ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

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Dr Stuart Turner
Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: corporations.joint@aph.gov.au

Dear Dr Turner

Corporate Insolvency in Australia Inquiry

Thank you for your letter of 23 December 2022 and the opportunity to make a further contribution to the Committee's inquiry into corporate insolvency.

The attached submission provides responses to the questions set out in your letter and some other commentary that we feel will be helpful to the Committee.

We look forward to participating further in the considerations of the Committee, and if you require any further information please contact Dr Warren Mundy at wmundy@arita.com.au or on (0409) 911 554.

Yours sincerely

John Winter
Chief Executive Officer

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1 Introductory comments

ARITA welcomes the opportunity to make a further contribution to the Committee's inquiry into corporate insolvency. We have appreciated the thoughtful and constructive way the Committee has conducted this inquiry and its obvious commitment to meaningful non-partisan reform of Australia's insolvency framework.

In the remainder of this chapter we provide some high-level observations of the progress of the inquiry to date and some specific issues that have emerged during the hearings that we wish to make some substantive comments on. As for the remainder of this submission, chapter 2 addresses questions on notice, chapter 3 addresses the questions the Committee has asked of all participants and chapter 4 identifies and/or corrects some points made in evidence by others. Whilst we have adopted the same section numbers as is found in the Committee's letter, for the sake of brevity we have not repeated the individual questions.

1.1 A substantive consensus is emerging for the evidence before the Committee

Whilst the Committee has asked for feedback on recommendations advanced by other participants, which we address in section 3.12(a), we thought it would be helpful to briefly summarise what we see to be an emerging consensus in the material now before the Committee:

- Australia's insolvency system is too complex from the perspective of small and medium businesses and this is leading to excessive cost, reduced incentives and likelihoods of business turnaround, and low returns to creditors.
- The primary cause of this is the legislative complexity, particularly in relation to small business restructuring and simplified liquidations, and the separation of personal and corporate insolvency.
- Practitioners are not being remunerated properly for the necessary work they do in relation to small insolvencies.
- The cost of small insolvency administration could be reduced by more nuanced, risk-based reporting requirements and the bringing together of personal, corporate, trust and partnership insolvencies under a single law administered by a single insolvency agency.
- The system seems to be generally working well for listed and other large businesses although legislative simplification and better education of both directors and creditors would be welcomed.
- A substantial (root and branch) review is generally preferred over piecemeal reform to legislation which the ALRC already considers is not fit for purpose.

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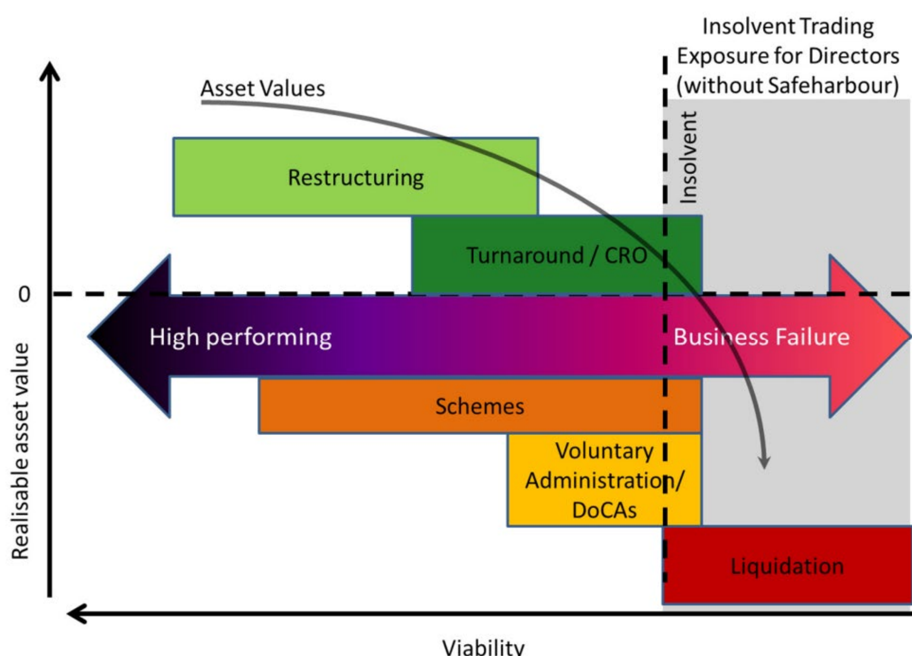
1.2 Financial distress lifecycle

The Committee, as did the Productivity Commission in 2015 (the PC), has heard that Australia has historically had a weak turnaround culture: although this has been significantly ameliorated by reforms such as safe harbour. It does seem that there is a lack of understanding about the relationships between viability and insolvency and what tools are available when businesses face challenges. We call this the financial distress lifecycle and find the following diagram helpful in understanding it.



