

OUR REFERENCE: Treasury Submission: ASIC User Pays  
YOUR REFERENCE:

9 October 2015

BY ELECTRONIC MAIL: [asicfunding@treasury.gov.au](mailto:asicfunding@treasury.gov.au)

Senior Adviser  
Financial System and Services Division  
The Treasury  
100 Market Street  
Sydney 2000

Dear Sir,

**RE: PROPOSED INDUSTRY FUNDING MODEL FOR THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (“ASIC”)**

We refer to the Australian Government’s Consultation Paper on the Proposed Industry Funding Model for the Australian Securities and Investments Commission and we are appreciative for the opportunity to provide our comments in relation to same.

Dye & Co. Pty Ltd is a specialist insolvency company providing corporate and personal insolvency advice since 1978. The company has four registered liquidators and one registered trustee.

In these circumstances our comments are made in regard to the proposed funding model and associated levy relating to registered liquidators.

On page 51 of the Consultation Paper, treasury has raised some direct questions numbered 43 – 46. We do not intend to answer each one by direct reference to the question but in answering the following predominant question we will address all queries.

**Which of the potential levy arrangements for liquidators do you support? Why?**

We simply do not support any of the potential levy arrangements for liquidators and are of the opinion that Registered Liquidators should be exempt from the user-pays model.

Registered liquidators hold a unique role in the Australian corporate system. We operate in a semi judicial capacity undertaking investigations into the conduct of failed entities, including the conduct of officers and report any identified breaches to ASIC.

It is from these reports that ASIC can elect to seek further information, take further enforcement action or determine that the case does not warrant further enquiry.

Accordingly Registered Liquidators in most cases are ASIC’s frontline investigators and sometimes enforcers of regulation on behalf of all stakeholders of which ASIC and the public are one.

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As an extension of the regulator there should be recognition provided to the unique position that Registered Liquidators hold in considering any user pays model, such recognition has not been considered in the levy arrangements advanced.

The levy arrangements also fail to consider the significant amount of unfunded work carried out by Registered Liquidators from court appointed liquidations, which we are advised is in the vicinity of \$42 million not including disbursements. This unfunded work still requires significant investigation and statutory reporting requirements to provide ASIC information on the conduct of the company and its officers and whether they have breached any provisions of the Corporations Act 2001 or any other applicable laws.

Notably ARITA is currently developing its first Practice Statement: Insolvency pertaining to the minimum standards of investigations required in liquidations and bankruptcies. Whilst we expect that many of the standards are currently being met, any increases in relation to unfunded work may also see the cost of the unfunded work significantly increase.

This unfunded work is borne by the Registered Liquidators unlike personal insolvency where the Official Receiver can be appointed by debtors/creditors of unfunded bankruptcies. Accordingly the government currently avoids the cost burden of these unfunded liquidations and imposes that cost onto Registered Liquidators. Should a similar position be introduced for corporate insolvencies, we are sure that the costs will far exceed the \$9 million being sought from 707 private Registered Liquidators.

In many of the Court Liquidations there is a significant amount of non compliance with the external administration process by directors who fail to lodge a Report as to Affairs or deliver up books and records. We are of the opinion that ASIC has the ability to prosecute these directors and seek the imposition of significant fines that would contribute to the cost recovery and promote and encourage compliance. Nominal fines of \$500 for these breaches do not encourage or promote compliance nor does it assist in cost recovery.

We also note that the Australian Insolvency Statistics figures released by ASIC in August 2015 disclose that there are currently 707 Registered Liquidators operating within Australia. The User Pays model seeks to recover \$9 million from this shallow pool, or \$12,729 per liquidator. I expect that should such a levy be imposed these additional costs will be passed on through an increase in rates and will be borne by the creditors of insolvent entities.

We also anticipate that there would be a small decrease in the number of practitioners resulting in the levy being increased in following years as a result.

These increased costs and reduction in practitioner numbers are likely to inhibit small proprietary companies from accessing the services of a registered liquidator. Especially for many of the small companies whose external administrations are personally or family funded as the company is without sufficient assets.

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This may encourage a continuance of insolvent trading activity in a hope that they will trade out of the problem as they cannot afford to remedy the problem. In the alternative many directors will simply wait for a creditor, usually the ATO, to apply for a court winding up. Even worse, they will simply allow the company to be deregistered avoiding any form of scrutiny.

This issue is likely to be exacerbated in regional areas that may lose regional exposure to registered liquidators that are forced out due to significant ongoing registration costs. The result may be similar to the small business example in the above paragraph.

Regulation

Registered Liquidators are one of the most regulated positions. Currently most Registered Liquidators are subject to self-regulation as members of ARITA and the acceptance of the Code of Professional Conduct. The operation of APES 330 which incorporates a large portion of the Code applicable to ARITA members, Quality Reviews and Audits conducted by professional accounting bodies such as CA and CPA. This is in addition to the Courts, ASIC and the public.

In addition creditors now receive significantly greater depth of information including but not limited to detailed remuneration estimates, actual and associated calculations, investigation results and background to formal appointments from the Declaration of Independence, Relevant Relations and Indemnities. Creditors also have greater opportunity to replace incumbent liquidators through meetings of creditors.

Whilst we accept that there is a regulatory need there is a perfectly acceptable self regulation model as an alternative. Should the regulatory supervision of all Registered Liquidators remain with ASIC to monitor and oversee the role and conduct of Registered Liquidators, these costs should not be borne by the liquidators as they are an extension of ASIC's investigative powers as mentioned earlier. Registered Liquidators should be wholly exempt from any form of levy in recognition of their unique role and the cost impost they bear from unfunded court liquidations.

In addition the purpose of the proposals detailed in the Consultation Paper state that those creating the need for regulation bear its cost. It also states that it drives efficiency, improves transparency and accountability. We note that there is absolutely no detail or analysis that supports this claim in the documentation provided, only assumptions, which do not concur with our expectations, most of which are detailed under concerns later in this letter.

We are firmly of the opinion that the need for regulation is borne by the corporate system itself and that companies within that system and directors receiving the benefit of the corporate veil are the beneficiaries of that system. Registered Liquidators are the overseers and reviewers of those that fail within that system to ensure that the company and its officers acted appropriately.

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Just as members of Parliament make the law and police regulate and enforce it, there are “bad apples” in all industries e.g. Craig Thompson, Peter Slipper, however a levy has not been sought to be placed on members of Parliament, similarly police are not expected to pay for the monitoring and prosecuting of corrupt police. Why? Because of their unique role they play in the government and policing systems for the benefit of the public!

“Assets Realised” – Number of External Administrations

Levying liquidators on the basis of “assets realised” similar to the AFSA model is a fundamentally flawed concept for application to the corporate regime. Firstly the cost is borne by the creditors of the company and in the first instance; it will deprive priority creditors and in turn provide a greater impost on the Fair Entitlements Guarantee system in relation to employee entitlements and potentially on the pension system, by virtue of non payment of superannuation entitlements.

Secondly companies with higher asset values do not necessarily contain a higher level of risk or require an increased level of oversight. Similarly undertaking a larger number of administrations does not necessarily mean higher risk or a higher level of oversight. Each external administration is unique and contains its own complexities, and these complexities may change over the course of an external administration.

Concerns

ASIC is currently undertaking a Capability Review. Surely any proposed funding models or arrangements cannot be adequately constructed until the capability review is complete and ASIC’s capabilities are known.

A user pays model provides its own issues and concerns, none of which have been addressed in the Consultation Paper.

Under an industry funded model, what measures would be put in place to ensure that ASIC was utilising the resources effectively? In an external administration the external administrator is required to prepare remuneration reports for creditor approval and make declarations that the level of the remuneration sought is fair and reasonable and accurately reflects the time spent on the file. What reporting, review and other accountability mechanisms would be implemented?

What mechanisms are in place to ensure the appropriateness of any levy increases against efficiencies and resources?

Any cost imposition on Registered Liquidators or asset levy will be a cost ultimately borne by already suffering creditors and in the first instance priority creditors such as employees for unpaid wages, leave and superannuation entitlements. In the alternative Registered Liquidators that increase hourly rates to recover a levy may end up doing less work as a result given that any liquidation has finite assets.

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There is lots of rhetoric around the user pays model providing more accountability and transparency but it does not say how?

Has the funding model arisen primarily based on the desire to sell off the registry arm of ASIC and thereby removing its funding source?

Are the figures detailed in the Consultation Paper inclusive of the offsets gained from the registry arm of ASIC, including the Insolvency Notices Website (INW)?

Does the \$9 million include any offset of gains or profits made from the INW? The proposed funding model includes returning the cost associated with lodging notices on the website. Why?

There is insufficient detail of how the \$9 million was incurred, what results were produced, why the \$9 million was incurred, the determinative factors resulting in the \$9 million being expensed.

Acceptable Alternatives

We consider that the following could provide acceptable funding alternatives for ASIC in recouping the \$9million associated with Registered Liquidators.

1. Minimal annual fee to registered companies

On page 33 of the treasury consultation paper it is detailed that there are currently around 2,000 listed public companies, 3,000 unlisted, disclosing public companies, 19,000 unlisted, non disclosing public companies, 9,000 large proprietary companies and 2.1 million small proprietary companies, totalling approximately 2,133,000 companies in Australia who have access to Registered Liquidators should the company find themselves in that position. To recover the \$9 million from the corporations would see an additional fee of **\$4.22** per corporation.

This alternative is congruent with our view that Registered Liquidators are an extension of ASIC and its investigatory powers and they act in the best interests and to the benefit of all stakeholders, including the general public in the maintenance and enforcement of a strong corporate system. It acknowledges the significant unfunded cost that Registered Liquidators already bear.

2. Solvency Statements

At a minimum, companies are required to lodge financial statements and tax returns on an annual basis. In completing these financial statements the directors are also required to execute a solvency statement. This solvency statement is generic in its nature and is often prepared by the company's external accountant and signed by the director as just another spot to sign on the financial statements. The tax returns based on these financial statements are then lodged with the ATO sometime prior to mid May the year following the end of the prior financial year.

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We consider that a solvency statement should be completed and lodged with ASIC by all registered companies within three (3) months of the end of the financial year.

The solvency statement should not be entirely generic and should provide a considered opinion of the director, why, in their opinion the company is solvent and can remain solvent throughout the coming financial year. The lodgement of this statement would:

- hold directors of companies more accountable
- ensure the directors consider their financial position in a more timely manner
- potentially reduce insolvent trading and the impact on stakeholders
- provide a public statement that could be relied upon by any future appointed external administrators to a company
- result in directors potentially seeking professional advice at the earliest signs of trouble rather than when it is way too late, potentially driving a corporate recovery culture amongst directors and stakeholders

This would also tie in with the Education suggested below.

The lodgement of the solvency statement can impose a charge for its lodgement which will cover the ASIC lodgement and processing fees and the additional **\$4.22** per corporation to cover the \$9 million. This fee would most likely increase as not all would lodge.

Non lodgement should be met with a personal fine against the directors and regulatory inspection should occur promptly. It should also be considered that a company that cannot execute and lodge a solvency statement within that timeframe may be considered insolvent allowing prompt action to be taken by ASIC, ATO and other creditors. This could reduce the requirement for creditors issue a Statutory Demand for Payment and to rely on its default before issuing an Application to Wind Up.

### Education

We consider that education should be an important focus for ASIC. We note that most of the directors, especially of small proprietary companies, have very limited or inadequate knowledge of their duties or obligations as directors. ASIC should consider that before being eligible to be a director an online course should be conducted to ensure the new director can meet set minimum requirements regarding their director's duties/responsibilities / solvency and the consequences of their actions.

Such education requirements will also remove a number of hurdles when seeking to prosecute directors who claim to not understand, have no knowledge or to have relied entirely on the representations of their advisors regarding their duties.

Further the costs of such a course would more than adequately cover the \$9 million ASIC is seeking.

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ASIC statistics disclose that 5% of expenditure is on education. All relevant education has been run by ARITA and not ASIC. So we are unsure how this figure is derived.

Unwanted Outcomes resulting from a User Pays model.

1. Disincentive for formal Registration as a Registered Liquidator

The proposed level of application and registration fees are substantial, especially for a wage earner, not a partner. Then to consider that having obtained registration the wage earner would also be required to contribute an annual fee to maintain registration may see a first year Registered Liquidator required to provide in excess of \$25,000 to ASIC. This cost would be a significant disincentive for persons to apply to become registered liquidators and may lead to a significant increase in unregulated insolvency advisors.

This significant cost impost also creates a barrier to entry which decreases competition.

2. Unregulated and Unregistered "Pre Insolvency" Advisors

This unregulated "pre insolvency" advisory space is already significantly undermining the corporate governance system by perpetuating phoenix activity and in some cases, committing frauds to achieve outcomes that are designed to protect directors and their assets, divest companies of their assets and leave the creditors of the company without funds or recourse.

Many of these unregulated advisors are utilising the ASIC insolvency notices website and the court lists to solicit an engagement with often vulnerable persons and companies.

We are strong in our opinion that there needs to be regulation around these advisors which could be simply done by making them required to be licensed, similar to the licensing regime for financial advisors (Australian Financial Services Licence).

In these circumstances, suspect providers can have their licences cancelled, those that are unlicensed can be subject to criminal and civil sanction.

We are also of the opinion that operators in this area will be subject to increased surveillance and enforcement costs and the costs of a licence should be appropriately set to reflect this. We note that this sector is significantly different and separate from Registered Liquidators in that pre insolvency advisors act for the directors and the company not all of the stakeholders. There are no investigations or other breach reporting requirements. There is no level of self governance. In short their goals are not congruent with an effective corporate governance system and are not an extension of the regulator like a Registered Liquidator.

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This area of advisors appears to be populated by people with no formal qualifications, or membership bodies and have no consequences to their advice or actions.

Summary

1. We oppose the user pays model as proposed for Registered Liquidators
2. Registered Liquidators should be exempt from any user pays model considering their unique role in the corporate system
3. Registered liquidators are effectively an extension of ASIC investigatory powers
4. Registered liquidators provide a significant amount of unfunded work which should be considered in any proposed model
5. We support the alternatives model proposed in this submission
6. We have concerns regarding the proposed system and its governance
7. There is insufficient detail or analysis provided supporting the claims that a user pays model will drive efficiency, improve transparency and accountability.
8. There needs to be stronger fines and enforcement for non compliance of directors
9. We believe minimum education requirements for prospective directors should be met and the minimal cost will meet the funding requirements
10. There needs to be strict regulation and licensing of unregulated insolvency advisors.

Should you have any queries do not hesitate to contact one of the directors named below on 03 9818 8800.

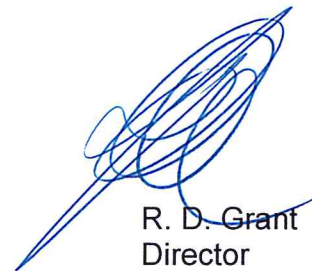
Yours faithfully



N. Giasoumi  
Director



S. L. Deane  
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R. D. Grant  
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