ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

27 February 2023

Mr Alan Raine
Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Mr Raine

Australian Securities and Investments Commission Investigation and Enforcement

The Australian Restructuring Insolvency & Turnaround Association – ARITA – is pleased to provide this submission to the Committee in relation to its inquiry into the capacity and capability of the Australian Securities and Investments Commission (ASIC) to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct.

As you are aware, ARITA is Australia's largest representative body of insolvency practitioners, covering some 80% of registered liquidators and bankruptcy trustees as well as insolvency lawyers and other experts in the field of business rescue.

We have considered each of the issues raised by the terms of reference from the perspective of the population of registered liquidators that are regulated by ASIC. This comes primarily in two ways – in relation to ASIC's role as the regulator of registered liquidator conduct, and in the way ASIC deals with potential insolvency offences identified by registered liquidators through their statutory reporting obligations. Where a term of reference is not relevant to this population, we have not addressed it. We also stress that our comments are limited to ASIC's role as the insolvency regulator as broadly defined above, including its actions against directors/officers of insolvent companies,

For abundant clarity, we have no observations to make regarding item (a) in the terms of reference. As you and the Committee will appreciate, policy discussions regarding insolvency reform are at large at the moment and are wide ranging. As such, rather than canvass this wider debate here, we would draw your attention to our submissions and

evidence to the Joint Parliamentary Committee on Corporations and Financial Services inquiry into corporate insolvency.

In summary, we consider that ASIC is not a best practice regulator. In addition to it being inefficient and lacking transparency, it has failed to promote a turnaround culture in Australia, a problem identified by the Productivity Commission in 2015. It has done precious little to prevent illegal phoenixing. Its failure to adopt a vigorous risk-based approach to dealing with malfeasance of directors means that too much money is being spent on reporting that is not even considered by ASIC and too little enforcement action is brought against directors who are rorting the system.

Whilst this problem is not entirely systemic, it is our view that the best resolution to it is to be found in major reform of Australia's insolvency system. This means developing a single insolvency law administered by a single dedicated insolvency agency modelled on the Australian Financial Securities Agency, the reasons for which are set out in our evidence to the Joint Parliamentary Committee mentioned above.

We would be happy to meet with the Committee to discuss these matters further, but if you require any further information please contact me at [redacted] or [redacted] at [redacted].

Yours sincerely

[redacted]

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 2021, ARITA delivered 82 professional development sessions to over 7,100 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 19 inquiries, hearings and public policy consultations during 2021.

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1 Balance in policy settings

The terms of reference includes consideration of the balance in policy settings that will deliver an efficient market but also effectively deter poor behaviour.

Areas of focus

Corporate insolvency and registered liquidators are regulated by ASIC. ASIC's regulatory portfolio is wide, ranging from auditors and liquidators, to companies, banks, financial services, market operators, financial advice and insurance. Based on information provided as part of ASIC's industry funding model reporting, registered liquidators are one of ASIC's smallest regulated populations, making up only 1.64% of its budget.[1]

This wide portfolio and the small size of the registered liquidator population means that ASIC is not focused on insolvency. Our experience is that this impacts on the decisions that are made, the relationship that ASIC has with registered liquidators, its ability to properly engage with those it regulates, and its responsiveness to feedback and consultation submissions, as well as the quality of its reporting and statistics.

We also hold the view that ASIC has a disproportionate interest in the activities of liquidators, despite very limited examples of poor behaviour, compared to a very limited interest in the poor behaviour of directors who lead their business into insolvency – even when registered liquidators identify and report this poor behaviour.[2]

For example, ASIC's Corporate Plans[3] specifically identify "High-risk registered liquidators" as a strategic priority, notwithstanding that very few disciplinary actions are taken against registered liquidators; with all recent matters being either self-reported or reported by ARITA as a professional body legislatively empowered to notify a regulator if we have reasonable grounds for the regulator to take disciplinary action.[4]

This stands in stark contrast to the virtual absence of enforcement action against directors for breaches of directors' duties, insolvent trading or any other misconduct that results in or is related to the failure of a company.[5] Whilst accepting the need to regulate practitioners, director misconduct is a primary focus of the corporate insolvency law, along with the protection of the rights of creditors. Indeed, of all the entities regulated by ASIC, registered liquidators are the only ones who exist, at least in part, to assist ASIC in the discharge of its statutory duties.

