

1 February 2022

Financial Regulator Assessment Authority
The Treasury
Langton Crescent
PARKES ACT 2600

By email: FRAA@treasury.gov.au

Dear Sir/Madam

Assessment of the Australian Securities and Investments Commission

Thank you for the opportunity to lodge a submission on this consultation paper. Our submission focuses on the experience of registered liquidators when dealing with the Australian Securities and Investments Commission (ASIC).

The Australian Restructuring Insolvency and Turnaround Association, ARITA, represents professionals who specialise in the fields of restructuring, insolvency and turnaround. More information about ARITA appears at the end of this submission.

ASIC's performance against the Regulator Performance Framework

ARITA has provided feedback to ASIC as part of its self-assessment of performance against the Regulator Performance Framework for the past four year (2016/17 to 2019/20, noting that 2020/21 has yet to be undertaken). To provide this feedback, we survey our members each year using the questions in the draft report that relate to the key performance indicators. We thought that it would be useful to FRAA to see a summary of the outcome of those surveys as part of this submission. Members assess each question from one to five, with one being very poor and five being very good (a sixth option of no opinion was also available).

ARITA's submission for the 2019/20 year is provided at Appendix A.

- *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

- *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

- *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

What is clear from the survey results is that, notwithstanding some modest improvements with respect to many of the questions, the regulated liquidator population continues to hold concerns regarding ASIC’s regulatory approach.

ARITA also raised concerns that despite active participation in the self-assessment process for the last four years, with concerns being raised for each of these four years, 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.

Consideration of ASIC assessment areas of focus

Surveillance function

For many years ARITA has raised concerns about the focus of ASIC’s surveillance as it relates to insolvent companies, director misconduct and liquidators.

Lack of focus on director conduct enforcement

It is our strongly held view that ASIC is not focusing on the root cause of misconduct in corporate financial distress: director misconduct.

By targeting director misconduct – where directors may attempt to siphon assets, act to avoid prosecution or phoenix a business – the regulator would remove any incentive for directors to seek facilitators of this behaviour and, even if provided with inappropriate advice by a practitioner (registered or unregulated), directors would be more likely to reject that inappropriate advice for fear of prosecution.

Prior to the Senate Economics Reference Inquiry into The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia in 2010, ASIC maintained some focus on director misconduct that led to insolvency.

After this inquiry, ASIC’s regulatory focus moved almost exclusively onto liquidator conduct, with limited results. The focus on liquidators is not supported by regulatory outcomes.

As set out in Table 1. since July 2017 when the industry funding arrangements for ASIC became law, ASIC has achieved only 13 outcomes (almost entirely administrative outcomes) by way of findings of some degree of misconduct against liquidators – or \$1.96 million per outcome.

Table 1: Outcomes against liquidators¹ v actual cost recovery amount²

Period	Criminal	Civil	Administrative remedies	Enforceable undertakings /negotiated outcomes	Total	Actual Expenditure \$m
2020/21	-	1	-	-	1	5.125
2019/20	-	-	2	-	2	6.139
2018/19	1	2	1	1	5	7.338
2017/18	-	1	1	3	5	6.870
Total	1	4	4	4	13	25.472

In the last three years, there have been only two examples of truly egregious liquidator behaviour brought to real justice (one still underway as at 28 January 2022). Those were two cases of significant fraud that were uncovered and reported to both police and ASIC by the firms where those two individuals worked – their crimes were not exposed by any regulatory activity. There has been little evidence of other successful administrative actions against liquidators in this period around substandard work or not meeting their statutory obligations.

This demonstrates either a manifestly inefficient or ineffective process or the absence of a major issue in liquidator conduct.

In contrast, as part of their statutory responsibility to undertake investigations into insolvent companies to which they are appointed, in the 2018 and 2019 financial years, liquidators lodged over 15,000 possible misconduct reports with ASIC citing 40,000 possible breaches by directors.

Table 2: Possible misconduct by directors, reports to ASIC³

	2018/19	2017/18	Total
Total reports lodged	7,498	7,613	15,111
Possible breaches reported	19,985	20,015	40,000

Despite this substantial volume of misconduct being reported to ASIC, ASIC only achieved an average of 21 successful outcomes (17 in 2017/18, 25 in 2018/29) against Australia’s estimated 2.2 million company directors.