It is important to note that the liquidation of a company occurs at the end of the financial distress lifecycle where the realisable value of assets, if any remain, has diminished and the opportunities for restructure, turnaround, or rehabilitation through a voluntary administration or small business restructuring no longer exist.

At this point, the company is, in all likelihood, insolvent and as such the appointment of a liquidator is required. It is not the appointment of a liquidator that causes the insolvency but rather it is usually the conduct of the business' operator in running the business and not dealing (willingly or otherwise) with the financial distress earlier.

Taking into account statutory priorities where employees and/or secured creditors are entitled to payments in advance of unsecured creditors and for the appropriate payment of liquidator's remuneration, this means that the majority of liquidations commence without any likelihood of a material return to unsecured creditors, let alone the providers of equity to the business. To reiterate: this is because most insolvent businesses have so few net assets at the point where they formally declare insolvency that there cannot be any hope of material returns to creditors. This isn't a failing of the insolvency regime, it's the reality of why businesses become insolvent.

The simple fact is that if a business is to be rescued, or where that is not possible, to return more money to creditors in a liquidation, the directors need to take action earlier when net asset values are higher and provide more opportunities for restructuring. As many participants have noted, outside major and listed companies, most directors are neither aware of their obligations nor their options. Correcting this lack of knowledge is one of the main reasons why Australia needs a for-purpose best practice national insolvency agency.

1.3 There has been substantive change in the policy environment since 2015

In responding to a question from Senator Scarr, the Chair of the PC indicated, correctly, that the PC did not recommend the adoption of a single insolvency law and posited the question "what has changed since 2015".

As we indicated in our primary submission, there is an absence of detail provided by the PC regarding the basis for it not recommending a single insolvency law.[1] We also note that the current Chair of the PC was first appointed just under three years *after* the PC provided the report in question to the government and, as indicated in its evidence to the Committee, the PC has had very little involvement in this policy area since.

It is our strong view, informed by Dr Mundy's recollections as the Presiding Commissioner on the PC's 2015 Inquiry, that the policy environment today is very different to that in which the PC undertook its work and that, as a minimum, if the Committee does not feel it can recommend the government develop a unified regime, it should recommend that a detailed review of such be undertaken.

The current policy environment is different to 2015 in the following regards:

- *The structure of the economy has changed*. As the Chair of the PC noted in his evidence to the Committee, the "gig" or "platform" economy is a significant change that has emerged in the economy since the PC reported in 2015. We agree, but we suggest there are others that make ongoing reliance on the PC's reluctance to recommend more fundamental reform risky. These would include the increasing digitisation of the economy, especially in relation to the payments system and the keeping of books and records in the cloud, the massive growth in e-fulfilment compared to traditional premises-based retailing and wholesaling, changes in the distribution of services, especially in relation to travel, and the growth of home-based work and hybrid working arrangements accelerated by the pandemic. Indeed, even in the 8 years since the PC inquiry, our economy has further accelerated in its long-term transition to a more service/virtual-based (and less asset-based) economy.

- *There is new evidence of very different behaviours between the directors of small and large businesses*. As we noted in our primary submission, we undertook an

[1] ARITA 2022, *Submission to the Joint Parliamentary Committee on Corporations and Financial Services Inquiry into Corporate Insolvency*, Sydney, (ARITA Primary Submission), pp35-36.

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extensive survey of our members in 2021 about access to the safe harbour provisions.[2] That research revealed that the protections afforded to directors by the safe harbour regime had made limited difference to the behaviour of directors of small businesses. It further reinforced that directors of these businesses were more concerned with their personal liabilities for guarantees and tax debts than insolvent trading – in effect, they were operating the companies as if the business was unincorporated and an extension of the financial affairs of their principals.

If this is the case, and we do believe this to generally be the case in relation to small businesses (which constitute the bulk of distressed and failed businesses), then better alignment of personal and corporate insolvency should improve business outcomes and reduce personal distress in the event of business failure. It is our strong view that this is best achieved by a single insolvency law administered by a single, best-practice insolvency agency.