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[1] ASIC CRIS 2021/22 (https://asic.gov.au/about-asic/what-we-do/how-we-operate/asic-industry-funding/cost-recovery-implementation-statement/cost-recovery-implementation-statement-2021-22/) $5.125 million of a total amount to be recovered of $312.774 million.
[2] Discussed further in section 5 Resourcing.
[3] ASIC Corporate Plans 2022-26, 2021-25.
[4] Discussed further in section 5 Resourcing.
[5] No mention in the ASIC Corporate Plans for 2022-26, 2021-25.

Education

Education of directors of their duties and obligations is a key factor in deterring poor behaviour.

ASIC's website reflects the diversity of its regulatory remit: as such, there is a lot of information for a lot of different purposes. This makes it hard to actually find information when it's needed, particularly for lay people who may not be aware of the technical terminology to search for.

Even if information is located on ASIC's website, it tends to be difficult to understand, making it hard for:

- directors to determine what their duties and obligations are when their company is insolvent or in financial distress, and
- directors of companies in financial distress to understand their options and who they should turn to for help.

The information that is available is very generic in nature and designed on a 'one size fits all' basis. This fails to take into account the disparity that can exist between directors of small companies and professional directors of large companies. As the regulator for the breadth of director types, information should be tailored for different scenarios, particularly small business directors who may not have undertaken any formal training in relation to their duties and obligations.

Proactive intervention and education can save companies and jobs.

In 2005 ASIC established the National Insolvency Trading Program (NITP) which ran until the end of the 2009-10 financial year.[6] A key objective of the NITP was to encourage directors to identify insolvency indicators relating to their company and to seek professional advice at an early stage.

Via the NITP, ASIC:

- visited over 1,530 companies displaying solvency concerns during the period from 2005–06 to 2009–10
- provided an awareness of director duties and ASIC's expectations of professional advisers when companies are experiencing financial difficulties
- encouraged directors to seek advice from an insolvency professional about the appointment of an external administrator where significant insolvency indicators were identified, and

[6] REP 213 National insolvent trading program report | ASIC.

- observed that 15% of companies reviewed by us were subsequently placed into external administration – mostly by the directors.

This project is an excellent example of what a corporate regulator acting proactively can achieve. Unfortunately, in 2010 ASIC's attention was moved from directors to registered liquidators following the poor conduct of a single registered liquidator who lost his registration and was jailed.[7] ASIC has not recommenced the NITP nor provided any explanation for what seems to us to be a decision not consistent with general regulatory best practice.

[7] https://www.arita.com.au/ARITA/News/ARITA_News/Former_Liquidator_Stuart_Ariff_sentenced.aspx

2 Meeting expectations

The terms of reference ask submissions to comment on whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement.

ARITA makes every effort to be an engaged and involved professional body, actively representing the views of our members to ASIC. We respond to all ASIC consultations that impact on our members, including the annual draft Cost Recovery Implementation Statement and ASIC's annual self-assessment of its performance. We hold regular, formal consultation meetings with senior ASIC staff (and tripartite meetings involving AFSA).

We have provided feedback to ASIC as part of its self-assessment process from 2017 to 2020. To ensure that we were representing the views of our members, we surveyed them annually regarding their assessment of ASIC's performance against its key performance indicators. ASIC did not request us to provide feedback in their most recent performance assessment (2020/21) and there are no submissions listed on the ASIC website, so it appears that ASIC did not seek any feedback prior to issuing this most recent report[8] – this is not good regulatory practice. During the four years in which we provided feedback, our members raised consistent concerns about ASIC's performance as their regulator. From our perspective, these concerns have been disregarded.

The tables below summarise our members' views of ASIC's performance against three common KPIs. The survey used required respondents to rate the regulators' engagement performance out of 5 and the results have been tallied into a net promotor score.[9]

	Net promoter score for year ending 30 June				
	2017	2018	2019	2020	2021
Regulator does not impede the efficient operation of regulated entities					
ASIC	-48%	-17%	-22%	-27%	
Communication with regulated entities is clear, targeted and effective					
ASIC	-24%	-6%	-7%	-1%	
Actions undertaken by the regulator are proportionate to the regulator risk being managed					
ASIC	-30%	-23%	-24%	-12%	

What is clear from the survey results is that, notwithstanding some improvements, the regulated liquidator population is clearly of the view that ASIC is not meeting their expectations.