¹ ASIC enforcement outcomes: REP 699, REP 688, REP 666, REP 660, REP 625, REP 615, REP 585, REP 568, REP 536,

² ASIC industry funding actual levies 2020-21, 2019-20, 2018-19, 2017-18

³ ASIC Insolvency statistics: External administrators’ reports: REP 645, REP 596

By way of comparison, the UK's Insolvency Service published 2019 annual report highlights their successful pursuit of companies, directors and individuals abusing the insolvency and corporate frameworks:

We remain alert to abuse in the corporate market place and proactively monitor intelligence received from various sources, including complaints from the public. Consideration of the conduct of directors prior to insolvency is a fundamental part of our regime. This is backed by powers to prevent an unfit director from running a business for up to 15 years.

We obtained the disqualification of 1,242 directors in 2018–19.

We're fully prepared and equipped to tackle the most serious cases of misconduct. The average length of disqualification undertakings and orders secured against directors was 5.5 years, with 8.9 per cent disqualified for 10 years or more.

We estimate that the net benefit to the market for each director disqualified is around £100,000 in terms of creditor damage prevented.⁴

While more recent data is available from the UK's Insolvency Service, 2018/19 data has been included for comparative purposes as ASIC data is not available for 2019/20 or 2020/21 financial years. We also echo the below conclusions of Ian Ramsay and Miranda Webster in relation to the ability to accurately review and consider ASIC data:

Finally, our research identifies problems in ASIC's reporting of its enforcement outcomes in its enforcement reports. There is both under-reporting of some enforcement outcomes, over-reporting of some enforcement outcomes and inconsistent reporting of enforcement outcomes when the enforcement reports are compared to other sources we have used for our research. As noted in the Introduction, a range of organisations have used the ASIC enforcement reports, including the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the Senate Standing Committee on Economics, and the Australian National Audit Office. It would be appropriate for steps to be taken to increase the accuracy of the enforcement reports.⁵

It should be noted that the wide awareness of the lack of funds for proper investigation and the almost non-existent follow up of misconduct reports by ASIC is exploited by unregulated advisers who facilitate phoenix activity or advise on how to asset strip businesses in financial distress. This creates a substantial moral hazard and has led to widespread rorting.

⁴ The Insolvency Service Annual Report and Accounts 2018–19

⁵ An analysis of ASIC enforcement against auditors and liquidators, Company and Securities Law Journal, Vol. 38, No. 2, 2021, pp. 112-137

No focus on education to prevent insolvency or insolvency fraud

ASIC has disclosed⁶ that only 5.6% of its insolvency-related funding is spent on education and other regulatory activities that would help avoid complaints, avoid corporate failure and avoid or reduce exposure of individuals involved. As an analogy, it is often noted that the best fire department is the one that educates a community in fire prevention to stop fires happening, rather than the one that turns out frequently to put out fires that have already caused damage.

In the five years prior to 2010 ASIC undertook an insolvent trading project that showed what positive actions a regulator can achieve in focusing on the root cause of financial failure.

A key objective of the project was to encourage directors to identify insolvency indicators relating to their company and to seek professional advice at an early stage. ASIC's National Insolvency Coordination Unit visited companies displaying solvency concerns and encouraged directors to seek advice from an insolvency professional about the appointment of an external administrator where significant insolvency indicators were identified. This program was very successful as an early intervention strategy. However, a decision was made by ASIC to instead focus on regulating insolvency practitioners and the program was dropped.

Programs like this are valuable education tools with the outcome report noting that:

A director is less likely to breach their duties under the Corporations Act 2001 (Corporations Act) if they take into account the following key principles in carrying out their role:

- *maintain appropriate books and records*
- *identify insolvency concerns and assess available options*
- *seek professional advice; and*
- *act in a timely manner.*⁷

Unfunded Work of Insolvency Practitioners

Registered Liquidators are expected to, and do, carry out substantial work on behalf of ASIC as the regulator, especially in conducting investigations as required by the *Corporations Act 2001*. Indeed, liquidators appointed by the court act as officers of the court in their role. This is a unique position that, by any reasonable assessment, should provide for a special and cooperative arrangement with the regulator. That relationship does not exist, rather most liquidators are too worried about drawing ASIC's attention to directly address issues with ASIC staff.

