



PITCHER PARTNERS

ACCOUNTANTS • AUDITORS • ADVISORS

Level 19
15 William Street
Melbourne
Victoria 3000

Level 1
80 Monash Drive
Dandenong South
Victoria 3175

Postal Address:
GPO Box 5193
Melbourne Vic 3001
Australia

Tel: +61 3 8610 5000
Fax: +61 3 8610 5999
partners@pitcher.com.au
www.pitcher.com.au

J BRAZZALE
R RIGONI
G M RAMBALDI
D A KNOWLES
M C HAY
V A MACDERMID
P A JOSE
M J HARRISON
T SAKELL
G I NORISKIN
A T DAVIDSON
C D WHATMAN
A E CLERICI
P MURONE
A D STANLEY
D C BYRNE
P B BRAINE
R I MCKIE
F V RUSSO
M R SONEGO
S J DALL
D W LOVE
A SULEYMAN

A R FITZPATRICK
M W PRINGLE
D A THOMSON
M J LANGHAMMER
S SCHONBERG
S DAHN
A R YEO
P W TONER
D R VASUDEVAN
B J BRITTEN
K L BYRNE
S D WHITCHURCH
D J HONEY
G J NIELSEN
N R BULL
A M KOKKINOS
G A DEBONO
R H SHRAPNEL
T G HAIR
A T CLUGSTON
M G JOZWIK
B POWERS

9 October 2015

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

By email: asicfunding@treasury.gov.au

Pitcher Partners' Submission on Proposed Industry Funding Model for the Australian Securities and Investments Commission

Pitcher Partners welcomes the opportunity to comment on the Proposed Industry Funding Model for the Australian Securities and Investments Commission Consultation Paper of 28 August 2015.

We preface our more detailed comments relating to Attachment D - Funding Model for Registered Liquidators - by noting that all regulatory activities by the Australian Securities and Investments Commission ('ASIC') are to be funded by industry participants; yet the Australian community generally, Australian taxpayers, the Australian Government, the Australian Taxation Office, and the business community broadly also share in the benefit of regulation by ASIC and the legislation under which it operates. A cost recovery model that ignores the wider public benefit from ASIC regulation and which is without commensurate contribution via Government consolidated revenue is not consistent, in an equity sense, with a regime which benefits those beneficiaries above (as well as those creating the need for regulation).

We now provide the following commentary on questions 43 to 46 at page 51 of the Consultation Paper:

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

Pitcher Partners do not support either of the two proposed methodologies for levying liquidators.

Under the proposed metric of 'assets realised', calculated based on the total assets realised during the relevant period in an external administration, the Consultation Paper suggests that those registered liquidators who complete an administration with higher asset values generally present a larger risk and require more regulatory oversight. To the extent that the amount of the levy is based on an argument (as set out in the Consultation Paper) that there is a positive correlation between risk and asset realisation value, we note that, as registered liquidators, we do not agree with this inference. We would have concerns about the accuracy of a model in which a risk based levy is determined based on asset realisations alone, noting that the cost of the regulatory activities will not be levied accurately on those creating the need for regulation. Rather the cost will be placed on the industry participants who collect the greatest value of assets.

The Consultation Paper on page 51 provides that levying liquidators on the basis of 'assets realised' would promote greater harmonisation between bankruptcy and corporate insolvency laws. In bankruptcies the liability to pay the asset realisations charge is that of the practitioner, but the amount of charge paid is borne by the estate or administration. This aspect is not discussed in the Consultation Paper. But presumably if the ASIC levy follows the bankruptcy scheme, the levy will be paid from funds held or realised by the company under external administration. This is a significant difference. To the extent that instead the matter is driven by a decision to assist in harmonisation between bankruptcy and corporate insolvency laws, rather than a methodology to determine a risk based levy for liquidators, then we note that tiering on assets-realised methodology has more merit than tiering on the number of external administration appointments.

We believe that it is very difficult to argue that an equitable contribution arrangement could be achieved through the second proposed metric, being a levy for liquidators based on the number of administration appointments (new and ongoing) undertaken each year. We refer to the research report titled '*An Analysis of Official Liquidations in Australia*' undertaken through the Australian Restructuring Insolvency & Turnaround Association's (then the Insolvency Practitioners Association of Australia) Terry Taylor Scholarship for 2012. The report analysed the nature of insolvency administrations undertaken by Official Liquidators pursuant to court appointments. According to survey responses, the average cost to administer an official liquidation (inclusive of remuneration and disbursements) was \$18,066 over an average period of seven to twelve months. In respect of assetless official liquidations (realisable assets of \$0 to \$10,000), the recovery rates for the Official Liquidators' remuneration and disbursements were 2 per cent and 12 per cent respectively. Extrapolating these results to an annual basis, insolvency practitioners are therefore required to personally fund disbursements of \$1 million and remuneration of \$32 million in the conduct of their roles as Official Liquidators of assetless official liquidations. These results alone suggest that to impose additional costs to practitioners in accepting these appointments, in addition to the financial risk they already pose, would be a further disincentive to consent to act. Further, setting a levy based on the number of appointments undertaken would act as a deterrent against Official Liquidators accepting Official Liquidations (which tend to have the greatest proportion of unfunded matters). It would be a serious concern to us were this to occur, given that there is a significant public benefit of such matters being accepted and proper investigations and reporting being undertaken.

44. *Would any of the proposed levy arrangements for registered liquidators not be competitively neutral? If so, why?*

As discussed above, we consider that, in particular, the number of appointments-based levy would result in a disproportionate amount being paid by certain registered liquidators who undertake volume (potentially low value) work. This may still be the case in relation to a levy based on asset recovery, where engagements with a higher asset base (typically undertaken by larger firms) would, despite the payment of a levy, still result in the full recovery of professional remuneration. This can be compared to a potential shortfall in small asset based matters where a shortfall in remuneration may occur to the extent of the levy being imposed.

45. *Would any of the proposed levy arrangements for registered liquidators not support small business? If so, why?*

The imposition of a levy may impact small business for two reasons. The first being that where there is a surplus of assets over the costs and expenses of the liquidation, then the amount available for a dividend will ultimately be reduced by the amount of any levy. Secondly, Insolvency Practitioners play an important 'clean up' role of failed small business facilitated through the court winding up process. Without this function, proper investigation and reporting to the ASIC of directors failed businesses, the recovery of assets and the commencement of actions for the benefit of creditors would not be readily available. The function of undertaking court liquidations is already one that presents financial risk to a registered liquidator. Any levy imposed on a liquidator may be a disincentive for some registered liquidators resulting in the avoidance of such appointments. The role that Official Liquidators play in such liquidations is vital for small business.

46. *Would any of the proposed levy arrangements for registered liquidators not support access to liquidators in regional Australia? If not, why not?*

We do not have a specific view concerning this question, although our comments with respect to the impact on small business is likely to have a similar impact on those small businesses based in regional Australia.

If you have any questions in relation to our submission, please contact myself on 03 8610 9261.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Yeo', with a long, sweeping underline that extends to the left.

Andrew Yeo
Partner
Pitcher Partners
National Business Recovery and Insolvency Services