- *The PC Inquiry pre-dates additional complexity being added to the regime*. The PC Inquiry of 2015 predates the most significant rewriting of Australia's insolvency law which occurred as part of the *Insolvency Law Reform Act 2016* (ILRA). While this law reform changed little in terms of material benefit, it added vast complexity. At the time of the PC's Inquiry, there had been significant hope that the ILRA would be positively transformative. It was not, and this is despite it being the largest piece of legislation passed by the Parliament in that year. As noted elsewhere, we've had notable other subsequent reforms such as safe harbour, SBRs, simplified liquidations, ipso facto moratorium and the like, that while positive in many regards, regardless have added extra complexity. So, in short, much of the weight for fulsome reform has been added post the PC's work.

- *ALRC work on the* Corporations Act. The ALRC has identified significant and unnecessary complexity with the *Corporations Act 2001 (Cth) (Corporations Act)* that is likely to be more challenging for small businesses than other stakeholders. Although the PC was aware of the general complexity of the *Corporations Act* when it conducted its 2015 inquiry, the highly, counterintuitively complex, small business-related reforms of 2020 had not been enacted. More importantly, the PC was not in possession of the authoritative advice of the ALRC regarding the lack of fitness for purpose of the *Corporations Act* that the Committee now has the advantage of access to. Dr Mundy's view is that the PC would have had significant regard to such evidence if it was at hand.

- *ASIC performance.* There is heightened concern regarding the regulatory performance of ASIC, particularly in comparison to AFSA, which was not before the PC in 2015. We have taken the opportunity to review our submissions to the PC in 2015 with a view to determining whether we were as critical of ASIC then as we are now – the answer is that we weren't. We note further that the PC made no adverse commentary with regard to ASIC in 2015 and are strongly of the view that if it was in

[2] ARITA Primary Submission (2022), p42.

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possession of credible evidence that ASIC was under-performing as a regulator it would have said so, especially given the PC's 2013 work on regulator engagement with small business.[3]

The Committee is more aware than most of the broad and growing concerns with ASIC's performance in a range of areas. Our experience, and more specifically, that of our members, is that ASIC's performance in the insolvency space has deteriorated materially since 2015 and that whilst this of itself would not justify major structural change to the insolvency system, a major root and branch reform leading to a single best practice insolvency agency would provide a valuable regulatory circuit breaker and reset that would have the sorts of benefits described elsewhere in this and our primary submissions.

- *The level of advocacy for change has heightened*. Much like parliamentary committees, the PC responds to and develops its policy propositions from the material placed before it via its public inquiry processes, although we acknowledge that the PC's resourcing gives it far greater capacity to undertake self-initiated research. The PC acknowledges in its 2015 report that it had received "several" submissions suggesting a unified law[4] but it is clear from the wider body of submissions, the transcript of public hearings and the final report that this issue was not front of mind for participants or the PC. The key issues were around saving potentially insolvent but viable businesses and improving the approach to small business insolvency (including dealing with assetless administrations).

  The notion of a "root and branch review" is hard to find in the materials surrounding the PC's 2015 inquiry. This is in stark contrast with the Committee's inquiry where the majority of professional, academic and government participants (including ASBFEO) in written and oral evidence have either advocated for, or when asked, supported, a unified law or suggested such should be considered as part of a root and branch review. Many of these participants, including ourselves, were participants in the PC's inquiry. What should be taken from this is that the operation of the insolvency system in Australia has changed since 2015 in ways those who operate within it feel now requires fundamental reform.

1.4 The business model of insolvency firms

Fee levels of insolvency practitioners

The Committee has raised concerns regarding the quantum of remuneration of insolvency practitioners and their hourly rates, which are seen by some as unjustifiably high and possibly inflated to offset the excessive cost of unfunded work done by the profession.[5]

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[3] Productivity Commission 2013, *Regulator Engagement with Small Business*, Research Report, Canberra.
[4] Productivity Commission 2015, *Business Set-up, Transfer and Closure, Final Report 75,* Canberra, p333-334.
[5] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Tuesday, 13 December 2022, Canberra, p33.

Similar concerns were raised by the Senate Committee inquiry into Lending to Primary Production Customers in 2017. In giving evidence to this Committee, Mr Winter noted as follows.