⁶ ASIC Cost Recovery Implementation Statement: ASIC industry funding model (2020–21)

⁷ ASIC REP 213 National insolvent trading program report
<http://download.asic.gov.au/media/1343486/rep213.pdf>

It should be noted that much of the work that is carried out on behalf of ASIC is done without compensation and with no capacity to avoid that cost. Indeed, research in 2012⁸, supported by ARITA's Terry Taylor Scholarship, uncovered that official liquidators carry out some \$47 million of work and some \$1.4 million in disbursements in unfunded court-appointed work alone each year – a significant part of which is ASIC investigations. This arises when the liquidation of a company result in insufficient recoveries to fund even the work of the liquidator. Our State of the Profession survey in 2017 reinforced this large amount of unfunded work with members indicating write-offs in excess of \$100 million dollars a year in undertaking unfunded insolvency appointments.

While ASIC does provide an Assetless Administration Fund, liquidators are required to undertake the initial investigation work, as required under statute, with no funding in order to be able to provide the required information to apply for funding, with no certainty of funding being provided.

We also point out that liquidators are required to undertake and pay ASIC for the searches of the ASIC database that they need to undertake in order to be able to conduct their investigations and report back to ASIC. Noting that often these searches are paid for from the liquidator's own pocket as there are insufficient funds in the administration to meet that cost.⁹ ARITA has made a submission to the Modernising Business Registers Business Advisory Group calling for search fees to be removed when company data transitions to the new Australian Business Registry Services.

Overly simplistic focus on insolvency practitioner conduct

Even a summary review of ASIC enforcement outcomes reports¹⁰ and their associated media releases shows an imbalanced focus on paperwork compliance over substantive misconduct complaints.

In regard to administrative failings on the part of registered liquidators, it is often noted by our members that ASIC does not necessarily pay due regard to the heavy administrative burden that ASIC and the law places on practitioners, again noting that much of the work is often unfunded and that they often do not offer a consultative or educative approach to resolving issues when they are identified (in contrast to the approach taken by AFSA, as the personal insolvency regulator).

Unable to share important information with professional associations

Despite ARITA, Chartered Accountants ANZ, CPA and the various Law bodies all having robust complaints and conduct systems (and indeed, ARITA's Code of Professional Practice is seen as the default by most Courts), all professional bodies find out about ASIC enforcement work by press release after the fact. This takes no regard of the fact that

⁸ https://www.arita.com.au/ARITA/About_Us/Arita_Terry_Taylor_Scholarship/past-recipients.aspx

⁹ https://www.arita.com.au/ARITA/About_Us/Arita_Terry_Taylor_Scholarship/past-recipients.aspx

¹⁰ ASIC enforcement outcomes: REP 444, REP 421, REP 402, REP 383, REP 360, REP 336, REP 299, REP 281

professional bodies may often be running complaints on the same practitioner and matter. This is an unhelpful duplication for the community.

Furthermore, the Act¹¹ specifically recognises the important role these bodies play with identifying suspected misconduct with the profession by providing industry bodies with the ability to lodge a notice with ASIC where the industry body suspects there are grounds for ASIC to cancel or suspend registration, issue a show cause notice or impose a condition on a registered liquidator.

ASIC is also noted as providing very little statistical information to the profession or to any researchers to assist in improving policy. The Insolvency Academics Network have, in particular, campaigned for greater and free access to no avail. This is in contrast to regulators in other regions. In the UK, for example, data is free to all users.

It should also be noted that registered liquidators cannot even reference ASIC's EXAD portal (the portal through which they make electronic lodgements with ASIC) to determine if any of their own paperwork may be overdue to ASIC, as ASIC's systems do not have the capability to track and report this information.

Licensing

ARITA has a statutory role in working closely with ASIC in relation to the registration of registered liquidators as it chooses a registered liquidator to sit on registration committees convened by ASIC in accordance with section 20-10 of Schedule 2 to the Act. Similarly, ARITA also appoints a member to ASIC disciplinary committees.

Having assisted in the formation of over 100 committees since the commencement of the new registration and disciplinary processes in 2017, ARITA has seen only limited improvement in ASIC's processes to support the committees.

However, the process remains unwieldy, and ASIC takes an inflexible view about the operation of the committees and their wider function. Despite operating under identical legislation as for bankruptcy trustees, AFSA takes a more cooperative approach.

As an example, ARITA wrote to ASIC in August 2020 seeking formal agreement that ARITA's appointees to committees would be able to share non-sensitive information out of those committees with ARITA to help develop better advice to future committee members and highlight developmental needs for the profession and for policy setting. This is normal practice with similar AFSA committees. ASIC refused. This leads to a situation where there can be no continuous improvement amongst ARITA's committee appointees in fulfilling their roles nor in ARITA providing advice to government about the effectiveness of these committees. This is patently unhelpful to all concerned. This point is further reinforced when you consider that ARITA's appointee is the only insolvency expert likely to be on these committees (the ASIC appointee is from ASIC's legal team – not their insolvency team, and the ministerial appointee almost invariably does not have insolvency experience).