[8] 2020/21 published May 2022: https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-727-regulator-performance-framework-asic-self-assessment-2020-21/
[9] This table is from ARITA's submission to the PJC on Corporate Insolvency in Australia.

Our members' concerns were raised with the Financial Regulator Assessment Authority (FRAA) during its 2022 review of the effectiveness and capability of ASIC.[10] Our concerns were not addressed in the FRAA's report.[11]

The position of ASIC can be contrasted with that of AFSA. While ASIC is responsible for the regulation of registered liquidators (who undertake corporate insolvency appointments), AFSA is responsible for the regulation of registered trustees (who undertake insolvency appointments over individuals). Most of Australia's 200 registered trustees are also registered liquidators, so there is significant overlap of the regulated population between the two regulators.

In the same way that we survey members about ASIC's performance, we have done so for AFSA since 2019.[12]

	Net promoter score for year ending 30 June				
	2017	2018	2019	2020	2021
Regulator does not impede the efficient operation of regulated entities					
AFSA			50%	59%	71%
Communication with regulated entities is clear, targeted and effective					
AFSA			61%	72%	57%
Actions undertaken by the regulator are proportionate to the regulator risk being managed					
AFSA			45%	70%	50%

It is clear that AFSA is more effectively meeting the expectations of registered trustees than is the case with ASIC and registered liquidators.

[10] https://fraa.gov.au/sites/fraa.gov.au/files/2022-08/226579-arita.pdf
[11] https://fraa.gov.au/publications/effectiveness-and-capability-reviews-australian-securities-and-investments-commission
[12] This table is from ARITA's submission to the PJC on Corporate Insolvency in Australia.

3 Range and use of regulatory tools

The terms of reference are to consider the range and use of various regulatory tools and their effectiveness in contributing to good market outcomes.

Rather than undertaking preventative measures, such as the proactive practice reviews undertaken by AFSA (discussed in section 6), ASIC's approach to regulation is reactive.

Little data is available to indicate the extent that ASIC uses its various regulatory tools and their effectiveness in contributing to good market outcomes. Anecdotally, we understand that, rather than early intervention and correction, ASIC is more likely to intervene using more severe regulator tools at a later, more critical stage (such as when a company has failed). This is evidenced by ASIC's abandoning of the NITP as discussed above.

Regulation of directors

This includes its dealings with liquidators in relation to possible directors offences they have identified. ASIC's consideration of further action is automated using AI to make an assessment following the lodgement of a comprehensive and costly report by liquidators. Little avenues exist for further consideration of any regulatory action once the automatic assessment is made. Conversely, AFSA actively encourages registered trustees to engage with it prior to reporting possible offences.

Regulation of Liquidators

ASIC has taken an intensive approach to the regulation of liquidators, notwithstanding that there have been few successful disciplinary actions taken against registered liquidators in recent years.

While it is our view that the Disciplinary Committee approach introduced as part of the *Insolvency Law Reform Act in 2017* is a better process than the previous Company Auditors and Liquidators' Disciplinary Board, since its commencement 11 matters have been referred with haphazard outcomes. This is contrasted to AFSA's Disciplinary Committee outcomes in the following table.[13]

[13] ASIC registered liquidator disciplinary decisions - https://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/liquidator-compliance/registered-liquidator-disciplinary-decisions/ & AFSA Trustee Register.

Outcome	ASIC	AFSA
Regulator's concerns not made out	3	1*
Registration cancelled	2	2
Registration suspended	1	
Conditions applied	1	1
Public reprimand	1	
Ongoing	2	
Committee superseded by Court decision cancelling registration	1	
Resigned registration prior to Committee hearing		1
Total	**11**	**5**

** Trustee's registration was subsequently cancelled by a second Disciplinary Committee.*

In the last four years, there have been only two known examples of truly egregious liquidator behaviour brought to real justice. Those were two cases of significant fraud that were uncovered and reported to both the police and ASIC by the firms where those individuals worked – these occurrences were not exposed by any regulatory oversight activity. These two instances relate to the two ASIC and one AFSA Disciplinary Committees where registration was cancelled.