> *If you looked across the different accounting firms, you would find that insolvency partners are paid less than their equivalents in tax or audit—and yet they often have far higher levels of training and skill. That is evidence of the high level of competition. It is one of the most complex jobs in the country. Ten percent of all legislation passed in the Senate last year related to insolvency law. Trying to stay on top of the complexity and the enormous amount of red tape requires high-level professionals. As you heard in earlier evidence, it also requires those professionals to have enormous skills. They need to be able to go in and assess a wide variety of businesses.*
>
> *There is one other very significant point that has been made a number of times but probably not picked up strongly enough. Whenever a liquidator goes into these types of businesses, they immediately take on personal liability for trading that entity. Think about some of the big insolvency appointments. You expressed concern about the fees relating to Cubbie Station, for example. That is a multimillion-dollar trading enterprise with enormous risks—and that individual is asked to personally carry the liability. In that sort of environment, I would be hard-pressed to say those fees were unreasonable.*[6]

We maintain (noting the absence of any analysis to the contrary) that the hourly rates charged by insolvency practitioners are not excessive and that the quantum of remuneration is reflective of the nature and extent of work required under the legislation rather than excessive practitioner remuneration.

In the past, ARITA (then the Insolvency Practitioners Association of Australia (IPAA)) issued a guide to hourly rates which became a standard accepted as reasonable by courts and many creditors. This guide was reviewed by the Australian Securities Commission (now ASIC) on an annual basis and a major review, funded by the IPAA, was conducted triennially. The guide was also given legislative recognition in the context of personal insolvency in instances where the creditors of a bankrupt estate failed to fix the trustee's remuneration, and remuneration was calculated in accordance with the guide.

A Government review of the Regulation of Corporate Insolvency Practitioners in 1997 addressed the question of the basis of remuneration and concluded that:

> *the market should be allowed to determine the most cost effective fee systems, however it sympathised with the view that that the public interest is not necessarily best served by minimising the cost of administrations at the expense of quality.*[7]

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[6] Official Committee Hansard Senate Lending to Primary Production Customers Friday, 20 October 2017, Canberra, p41.
[7] Review of the Regulation of Corporate Insolvency Practitioners Report of the Working Party, June 1997, Chapter 10, p15.

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This review also referenced a report by the former Trade Practices Commission[8] expressing concern about features of the guide to hourly rates for remuneration for insolvency practitioners on the basis that it had the potential to affect the impartiality and efficiency of insolvency administrations.

In response to the review and concerns regarding the guide's impact on price competition in the market, the guide was discontinued in 2000 and replaced by a Statement of Best Practice – Remuneration. Importantly, this guidance defined the 'Firms Fee Structure' to mean the rate per hour that the Appointee or the Firm of the Appointee proposes to charge to the administration for the principals and staff, based on the perceived complexity and demands of the administration and those most suitable with relevant experience to be assigned to it.

In the table below we have escalated the 1999 rates using the ABS Producer Price Index for legal and accounting services (series 693) to get an estimate of how reasonable these rates might be today. This should better reflect the growth in input costs for insolvency practitioners, which include staff training, professional indemnity insurance and technology expenditure, in addition to general increases in remuneration of staff.

By way of comparison, we also provide examples of hourly rates currently charged by what would broadly be described as small and large end insolvency firms in the Sydney market. What is interesting is that the rates of the owners of the firm are below those expected from 1999 whilst more junior staff are above. This more likely reflects general labour market conditions than excessive returns being earned by principals.

Professional designation	1999 Guide to Hourly rates (Sydney)		Current Actual Insolvency firms (Sydney)	
	Actual $	Adjusted[9] $	Small $	Large $
Partner	377	818	680	795
Director	296	642	590	745
Manager 1	242	525	545	595
Manager 2	183	397	500	
Supervisor	154	334	420	545
Senior 1	137	297	390	495
Senior 2	112	243	355	
Intermediate 1	95	206	390	425
Intermediate 2	89	193	265	
Junior	49	106	220	375

[8] Trade Practices Commission, Study of the Professions, Final report—July 1992, Accountancy, pp74–82.
[9] Calculated using Australian Bureau of Statics, Producer Price Indexes by Industry series 693 – Legal and accounting services.

Unfunded work/unrecoverable fees/cross-subsidisation of fees issues

The Committee has also raised concerns about the viability of firms given the significant unfunded work and unrecoverable fees experienced by registered liquidators.[10] This has long been a feature of the insolvency profession.