¹¹ Section 40-100 Schedule 2 – Insolvency Practice Schedule (Corporations) Corporations Act 2001

A copy of the correspondence is attached at Appendix B.

This raises a further important point in regard to ASIC's performance in its approach to liquidator licensing: that ASIC would choose to appoint a staff member from their legal team over appointing one of the insolvency regulation staff to a registration committee is clear failure of administration.

With insolvency law being one of the most complex areas of Australia's corporate law and the granting of a liquidator's registration gifting such significant authority to registered individuals, systemically rejecting using their own internal expertise to ensure only fit and proper experts are registered reflects poorly on ASIC and undermines the committee process. This is only magnified when one considers that ASIC takes the same approach to disciplinary committees where the need for expert understanding amongst those committee members is all the more apparent.

Should you wish to discuss any of these matters further with ARITA, please do not hesitate to contact ARITA, Policy & Education Manager, Ms Kim Arnold, on 02 8004 4340.

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 2,200 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.

Appendix A
Submission on ASIC's performance against
the Regulator Performance Framework

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: 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 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.

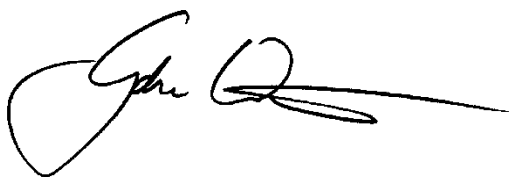
Whilst there have been some modest improvements with respect to many of the questions, it is clear that the regulated liquidator population continues to hold concerns regarding ASIC's regulatory approach. In particular, concerns were raised about the self-assessment model and the lack of independent 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 02 8004 4340.

Yours sincerely

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John Winter
Chief Executive Officer



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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.

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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.

Appendix B

Access to decisions and reasons for applications for registration as liquidator

10 August 2020

Mr Greg Yanco
Acting Regional Commissioner – New South Wales
Australian Securities & Investment Commission

By email: Greg.Yanco@asic.gov.au

Dear Mr Yanco

Access to decisions and reasons for applications for registration as liquidator

We are writing to detail our request for access to the decision, and reasons for decision, for the application for registration as a liquidator recently made by Mr Mohammed Najjar. We understand the decision in this application was handed down on or about 22 July 2020.

In addition to the specific committee noted above, we also seek ongoing access to decisions and reasons for decisions for all committees convened under Part 2 of Schedule 2 to the *Corporations Act 2001*.

As you are aware, ARITA – Australian Restructuring Insolvency & Turnaround Association, plays an integral role in the constitution of Part 2 Committees to consider application for registration as a liquidator made under s 20-30 of the *Insolvency Practice Schedule (Corporations)* (IPSC).

In particular, ARITA is authorised under r 50-10 of the *Insolvency Practice Rules* (IPR) to appoint a member to a committee convened for the purposes both registration as, and discipline of, liquidators (among other purposes).

We understand that ASIC is of the view that none of the matters referred to in IPSC 50-35(2) apply to ARITA and that accordingly, under IPSC 50-35(1), ARITA's delegate to the committee could be committing an offence if they provide the report to ARITA (or another person), or disclosed its content to ARITA (or another person).

We note that, while subject to substantively the identical provisions, the Australian Financial Securities Authority (AFSA) has taken a contrary view regarding the release of committee decisions to ARITA, having advised that:

“ARITA is prescribed under r 50-100 of the [Insolvency Practice Rules (Bankruptcy)], for the purposes of s 50-35(2)(b)(iv) of the [Insolvency Practice Schedule (Bankruptcy)], as a body to which information or a document disclosed to you for the purposes of performing your role as a member of the Committee can be disclosed, provided it is for the purpose of enabling or assisting that body to perform its disciplinary function in relation to its members.”

We would be grateful if ASIC could provide ARITA with an understanding of the reasons for its view and the underlying policy basis.

Should ASIC continue to maintain its position that ARITA is unable to be provided with the information in accordance with the IPSCs, we also wish to make a request, pursuant to s 127(4)(e) of the *Australian Securities & Investment Commission Act 2001* (Cth) (ASIC Act) for access to the decision, and reasons for decision, for the application for registration as a liquidator recently made by Mr Mohammed Najjar and future committees.