There has not been an enforceable undertaking in respect of a registered liquidator since 2018. Previously, enforceable undertakings had been regularly used as part of ASIC's approach to the regulation of registered liquidators. It is our opinion that the Committee process is a more appropriate option to deal with disciplinary action than enforceable undertakings.

As well as being regulated by ASIC and AFSA, registered liquidators and registered trustees are generally subject to professional oversight by at least one professional body,[14] with many of these bodies also empowered to notify the respective regulators if they have reasonable grounds for the regulator to take disciplinary action.[15]

ARITA Professional Members, who make up around 80% of all registered liquidators and trustees, are subject to professional oversight by ARITA and ARITA actively investigates complaints about the professional conduct of members. We also investigate concerns about the professional conduct of members that come to our attention other than by way of a complaint.

We acknowledge that some registered liquidators and registered trustees do not maintain the high standards of professional and ethical conduct required, and we have discretionarily terminated the membership of individuals whose conduct has failed to reflect these standards.[16]

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[14] A comprehensive, but not exhaustive, list of industry bodies is detailed in section 40-1 of Insolvency Practice Rules (Corporations) 2016 & Insolvency Practice Rules (Bankruptcy) 2016.
[15] Section 40-100 Schedule 2 – Insolvency Practice Schedule (Corporations) and Schedule 2 – Insolvency Practice Schedule (Bankruptcy).
[16] Eight ARITA memberships have been discretionarily terminated since 1 July 2017.

In addition to the constitutional power to oversee the conduct of our members, we are a professional body empowered to notify a regulator if we have reasonable grounds for the regulator to take disciplinary action. Since the commencement of specific powers implemented as part of the ILRA in 2017, we have lodged six 'Form RL35 - Notice by industry body of possible grounds for disciplinary action' with ASIC having identified significant concerns regarding the conduct of registered liquidators. It is our understanding that the lodgement of these notices has resulted in three matters being subject to investigation and action by ASIC; however, despite two matters having been lodged in 2020 and 2021 we are yet to see an outcome. The other matter was referred and resolved by a disciplinary committee convened by ASIC.

4 Offences and nature of liability

The terms of reference seek consideration of the offences from which penalties can be considered and the nature of liability in these offences.

The law generally

When the law seeks to require compliance and imposes a penalty for non-compliance, it is essential that users of the law understand their obligations and consequences. Significant work is being done by the Australian Law Reform Commission (ALRC) on the issue of complexity of the Corporations Act in its review of the financial services provisions. The President of the ALRC recently noted in its review that stakeholders found the legislation "too complex and in need of simplification"[17]. This is a view that the vast majority of ARITA's members would concur with in relation to the insolvency provisions of the *Corporations Act*.

Although not specifically considering offences and the nature of liability, the ALRC's comments around legislative complexity equally apply to this issue.

Whilst it is important for practitioners to be able to readily apply the law, the real issue is that directors and managers must be able to readily understand their obligations with respect to insolvency and their options when businesses experience difficulties, and also that creditors can easily understand their rights in relation to recovering the monies owed to them. This is critically important in the case of smaller businesses who may not have the resources to retain advisors, or even seek one-off advice, and there may also be complex interactions with the personal insolvency system.

Action against directors

Despite the substantial volume of possible misconduct being reported to ASIC, ASIC only achieves limited successful outcomes (again, mostly administrative)[18] against Australia's estimated 2.2 million company directors per year. By way of comparison, the UK's Insolvency Service has published its enforcement outcomes for 2021/22 which highlights its successful pursuit of companies, directors and individuals abusing the insolvency and corporate framework':

- *During 2021/22, 802 directors were disqualified under the Company Directors Disqualification Act (CDDA) 1986 as a result of the work of the Insolvency Service. The number of director disqualifications in 2021/22 was lower than in 2020/21. Before the coronavirus (COVID-19) pandemic, the number of disqualifications had been stable at between 1,200 and 1,300 between 2013/14 and 2019/20. Lower numbers in 2020/21 and 2021/22 coincided with historically low numbers of company insolvencies during the pandemic.*

[17] (2022) 34(1) ARITA J, The changing face of law reform in Australia, Derrington, The Hon Justice Sarah, p7 and also https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20211111

[18] Details of outcomes against directors are included in Section 5 below.

