Our Ref: DEPAOF01/16/SGC:GK:cb
Reply To: Parramatta

28 October 2022

Senior Adviser
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: ASICIFMReview@treasury.gov.au

Dear Sir/Madam

Re: Australian Securities and Investments Commission Industry Funding Model Review

We refer to your request for submissions in relation to The Treasury's Discussion Paper regarding the review of the ASIC Industry Funding Model ("IFM") and take pleasure in providing these submissions. We formally thank Treasury for the opportunity to do so as we welcome any efforts that are constructively made to improving the process that could enable creditors to see funds returned to them earlier and in greater quantum.

We note that we have only been provided with a short period to review and consider the discussion paper and as such believe the further consultation should be undertaken to ensure that the proposal is truly workable in the current market.

This response has been prepared under the following headings for the purpose of clarity and understanding: -

A. Condon Advisory Group
B. Overview of the ASIC Industry Funding Model (IFM)
C. General Commentary
D. Registered Company Auditors
E. Registered Liquidators
F. Perception of the Insolvency Industry
G. Other Potential Areas of Recovery
H. Association of Independent Insolvency Practitioners
I. Conclusion

A. CONDON ADVISORY GROUP

Condon Advisory Group is a specialist Firm of Forensic Accounting, Solvency and Turnaround Practitioners headquartered in Parramatta, NSW. The Firm undertakes Liquidations (Official and Voluntary), Receiverships, Voluntary Administrations and Deeds of Company Arrangement under the provisions of the Corporations Act 2001 (Corporations Act), as well as the formal administration of Bankrupt Estates and Part X Arrangements pursuant to the Bankruptcy Act 1966 (Bankruptcy Act).

In addition, the Firm provides services within the related areas of Forensic Accounting, and Litigation Support as well as business and financial Turnaround and Advisory Services not involving formal appointments.

It should be noted that the general focus of our corporate work is in the small to medium, proprietary companies rather than Publicly Listed entities.

The Firm's Managing Principal, Schon Gregory Condon, was an Official Liquidator, now simply a Registered Liquidator and Registered Trustee in Bankruptcy with in excess of 40 years of experience in the field, with almost 30 years at the Principal/Partner level. In addition to the Managing Principal, the Firms senior management consisting of senior Associates, Senior Consultants and Supervisors have a combined experience in excess of 100 years in providing specialist insolvency advice.

B. OVERVIEW OF THE ASIC INDUSTRY FUNDING MODEL (IFM)

We are aware that the current IFM breakdown the industries ASIC seeks funding form into six industry sectors which are then broken down into subsectors. We note that Registered Liquidators are a subsector of the Corporate Sector. Also contained within the Corporate Sector are the following: -

- Listed Corporations
- Unlined Public Companies
- Large Proprietary Companies
- Small Propriety companies
- Auditors of disclosing entities
- Registered Company Auditors
- Registered Liquidators.

In the Cost Recovery Implementation Statement (CRIS) issued by ASIC, we note that of all of the above subsectors it is only that of Registered Liquidators the revolves around metrics of lodgements, complexity and delays.

The remainder are either a simple flat fee, or a simple variable that relates to either revenue per client or market capitalisation.

C. GENERAL COMMENTARY

We note that the discussion paper proposes a number of questions to which answers are being sought. It is intended that the issues raised by those questions will be addressed by this submission, it is not our intention to answer these questions specifically, but deal with the issues on a sector-by-sector basis.

Thus, it will provide Treasury with our views on the IFM from the perspective of an active participant in the sectors that we are involved in. That being a participant in the Audit, and Insolvency sectors.

D. REGISTERED COMPANY AUDITORS

We note that the IFM as it relates to registered company auditors is essentially divided into two categories, namely: -

1. Auditors of Disclosing Entities, and
2. Registered Company Auditors

The levy of an Auditor of disclosing entities is a simple levy of a rate, the most recent expectation being $126, per $10,000 of audit fee revenue generated from Disclosing entities. The only issue is that this is only an estimate rather than a fixed fee.

