

4 February 2020

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

By email: andrew.fawcett@asic.gov.au

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 2018-19 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 97 responses to the survey, with 79 of those being from registered liquidators who were then able to progress with the survey. This is approximately 12% 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.

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

Whilst there have been improvements, 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.

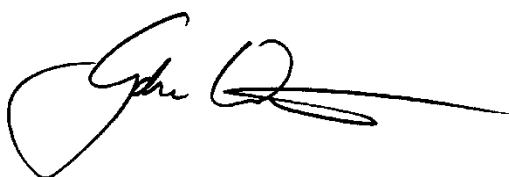
ARITA is also concerned that despite active participation in this process for the last three years, with concerns being raised regarding the regulatory approach being taken in respect of registered liquidators, we continue to see the same issues being raised by our members. This is contrary to the approach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

Further, we note that the timing of this process (over the December-January holiday period) makes obtaining feedback from our members difficult. We contrast this with the same process undertaken by AFSA who regulates registered trustees, which was completed in September 2019. Most registered trustees are also registered liquidators.

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

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

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

We have more than 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Some 82% of Registered Liquidators and 87% of 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 2018, ARITA delivered 183 professional development sessions to nearly 6,000 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' needs, knowledge and experience. We represented the profession at over 20 inquiries, hearings and public policy consultations during 2018.

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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		
	2018/19	2017/18	2016/17
3. ASIC demonstrates an understanding of the markets in which its regulated population operates, and best practice regulatory approaches in those.	2.90	2.85	2.47
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.	2.98	2.85	2.49
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.	2.21	2.36	1.75
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.	2.46	2.52	2.29

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.

1.3 ARITA Feedback

- The *Insolvency Law Reform Act 2016* (ILRA) commenced over two 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. ASIC has, however, recently consulted on s444GA (Consultation Paper 326), to formalise its policy on a niche issue where ASIC has provided relief on just 10 administrations since the section's commencement in 2007.

These matters are referred to by members as being illustrative of an apparent misallocation by ASIC of its regulatory resources and efforts.

- There have been also ongoing implementation issues with regards to the use of proposals without meetings which were introduced as part of the ILRA.

These issues relate to using proposals without meetings to pass resolutions that are required to be passed at a meeting. This issue has been confusing for registered liquidators as ASIC's form for lodgement of proposals without meetings provides options that are not available under law (e.g. compromising debts, and agreements longer than 3 months) and fails to provide clarity around the restrictions on the use of proposals to approve remuneration on appointments that commenced prior to 1 September 2017.

These issues were present in the initial draft of the form and were raised with ASIC by ARITA prior to the commencement of the ILRA –however, changes were not made.

A subsequent project completed by ASIC in 2019 identified numerous instances of proposals being used incorrectly. This whole issue could have been avoided if ASIC had of corrected the form, as suggested, prior to the commencement of the ILRA.

This failure to deal with identified issues promptly makes it difficult for the registered population to properly understand their obligations. It also results in increased costs to the regulated population via the Industry Funding Model due to the need to undertake a (what should have been an unnecessary) review project and communicate with affected liquidators.

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		
	2018/19	2017/18	2016/17
8. ASIC manages interactions with regulated entities in an efficient manner.	2.89	3.00	2.58
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).	2.94	3.15	2.56
10. ASIC consults with its regulated population on policy proposals that affect them.	2.48	2.56	2.35
11. ASIC reports to stakeholders on its performance.	3.15	2.95	2.87

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.
- Respondents requested that ASIC be clearer in its requirements when communicating with practitioners. For example, in the newsletter, rather than saying "you may wish to consider" – tell practitioners what ASIC wants practitioners to do.
- Favourable feedback was given in respect of the Regional Insolvency Liaison meetings.

2.3 ARITA Feedback

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

An example of the need for such guidance concerns the issue related to the standing of Industry Funding Model levies imposed on companies that had gone into external administration or receivership. In a circumstance where the legislation is being enforced by ASIC (through the imposition and collection of the levy) and the legislation is new with

no court guidance, it is our view that ASIC should be able to provide a specific view in order to provide its regulated population with certainty as to the expectations imposed on them.

In an email to all liquidators on 22 March 2019, the only guidance provided was on a simple scenario of pre and post appointment, with a caveat that registered liquidator should seek their own legal advice about this issue. The adoption of this position causes frustration, particularly as there is little to no guidance 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.

On behalf of our members, ARITA subsequently sent a list of queries to ASIC on the issue (sent 28 March 2019) attempting to obtain clarity around a number of issues including priority, concurrent appointments, administrations without funds and situations where the administrator or controller is possibly not personally liable as the levy is not incurred as a result of the administrators/controllers actions. A response has still not been received in relation to these questions.

- ARITA appreciates the valuable contribution made by ASIC as a stakeholder during the consultation process on 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		
	2018/19	2017/18	2016/17
13. ASIC takes a strategic approach to its supervision activities, by targeting the highest priority threats and harm.	2.45	2.41	2.26
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.	2.31	2.37	2.14
15. ASIC minimises the impact on the regulated population of complying with requests for information, including improving its data management and analytics.	2.64	2.68	2.39
16. ASIC cooperates and coordinates with other regulators when undertaking relevant surveillance activities.	2.71	3.00	2.81

3.2 Summary of key comments raised by survey respondents

- Concerns were raised regarding the apparent failure of ASIC to actively pursue director misconduct reported by registered liquidators.
- A number of responses also felt ASIC focused on compliance matters, or the “lowest hanging fruit”, in respect of actions against liquidators; rather than targeting the major issues faced by the regulated population.

3.3 ARITA Feedback

- ARITA has been pleased to see an increase in enforcement action by ASIC against pre-insolvency advisors and directors in respect of phoenix activity. For example, Media releases 19-047MR, 19-131MR, 18-351MR, 18-240MR.
- We also appreciate that in its media releases, ASIC recognises the work done by liquidators in assisting ASIC with successful prosecutions.