- *The mean average length of director disqualification in 2021/22 was 5 years and 10 months. The average length has been between 5 years and 5 months, and 6 years in each of the past ten financial years.*
- *During 2021/22, 52 companies were wound up in the public interest, up ten cases from the previous financial year, but lower than in all previous years in the time series. Numbers of these orders declined followed a legislative change in 2016, which increased the number of regulatory and enforcement bodies to which the Insolvency Service could disclose material. In some cases, allowing disclosure to these additional bodies has been more effective than winding up the company.*

It should be noted that the wide awareness of the lack of funds for proper investigation by liquidators and the very limited follow-up of misconduct reports by ASIC is exploited by unregulated 'pre-insolvency 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 by directors and unregulated pre-insolvency advisers.

As a general statement, the task of an insolvency practitioner is unnecessarily distracted by the need to pursue breaches of the law during the course of an administration. Their tasks should be primarily focused on recovering and realising assets for the creditors. That task requires assistance from the directors. If they don't comply with their statutory duties, for example in preparing a report as to affairs (RATA), or handing over books, the time and cost of the administration is extended.

Therefore, while we support the use of conventional penalties and sanctions to enforce compliance, the prosecution of these consumes time and money in an insolvent estate that might otherwise be available for creditors.

We therefore recommend that alternative means to enforce compliance in insolvency should be considered.

The threat of penalties for breach or non-compliance of the law is only a means to the end of securing that compliance with that law. That threat operates by way of general and specific deterrence. It is accepted that the threat must be carried through to enforcement in a sufficient number of cases to make the threat real and effective.

Conversely, if the law is not enforced, or penalties imposed are minimal, the law's effectiveness is not only lessened but the breach is of little consequence[19].

[19] Refer ASIC press release 23-039MR which advised that ASIC had prosecuted 81 individuals for 140 offences from 1 July 2022 to 31 December 2022 for failing to assist registered liquidators (total fines of more than $350,000). This equates to approximately $2,500 per offence which is minimal for the disruption it causes to the liquidation process and the cost of the prosecution: 23-039MR ASIC prosecutes 81 individuals for failing to assist registered liquidators | ASIC

Strict liability provisions

The commencement of the *Insolvency Law Reforms Act* in 2017 saw the introduction of a number of strict liability offences for the conduct of external administrations.[20] Some of these strict liability offences have resulted in inflexibility in the legislation and additional costs for external administrations, as external administrators have to seek consent from the Court to be able to proceed with actions that would otherwise result in a strict liability offence.

The best example of this is the strict liability offence for funds handling under Division 65 of the Insolvency Practice Schedule (Corporations).

Feedback from the profession on funds handling

The funds handling requirements are burdensome in that they require:

- all money … in relation to the company to be paid into an administration account within five business days and
- not pay any money into an administration account if it was not received by the external administrator in relation to the company.

An example of this would be any business traded by a practitioner where there are multiple or large floats. For example, a pub with poker machines. The cash floats across all the cash registers, poker machines and in the safe (for poker machine winnings) would need to be physically taken to a bank, deposited, withdrawn, and then redistributed back to their original locations.

The cost of this, not to mention the risks of transporting such a volume of cash, is ridiculous and serves no positive purpose. And such a task may require the pub to be shut while this occurred, which would have further negative consequences (a whole day's takings lost yet the staff still have to be paid).

The alternative would be a court order for relief – but again, this is a costly exercise.

Dealing with cash floats is a significant problem and is not just limited to larger administrations. On a smaller scale, imagine being appointed to a suburban convenience store. While the cash float might be just a few hundred dollars, failure to collect it up and pass it through the administration bank account in a timely manner potentially risks a $10,500 criminal penalty. Not to mention the inconvenience to the company's ability to keep trading while its cash register is temporarily devoid of a cash float.