For Registered Company Auditors, the levy is even simpler in that it is simply a flat levy. That levy is currently anticipated (again not fixed) to be $269 based on their being 3,657 auditors.

From simple observation it is easy to perceive that, in both cases, this is an extremely simple formular to calculate, and as a result is more easily understood by the general public.

E. REGISTERED LIQUIDATORS

We believe that this area where the review by Treasury has the potential to have the greatest impact, simply because: -

1. The current methodology has been based around an inanely complex and unnecessary structure;
2. It focuses and the smallest numerical component of those involved in insolvency; and
3. There was a funding model established by the Bankruptcy Act in the 1960's, thus predating ASIC's, that has operated for in excess of sixty years that is efficient, cost effective and fair.

We are of the view that the way that the IFM is currently structured for the insolvency sector is unnecessarily complex, cost in effective for both ASIC and practitioners and burdensome on small practitioners who undertake higher volumes of matters. Additionally, it demonstrates a blunt inequity in that a practitioner who takes on a matter which is ultimately unable to cover the costs of the performance of their statutory duties is left with a debt to the Commonwealth in exchange for doing communal work without reward.

Put simply, an unfortunate practitioner who in a reporting period only was appointed to matters that were unable to contribute to the recovery of their fees would nonetheless be left with potentially a significant liability to the commonwealth. With the ongoing increase in pre-insolvency advisors the assets available to deal with Company liabilities continues to diminish.

1. Calculation Method

The calculation of the IFM levy for registered liquidators is a combination of a fixed fee (currently $2,500) per liquidator, plus a rate-per-metric. The metrics consist of "notifiable events". The current notifiable events are advertisements placed on ASIC's published notices website and lodgements of specific forms with ASIC, as well as the number of administrations entered into that financial year or continuing from the previous financial year. We note that the per event fee is currently set at $77.64.

It should also be noted another complexity issue occurs depending on whether the external administration is undertaken by a sole liquidator, or joint, or joint and several liquidators. In that notwithstanding that there is only one appointment, additional fees are paid if more than one appointee exists.

The draft CRIS is intended to be issued in June each year, but is regularly issued later, and contains estimates of costs ASIC anticipates it will need to recover. The final CRIS is issued on or around November of each year, and contains the actual cost of ASIC incurred for the financial year just ended, and calculates the actual cost per metric. Again, this is often issued late, demonstrating ASIC's own inability to deal with the complexity of the programme.

Thus, this document then forms the basis for the notified event fee amount.

2. Issues in Calculation Method

At the end of each IFM period, ASIC requests liquidators to confirm the number of metrics they believe they have incurred in the last financial year. ASIC provides the practitioner with a spreadsheet based on the systems that they have access to then request us to verify the amount. We note that there is no simple method of verifying this unless, we as the practitioner have kept a sperate record of the notifiable events. Therefore, we have a duplication of effort by those involved, an obvious inefficiency.

It is also of note that it is likely that small practices will perform a greater volume of liquidations than a larger practice. For example, a smaller practice may perform 10 liquidations to every 1 liquidation for a bigger firm. The current system results in the smaller practice incurring a greater number of metric events, and therefore a higher fee relative to the larger practice as it is based on the number of events rather than some other metric like funds recovered as what occurs under the Personal Insolvency Regimen.

Correspondingly the larger Firm is likely to avoid appointment that are unfunded and thus the smaller number of matters will most likely represent significantly greater assets under administration, and thus greater fees earned.

As such it would appear that there is an inherent inequality in the way the IFM currently operates for registered liquidators. Further, it attributes the issues of the insolvency industry to one group being liquidators, leaving directors, lenders, creditors, companies, advisors and most importantly criminal pre insolvency operators without any requirement for contribution.

Additionally, some types of external administration such as controllerships will not have as many metrics as liquidations, e.g. advertisements for dividends, even though significant distributions are made in such situations to a variety of levels of Creditors. For example in a liquidation a distribution to priority Creditors is a formal distribution, whilst in a Receivership it may simply be regarded as a trading payment to employees. The use of an asset realisation charge would result in a more equitable distribution of the IFM amongst all stakeholders.