The 1997 Government review also made the following observations in relation to the unpaid work done by the profession, which were echoed in the PC's 2015 Report.

> *A threshold issue in relation to assetless companies is whether there is any point in liquidating them as creditors do not stand to recover anything in any event. This issue was considered by the ALRC in the Harmer Report. The ALRC was of the opinion that there were strong reasons for encouraging administrations of assetless companies. Allowing an assetless company simply to lie dormant, eventually to be deregistered, means that there would never be a review of the company's activities by someone other than the company officers. Unscrupulous directors could improperly move assets out of companies into related companies or appropriate the corporate property themselves. As long as they do not leave enough assets behind to pay for an administration, their activities would probably not be subject to scrutiny and they would not be subject to clawback provisions and other remedies available to a liquidator. Furthermore, the regulator would not find out about the conduct so the directors would not be subject to action by the regulator. This would leave little in the way of deterrence for illegal conduct and entering voidable transactions—rather it would be likely to encourage abuse.*[11]

These historical concerns for a mechanism to deal with unfunded work supports the recommendation from our primary submission that the Committee adopt our recommendation 23 which is based on those made by the PC in its 2015 Report.

While it remains problematic that such an amount of unfunded work is required and it may act as a significant disincentive for some liquidators to undertake some types of insolvency work, we do not agree with the view that this leads to a direct cross-subsidisation of work on unfunded jobs by creditors of other appointments which are "in the money". Indeed, there is no empirical evidence to support this claim and if anything, our view is reinforced by the fee table above.

We further add that the business model where work does not get remunerated is far from unique to the insolvency profession.

One example we offer is in the recruitment profession. Recruiters undertake two types of work: retained (fee agreed to up front regardless of performance) and contingent (work speculatively undertaken where payment only occurs on successful appointment of a

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[10] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Tuesday 13 December 2022, Canberra, p6.
[11] Review of the Regulation of Corporate Insolvency Practitioners Report of the Working Party, June 1997, Chapter 10, p20.

candidate). It’s not ever suggested that the retained clients subsidise the contingent and in practice they do not. This analogy holds completely for insolvency practice.

Our concern about the extent of fee write-offs for the insolvency profession is that they are entirely unnecessary and unfair compared to if the legislation was better crafted and risk-based.

1.5 Insolvency Practitioners save businesses

During the hearings observations to the effect of “insolvency professionals are good at liquidating business but they don’t have the skills to run businesses”. This is not the case.

Insolvency practitioners are highly skilled professionals with skills in both the formal external administration of companies and the ability to assess and turnaround businesses outside of a formal appointment, including as a safe harbour advisor. Saving businesses is at the core of the work insolvency practitioners do.

We provide the following brief examples of the complex work done by liquidators.

Business rescue via voluntary administration

The very concept of Part 5.3A of the *Corporations Act*, the voluntary administration provisions, is for insolvency professionals to take over a business, run it successfully and rehabilitate it for sustainable future profitability. In addition, the concept of safe harbour, in which insolvency practitioners are the most likely lead of such appointments, also requires exactly that: for the insolvency practitioner to create and advise on the successful running of the business for a sustainable future.

The evidence of Mr Winter to the Committee[12], referred to high profile examples of this, namely the recent administrations of Virgin and Arrium. In both instances, the registered liquidators appointed as Voluntary Administrators took over the day-to-day running of those highly distressed businesses. They operated the businesses for some time while rehabilitating their operations and cleaning up their financial positions. They then sold the remaining viable business to owners who installed new management. This was only possible due to the high level of skill that insolvency practitioners have in running businesses, and particularly those in distress: a skill set that other business advisors may not have.

Safe harbour engagement

Safe harbour is one of the main rescue tools available to distressed businesses. The legislation requires that a safe harbour is overseen by “an appropriately qualified entity” (AQE). While an AQE is inadequately identified, a fact that the Safe Harbour Review panel drew to the attention of Parliament in its final report[13], it is generally accepted that an AQE either needs to be a registered liquidator or it requires the support of a registered liquidator.

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[12] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Wednesday, 14 December 2022, Sydney, p10.
[13] Review of the Insolvent Trading Harbour Report, 23 November 2021, p52.

This is for good reason: a registered liquidator has the unique skill set to appraise and assess the viability of a business and its value at the end of all alternate rescue or shutdown solutions. In addition, it is the unique business rescue skills of a registered liquidator that position them best to be an AQE.