There are also situations involving groups of companies where one entity acts as a 'treasury' company receiving and distributing moneys on behalf of everyone in the group.

[20] See IPS (Corporations) ss 60-20, 65-5, 65-15, 65-25, 65-40, 70-25, 80-55.

The Ten Network group of companies were structured this way, but that administration commenced pre-1 September 2017 so it wasn't impacted.

Where there is a treasury company in a group of companies, the external administrator would need court relief to maintain the status quo and avoid the costly and time consuming task of separating everything into individual company accounts.

It was standard practice to maintain pre-appointment accounts for a time in trade on situations to ensure that direct payments of pre-appointment debtors were captured. This can no longer be done.

Another example is the imposition of a strict liability offence on members of a creditors' Committee of Inspection (COI)[21] to not directly or indirectly derive a profit or advantage from the external administration of the company.[22] If the company is continuing to trade, it is usual that the external administrator would continue to trade with the company's existing creditors. The creditor would, as a result of these transactions, be making a profit – that is the purpose of being in business. If that creditor is a member of the COI, this would be a strict liability offence by the creditor, which in our view is totally unreasonable, particularly since it is unlikely that the creditor would be aware of the issue unless the external administrator told them.

Care must be taken when making an offence a strict liability offence to not make the legislation unworkable or unreasonable. Also, where strict liability offences are set in the Act, they should be set for a reason and ASIC should be enforcing them. We are not aware of any project by ASIC to review insolvency practitioner's files and enforce the strict liability offence for funds handling. However, our members' experience would indicate that ASIC's approach could change at any time and so they try to ensure that the letter of the law is followed even though it can be practically difficult or involve the expense of court applications.

[21] A Committee of Inspection (COI) is a committee of creditors that is representative of the whole body of creditors. The COI can approve actions of the external administrator, approve remuneration etc. A COI can be appointed by a resolution of creditors in liquidations and voluntary administrations and is usually only appointed in larger administrations.
[22] IPR s 80-55.

5 Resourcing

The terms of reference have asked us to comment on the resourcing allocated by ASIC to ensure investigations and enforcement action progresses in a timely manner.

We have considered this issue by looking at enforcement from two perspectives – the regulation of directors when their companies end up in an external administration and the regulation of registered liquidators.

Directors

What is important to understand is that part of ASIC's role as a corporate regulator is to ensure compliance with the law by directors, including in the lead-up to and during the failure of the company.

Liquidators assist ASIC by investigating the company, including reasons for its failure and director conduct, and reporting to ASIC. ASIC should then use that information to take enforcement action, as appropriate, against directors. Liquidators do not cause the failure of a company's business, but rather clean up after the failure of the business.

We have gathered the following information from various ASIC Annual reports regarding actions against directors where that action is related to external administration.

Disqualifications and action against directors for failing to assist liquidators[23]:

ASIC Annual Report[24]	Failure to assist liquidator	Disqualification from managing corporations	Disqualifications relating to illegal phoenix activity
2021/22	163	56	8
2020/21	750	49	4
2019/20	1,235	51	10
2018/19	820	62	Not reported

Offences by directors reported by external administrators and action taken by ASIC[25]:

ASIC Annual Report[26]	Initial reports	Reports with suspected offences[27]	Follow up reports requested by AISC[28]	Referrals by ASIC[29]
2021/22	4,313	3,767 (87%)	593 (16%)	118 (3%)
2020/21	4,566	3,810 (88%)	709 (19%)	85 (2%)
2019/20	8,040	7,163 (89%)	1,070 (15%)	246 (3%)
2018/19	8,621	7,227 (84%)	515 (7%)	123 (2%)s

[23] This table is from ARITA's submission to the PJC on Corporate Insolvency in Australia.
[24] https://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/
[25] This table is from ARITA's submission to the PJC on Corporate Insolvency in Australia.
[26] https://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/
[27] Percentages are expressed as a percentage of initial reports.
[28] Percentages are expressed as a percentage of reports with suspected offences.
[29] Referral for compliance, investigation or surveillance action. Percentages are expressed as a percentage of reports with suspected offences.

