

29 January 2018

Mr Andrew Fawcett  
Senior Executive Leader, Strategic Policy  
Australian Securities and Investments Commission  
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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 2017-18 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 believe it is therefore also important to ensure that ASIC receives genuine, accurate and constructive feedback, as we know is sought, 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 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 125 responses to the survey, with 93 of those being from registered liquidators who were then able to progress with the survey. This is approximately 15% of all registered liquidators. 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.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Winter', with a long horizontal flourish extending to the right.

**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 2,400 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Around 84 percent of registered liquidators and 87 percent of registered trustees are ARITA members. We represent firms of all sizes, from small practice through to multi-national firms, with the majority of our membership being drawn from those in small-medium practice.

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

We deliver this through the provision of 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 2017, ARITA delivered close to 300 professional development sessions to around 5,000 attendees.

The Association 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' needs, knowledge and experience. We represented the profession at 23 inquiries, hearings and public policy consultations during 2017.

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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
3. ASIC demonstrates an understanding of the markets in which its regulated population operates, and best practice regulatory approaches in those markets - para 21(a).	2.85
4. 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 - para 21(b).	2.85
5. 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 - para 21(c).	2.36
6. ASIC contributes to continuous improvement of regulatory frameworks by providing advice to government, and identifying where reform to existing regulatory frameworks may be required - para 21(d).	2.52

## 1.2 Summary of key comments raised by survey respondents

- ASIC's approach to regulation increases red-tape burden and unnecessarily increases costs for administrations without any actual benefit to the regulatory environment.
- ASIC consults, but there are concerns that regard is not had to feedback and any suggested changes are not implemented. A number of comments specifically highlighted the recent changes to the ROCAP which was seen as an "ineffective solution".

A full extract of the survey comments is provided at Annexure A for your reference.

## 1.3 ARITA Feedback

ARITA participated in ASIC's consultation regarding the changes to the Form 507- Report as to Affairs (now renamed to the Report on company activities and property).

Limited opportunity was provided to review and provide specific feedback on the proposed amendments and fundamental concerns were raised by ARITA that despite the form being a key tool in the investigations undertaken by registered liquidators, the redesign of the form was approached from the director's perspective and their ability to complete it, rather than the information required by registered liquidators.

Our members continue to voice their concerns that the form is no longer fit for purpose.

## 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
8. ASIC manages interactions with regulated entities in an efficient manner - para 78(a).	3.00
9. 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) - para 78(b)(i)-(iv).	3.15
10. ASIC consults with its regulated population on policy proposals that affect them - para 78(b)(v).	2.56
11. ASIC reports to stakeholders on its performance - para 78(b)(vi).	2.95

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

- ASIC consults, but insufficient time is allowed for proper consultation. Consultation appears process driven and not genuine with concerns that an approach is determined, but that approach is not necessarily reasonable or responsive to the relevant population's needs.

A full extract of the survey comments is provided at Annexure B for your reference.

### 2.3 ARITA Feedback

ASIC revised a number of its forms following the commencement of the *Insolvency Law Reform Act 2016* (ILRA). This resulted in a significant period of change for the profession and ARITA received significant feedback from its members that ASIC failed to respond to its queries on the new and revised forms in a timely manner, even where queries were lodged in accordance with the requested process.

## 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
13. ASIC takes a strategic approach to its supervision activities, by targeting the highest priority threats and harms - para 143(a).	2.41
14. 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 - para 143(b).	2.37
15. ASIC minimises the impact on the regulated population of complying with requests for information, including improving its data management and analytics - para 143(c).	2.68
16. ASIC cooperates and coordinates with other regulators when undertaking relevant surveillance activities - para 143(d).	3.00

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

- Concerns were raised regarding the apparent failure of ASIC to actively pursue misconduct reported by registered liquidators. This includes illegal phoenix activity which some respondents felt was being left to other agencies, with little support from ASIC.
- A number of responses also felt ASIC focused on compliance matters, or the “lowest hanging fruit”, rather than the major strategic issues faced by the regulated population.
- With the commencement of the ASIC industry funding levy in 2017-18, a number of concerns were raised regarding a lack of transparency in ASIC’s costs of supervision, together with the ongoing apprehension regarding the retrospective nature of the levy.

A full extract of the survey comments is provided at Annexure C for your reference.