3. A Different Way

We believe there could be a much simpler method for determining the IFM, and that is for there to be, as there is in Personal Insolvency regimen, a realisations charge model. In this model, a simple calculation using a percentage of recoveries made by the registered Liquidator. We note, however, that this should extend to all types of corporate external administration so that controller and receiverships are included.

The realisations charge method was introduced in 1997 and has been accepted and understood by Trustees in Bankruptcy, Creditors and the general public. We note that the percentage that is charge on realisation is subject to review each year based on the expected expenses to be incurred by AFSA.

We foreshadow a number of advantages of this type of system as opposed to that currently in place: -

- it is simple and straight forward calculation
- it is easier to explain to stakeholder
- it is only paid if there is an asset realisation
- it is specific to each matter
- the percentage rate is a defined number and known upfront
- it is currently payable within 45 days of the end of the financial year

With this method, as the levy would be incurred as a cost of the external administration, it will not require approval of creditors, thus reducing the amount a red tape as well as the likely costs.

Another alternative funding model would be the introduction of a strict liability offences for directors and company officers in the event that an offence is reported. This would increase the perception by the public that ASIC has the ability to focus on corporate misconduct rather than as it appears now where it is simply overlooked or deemed not in the public interest.

Again, reverting to the AFSA model, the administrative process does not involve duplication of effort by Government and practitioners, is complete by the second week of August for the year ending 30th June prior, and enables contributions to be paid throughout the year allowing early receipt of revenue by the Government. In less than six weeks after the end of the financial year all administrative work is complete and the full revenue is essentially collected. It is acknowledged that there could be some late performers/payers, but this becomes the exception rather than the rule.

4. Recovery of the Levy

It is the practice of this firm, and we understand most other insolvency practices, to seek to recover the anticipated costs form the administration to which we are appointed to. In order to make a reasonable calculation of the likely levy amount, we are required to consider the flat fee amount and then the likely number of notifiable events that multiply that by the expected notifiable event fee. This result is some period of time elapsing before the actual costs are known. This is also shown in the time period with which ASIC provide for Liquidators to meet the levy payment.

This method is chosen because the levy is imposed on us in order for us to perform our duties under then Corporations Act. Thus, it is reasonable that such costs be passed onto the matters concerned. The manner of passing on the cost is an option, if fees are increased to cover them then the issue of expensive liquidators is raised even though the fee now contains an amount payable to the Government. The alternate is that they are passed through specially as a fee based on ASIC cost recovery, however calculated.

In seeking to recover the amount for our matter, we seek approval from the Creditors for these charges. This can prove difficult for a number of reasons:

- We are not aware of the actual costs;
- We are required to explain what is a complex system in a short amount of time, either in a meeting or in writing;
- Creditors see this as a reduction in their likely dividend as there is no general understating of the IFM model
- We are required therefore in many cases to seek a "round figure" approval which usually represents an average estimate of costs over a financial year for all administrations

F. PERCEPTION OF THE INSOLVENCY INDUSTRY

It is a well-regarded fact that the current view of the general public that the insolvency systems is not fit for purpose, and in many ways can be considered costly, overly litigious and unlikely to provide any return to Creditors. However, notwithstanding the significant number of events of misconduct and/or offences reported by Liquidators little or no action occurs.

This has been the subject of irregular media attention, by way of example the ABC article attached as **Annexure "A"**. The recent increase in public discussion of this point has resulted in a Senate Review as is detailed in **Annexure "B"**. It is clear that the public understand that the system as is simply does not work effectively.

It has been a long-known fact amongst many that wish to 'play' the insolvency game that you are essentially guaranteed a safe passage if: -

- It is ensured that minimal books and records of the company exist at the time of liquidation,
- the company should have little to no realisable assets,
- any external creditor likely to commence or fund a recovery action is dealt with, and
- that the liquidator has little to no funds at the time of a winding up.

Why, well simply put: -

- The liquidator has no funds to commence any action;
- The liquidator is significantly exposed to potential personal costs orders;
- ASIC is highly unlikely to take any real or effective action; and
- Once finalised the matter is unlikely to ever be raised again.