It is clear that very little action is taken by ASIC as a result of the thousands of reports alleging offences by directors that are lodged by registered liquidators every year. Given ASIC's primary function is the regulation of companies this is a curious position. The community and government would reasonably expect that the "corporate regulator" would take an active and engaged approach to any evidence of malfeasance by company directors, especially where it is identified by the required investigations work of qualified, senior experts like registered liquidators.

Registered liquidators report that despite lodging reports about poor director behaviour that include key words such as "fraud" and "creditor defeating dispositions", "phoenixing" and "failure to keep adequate books and records", they receive automated notices of "no further action" within 30 seconds of submission. There is no transparency of ASIC's algorithm and as such, it is impossible for registered liquidators to understand ASIC's enforcement priorities or how best to assist ASIC in identifying director behaviour of concern. This simply increases costs that are borne by creditors or our members if there are insufficient funds to meet their costs and remuneration. Further, and more concerningly, it is likely that malfeasance is going undetected by ASIC. The solution to this problem is:

1. Review the current arrangements to identify unnecessary burdens – the Productivity Commission has extensive experience in such analyses[30]
2. Make ASIC's filtering algorithm transparently available to registered liquidators, demonstrate its alignment with ASIC's enforcement priorities and align those with the obligations of reporting by registered liquidators, and
3. Introduce more human consideration – the dangers of algorithmic law enforcement are plain to see from the Robodebt matter.

Actions take too long

It is our view that ASIC takes too long to take enforcement action, particularly where action is taken against registered liquidators. If egregious conduct is alleged, disciplinary action needs to be taken swiftly:

- If the alleged conduct is proven, that registered liquidator will have continued to accept and undertake appointments during the investigation and disciplinary action period, potentially creating further risks
- If the alleged conduct is not proven, lengthy ongoing investigations and disciplinary action can have adverse consequences on a registered liquidator's mental health, business and reputation, and
- Taking too long to bring a matter to Court can negatively affect the chances of success.

[30] These issues were not addressed in Productivity Commission 2010, *Annual Review of Regulatory Burdens on Business: Business and Consumer Services*, Research Report, Canberra.

ASIC v Wily & Hurst[31]

ASIC was unsuccessful in having the Court order an inquiry into the misconduct of two liquidators – Mr Wily and Mr Hurst.

The claimed misconduct related to companies that the liquidators were appointed to in 2009. The companies were deregistered in 2011 and the proceedings were not bought until 2016.

The Court was critical of ASIC:

- The conduct of the litigation, in particular the delay caused by ASIC deferring the investigation while it investigated other matters concerning the liquidators – "in effect, holding it in reserve – until the others had come to nothing" – was criticised to the point of being described as "vexatious".
- ASIC's continuation of the proceedings after Mr Wily had retired and Mr Hurst had continued in practice without complaint and "with no suggestion of a systemic or continuing pattern of misconduct". In these circumstances, the "prospects of establishing *present* unfitness by reference to the conduct complained about, are remote in the extreme".
- ASIC had options other than applying to the Court.

It should be noted that although the application was made in 2016, the hearing was in September 2017 and the judgment was not delivered until May 2019. The judgement was 10 years post the appointment.

[31] ASIC v Wily & Hurst [2019] NSWSC.

6 Reduce duplicative regulation

The terms of reference include the consideration of opportunities to reduce duplicative regulation.

In Australia, corporate insolvency is performed by approximately 650 registered liquidators regulated by ASIC – a generalist regulator. Personal insolvency is performed by approximately 200 registered trustees regulated by AFSA – a specialist regulator. These two agencies are responsible for the licencing and oversight of liquidators and trustees, with funding provided to ASIC via the Industry Funding Model (IFM)[32] and funding provided to AFSA through the realisations charge and interest charge.[33]

Most registered trustees are also registered liquidators, and so have dealings with both regulators. This overlap results in over-regulation, with two regulators essentially undertaking the same duties.

ARITA's view is that regulation would be improved by the creation of a single specialist agency responsible for both personal and corporate insolvency law, and that this agency should be modelled on AFSA. This view was set out in detail in ARITA's submission to the Parliamentary Joint Committee on Corporations and Financial Services review of Corporate Insolvency in Australia.[34]

Why a regulator modelled on AFSA?

