

13 April 2021

Mr Andrew Fawcett  
Senior Executive Leader, Strategic Policy  
Australian Securities and Investments Commission  
Level 7  
120 Collins Street  
MELBOURNE VIC 3000

By email: [REDACTED]

Dear Mr Fawcett

### **Submission on ASIC's performance against the Regulator Performance Framework**

Thank you for the invitation to provide feedback on ASIC's performance against the Australian Government's Regulator Performance Framework (RPF) over the 2019-20 reporting period.

We are making this submission as the professional body representing registered liquidators, who make up a small, but critical part of ASIC's regulated population. We recognise the importance of the work undertaken by ASIC in regulating registered liquidators and the equally important role our members play in assisting ASIC to discharge its duties in maintaining confidence in the market.

On this basis, we consider it is also important to ensure that ASIC receives genuine, accurate and constructive feedback as part of the RPF process in order to ensure that ASIC remains an effective regulator.

### **How we approached this submission**

In order to provide a representative view of ASIC's performance in relation to registered liquidators, we again undertook a survey of our registered liquidator professional members.

We asked our professional members to rate ASIC on a series of questions which we extracted from the consultation paper. The rating was from one to five, with one being very poor and five being very good (a sixth option of no opinion was also available). The results of that survey are included under each of the KPIs below. We also provided an opportunity for members to provide written comments and we have included a representative summary of those comments.

We received 99 responses to the survey, with 85 of those being from registered liquidators who were then able to progress with the survey. This is approximately 13.5% of all registered liquidators as at June 2021. Responses were received from a cross section of firm sizes from sole practitioners to very large firms. We therefore consider this survey to be statistically valid and, therefore, representative of the population. These numbers are consistent with prior year surveys.

We have now been providing feedback on ASIC's performance in this format for four years and we have taken the opportunity to include the three prior year's results to identify trends in the results.

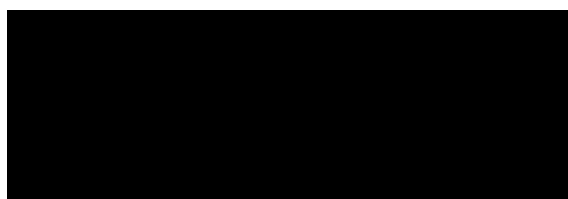
Whilst there have been some modest improvements with respect to many of the questions, it is clear that the regulated liquidator population continues to hold concerns regarding ASIC's regulatory approach. In particular, concerns were raised about the self-assessment model and the lack of independent assessment of performance.

ARITA is also concerned that despite active participation in this process for the last four years, with concerns being raised regarding the regulatory approach being taken in respect of registered liquidators, we continue to see the same issues being raised by our members. This is contrary to the approach taken by ASIC in respect of the regulated population, where failure to meet any required standard is perceived to be subject to disciplinary action.

As always, ARITA seeks to work collaboratively with ASIC to improve the standards of the regulated liquidator population.

Should you have any questions regarding this submission, please contact Ms Kim Arnold, ARITA Policy & Education Director, on [REDACTED].

Yours sincerely

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**John Winter**  
Chief Executive Officer



## About ARITA

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

We have 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 2019, ARITA delivered 118 professional development sessions to over 5,300 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 2019.

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# 1 KPI 1 and KPI 6

## 1.1 Survey Rating

- *KPI1: ASIC does not unnecessarily impede the efficient operation of regulated entities*
- *KPI6: ASIC actively contribute to continuous improvement of regulatory frameworks*

Question	Rating			
	2019/20	2018/19	2017/18	2016/17
1. ASIC demonstrates an understanding of the markets in which its regulated population operates, and best practice regulatory approaches in those.	2.76	2.90	2.85	2.47
2. ASIC promote public discussion of market and regulatory developments by engaging with stakeholders through regular meetings, external committees and panels, and hosting the ASIC Annual Forum.	2.68	2.98	2.85	2.49
3. ASIC make it easier for regulated entities to do business, including by: i. implementing measures to reduce red tape and the compliance burden on business (including for innovative business models) ii. effectively and efficiently considering applications by regulated entities for relief from the law.	2.27	2.21	2.36	1.75
4. ASIC contributes to continuous improvement of regulatory frameworks by providing advice to government, and identifying where reform to existing regulatory frameworks may be required.	2.51	2.46	2.52	2.29

- Summary of key comments raised by survey respondents
- The implementation of the new regulatory portal (for the lodgement of the EX01, assetless administration funding requests and supplementary reporting) and the design of forms within that portal was not well done and provides a poor user experience and poor functionality. Liquidators now have to deal with multiple portals to make lodgements with ASIC.
- Insolvency reforms over the last 4 years have added complexity and inefficiencies to the insolvency process. ASIC should be providing advice to government that prevents or minimises these types of outcomes or results in amendments to resolve ongoing

practical and drafting issues, but the view provided by members is that this does not happen.

- The industry funding model (IFM) is impeding the efficient operation of regulated entities as there is no certainty regarding the charges, reporting is late and there has been no evidence of improvements to the regulatory framework, which was meant to be a benefit of the IFM approach.
- Slow turnaround of funding applications made to the Assetless Administration Fund.
- Members expressed concern that they did not feel supported by ASIC.

## 1.2 ARITA Feedback

- ARITA agrees with members' comments regarding the implementation of the new regulatory portal. We received (and still receive) numerous queries from members regarding the portal and forms more generally. Better guidance should have been provided to liquidators regarding how the portal works, the questions asked in the new forms and how liquidators could get problems and queries resolved. ARITA is unable to assist members with queries regarding forms as ARITA does not have access to the regulatory portal or the liquidator's portal.
- The *Insolvency Law Reform Act 2016* (ILRA) commenced over three years ago and yet some Regulatory Guides and forms have still not been updated. For example, "RG81 Destruction of books" and the related Form 574 have not been updated to include consent for early destruction of books and records in Court Liquidations, yet this is an issue that our members have to deal with regularly.
- Although the implementation of the Small Business Insolvency Reforms occurred in the 2020/21 year, we want to acknowledge the work done by ASIC to prepare for the commencement of the reforms in what was a very short timeframe. There is still significant work to be done to assist the profession with ongoing implementation of the new regimes, such as flowcharts of commonly lodged documents, and we encourage ASIC to make these available as soon as possible.

## 2 KPI 2 and KPI 5

### 2.1 Survey Rating

- *KPI 2: Communication with regulated entities is clear, targeted and effective*
- *KPI 5: Regulators are open and transparent in their dealings with regulated entities*

Question	Rating			
	2019/20	2018/19	2017/18	2016/17
5. ASIC manages interactions with regulated entities in an efficient manner.	2.86	2.89	3.00	2.58
6. ASIC communicates with stakeholders on issues that affect its regulated population, such as its assessment of the key threats and harms we see in the market (through its corporate plan; guidance it provides about its regulatory expectations; its approach to enforcement; and its decisions on applications for relief).	3.14	2.94	3.15	2.56
7. ASIC consults with its regulated population on policy proposals that affect them.	2.53	2.48	2.56	2.35
8. ASIC reports to stakeholders on its performance.	3.18	3.15	2.95	2.87

### 2.2 Summary of key comments raised by survey respondents

- There is inconsistency in the communications that ASIC makes in relation to insolvency. Some communications go to a wide population (eg newsletter), whereas some only go to registered liquidators. It is suggested that all general communications (ie other than a specific letter on a specific issue to a particular registered liquidator) should go to the wider community to ensure that all parties affected by the changes are advised, including professionals who may soon be seeking registration as a registered liquidator. This will also assist with ensuring that necessary changes are picked up and implemented by insolvency firms.
- ASIC consults but does not listen to the outcomes of the consultation process. Consultation appears process driven and not genuine, with concerns that outcomes are determined which are not necessarily reasonable or responsive to the relevant population's needs.
- When ASIC undertakes a project, it should report on the outcomes/findings of that project in a timely fashion.

- ASIC should set KPIs and then report on response times to funding applications, correspondence, offence referrals etc.
- Comprehensive, detailed reporting should be provided on costs charged to regulated populations via the IFM.

## 2.3 ARITA Feedback

- ASIC needs to ensure that adequate guidance is provided to assist registered liquidators efficiently comply with their obligations.

The profession has still not received more detailed guidance from ASIC regarding the standing of Industry Funding Model levies imposed on companies that have gone into external administration or receivership. This issue was originally raised with ASIC in March 2019 and was raised by us in our response to this process last year. Liquidators have been left with the position that they should seek their own legal advice about this issue. The adoption of this position by ASIC causes frustration, particularly as there is little to no guidance available, no court decisions available and, as ASIC is aware, given a significant number of such administrations are without funds, it is neither cost effective or efficient for legal advice to be sought in each case.

- ARITA acknowledges the valuable contribution made by ASIC as a stakeholder during the consultation process on the updates to the Remuneration Approval Report and Declaration of Independence, Relevant Relationships and Indemnities from the 4th edition of the ARITA Code of Professional Practice.



## 3 KPI 3 and KPI 4

### 3.1 Survey Rating

- *KPI 3: Actions undertaken by regulators are proportionate to the regulatory risk being managed*
- *KPI 4: Compliance and monitoring approaches are streamlined and coordinated*

Question	Rating			
	2019/20	2018/19	2017/18	2016/17
9. ASIC takes a strategic approach to its supervision activities, by targeting the highest priority threats and harm.	2.56	2.45	2.41	2.26
10. ASIC adopts a proportionate approach to enforcement, including being transparent about how it approaches its enforcement role and why it responds to particular types of breaches of the law in different ways.	2.55	2.31	2.37	2.14
11. ASIC minimises the impact on the regulated population of complying with requests for information, including improving its data management and analytics.	2.86	2.64	2.68	2.39
12. ASIC cooperates and coordinates with other regulators when undertaking relevant surveillance activities.	2.98	2.71	3.00	2.81

### 3.2 Summary of key comments raised by survey respondents

- Support was expressed for disciplinary action taken for poor conduct but concern was expressed regarding the lengthy delays before action was taken.
- Favourable comments were made in respect of guidance provided to liquidators during COVID-19 (eg virtual meetings)
- Concerns were raised about ongoing trust issues between ASIC and the registered liquidator population.
- Concerns were raised about the perceived focus of regulatory activities on small insolvency practitioners and the cost of regulatory activities born by the profession via the industry funding model.
- Concerns were raised regarding the apparent failure of ASIC to actively pursue director misconduct reported by registered liquidators.

- It was suggested that all Regulators and government agencies would benefit from better and closer working relationships.

### 3.3 ARITA Feedback

- ARITA appreciates the work done by ASIC to provide guidance to practitioners during the pandemic. Furthermore, ASIC's Insolvency Team was responsive and met regularly with ARITA and AFSA to ensure that issues being faced by the profession were being proactively identified and dealt with where possible.
- We appreciate that in its media releases, ASIC recognises the work done by liquidators in assisting ASIC with successful prosecutions.