which concerns personal bankruptcy rather than corporate liquidation but is relevant nevertheless – his Honour, Hill, J said: "The obligation to file a statement of affairs in a public register is intended to make information concerning the bankrupt's affairs available to creditors and, for that matter, members of the public. The former may inspect without payment of a fee, the latter only on payment of a fee. But it is in the interests of the public in the encouragement of morality in trading that the financial situation of a bankrupt debtor be open to inspection. Because, ordinarily, the administration of the estate and ultimate distribution of dividends from the estate, will be dependent upon the trustee having full details of the trade dealings and debts of a debtor, the statement is to be made available as well to the trustee in bankruptcy.". See *Nilant v Macchia* (2000) 104 FCR 238 at 245, 178 ALR 371 at 377. This statement is quoted approvingly by Collier, J in Wangman v The Official Receiver [2006] FCA 202 (see paragraph 49).

[17] In bankruptcy law the Official Receiver may refuse to accept a Statement of Affairs and return it to the bankrupt on the basis that the statement had not been satisfactorily or properly completed. Following the judgment of Collier, J, in Wangman v The Official Receiver [2006] FCA 202, the Inspector-General in Bankruptcy issued a Practice Statement (number 14) in which he says: "Due to the operation of section 6A(2) of the Act, and further supported by Wangman v The Official Receiver, the Official Receiver has a discretionary power to either accept or not to accept a Statement of Affairs form as being a valid statement of the debtor's affairs. Should a Trustee receive a completed or partially completed Statement of Affairs form from a bankrupt, that document (or an original copy of it) should be forwarded to the Official Receiver for consideration as to whether or not it has been properly completed. It is not appropriate for Trustees to make a determination as to whether or not such a document is properly completed and therefore acceptable to the Official Receiver." See Inspector-General Practice Statement 14, Referring offences against the Bankruptcy Act 1966 to the Inspector-General, 2 February 2010. In the Official Receiver's Practice Statement 10 - Filing Of A Statement Of Affairs and Issue Of 77CA Notices by The Official Receiver - issued 1 December 2010, the word "incomplete" is used to describe a Statement of Affairs that may not be accepted.

[18] Section 475(7) states: "The liquidator must, within 7 days after receiving a report under subsection (1) or (2), cause a copy of the report to be filed with the Court and a copy to be lodged".

[19] In bankruptcy there is case law which states: "the defects in the 1998 Statement of Affairs were so significant that it could not be said that the document was a statement of affairs at all"; "very little of the document was genuinely attempted by the appellant (bankrupt)"; and "the 1998 Statement of Affairs was clearly defective because of: (a) the quantity of information which had either not been included or not appropriately address by the appellant (bankrupt)" – see Wangman v The Official Receiver [2006] FCA 202. His Honour, Collier, J supported the view of Federal Magistrate Jarrett, FM, that because the Statement of Affairs submitted was so defective as to not be a statement of the bankrupt's affairs, ITSA was under no obligation to accept it". These statements and findings may mean little in the liquidation arena. But they do suggest that for a report "as to the affairs of the company" - the phrase used in sections 475(1) and (2) to qualify as such, the report needs to fulfil some standard.

[20] Official Receiver's Practice Statement 10 - Filing Of A Statement Of Affairs and Issue Of 77CA Notices by The Official Receiver - Issued 1 December 2010.

[21] These comments were made in a case concerning a decision by the ASIC to ban a director. One of the ASIC's many reasons for the ban was "failure to give full disclosure in a report as to affairs". The RATA did not disclose any assets (including debtors) or creditors of the company, although the director

knew there were assets and liabilities. The ASIC was of the view that "failure by the Applicant (director) to submit a RATA that fully disclosed the company's liabilities showed a reckless disregard of his obligations under the legislation and a reckless disregard for the interests of creditors." The ASIC "maintained that the attitude taken by the Applicant, he relying on the accountant as saying "it was accurate" that "being good enough for me" indicates want of a proper appreciation of directorial responsibility." The case came before the Administrative Appeals Tribunal in 2000. In concurring with the ASIC the Tribunal found that: "The RATA declared by the Applicant to be true to the best of his knowledge and belief was patently untrue and not consistent with the accounting records then maintained by the company. No qualification was made to the information contained in the RATA nor was mention made of this situation in the answers to the questionnaire, also certified by the Applicant. There is an obligation resting upon a person such as the Applicant to provide information to a Liquidator such as to enable the Liquidator to more properly conduct the affairs of the liquidation. The Applicant in this case clearly adopted a position of not personally examining records or, indeed, the document that he signed. A statement that there are "nil" sundry debtors and "?" creditors, clearly is at odds with appropriate responsibility." See Administrative Appeals Tribunal, James Warren Byrnes and Australian Securities & Investments Commission [2000] AATA 333 before Hon Mr R N J Purvis, QC, and Ms J A Shead. Decision 28 April 2000.

[22] Section 1274(8) of the Corporations Act 2001.

[23] Section 475 of the Corporations Act 2001. Precursors: section 234 of the Uniform Companies Act 1981; section 131 of the Companies Act 1896 (Victoria).

