

12 August 2021

Australian Securities & Investment Commission
[REDACTED]
[REDACTED]

By email: [REDACTED]

Dear Sir/Madam

**Feedback on draft Cost Recovery Implementation Statement:
ASIC industry funding model (2020-21) (CRIS)**

We refer to the draft CRIS for 2020-21 released by the Australian Securities & Investments Commission (ASIC) for feedback on 23 July 2021.

ARITA - Australian Restructuring Insolvency and Turnaround Association - makes this submission on the draft CRIS for 2020-21 and also reiterates our fundamental concerns on the operation of the industry funding model (IFM) as it applies to the registered liquidator subsector. More information about ARITA is provided at the end of this submission.

General feedback

ARITA has been heavily involved in providing ASIC and The Treasury with feedback and commentary (both through formal consultation processes and separately) expressing our concerns over the implementation and impact of the IFM on registered liquidators. A summary of the previous submissions and correspondence provided by ARITA is included in the Annexure to this submission.¹

Adverse impact on liquidator numbers

We have repeatedly expressed the view that the IFM would have an adverse impact on the numbers of registered liquidators such that the proper operation of the economy would be at risk in any future recession.

¹ We have not reproduced the body of each of these submissions (as they have been previously provided on more than one occasion) but we can provide them again to ASIC or The Treasury upon request.

Liquidator numbers have declined from 726 just prior to the commencement of the IFM to 631 at the end of June 2020 before climbing to 646 at 31 March 2021² following government initiatives to reduce the barriers to entry to the profession via the creation of a new class of registered liquidator and a waiver of application fees. Notwithstanding these initiatives, liquidator numbers still remain at historically low levels.

As noted in the next section, these low numbers are currently not an issue, but we remain concerned about the longevity of the profession with declining numbers in what is a highly specialised field of practice.

Stress in the profession

There has been a strong focus on the impact COVID-19 has had on trading companies and other businesses, and how government support measures have enabled many of those entities to withstand major supply and demand shocks to trade on.

Yet, outside of the restructuring, insolvency and turnaround profession, there has been little focus on or understanding of the flow-on impacts this has created for our members in their practices.

Throughout the pandemic, statistics releases by ASIC and AFSA have reported substantially fewer external administration appointments than in the corresponding previous year – typically down 50-60%. We also know that advisory engagements in restructuring and turnaround have fallen sharply, too.

In a recently issued paper, Deloitte estimates that in July 2021 external administration appointments are down 7,515 (compared to the base line 10 year average) since the announcement of the first economic stimulus package in early 2020.

This reduction in activity has had a severe and prolonged impact on the profession.

The CRIS has given an indicative levy of \$127 per notifiable event, which is up 162% (from \$79.16). With a budget of \$7.552M, the cost base has increased over \$1.4M (from \$6.139M in 2019/20) notwithstanding a substantial reduction in activity in the sector. This is an increase in the average cost from \$9,203 per registered liquidator to \$11,373.

We are concerned about the total increased cost that is being passed onto registered liquidators at a time when they are struggling financially, noting that most registered liquidators operate small businesses.

² ASIC Insolvency Statistics Series 4 Quarterly registered liquidator statistics

Ex-post nature of IFM

The ex-post nature of the IFM continues to cause issues and concerns due to the extreme lack of certainty of the quantum of levies facing all of ASIC's regulated populations. This is of particular issue for insolvency practitioners:

- Liquidators are unlike other professionals as they must undertake their duties even if they will not be paid. Increasing activity by unregulated advisers is seeing a rise in phoenix activity and related asset dissipation, as well as destruction of books and records and lack of co-operation with liquidators. These activities are further reducing the assets available to meet the cost of the liquidation process and provide a return to creditors. Where there are insufficient assets, liquidators are still required to undertake their statutory duties, including investigations and reporting to ASIC. ARITA's research indicates the population of less than 700 liquidators has to write-off some \$100 million in unrecoverable fees each year.
- Unlike other regulated populations, liquidators must seek to recover estimated IFM levies from short term appointments and the levy estimates provided by ASIC have proven to be very unreliable. High estimates disadvantage creditors and low estimates disadvantage insolvency practitioners and their ability to properly recover their costs.
- Liquidators are already obliged to carry out significant, often unpaid work on behalf of ASIC and the government, even if they are unable to recover their fees. This unique situation means liquidators are being double taxed by the IFM when they are already subsidising ASIC.
- Insolvency practitioners must have their remuneration approved by creditors or the Court who may not into consideration the cost impact of the IFM. This places an unreasonable burden on liquidators, especially those dealing in the SME space where remuneration is often unrecoverable.
- The IFM levy is considerably unjust given the very high cost per liquidator compared to other similar regulated populations and international comparatives; it also disregards for the work done by liquidators in support of ASIC (including having to pay to search ASIC's corporate register in order to report back to ASIC) and the limited benefits from the current ASIC supervision.

