

26 September 2023

Committee Secretary  
Senate Education and Employment Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [eec.sen@aph.gov.au](mailto:eec.sen@aph.gov.au)

Dear Committee Secretary

### **Fair Work Legislation Amendment (Closing Loopholes) Bill 2023**

Thank you for the opportunity to provide a submission to the Senate Education and Employment Committees' inquiry and report into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill).

ARITA is the professional body for those practicing in the area of financial distress and as such we have only considered the Bill to the extent that it relates to the small business redundancy exemption. We note that ARITA was key in advocating for amendments to correct the anomalous position created by the loophole.

In 2019 our members raised concerns with us regarding the practical operation of the small business redundancy exemption in section 121 of the *Fair Work Act 2009* (Cth) (FWA) and the potential inequities that can arise for some employees during the redundancy process. ARITA raised these concerns with the Fair Entitlements Guarantee (FEG) team and Treasury at the time and have continued to raise them periodically since.

We therefore support the proposed reforms in the Bill which address the unintended and inequitable outcomes for employees whose employment is terminated after their employer, which was previously a larger business, becomes a small business employer as a result of headcount reductions arising from a formal insolvency process. The current process sees employees who are not made redundant until after the business falls in size to become a small business employer, by employing less than 15 employees as prescribed in section 23 of the FWA, lose their previously held entitlement to a redundancy payment once they are terminated.

By way of example, a registered liquidator is appointed to XYZ Company which has 100 employees. The registered liquidator assesses that there is no possibility of saving the company by trade-on sale or similar and commences the shutdown of XYZ. The liquidator immediately makes 90 staff redundant. Ten staff are not made redundant in order to ensure the orderly realisation of the remaining assets. At this point, XYZ technically becomes a small business employer and does not have to pay redundancy, even though it was a large business at the time it went into liquidation. At the end of the winding up, the remaining ten staff are made redundant but are not entitled to any redundancy payments, missing out on a payment (whether by the liquidator, if there are sufficient funds or FEG if there are not) that they would have otherwise received if they were terminated at the same time as the bulk of the staff.

Any delay in enacting the small business redundancy exemption reforms means that employees may continue to miss out on redundancy pay during a formal insolvency process.

While we make no comment on the other provisions of the Bill, we urge the committee to recommend that these reforms be passed.

Should you wish to discuss any of these matters further with ARITA, please do not hesitate to contact our Technical & Standards Director, Ms Narelle Ferrier on 02 8004 4350.

Yours sincerely

  
**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 close to 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

We are a not-for-profit, incorporated professional association run for the benefit of our members.

Around 82% of Registered Liquidators and 86% of 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 2022, ARITA delivered 82 professional development sessions to over 5,000 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 14 inquiries, hearings and public policy consultations during 2022.