ARITA makes this application for the decision and reasons on the basis that, having access to this information will assist ARITA with its nomination process (under s 50-5 IPSC) for the constitution of Part 2 committees going forward, which as a result will assist that committee with the performance of its functions under the corporations legislation.

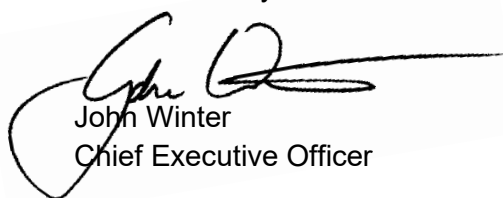
We consider that disclosure of the information requested is in the best interests of the purposes for which the powers are given to ASIC, ARITA and the relevant Minister in the IPSC as it is likely to assist with the consistency of the interpretation and application of the provisions regulating the registration process.

We also confirm that, should access to the information sought be granted to ARITA, we are content for it to be granted on the condition that it will only be accessed by key ARITA staff and used for purposes relating to ARITA’s obligations in constituting Part 2 committees.

In that regard, we do not consider that the administration of justice, or Mr Najjar’s or other parties subject to a committee’s interests, would be adversely affected by ARITA having access to the information sought.

We look forward to your confirmation that the requested material will be provided.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Winter', is written over a light grey rectangular background.

John Winter
Chief Executive Officer

cc. graeme.plath@asic.gov.au



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Mr John Winter
Chief Executive Officer
ARITA
Level 5, 191 Clarence Street
Sydney NSW 2000

By email: jwinter@arita.com.au

16 September 2020

Dear Mr Winter

Access to decisions and reasons for applications for registration as a liquidator

I refer to your letter dated 10 August 2020.

Your letter requests:

1. access to the decision, and reasons for decision, for the application for registration as a liquidator recently made by Mr Mohammed Najjar; and
2. ongoing access to decisions and reasons for decisions for all committees convened under Part 2 of Schedule 2 of the *Corporations Act 2001* (**Schedule 2**);
3. the reasons for ASIC's views about the operation of s50-35 of Schedule 2;
4. access to the reasons and decisions mentioned above under s127(4)(e) of the ASIC Act, if ASIC does not provide the information based on the requests at 1 and 2 above.

ASIC will not provide access to any decisions or reasons of registration committees in response to your requests at 1 and 2 above. Reasons for that decision, and the reasons requested at 3 above, are set out below.

Further, as a delegate of the ASIC Chair under s127(4) of the ASIC Act, I am not satisfied disclosing committee reasons and decisions will assist ARITA to perform its functions. Accordingly, I am refusing to disclose those reasons and decisions to ARITA under s127(4)(d) of the ASIC Act. Reasons for that decision are also set out below, together with my reasons for the view that s127(4)(e) only operates to authorise disclosure to a Schedule 2 committee, not ARITA.

The operation of s50-35 of Schedule 2

Your letter asks ASIC to provide ARITA with an understanding of the reasons for ASIC's views:

"... that none of the matters referred to in [Schedule 2] s50-35(2) apply to ARITA, and that accordingly under [Schedule 2] s50-35(1), ARITA's delegate to the committee could be committing an offence if they provide the report to ARITA (or another person), or disclosed its content to ARITA (or another person.)"

Your letter also includes an extract of advice provided to ARITA by AFSA on the release of AFSA committee decisions to ARITA. That extract is said to take a view about access under provisions that are substantively identical, that is contrary to ASIC's. The extract of AFSA's advice is:

"ARITA is prescribed under r 50-100 of the [Insolvency Practice Rules (Bankruptcy)], for the purposes of s 50-35(2)(b)(iv) of the [Insolvency Practice Schedule (Bankruptcy)], as a body to which information or a document disclosed to you for the purposes of performing your role as a member of the Committee can be disclosed, provided it is for the purpose of enabling or assisting that body to perform its disciplinary function in relation to its members."

ASIC's interpretation of s 50-35 of Schedule 2

Section 50-35(1) of Schedule 2, applies to disclosure of information by committee members. It provides:

- "(1) A person commits an offence if:
- (a) the person is or was a member of a committee convened under this Part; and
 - (b) information or a document is or was disclosed to the person for the purposes of exercising powers or performing functions as a member of the committee; and
 - (c) the person uses or discloses the information or document."