We again call for the Government to reconsider the inefficiencies of the ex-post model and change the model to one which sets a fee at the start of the financial year based on ASIC's budget and then smooths costs in subsequent financial years. We note that notwithstanding the ex-post nature of the IFM, there are still "Adjustments for prior year (under or over recovery)" occurring for most regulated populations, so the ex-post model does not achieve the objective of ensuring that each regulated population pays the actual cost of its regulation for that year.

Late provision of CRIS

We consider it completely unacceptable that the draft CRIS providing estimates for the 2020-21 financial years was not provided for consultation until 23 July – 23 days after the end of the financial year that it relates to. How is any business meant to budget for and manage this uncertainty – heightened by the current economic times with the Coronavirus crisis?

The release date of the draft CRIS continues to drift with release dates moving from October 2017 for the 2017/18 CRIS, to 23 July for the 2020/21 CRIS. The final CRIS for 2019/20 was published on 4 March 2021, the same month that invoices were issued to regulated populations for payment. In the 2019/20 final CRIS at section R Key events and dates stated that the 2020/21 CRIS for feedback would be provided in April 2021 – it was provided at the end of July 2021. We find it hypocritical that ASIC cannot meet its deadlines and yet penalises its regulated populations when they don't.

This continued lateness is compounded by the lack of reliability of these estimates with the draft CRIS noting that:

“There will be differences between indicative and actual regulatory costs, once known. This may be due to changes in our operating environment and the conduct of our regulated population during the year that requires us to adapt to new developments and emerging threats and harms.

Statements such as this do not seem reasonable considering the draft CRIS has been issued after the end of the financial year to which the estimates relate to.

Specific feedback

Some specific feedback on the draft CRIS for 2020-21 is set out below.

Part 1 – Industry funding levies

The CRIS asserts (at [20]) that, for ASIC, the IFM:

- “(a) ensures that the costs of the regulatory activities undertaken by ASIC are borne by those creating the need for regulation, rather than Australian taxpayers;
- (b) establishes price signals in the way resources are allocated within ASIC;
- (c) provides economic incentives to drive the Government’s desired regulatory outcomes for the financial system;
- (d) provides greater stability and certainty in ASIC’s funding and ensures that ASIC is adequately resourced to carry out [its] regulatory mandate; and
- (e) improves [ASIC’s] cost transparency and accountability to the industry.”

However, the IFM, in its application to the registered liquidator subsector, fails to achieve any of the objectives stated above.

Disproportionate application and lack of transparency

The application of the IFM to registered liquidators is disproportionate particularly when:

- (a) consideration is given to the significant amount of work carried out in terms of unfunded investigations, much of which is done for the benefit of ASIC; and
- (b) comparison is made with other regulated communities, for example, registered company auditors who have been assigned a flat levy.

There is a lack of transparency in the manner of allocation of costs across subsectors and exactly what are included in direct and indirect costs. Given the high levels of disclosure which are required of registered liquidators when seeking approval of their remuneration from creditors or the Court, it is highly unfortunate that ASIC is not able to provide more detailed information, on a specific subsector basis, of the manner in which its costs are allocated and charged.

This lack of transparency in accounting is particularly galling for insolvency practitioners where remuneration is a focus for ASIC (refer Table 14). That ASIC are unable to display more than a few budget line items for some \$7.5 million of charges levied to the insolvency profession is hypocritical and fails to follow the same standard it demands of the regulated population.

Increased compliance burden and lack of guidance as to practical implications

The application of the IFM to registered liquidators is also placing a significant regulatory and compliance burden on what is a small and highly specialised subsector.