AFSA's prosecution of offences by bankrupts[35]:

Enforcement	2018-19		2019-20		2020-21		2021-22	
Offence referrals received	984		772		865		596	
Accepted for investigation	744	76%	552	72%	534	62%	307	52%
CDPP briefs prepared	112	11%	77	10%	123	14%	126	21%
CDPP briefs accepted	105	11%	63	8%	87	10%	123	21%
Total persons prosecuted	96	10%	94	12%	69	8%	95	16%

We note that a much higher percentage of offence referrals to AFSA are prosecuted than those reported to ASIC. This may be due to several factors:

- reporting to ASIC in liquidations is required except in very few instances[36] resulting in a large number of reports. In the vast majority of liquidations there will have been

[32] https://asic.gov.au/about-asic/what-we-do/how-we-operate/asic-industry-funding/
[33] Charge imposed as a percentage of all asset realisations in regulated debtor estates, currently 7%: https://www.afsa.gov.au/resource-hub/realisations-and-interest-charges
[34] Submission 36 - https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/CorporateInsolvency/Submissions
[35] This table is from ARITA's submission to the PJC on Corporate Insolvency in Australia.
[36] S533 requires liquidators to report to ASIC on possible breaches or if the company may be unable to pay unsecured creditors more than 50 cents in the dollar.

some type of offence, default or breach of duty. There is no discretion for liquidators to not report minor offences or where insufficient evidence is held, and ASIC has prosecuted liquidators for not investigating and reporting offences.[37]

- Whilst registered trustees are required to report offences, AFSA encourages registered trustees to contact them and discuss whether offences should be referred. Trustees are not required to report offences in situations where there is insufficient evidence to support the allegation.[38]

- AFSA's resources are dedicated to personal insolvency and as such regulatory resources do not have to be allocated amongst competing activities.

AFSA provides excellent comprehensive and easy to access statistics on all aspects of personal insolvency and registered trustee conduct. It is a progressive regulator embracing the move to online reporting to the regulator by trustees and online inspections, using pictorial representation of statistics, and implementing mental health programs and measures to encourage gender diversity in the profession.

AFSA has historically taken a pragmatic approach to regulation of registered trustees, with an established inspection program and clear categories for any non-compliance identified during the review process. To assist in assessing the seriousness and relevant regulatory response, and to alert practitioners of the issues and possible repercussions, non-compliances are classified as category A, B or C depending on the level of seriousness.[39] Category A are very serious with possible loss of registration, category B are serious and the trustee is counselled with remedial action required, while category C are one-off practice or procedural errors which are brought to the trustee's attention. ASIC does not apply this approach to regulation and ASIC's responses are less predictable and certain for liquidators involved. These different approaches are likely to do with the fact that there is consistency with the services reviewed by a specialist regulator, versus the diversity of offerings from the different regulated populations regulated by ASIC.

The Bankruptcy Act also provides for an infringement notice regime which is administered by the Inspector-General in Bankruptcy.[40] ASIC does not have this power and again this is likely to be because of the diversity of its regulated population.

As a regulator that also undertakes appointments as the Official Trustee, AFSA has a deep and practical understanding of the implementation of insolvency law. AFSA is also empowered under the Bankruptcy Act to review and approve trustee remuneration, thus removing the need to involve the Courts, which reduces costs significantly for bankrupt estates. It is AFSA's practical knowledge which makes this possible.

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[37] Court enforceable undertakings register | ASIC; Registered liquidator disciplinary decisions | ASIC
[38] https://www.afsa.gov.au/resource-hub/practices/practice-guidance/referring-offences-against-bankruptcy-act-1966-inspector-general
[39] https://www.afsa.gov.au/resource-hub/practices/practice-guidance/monitoring-and-inspection-bankruptcy-trustees-and-debt-agreement-administrators
[40] https://www.afsa.gov.au/resource-hub/practices/practice-guidance/infringement-notices

AFSA's website is focused on personal insolvency. We recognise that AFSA also has responsibility for the personal property securities system, however, AFSA has separated this role onto a separate website.

AFSA's online information is organised in a way that makes it easy for lay person users to find the information they need. The information is also written in easy to understand English, avoiding technical jargon.