# Annexure A - KPI 1 and KPI 6 survey comments

ASIC's performance 2017-2018

## Q7 Any comments on these KPIs?

Answered: 24 Skipped: 101

#	RESPONSES	DATE
1	No	1/21/2019 3:51 PM
2	ASIC add very little value.	1/21/2019 10:06 AM
3	ASIC significantly adds to red tape and cost with no actual benefit to the regulatory environment	1/21/2019 8:18 AM
4	ASIC's knowledge of insolvency law is very poor and this creates problems in their approach to issues	1/17/2019 11:57 AM
5	Meaningless gobbledegook, ie rubbish, why are we paying for you to attend international meetings when you cant organise a meeting in Australia ?	1/14/2019 3:09 PM
6	"Stakeholder engagement" and other catchphrases hide the fact that dealing with ASIC is cumbersome and ASIC's willingness to address this appears to be limited at best.	1/11/2019 11:21 AM
7	ASIC has focused on impractical and low value add compliance by liquidators which is not a solution to the key issues in the industry. When ASIC sent spreadsheets with compliance errors identified for our firm, these focused on minutiae and petty issues. Remarkably, ASIC also sent the wrong spreadsheet to us, showing us the compliance errors of a competitor. This was a poor example of attention to detail - the same attention to detail they were supposedly monitoring practitioners on.	1/10/2019 3:22 PM
8	Historically, ASIC seems to have been hell bent on making life more difficult for practitioners and not facilitating making things easier and more transparent.	1/10/2019 3:07 PM
9	I think the KPIs could be reviewed and amended.	1/10/2019 12:42 PM
10	There is material red tape associated with ASIC compliance. This could be significantly streamlined with assistance from industry. EXAD is unwieldy and has significant shortcomings, particularly for lodgements in relation to large administrations.	1/10/2019 10:06 AM
11	ASIC introduced ROCAP whith little industry comment and made it effective immediately. Resulted in a ineffective solution	1/10/2019 8:56 AM
12	no other than ASIC seems to do a good job in a fairly difficult environment	1/9/2019 4:03 PM
13	ASIC seem to have a superficial grasp of the market without genuine endeavour as an organisation to improve the regulatory frameworks and markets.	1/9/2019 2:09 PM
14	ASIC can be limited by its own structure. Whilst it's officers engage in discussion ASIC can be limited by its own governance and controls thus unable to respond to industry concerns	1/9/2019 12:08 PM
15	ASIC's consultation with industry in respect of the changes to the RATA was disappointing. The form is now more complex and will be harder for liquidators to get directors to complete.	1/9/2019 9:00 AM
16	No.	1/9/2019 8:21 AM
17	I am aware that ASIC has held some meetings/forums with registered liquidators in metro cities however no attempts have been made to take such forums to regional areas	1/8/2019 7:11 PM
18	As the industry regulator, ASIC should engage with practitioners rather than preemptively acting in an adversarial and uncommercial manner	1/8/2019 6:54 PM
19	It is clear from the Banking Royal Commission that ASIC has little understanding of the markets it regulates. This is also supported by an apparent lack of understanding of the market in which liquidators operate. ASIC may regularly engage with various panels and stakeholders, however, i would like ASIC to demonstrate when it has accepted their views and changed its intentions. Granting relief from the law as a demonstration of reducing red tape has not proven successful with respect to regulating the banks.	1/8/2019 6:12 PM

### ASIC's performance 2017-2018

20	Red tape has increased the liquidators adding time to liquidations and cost to stakeholders. The insolvency laws and regulations have become unnecessarily convoluted by moving laws and regulations to Insolvency Practice Schedules. We now have 4 different sources/areas of reference of laws and regulations instead of 2 with some minor law reform improvements but no significant major changes. The convoluted method of charging under the cost recovery model could have been simplified by a realization charge similar to what applies for bankruptcies (this would have also aligned the 2 areas of insolvency practice). No commercial enterprise could levy its customers with such a complicated charging system in arrears/after the event.	1/8/2019 5:31 PM
21	ASIC's IP team does little to reduce red tape / compliance burden, publishes insufficient guidance on what it does require, and does not effectively engage with IPs directly (which requires something other than periodic emails to IPs on ad hoc matters.)	1/8/2019 5:29 PM
22	The ILRA is a disaster.	1/8/2019 4:40 PM
23	ASIC are out of touch with industry so it follows any government advice given is flawed	1/8/2019 4:30 PM
24	ASIC does meet with the industry regularly, however, they do not listen to feedback and rarely, if ever, implement any suggestions. Their position is always that they dictate what is happening.	1/8/2019 4:27 PM

