



ASIC
Australian Securities &
Investments Commission

Committee	Parliamentary Joint Committee on Corporations and Financial Services
Inquiry	Inquiry into Corporate Insolvency in Australia
Question No.	003
Topic	Recommendation 27 from ARITA's submission to publish ASIC algorithm
Reference	Spoken, 14 December 2022, Hansard page 69-70
Committee member	Senator Paul Scarr

Question

Senator SCARR: You can go all the way down to Z if you like! I'm interested to see what your reaction is. This is from ARITA's submission and their recommendations:

Recommendation 27: The Committee should recommend that ASIC publish the algorithm that it applies to reports lodged by registered liquidators and demonstrate how it aligns to its published enforcement priorities and the reporting obligations of registered liquidators.

So should ASIC open this black box and shine a bright light into it?

Mr Day: I think the answer is that we should always explain the types of things we're taking into consideration when we make our regulatory decisions. I think that's just part of the way we go about it. We try to be as transparent as we can as a regulator. I'd be loath to say we'd open up all the inner workings of the 'black box', as I think you're describing it, mainly because we've seen a bit of gaming of it in other spaces.

Senator SCARR: On that point, which was raised by some of the witnesses, who are you concerned is doing the gaming? What is their motivation?

Mr Day: I think, as you've seen, there are a lot of liquidations in Australia where there's no money. Getting a formula together where your 533s will tick the box and then go through to the next level nearly all the time because of the way they've answered it probably doesn't quite work. The other thing is that, by publishing that, we're nearly showing the broader public what things we take into account in what we might take enforcement action on, compared to other things. And the answer is that, at any one time, it depends on what other problems we're seeing in the market. It's not really the liquidators; it's actually those people who are probably trying to avoid detection or avoid us identifying misconduct. For example, a corporate lawyer might say to their clients, 'Well, we've seen what ASIC pays attention to in section 533 reports, so, as long as you only do it this way, you probably won't run afoul of their algorithm and you'll be fine.' So there's that issue.

Senator SCARR: Can I ask you to take on—

Mr Day: I've convinced you, have I, Senator?

Senator SCARR: No, not yet. I'm reserving my position and regrouping, Mr Day.

Mr Day: I just wanted to see what you meant.

Senator SCARR: I request that you take on notice the issue as to whether or not it would be possible to provide more meaningful material to the profession itself with respect to the sorts of things ASIC takes into account, in order to redress what is obviously a good-faith concern that the profession has. They've raised it with us, so it would be interesting to know whether there's a workaround that doesn't trigger the concerns you've raised.

Mr Day: We'll absolutely take that on notice. I think that, as part of that, we'd probably endeavour to identify areas where we've spoken to practitioners and the information we've given to practitioners explaining, within the limits of what we can, about that.

Answer

ASIC receives a large number of Initial Statutory Reports (ISR) each year and must consider which ones it can apply its resources towards to take appropriate further action consistent with [Information Sheet 151 ASIC's approach to enforcement](#).

The form uses conditional logic, and provides different questions depending on answers to previous questions.

The conditional logic framework is necessarily a constantly evolving one, intended to be adaptable and respond to ASIC's priorities over time.

Depending on the answers to the questions, the following factors are evaluated to determine whether a supplementary report is requested from the liquidator:

- any Director of the company under administration has had two or more recent section 533 (ISR) reports against them
- there is active or inactive further action being (or been) taken by ASIC
- the company failed to submit an annual return or accounts in the last 5 years
- the company holds a permission from ASIC, and
- charges have recently been laid against the Company.

All Supplementary Reports received by ASIC are manually assessed to determine whether ASIC will take further regulatory action against the company or its directors.

ASIC meets regularly with Registered Liquidators, including bi-annual Regional Insolvency Liaison Meetings. These meetings afford Registered Liquidators the ability to ask questions of ASIC and provide feedback on any important industry matters, including the ASIC priorities and ASIC's approach to taking further regulatory action upon receipt of an ISR.