[24] The ASIC had a group of staff carrying out liquidator assistance work before 2002, but it did not receive special funding until that year.

[25] The ASIC says that it issued 1,465 warning letters to company officers in 2008/09 under the LAP. (See the ASIC submission to the 2010 Senate Inquiry – submission number 69, March 2010, page 74, Table 16.) These figures appear to be the most recent that are publicly available.

[26] The Senate Economics References Committee Inquiry into the Conduct of Insolvency Practitioners and ASIC's Involvement.

[27] ASIC Submission number 69, March 2010, page 15, Table 1.

[28] ASIC Submission number 69, March 2010, page 57, Table 7. All published submissions are available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/liquidators_09/submissions.htm

[29] Sections 533, 422 and 438D of the Corporations Act 2001 and ASIC Regulatory Guide 16, Section B.

[30] On its website the ASIC publishes annual reports titled "Insolvency Statistics – External administrators reports". The number of alleged breaches of RATA provisions in sections 429, 438B, 446C and 475 are given under the heading stream "Initial external administrators reports" > "Possible misconduct" > "Alleged criminal misconduct" > "Post-appointment criminal misconduct". See for example Report 263 of November 2011, page 26, table 21. URL is http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep263-published-22-November-2011.pdf/$file/Rep263-published-22-November-2011.pdf. In the two reports published – Report 225 (published 8/12/2010) and Report 263 – the number of reported instances shown in those reports total 3,033, comprising 1,240 in the year 2008/09, 948 in 2009/10 and 845 in 2010/11.

[31] "As a liquidator or administrator you can ask us for help with RATA, s530A and s530B offences. We would prefer if you put in a complaint (separate from your S533 report) so we can deal with the matter quickly and efficiently." See http://www.asic.gov.au/asic/asic.nsf/byheadline/Liquidator+assistance:+Books,+records+&+RATA+. See also Table 1, page 15, of the ASIC's March 2010 submission to the 2010 Senate Inquiry.

[32] Op cit note 30.

[33] These latest statistics on the ASIC's LAP activities appear in the October 2011 edition of *"ASIC Insolvency Update for Registered Liquidators".* See http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC-Insolvency-Update-October-2011.pdf/$file/ASIC-Insolvency-Update-October-2011.pdf. Also, in its March 2010 submission to the 2010 Senate Inquiry into insolvency practices the ASIC said that under the LAP: "ASIC's initial response is a warning letter to directors, which achieves compliance in 55 per cent of cases." In earlier years the ASIC has spoken of receiving "compliance rates" under the LAP of 74 per cent and 67 per cent.

[34] Schedule 3 of the Corporations Act 2001. There have also been cases in which failure to submit a RATA to the liquidator has been a factor in the ASIC's decision to exercise its power under section 206F of the Corporations Act to disqualify or ban a person from acting as a director: see, for example, the case of Robert Doon, reported in ASIC Media Release 10-172AD of 12/8/2010, which can be found at http://www.asic.gov.au/asic/asic.nsf/byheadline/10-172AD+ASIC+disqualifies+13+directors+of+failed+companies+from+managing+corporations?openDocument.

[35] Paragraph 227 of The Treasury *"Proposals paper: A modernization and harmonisation of the regulatory framework applying to insolvency practitioners in Australia"*, December 2011.

[36] In the five years the average fine under section 475 was $1,099 (2006), $1,001 (2007), $818 (2008), $640 (2009) and $817 (2010). I obtained this data by conducting detailed analysis of periodic conviction reports published by the ASIC as media releases. My research paper is currently with the Australian Institute of Criminology undergoing a review process before its possible publication by that body.

[37] Paragraphs 227 to 236 of *"Proposals paper: A modernization and harmonisation of the regulatory framework applying to insolvency practitioners in Australia"*, December 2011.

[38] The director would have the right to appeal to the AAT against the notice of suspension.

[39] The Government proposal seems to suggest that regardless of other factors the suspension period will expire "after three years of non-compliance".

[40] Op cit note 12.

[41] Form 2.14B.

[42] Form 2.13B (Scot).

[43] Form No.13.

[44] Form RC2.

[45] Form 57.

[46] The attributes of useable forms are described in a paper issued by the Australian National Audit Office in January 2006 – "User-Friendly Forms: Key Principles and Practices to Effectively Design and Communicate Australian Government Forms".

[47] ASIC Information Sheet 53 for directors – *"Providing assistance to external administrators: books, records and RATA"*, dated November 2004. Available from http://www.asic.gov.au/asic/asic.nsf/byheadline/Providing+assistance+to+external+administrators:+books,+records+and+RATA .

[48] http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/New%20regulatory%20documents.

[49] There are nine regulatory guides and eleven information sheets touching on other corporate insolvency matters.

[50] Op cit note 35.

[51] Op cit note 37.

[52] Consultation Paper 124, “Duty to prevent insolvent trading: Guide for directors”, November 2009. From this process came Regulatory Guide 217 of the same name in July 2010. http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg217-29July2010.pdf/$file/rg217-29July2010.pdf.

Signed:

Date: