

AFSA – ARITA - ASIC Discussion Points

20 October 2021

Attendees: Greg Yanco, Thea Eszenyi, Adrian Furby, John Winter, Kim Arnold, Narelle Ferrier, Michael Brereton, Jason Porter, Rachel Burdett, Gavin McCosker, Peter Edwards, Paul Shaw, Lisa English, Paul Eric

ARITA update

- ARITA noted its roadmap to 2025 strategy had been finalised and outlined the priorities identified.
- ARITA noted that with COVID-19 restrictions it had to abandon in-person major conferences during the second half of 2021 and instead launched six “Expert Series” online half-day conference style events, covering bankruptcy, restructuring and turnaround, small practice and corporate insolvency. These were so popular that they will become permanent events alongside ARITA’s other online forums and face to face conferences.
- ARITA provided an overview of its financial performance for the 2021 year and noted the negative impact of losing major face-to-face events due to COVID-19 lockdowns and border closures.

AFSA update

- AFSA noted its Chief Executive (CE) and Inspector-General (I-G), Hamish McCormick, has recently departed the agency. Gavin McCosker is Acting I-G and CE and Peter Edwards is Acting Deputy Chief Executive (DCE). This will continue until the new permanent CE and I-G is appointed.
- AFSA noted some changes to its organisational structure made on 1 July 2021 to support efficiencies across the agency. As a part of that change the Regulation and Enforcement (R&E) division has become the Enforcement and Practitioner Supervision (E&PS) division. It will still focus on the Inspector-General function under the Bankruptcy Act.
- AFSA noted it would not be increasing fees or charges in the 2021-22 financial year and was currently consulting with Government under the annual Cost Recovery Implementation Statement (CRIS) process. Stakeholders from the personal insolvency and PPSR sectors will be consulted before ministerial approval is sought for any updated fees and charges.

ASIC update

- ASIC noted the appointments of Joseph Longo as ASIC Chair and Sarah Court as Deputy Chair on 1 July 2021.
- ASIC noted that Commissioner Sean Hughes is the Commissioner with a special interest in ASIC’s oversight of corporate insolvency matters.
- ASIC noted the release of its Corporate Plan 2021-25 – Focus 2021-22 on 26 August 2021, outlining priorities over the next four years to achieve a fair, strong and efficient financial system for all Australians. The Corporate Plan is consistent with ASIC’s new Statement of Intent released in response to the Australian Government’s Statement of Expectations for ASIC.

Law Reform

- ARITA noted it has been heavily occupied with ongoing law reform consultations since the last meeting in April. Submissions have been provided on Schemes of Arrangement, Review of Safe Harbour, Litigation Funding, ALRC reviews and consequential amendments. ARITA is currently working on the review of trusts.
- ARITA noted its CEO recently attended an ACCI conference event during which he called for root and branch review of insolvency law. A keynote address at ARITA’s upcoming Expert Series Insolvency event by Justice Derrington, President of the ALRC will also discuss the need for a comprehensive review of the insolvency regime.

- ASIC noted that Treasury had released consultation on:
 - [Improving schemes of arrangement to better support businesses](#) (submissions closed 10 September 2021).
 - [Review of the insolvent trading safe harbour](#) (submissions closed 1 October 2021).
 - [Clarifying the treatment of trusts under insolvency law](#) (submissions close 10 December 2021).
 - [Consequential amendments to regulations supporting small business insolvency reforms](#) (submissions close 1 November 2021).

Industry trends and current issues

- ARITA noted it continues to receive feedback on the impact of the reduced levels of insolvency on most firms, especially in the small-medium practices where concerns about their own financial performance remain high.
- ARITA noted that the exit of mid-senior staff in the profession continues due to the lack of engaging work available and more attractive salaries in external markets. Recruiters and firms have advised that vacancies in mid-senior level roles are proving very difficult to fill despite the continued downsizing of firms that reflects the loss of work in the profession over the last few years. It is generally accepted that a significant talent-squeeze is developing.
Action: AFSA, ASIC and ARITA to consider opportunities to support practitioners in developing and maintaining capability of their insolvency staff.
- AFSA noted their continuing release of [AFSA fortnightly statistics](#) and will continue to monitor the impact of the crisis.
- AFSA noted the September quarter 2021 personal insolvency statistics – released Tuesday, 19 October – are available on its website.
- AFSA noted that personal insolvency figures have stabilised since the December quarter 2020, following a significant decline in volumes observed in the March, June and September quarters of 2020.
- AFSA noted that industry commentators expect an uptick in personal insolvency volumes in the December quarter 2021. However, trends are yet to materialise in the data to date.
- AFSA noted recent work with the Behavioural Economics Team of the Australian Government (BETA) to review the best ways to communicate the consequences of bankruptcy. The outcomes from that work are under current consideration.
- AFSA noted a current survey of registered practitioners to monitor emerging harms and risks in the profession due to the COVID pandemic. This will build on previous surveys conducted in July and November 2020 to give a better picture of trends over time.
Action: AFSA to share key outcomes from the survey with ARITA and ASIC (and profession) when available.
- AFSA noted it is working, in collaboration with stakeholders, to support vulnerable users of Australia's insolvency system, recognising that certain people find it more difficult to access information due to their life circumstance.
- AFSA noted the proposed new Inspector-General guidance on information security for registered practitioners. Following stakeholder consultation, the revised version incorporates feedback received. It recognises the increased threat to organisations of vulnerability to cyber-attacks or fraud and aims to strengthen trust and confidence in the profession by raising awareness and providing clear guidance on the need to appropriately manage information, data and cybersecurity.
- ASIC noted its ongoing publication of weekly corporate insolvency statistics. These show a slight increase in formal corporate insolvency appointments, but appointment numbers remain significantly down on pre-COVID numbers. [INFO 80 How to interpret ASIC insolvency statistics](#) has been revised to include further information in the lists of registered liquidators.
- ASIC noted its recent 'town hall' meetings with registered liquidators in both New South Wales and Victoria to provide a forum to discuss the ongoing impact of prolonged COVID restrictions on their practice and what assistance ASIC might provide.
- ASIC referred to its ongoing work on cyber resilience and the recent article in the Corporate Insolvency Update encouraging registered liquidators review their policies and procedures (including training) to prevent and respond if their firm is subject to a cyber-attack.

- ARITA noted concerns with generic notifications being received by Trustees from a company engaged by financial institutions to take over their consumer insolvency dealings.
Action: AFSA and ARITA to review the practice and consider the potential risks and possible need for guidance to practitioners.
- ARITA noted it was writing to the ATO regarding CGT liability of Trustees realising bankruptcy assets which would be published on its website for members. This is an ongoing area of uncertainty for practitioners to be resolved with the ATO.

Continuing Professional Education

- AFSA noted practitioner information sessions are planned for early 2022 by the Enforcement and Practitioner Supervision and Insolvency and Trustee Services divisions, with dates to be advised. Any feedback on potential topics is welcome.
- AFSA and ASIC noted they will be giving a Regulators' update at an ARITA hosted information session on 14 December 2021 which is also open to non-members for no cost to them.
- ARITA noted the strong uptake of its online Expert Series events with over 650 registered with only two (of the six) completed so far. The bankruptcy event was the largest attendance at an Australian bankruptcy event ever with 208 people.
- ASIC and AFSA noted the release of information setting out their approach to the [continuing professional education requirements for registered liquidators](#) and trustees.

Practitioner trends

- AFSA noted the total number of Registered Trustees has risen to 201 with 20 (10%) of those now being female.
- AFSA noted that since 1 July 2021 the Official Trustee has made 37 offers to Trustees under AFSA's National Panel with 27 (73%) being accepted and appointed. Of those, 45% were females and 55% (11) were male Trustees.
- ASIC noted that the number of registered liquidators has returned to the June 2019 level and that it continues to receive a steady stream of applications for registration as a liquidator. At 30 September 2021 there were 652 registered liquidators (of which 9 were suspended and 2 had a condition placed on their registration precluding them from taking new appointments). One person has been registered as a liquidator with a condition that they only accept appointment as a restructuring practitioner.
- ASIC noted that 58 (8.9%) of the 652 registered liquidators, are female.

Registered practitioner compliance monitoring

- AFSA noted the Personal Insolvency Compliance Program 2021-22 was published in July 2021 on AFSA's website and Linked. It includes three focus areas which are: Support vulnerable users of the insolvency system; Drive willing compliance and engagement; and Strengthen trust and confidence in the profession.
- AFSA noted release of its Regulatory Charter and Regulatory Cooperation and Support Policy. The Regulatory Charter outlines its approach to regulation. The Regulatory Actions Cooperation and Support Policy outlines how AFSA will support those who cooperate in an investigation and prosecution.
- AFSA noted:
 - Complaints - 126 complaints about Trustees were finalised since the last meeting in April, with common areas being: General administration and accounting (36); Decisions concerning assets (29); and Inappropriate conduct or conflict of interest (10).
 - Aged Estates - Trustees with aged estates will receive Compliance Information Requests to ensure they are taking timely action to finalise estates.
 - CPD Hours – Trustees will be asked to provide evidence to AFSA when lodging their Annual Trustee Return (ATR) to provide assurance that they are complying with the required CPD hours as a condition of their registration.
- AFSA noted some highlights from the Annual Administration Return (AAR) 2020-21.

- ASIC noted the release of revised [INFO 29 External administration, controller appointments and schemes of arrangement: Most commonly lodged forms](#) to reflect changes to lodgement requirements resulting from the small business insolvency reforms that commenced on 1 January 2021.

Independence

- AFSA noted their [media release](#) and [report on practitioner independence](#).
- ASIC noted it continues to engage with registered liquidators over concerns about independence and disclosures in DIRRIs.

Untrustworthy pre-insolvency advisors and related illegal activity

- AFSA noted it has established a working group, with an agency wide focus, to capture intelligence on untrustworthy advisors.
- AFSA is concerned that people in financial distress due to the economic impacts of COVID-19 may be easy targets for dodgy and unlawful advice. Approximately a year ago, AFSA released an online educational video, targeting end users of the personal insolvency system.
- AFSA noted a focus area of its compliance program this year is to 'Support vulnerable users of the insolvency system'. A Best Practice Report has been commissioned to report on the state of the harms created by individuals providing untrustworthy advice and is planned for publishing towards the end of the financial year.
- AFSA has been working with the industry to assist with information gathering tools available to tackle untrustworthy advisors.
- In October 2021, ASIC issued Information Sheet 261 [ASIC orders about creditor-defeating dispositions](#) setting out how liquidators can ask ASIC to make such an order.
- ASIC noted that activities of untrustworthy pre-insolvency advisers have been, and continue to be, a focus for funding liquidators through grants from the Assetless Administration Fund to investigate and report misconduct.
- ASIC noted its continued work under the Phoenix Surveillance Campaign (PSC). The aim of the PSC is to proactively deter and prevent directors from engaging in illegal phoenix activity. Activities include engagement with directors to educate them about illegal phoenix activity and to encourage them to seek professional and trusted business advice if they are experiencing financial distress.

Insolvency Mental Health Awareness Program

- AFSA noted the new online course delivered by [Mental Health First Aid Australia](#) for financial service professionals. Its focus is how to help co-workers and clients experiencing mental health concerns, particularly those with financial difficulties. The course is suitable for a range of professionals working in financial services settings, including insolvency professionals, accountants, and financial counsellors.
Action: AFSA, ASIC and ARITA to identify further resources available to assist practitioners to support their own mental health.

Gender and age diversity of insolvency practitioners

- AFSA noted potential work and research by an academic drawing on the survey of the profession in 2019. ASIC is arranging procurement so that the project can proceed.
- ARITA noted pending consultation with its Division committees on a comprehensive "Balance Taskforce" plan that will include an extensive range of initiatives to lead action on addressing the lack of diversity in the profession. The plan, already agreed to by ARITA's Board, will include actions such as seeking a 40/40/20 gender split requirement for all events, etc.
Action: ARITA to share details of the plan with ASIC and AFSA when completed.