This situation has been worsened by the active involvement of pre-insolvency advisors who have realised that they can profit quite handsomely from the above shortcomings. Their focus is to ensure there are minimal, but in some sense arguably adequate books and records, and only sufficient funds to pay a basic cost to the liquidator. At this point they appoint a liquidator and provide them with the minimal funding noted above.

The Registered Liquidator will undertake their statutory obligations with the minimal funds and ultimately advise ASIC and Creditors there will be no distribution and that there were only minimal basic books and records and insufficient funds to prosecute any claim they may have. Accordingly, they would need funding from ASIC or Creditors to prosecute the Directors, or pursue others. We note that the provision of funding is unlikely as Creditors will generally not be willing to waste further money chasing an unlikely return.

Following from this point, we note that Registered Liquidators, and for that matter Bankruptcy Trustees are, appropriately, legally barred by relevant codes of conduct and statutory obligations from paying commissions to a referee in solicitation of insolvency matters. This the profession has no objection to.

Regrettably however, we are aware of advice from ASIC that concludes that the payment of referral fees to pre-insolvency advisors, who market that they will appoint appropriate insolvency practitioners when necessary, is both legal and acceptable provided the referral fee is disclosed to the client. One question remains, who is the client, a referring professional such as a lawyer, accountant of financier, or the director of the Company. Clearly there is inadequate review.

Attached as **Annexure "C"** is a redacted copy of the relevant ASIC letter.

G. OTHER POTENTIAL AREAS OF RECOVERY

Open minded consideration of alternate means of recover should be part of this review.

By way of example, other areas for potential recovery of ASIC's funding in this area could be derived from such things as: -

- Fine revenue from greater prosecution of directors, or other relevant parties for relevant offences;
- Greater prosecution of offences identified by liquidators;
- A levy added to company annual fees;
- A director bond system where the bond is drawn if the Director is involved in an insolvent entity;
- Increase in strict liability offences.

We note that there are likely to be many other alternatives also available.

H. ASSOCIATION OF INDEPENDENT INSOLVENCY PRACTITIONERS

We note that this firm assisted with the preparation of the submission made by the Association of Independent Insolvency Practitioners ("AIIP") and as such we are aware of the content of those submissions.

We wish to take this opportunity to indicate that whilst these submissions have been prepared based on the views of this Firm, we do substantially support the submissions made by the AIIP, as those views are, in the main, shared also by this Firm.

I. CONCLUSION

We congratulate Treasury on seeking wide input and thank you for the opportunity to do so. Our responses have been based on experience in the area and the available time, whilst still maintaining an active practice.

Again, we reinforce the point that more needs to be done to make the process focus more on the preservation of value and the return of that value to all stakeholders, in particular, creditors, and on a more expedient time frame.

In closing we consider it of an absolute critical nature that the whole process maintains the highest standards of transparency and equity. If the industry is expected to pay for the costs, then there needs to be visibility of what is being incurred, and that such costs are relevant to the recovery being sought. It is acknowledged that the level of costs will be determined by the enforcement action required, but for example it is difficult to understand why capital costs for form a component of an enforcement regime. The capital costs of housing ASIC would be a statutory liability.

We thank you for the opportunity to submit our thoughts.

Should you have any enquiries in respect of this matter, please contact Schon Condon or Gavin King or of this office on (02) 9893 9499.

Yours faithfully
Condon Advisory Group
Forensic Accountants, Solvency and Turnaround Practitioners

Schon G Condon RFD
Managing Principal

CC: - AIIP
IPA
CPA Australia
CAANZ

Annexure A

ABC NEWS

Economist alleges corporate watchdog ASIC is only investigating tiny proportion of complaints

By business reporter Daniel Ziffer

Posted Thu 6 Oct 2022 at 5:43am, updated Thu 6 Oct 2022 at 10:00am

In 2014, the boss of the nation's corporate watchdog said Australia was a "paradise" for white collar crime, due to weak penalties.

Economist John Adams's analysis of investigations by the Australian Securities and Investments Commission (ASIC) suggests things may have worsened.

He alleges that fewer than 1 per cent of complaints are going on to be investigated.

"The impact is that potential predators in the market have more confidence to actually engage in illegal activity," said the former advisor to former Liberal senator Arthur Sinodinos.

"Because obviously the view would be: 'Well, the chances of getting investigated by ASIC is less than 1 per cent'.

"But, also, the chance of ASIC actually [being] successful in bringing that investigation to trial and [getting] a conviction — the bar for that is even higher."

Key points:

- An economist alleges ASIC is doing fewer investigations compared to the number of complaints it is receiving
- Investigations and prosecutions can deter people and companies from engaging in crime
- The corporate watchdog has had a busy workload of cases related to the banking royal commission

Mr Adams, of Adams Economics, based his research on a decade's worth of ASIC annual reports and publicly available information.

He alleges the ratio of investigations compared to allegations of misconduct is falling:

- Almost 2 per cent of allegations in the 2014-15 financial year resulted in an official investigation
- Only 0.7 per cent of allegations in the 2020-21 financial year resulted in an official investigation
- On average, since July 2015, 91 per cent of disclosures by corporate whistleblowers resulted in no further action.

Mr Adams alleges that this ratio — of complaints made to investigations commencing — leads to a dim conclusion.

> "So, yeah, if you're a white collar criminal in this country, you would feel fairly confident of actually being able to engage in white collar crime," he said.

Mr Adams began his assessment after putting together a 600-page complaint about a financial matter.

The complaint is under investigation by the regulator.

ASIC response

The agency said 35 per cent of complaints were referred for action, resolved or beyond its jurisdiction.

In 65 per cent of cases, it said, complaints were analysed and no further action was taken.

An ASIC spokesman said Mr Adams has made several claims concerning ASIC to federal parliamentarians and media outlets.

"Two senior executives of ASIC agreed to meet Mr Adams [in early September] and hear his views about his 'report'," the spokesman said in a statement.

"Every year, ASIC receives more than 10,000 separate reports of misconduct and possible breaches.

"Every single report is examined and assessed — some for further examination, some for consideration by a more appropriate agency, or not warranting further action, and others referred for follow-up investigation.

> "These outcomes, year by year, are publicly available on our website and published in our Annual Report."

The agency's most recent annual report, listed that 15 per cent of misconduct reports were referred for action. It noted that 65 per cent were analysed and assess for "no further action".

Mr Adams suggests the difference in the figures occurs because ASIC is referring only to reports from members of the public.

His research included breach reports from auditors and financial licence holders, as well as notifications from liquidators.

Allegations of deceptive conduct

Legal counsel for the Australasian Centre for Corporate Responsibility (ACCR) James Fitzgerald said that, without adequate regulation, public trust was eroded.

"The report ... suggests that Australian companies are far from adequately regulated, leaving shareholders exposed to unacceptable risks and tarnishing Australia's reputation as a safe and transparent investment destination," he said.

ACCR is a not-for-profit organisation that advocates for shareholders. Last year it commenced proceedings in the Federal Court of Australia, alleging misleading and deceptive conduct by Santos Ltd of "greenwashing" its clean energy credentials.

Those proceedings are ongoing.

"ACCR's decision to commence the court proceedings itself, rather than to refer the matter to ASIC, was in part informed by ASIC's anaemic performance record to date," Mr Fitzgerald said.

Senators' support

Senators from both major political parties back Mr Adams' contentions — and his push for an inquiry into how ASIC deals with investigations.

Liberal senator Andrew Bragg says he has long had concerns about the culture inside ASIC.

"ASIC is not focused on law enforcement and prosecution," Senator Bragg says.

"It appears ASIC does not investigate enough complaints, or undertake enough law enforcement. There should be a proper review into these matters as more changes are clearly needed."

Senator Bragg was recently appointed chair of the Senate Economics References Committee. He says the committee could "do the job" of examining how ASIC deals with complaints and referrals.

"I will take steps to investigate the feasibility of this step," he says.

Meanwhile, Labor senator Louise Pratt also supports the push, having previously supported a Senate inquiry into a failed property scheme with the umbrella title of Sterling Income Trust.

"This report exposes ASIC's failings in following up the growing number complaints it receives about corporate and financial misconduct," she said.

"We should expect better from our Australia's corporate regulator".

Senator Pratt said as a member of the parliamentary committee that has oversight of regulator, the data sounded "alarm bells".

"These issues keep me awake at night as I have seen too many constituents fall victim to corporate misconduct with devastating consequences," she said.

Busy schedule

ASIC regulates the 'conduct' of local businesses and has had a busy few years.

At the banking royal commission it was spanked for its reluctance to take big banks to court, relying on negotiated deals called "enforceable undertakings" that compensated customers but often did not include an admission of guilt.

There were gruelling and, at times, embarrassing appearances in the witness box when examples showed the regulator to be cowed by large institutions.

In some circumstances, it even asked companies to approve text for press releases the watchdog was going to send out ... about what the company had done wrong.

Then chair James Shipton and his deputy Daniel Crennan changed tack on ASIC's reluctance to go to court, assuring the public its approach at the end of an investigation had changed to: "Why not litigate?".

Then both left their jobs in a messy investigation about expenses and ASIC dumped the "Why not litigate?" stance after the government emphasised an expectation the regulator would be more supportive as the nation's economy was focused on recovering from the impact of COVID-19.

Annexure 'B'

Business for today

Business of the Senate—Notices of motion

Notice given 25 October 2022

1 **Chair of the Economics References Committee (Senator Bragg):** To move—That the following matter be referred to the Economics References Committee for inquiry and report by the last sitting day in June 2024:

The capacity and capability of the Australian Securities and Investments Commission to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct, with particular reference to:

(a) the potential for dispute resolution and compensation schemes to distort efficient market outcomes and regulatory action;

(b) the balance in policy settings that deliver an efficient market but also effectively deter poor behaviour;

(c) whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement;

(d) the range and use of various regulatory tools and their effectiveness in contributing to good market outcomes;

(e) the offences from which penalties can be considered and the nature of liability in these offences;

(f) the resourcing allocated to ensure investigations and enforcement action progresses in a timely manner;

(g) opportunities to reduce duplicative regulation; and

(h) any other related matters.

Notice given 26 October 2022

*2 **Senator Allman-Payne:** To move—That the following matter be referred to the Education and Employment References Committee for inquiry and report by 22 March 2023:

The national trend of school refusal or 'School Can't' – as distinct from truancy – that is affecting primary and secondary school aged children, who are unable to attend school regularly or on a consistent basis, with specific reference to:

(a) the increasing number since the COVID-19 pandemic, of young people and their families who are experiencing school refusal;

(b) how school refusal is affecting young people and their families and the impacts it is having on the employment and financial security of parents and carers;

(c) the impacts and demands of the increasing case load on service providers and schools to support these students and their families;

Annexure U

Australian Securities and Investments Commission

Office address (inc courier deliveries):
Level 14, 91 King William Street,
Adelaide SA 5000

Mail address for Adelaide office:
GPO Box 9827,
Brisbane QLD 4001

Tel: +61 1300 935 075
Fax: +61 1300 729 000

www.asic.gov.au

By Email:

15/09/2022

Dear

– referral fee offer

I refer to your email on 14 June 2022 to ASIC Senior Executive Leader, outlining your concerns regarding an email you received from of / offering referral fees (**report of misconduct**).

I advise that, based on a review of the email, there is presently no evidence to suggest the email is unlawful. This is because ASIC has no evidence that the email was sent with the intention that requires you to not disclose a referral fee to a client that you referred to

ASIC engaged with , including certain aspects of its website.

Currently, ASIC will not be taking further steps regarding the matters raised in your report of misconduct. ASIC may recommence its enquiries, if circumstances change, for example, if new information becomes available indicating breaches of the law.

Thank you for bringing this matter to ASIC's attention.

If you have any queries regarding this letter, please contact me on or via email at

Yours sincerely

Australian Securities and Investments Commission