As noted in the Review of the Insolvent Trading Safe Harbour report: "Safe harbour is … not a public process. It relates to confidential board decisions and does not usually become public unless the company enters a formal insolvency process (and even then, there is little public data available). There are good reasons for this: publicising a company's financial distress during a period of safe harbour can have dire consequences for its liquidity and ongoing ability to trade."[14]

For this reason, public domain information on successful safe harbours is naturally limited.

We have been provided with the following information on a successful safe harbour engagement undertaken by ARITA President and William Buck Director, Mr Michael Brereton.

> *Following engagement as Safe Harbour Restructuring Advisors to the directors of an ASX listed company, we assisted the directors to navigate through the Safe Harbour legislation to minimise the directors' personal liability for insolvent trading.*
>
> *Our role included assisting with the development of the restructuring plan and ensuring ongoing compliance with statutory responsibilities.*
>
> *The advisory role included:*
>
> - *Working proactively with management on the restructure, including actively managing the company's relationship with the workout team at the company's secured creditor, including negotiations of a Standstill Agreement and revised covenants.*
> - *Assisting in the Board's assessment of potential voluntary administrators and assisted management to brief the potential voluntary administrator for a potential appointment, which ultimately was not required.*
> - *Working in conjunction with the company's other advisors to ensure the best outcome for the company, which ultimately resulted in the successful recapitalisation of the company.*
>
> *This process ensured that the company continued to operate as a going concern and resulted in the ongoing employment of approximately 250 employees, whose jobs would have been lost in either a voluntary administration or liquidation scenario.*

[14] Review of the Insolvent Trading Harbour Report, 23 November 2021, p4.

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2 Questions on notice

Senator O'Neill asked us to respond to a number of questions on notice for which the Committee has sought a response. In this section we first set out our responses to those questions and then several others which we also identified from the Hansard.

2.1 Complexity and financial risk that insolvency practitioners take on in performing their role

The role of an insolvency practitioner, especially in voluntary administrations, is unique. Generally, the practitioner takes control of a business they know very little about and accepts full personal liability for the debts incurred from the date of their appointment. While some may suggest that practitioners could undertake due diligence to understand the risks prior to taking on the appointment, Australia's insolvency framework has strict independence requirements that prohibit anything outside of engagement and minor planning meetings prior to accepting an appointment.

Aside from the personal liability risk assumed by practitioners, there are a number of other risks associated with their appointments. This includes all general officer obligations under the *Corporations Act*, workplace health and safety obligations, environmental responsibilities and the overarching risk that they undertake the work without certainty that they will be paid. Unless there are significant funds on hand at appointment, which the Committee would be aware is very rare, practitioners incur their time costs throughout the appointment but only get paid once assets are sold or recoveries made. Unlike the majority of professional service providers, who provide a service, render a bill and are paid in a timely manner, insolvency practitioners can carry their time costs until the completion of the appointment which might be years later. The Ansett administration is a good example of this.

Often recoveries are not possible without litigation and the practitioner often bears the significant risks associated with court processes, many of which were recently considered in the decision of *Re HRL Limited (in liq) & Anor* [2022] VSC 693.[15]

These risks are further complicated by the concerns raised in our primary submission regarding the conduct of FEG and the retrospective assessment of practitioners' decisions to trade on companies.

Some specific examples of these risks include:

- The decision of *EPA & Anor v Australian Sawmilling Company Pty Ltd (in liq) & Ors* [2020] VSC 550, where the Supreme Court of Victoria set aside a liquidator's disclaimer of contaminated land and determined that 'clean-up' costs are an expense of the liquidation thereby obtaining 'super priority' status in the appointment at the

[15] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2022/693.html?context=1;query=HRL%20LIMITED%20;mask_path=

expense of usual priority creditors and the *pari passu* treatment of general unsecured creditors.

- In the voluntary administration of ION Limited a line of credit in the amount of $20 million had to be obtained by the administrators to assist in the ongoing funding of ION Consolidated Group's businesses (including ION NZ) during the administration period.