These challenges are highlighted by the inability of registered liquidators to budget for the imposition of the IFM when the estimated amount for calculation of the graduated levy is not publicised until after the end of the financial year for which it is being charged (although we note that there is no requirement in the law for ASIC to meet these reporting guidelines, meaning that liquidators have no certainty as to when they will find out the cost impact of the IFM).

Further, a specific issue with the practical implementation of the IFM, which was flagged by ARITA in our submission dated 25 May 2017 and further raised with ASIC in March 2019, is the recovery of IFM levies from leviable entities that enter into external administration.

Since the commencement of the IFM in July 2018, ARITA has received a large number of queries which relate to this issue and specific queries have been raised of the relevant ASIC team. However, to date only limited guidance (caveated by the need to seek their own advice) has been provided in response to these queries. We note that ASIC has been developing (and has consulted with ARITA) further guidance, but this is yet to be finalised.

Part 3 – Stakeholder engagement

This section of the CRIS summarises the steps taken in terms of stakeholder engagement on the IFM.

As noted and evidenced in the annexure, ARITA has been an active participant in the consultation program concerning the implementation of the IFM and has consistently raised concerns over the impact of the model on registered liquidators, and the economy more generally.

However, there has been little specific engagement in response from ASIC or The Treasury on these issues.

Given the impacts of the IFM on the registered liquidator subsector ARITA will continue to review and press for reform, particularly as we remain fundamentally concerned that the impact of the IFM, alongside a protracted downturn in the insolvency profession, continues to drive liquidators from the market.

It is also disappointing that the neither the draft CRIS, nor any of the supporting documentation issued by ASIC, appear to contain any commentary or detailed analysis as to whether the overall system is meeting the objectives set out for the IFM approach.

Noting the matters discussed above for the registered liquidator subsector, ARITA's submission is that the implementation of the IFM has wholly failed to meet its objectives and is instead having a significantly negative effect.

Should you have any queries concerning this submission please contact us.

Yours sincerely,


John Winter
Chief Executive Officer

Annexure

Summary of ARITA submissions and feedback on IFM

Date	Summary of feedback
9 October 2015	<ul style="list-style-type: none"> - First round of consultation on implementation of industry funding model (IFM). - Letter to Treasury expressing concerns over IFM, including detailing the risks of significant negative market consequences.
14 December 2016	<ul style="list-style-type: none"> - Letter to (then) Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP expressing concerns over proposed IFM and its implications for the insolvency profession
16 December 2016	<ul style="list-style-type: none"> - Second round of consultation on implementation of IFM. - Letter to Treasury reiterating concerns over IFM and providing responses to consultation queries.
10 March 2017	<ul style="list-style-type: none"> - Letter to Treasury providing feedback on exposure drafts of ASIC Supervisory Cost Recovery Levy Bill 2017 and related bills.
25 May 2017	<ul style="list-style-type: none"> - Letter to Treasury providing feedback on the ASIC Supervisory Cost Recovery Levy Regulations 2017.
10 July 2017	<ul style="list-style-type: none"> - Letter to ASIC and Treasury expressing concerns over IFM and Public Notices Website (PNW) charges.
10 December 2018	<ul style="list-style-type: none"> - Letter to ASIC regarding changes to the ASIC fees and impact of calculation approach to ASIC fees for service. (Response received from ASIC on 13 March 2019. Further queries to be raised by ARITA.)
7 February 2019	<ul style="list-style-type: none"> - Letter to Treasury, submission on ASIC IFM and Registry Search Fees.
March 2019	<ul style="list-style-type: none"> - Correspondence with ASIC regarding application of IFM to companies in external administration
26 April 2019	<ul style="list-style-type: none"> - Submission on 2018-19 CRIS
18 September 2019	<ul style="list-style-type: none"> - Letter to Treasury, ASIC Industry Funding and the impact on registered liquidators
28 April 2020	<ul style="list-style-type: none"> - Letter to Hon Michael Sukkar, Assistant Treasurer, re late release of the 2019/20 draft CRIS and the impact on regulated populations.
7 July 2020	<ul style="list-style-type: none"> - Submission on 2019-20 CRIS



About ARITA

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

We have more than 2,200 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Around 80% of Registered Liquidators and 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 2020, ARITA delivered 70 professional development sessions to over 8,200 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 15 inquiries, hearings and public policy consultations during 2020.