This prohibition applies in relation to the use of information or documents by committee members. It is subject to the exceptions in s50-35(2), which say that the prohibition does not apply to use or disclosure by the committee member for the purposes of exercising powers or performing functions as a member of a committee, nor does the prohibition apply to disclosure mentioned in s50-35(2)(b):

- (i) to the Inspector-General in Bankruptcy to assist the Inspector-General to exercise his or her powers or perform his or her functions under the *Bankruptcy Act 1966*; or
- (ii) to a committee convened under Part 2 of the Insolvency Practice Schedule (Bankruptcy) to assist the committee to exercise its powers or perform its functions under that Part; or

(iii) to another committee convened under this Part to assist the committee to exercise its powers or perform its functions under this Part; or

(iv) to enable or assist a body prescribed for the purposes of this paragraph to perform its disciplinary function in relation to its members; or

(v) in order to enable or assist an authority or person in a State or Territory, or a foreign country, to perform or exercise a function or power that corresponds, or is analogous, to any of the committee's or ASIC's functions and powers; or

(vi) to a court or tribunal in relation to proceedings before the court or tribunal.

Section 50-35(2)(b)(iv) permits a committee member who receives information or documents for the purposes of exercising a committee's functions and powers to provide the information or document to ARITA to enable ARITA "to perform its disciplinary function in relation to its members." Disclosure of a committee's registration decision to ARITA by a committee member for the purposes described in your letter would be an offence, because it would disclose information received by the member as a committee member, for a purpose that does not relate to the performance of a disciplinary function by ARITA.

The AFSA extract provided by you refers to the disciplinary function, but does not provide any additional context, so it is not clear that AFSA has taken a different approach to ASIC's. We also note the extract appears to treat ARITA, and ARITA's committee nominee as the same entity. We do not think that is accurate. However, in the absence of context for the AFSA extract (for example how and whether it relates to registration decisions) it is unnecessary to say more.

Section 127 of the ASIC Act

Section 50--35 of Schedule 2 does not apply to ASIC (noting it does apply to the ASIC delegate on a committee). However, a registration committee must give its decision, and reasons for its decision to the applicant and ASIC (s20-25 of Schedule 2). The reasons and the decision are "information given to ASIC in confidence in or in connection with the performance of its functions under the corporations legislation", and under s127(1) of the ASIC Act, "ASIC must take all reasonable measures to protect the reasons from unauthorised use or disclosure."

Section 127 of the ASIC Act authorises ASIC to disclose information in specified circumstances, including, as mentioned in your letter, under s127(4)(e). Your letter states "having access to this information will assist ARITA with its nomination process ... for the constitution of Part 2 committees going forward..." and "it is likely to assist with the consistency of the interpretation and application of the provisions regulating the registration process."

Section 127(4)(e) of the ASIC Act authorises disclosure by ASIC to a committee convened under Schedule 2. It does not operate to authorise disclosure to a third party. Section 127(4)(d) of the ASIC Act authorises disclosure to ARITA (a

prescribed professional disciplinary body) if the disclosed information would enable or assist ARITA to perform one of its functions.

As a delegate of the ASIC Chair for the purposes of exercising the ASIC Chair's functions and powers under s127(4)(d), I am not satisfied that disclosure of committee reasons and decisions will enable or assist ARITA to perform its function of nominating committee members. ARITA's nomination of committee members is governed by s50-15 of the *Insolvency Practice Rules (Corporations) 2016*, which requires a nominee to have 5 years' experience as a registered liquidator. No other matters are prescribed.

I am not satisfied the reasons of past committees would assist, or be relevant in any way, to ARITA's function of nominating a committee member with the requisite experience. Nor am I satisfied that the reasons of a committee constituted in part by a specific ARITA nominee relating to an individual applicant, would have any bearing on the identity of another potential ARITA nominee, for a different individual applicant.

I've noted above that s127(4)(e) authorises ASIC's disclosure to a committee, and does not authorise disclosure to ARITA. However, for completeness, I note that consistency of decision-making by a committee is dealt with by the provisions of s50-35(2)(b)(iii) (set out above). That provision enables any member of one committee to disclose reasons and decisions to another committee convened to consider a registration matter. This is the method by which Schedule 2 ensures consistency of decision-making. ARITA itself has no role in seeking to ensure consistency of decisions, that is a matter for committees and committee members.

If you would like to discuss these matters further, please contact me, Thea Eszenyi, or Kathy Cuneo.

Yours sincerely



Greg Yanco
Executive Director, Markets
Australian Securities and Investments Commission