## Annexure B - KPI 2 and KPI 5 survey comments

ASIC's performance 2017-2018

### Q12 Any comments on these KPIs?

Answered: 14 Skipped: 111

#	RESPONSES	DATE
1	No	1/21/2019 3:51 PM
2	ASIC is at the lowest level of expertise, ability and performance than I have seen in my more than 30 years in the profession	1/17/2019 11:57 AM
3	More self servicing rubbish. There should be an independent Committee of Inquiry into ASIC, preferably run by Liquidators	1/14/2019 3:09 PM
4	As a Liquidator I would like to know what ASIC is actually spending the monies that liquidators have to pay to them both registration fees and the newly imposed levies.	1/11/2019 4:03 PM
5	Publishing a Charter, Service Standards and reports does not equate to actually doing anything to work with the regulated community. ASIC self-assesses. There is little evidence of ASIC being subject to, and responding to, the same pressures it imposes on its regulated community.	1/11/2019 11:21 AM
6	Given the relationship between ASIC and the industry is poor, practitioners have likely closed their minds to any communications.	1/10/2019 3:22 PM
7	As before	1/10/2019 12:42 PM
8	It was very disappointing that the new RoCAP was issued without input from industry.	1/10/2019 10:06 AM
9	Though ASIC consults with industry a frustration is it often cannot respond or adequately review a position as it can seem predetermined	1/9/2019 12:08 PM
10	No - ASIC's performance average at all times.	1/9/2019 8:21 AM
11	Again, ASIC may consult with the regulated population, however, it needs to demonstrate that it has accepted recommendations from the regulated population. I feel some of the issues raised have fallen on 'deaf ears'.	1/8/2019 6:12 PM
12	consultation is normally done with representatives of professional bodies who are not practitioners themselves. I think more effort should be made to have forums of licensed practitioners only and get input direct from the coalface. How the framework of insolvency laws and regulations has become so convoluted without any major changes in substance is beyond my comprehension.	1/8/2019 5:31 PM
13	Communication is ad hoc at best, limited direct interaction with IPs, limited consultation with IPs as whole, limited useful reporting direct to IPs on things that actually matter (where they do, its buried in lengthy annual reports or ad hoc items in emails and the corporate insol newsletter)	1/8/2019 5:29 PM
14	An independent non government body needs to make this assessment, not ASIC.	1/8/2019 4:40 PM

## Annexure C - KPI 3 and KPI 4 survey comments

ASIC's performance 2017-2018

### Q17 Any comments on these KPIs?

Answered: 16 Skipped: 109

#	RESPONSES	DATE
1	16 - How would we know?? They don't appear to be interested unless another agency takes on the matter	1/21/2019 3:51 PM
2	I agree with comments after the interim report of the Hayne Royal Commission suggesting that ASIC be dispensed with and to start all over again	1/17/2019 11:57 AM
3	I have yet to see any results in cracking down on phoenix operators in conjunction with the ATO in the past 20 years	1/14/2019 3:09 PM
4	These are all self-generated KPI's. ASIC appears to rely on statistically-based analytics. I am not convinced ASIC's reliance is appropriate. I am aware of clear examples where ASIC has impeded actual investigations by poor cooperation with the ATO, Immigration and other departments. Solutions need to be prioritised for these problems.	1/11/2019 11:21 AM
5	The lack of transparency in ASIC's costs for supervision of insolvency practitioners which practitioners are paying for is very disappointing.	1/10/2019 3:22 PM
6	ASIC is underfunded and appears scared to take on the Big Banks and other large organisations.	1/10/2019 12:42 PM
7	ASIC's enforcement approach focuses on compliance matters rather than strategic issues.	1/10/2019 10:06 AM
8	ASIC user pays system relies on actual reporting rather than providing a charge for IP's to budget. For FY2018 the charge was lower than estimated however this situation is likely to change in FY2019 yet no indication has been provided. Any other organisation would have to set its fee at the beginning of the period in question.	1/10/2019 8:56 AM
9	ASIC certainly has lifted the engagement with industry through direct discussions. The oversight of Liquidators is understandable and clearly essential. A frustration remains where ASIC does not appear sufficiently resourced to pursue those that cause financial loss in particular directors of companies who flout the law	1/9/2019 12:08 PM
10	ASIC's approach in all KPIs is average; fails to regulate the way I believe should.	1/9/2019 8:21 AM
11	ASIC appears to be more concerned about appeasing it's public and political detractors rather than constructively engaging with practitioners	1/8/2019 6:54 PM
12	ASIC appears to focus its efforts to prosecute liquidators (sometimes for apparently trivial digressions) and regularly fail to prosecute directors of failed companies. This does not appear to represent an organisation that focuses on high priority threats.	1/8/2019 6:12 PM
13	I am not in a position to judge or assess ASIC's approach to strategy, enforcement, data analytics or surveillance. my anecdotal observations of the results suggest that it is improving. AFSA appears to be much better at this than ASIC	1/8/2019 5:31 PM
14	ASIC still has substantial work to do in this area and there is no clear improvement / clarity despite leadership changes over the past 1-2 years.	1/8/2019 5:29 PM
15	ASIC attacks the lowest hanging fruit, not the major issues, for statistical purposes such as self regulation reports.	1/8/2019 4:40 PM
16	ASIC take almost no action on matters reported to them of significance. The best they do is provide \$7.5k for an assetless administration report, but almost never follow up with prosecution.	1/8/2019 4:27 PM