- Litigation in the appointment of Joe & Joe Developments Pty Ltd (Subject to Deed of Company Arrangement)[16] was ongoing for a number of years and ultimately resulted in the court handing down a 'mixed result'. The failure of the business primarily occurred due to significant disputes between the former directors and extensive litigation between them. The Court determined that the matters on which the plaintiff failed would have taken up 70% of the time taken to prepare the case for hearing and the time taken at hearing, and the matters on which the plaintiffs succeeded approximately 30%. Accordingly, applying the rule that costs follow the event, it was determined that the plaintiffs should pay 40% (70% failed offset against 30% success) of the deed administrators' costs of and incidental to the hearing, excluding the justification phase. In finding that the practitioners had managed the company's business in a way that is prejudicial to the interests of its creditors or members, or have made an omission that is prejudicial, it was specifically noted that the failure was 'significant' but 'unintentional'.

- In an extreme example of personal liability and the risks associated with trading a business, in 2004 a registered liquidator was made bankrupt in relation to debts he allegedly accrued while acting as a receiver. In the belief that the business of the company would be sold, the practitioner kept it trading long after it could not pay its debts. As a result of the bankruptcy the practitioner lost his registration as a liquidator and had to leave the profession.[17]

2.2 How would reducing the complexity of the insolvency regime reduce the costs of insolvency practitioners

As have other participants, our primary submission outlines a range of instances where reducing complexity would reduce costs for practitioners. Such reductions would be reflected in the either the value of unremunerated work, or in increased returns to creditors.

Among these are:

- Bringing together all insolvency legislation into one Act and aligning the processes so that insolvency for companies, trusts, partnerships, incorporated associations and individuals are largely dealt with in the same way and a business would generally be

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[16] *Re: Joe & Joe Developments Pty Ltd (subject to a Deed of Company Arrangement)* [2014] NSWSC 1703.
[17] 'Liquidator stripped of his clients', Australian Financial Review, 22 May 2004.

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treated as a single economic unit rather than a range of separate legal entities. This would make the insolvency process easier to understand by debtors and other stakeholders and easier and cheaper for insolvency practitioners to implement.

- By improving the general level of understanding of insolvency regulation by reducing complexity and improving education, costs will be reduced by reducing the time spent by practitioners explaining to stakeholders their rights and obligations and the insolvency process. More generally, a simpler and better understood law will reduce the need of all stakeholders to obtain expensive advice.
- Reforming the information to be provided to creditors to ensure that it is limited to that which they need and understand, with a particular eye on the proportionality of the information requirement relative to the size of the insolvency. We note that quite aside from the significant cost in preparing lengthy reports, creditors are much more likely to engage with simplified, approachable reporting.
- Restricting the information provided by liquidators free of charge to government agencies (the ATO and FEG in the main) to that provided to other creditors unless the costs are met by the agency concerned.
- Adopting a risk-based approach to investigations thereby reducing investigations and mandatory reporting where no enforcement action is taken by the regulator – AFSA has such an approach, ASIC does not.
- Increasing the default remuneration amount would avoid or reduce the costs of obtaining approval of remuneration. There is a substantial expense associated with providing the high level of information required under the Act when seeking remuneration approval. Better statistics about the cost of liquidations would assist with determining what that default amount should be over time. The current default remuneration rate is uncommercially low and well below the cost of even administering a Members Voluntary Liquidation (a solvent liquidation of a business that does not need to be run by a registered liquidator).
- Simplified legislation and processes for small business restructuring and simplified liquidations, as set out in detail in our initial submission (in particular Appendixes A and B).
- By reducing the complexity of the priority of employee entitlements, and FEG's recovery processes, where there are secured creditors, concurrent appointments or subsequent appointments, costs associated with paying these classes of creditors would be reduced.
- Simplifying the interaction between insolvency and the PPSA in accordance with recommendation 12 of our initial submission so that insolvency practitioners do not spend limited resources on resolving the status of secured creditor claims on the PPS register.

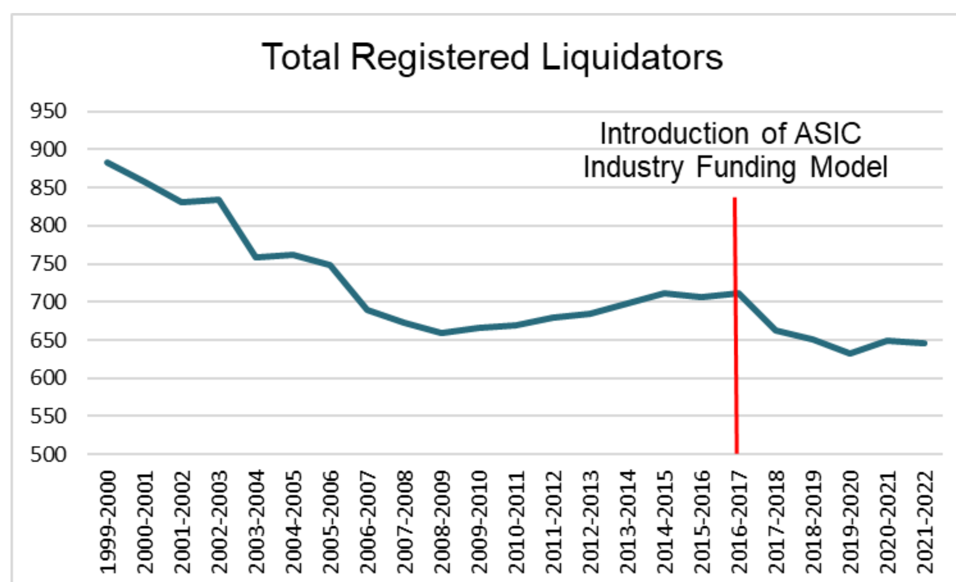
2.3 Cost obstacles to the collation of data on the performance of Australia's insolvency laws

We address this issue along with other data issues in section 3.6 of this submission.

2.4 Long-term trends in the professional insolvency workforce

The number of registered liquidators

There has been a dramatic fall in the number of registered liquidators in Australia in recent times. When ASIC's Industry Funding Model (IFM) was introduced there were 711 registered liquidators. This number fell to a low of 633 (down 11%) in 2020 but has steadied at around 650 with the aid of the government removing ASIC fees on liquidator registration applications for the two years of the COVID period.



A fall in the number of registered liquidators due to the imposition of ASIC's IFM was anticipated by ARITA. Concerns regarding the economic and market implications of the ASIC IFM on the insolvency profession were consistently raised in our submissions during the consultation period, in each subsequent submission on the draft annual Cost Recovery Implementation Statements and in our submission to the recent Treasury review of ASIC's funding model[18].

Data from our 2017 ARITA State of the Profession Survey regarding the impact of the [then] proposed imposition of the ASIC IFM on insolvency firms affirmed the above and indicated that:

[18] https://treasury.gov.au/consultation/c2022-317130

- 67% of firms will be more selective in the types of appointments taken (e.g. reject no or low funded jobs)
- 24% of firms will reduce their number of registered liquidators
- 13% of firms will reduce their total staff headcount
- 7% of firms will move away from taking formal insolvency appointments.

Like many businesses, these challenges were exacerbated by the pandemic and insolvency firms are also finding it difficult to find staff in the current environment with increasing demand for higher wages.

Diversity

We are pleased to see the Committee make focussed inquiries regarding the diversity of the insolvency profession. As highlighted in our, and others', submissions, diversity is a key issue for the profession.

As noted in our primary submission, ARITA is committed to improving diversity and inclusion in the profession through its Balance Taskforce[19], focusing initially on gender and age diversity.

ASIC provides some general diversity data[20] and key data on firm size, age and gender diversity is extracted below for the Committee's ease of reference.

Registered liquidators – Total by firm size						
	Firm size (number of registered liquidators)					
Period	**1**	**2-4**	**5-9**	**10-19**	**20+**	**Total**
2019-2020	115 (18%)	119 (19%)	97 (15%)	143 (23%)	159 (25%)	**633**
2020-2021	120 (18%)	136 (21%)	81 (12%)	139 (21%)	173 (27%)	**649**
2021-2022	116 (18%)	141 (22%)	87 (13%)	149 (23%)	153 (24%)	**646**

Registered liquidators – Total by age group						
	Age Group					
Period	**30-39**	**40-49**	**50-59**	**60-69**	**70+**	**Total**
2019-2020	90 (14%)	224 (35%)	193 (30%)	106 (17%)	20 (3%)	**633**
2020-2021	89 (14%)	226 (35%)	200 (31%)	115 (18%)	19 (3%)	**649**
2021-2022	84 (13%)	222 (34%)	204 (32%)	117 (18%)	19 (3%)	**646**

[19] More about ARITA's Balance Taskforce can be found at https://www.arita.com.au/ARITA/About_Us/Diversity___Inclusion/ARITA/About_Us/Diversity_and_Inclusion.aspx.
[20] ASIC Insolvency statistics – Series 4 Quarterly registered liquidator statistics – https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-4-quarterly-registered-liquidator-statistics/

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Registered liquidators – Gender					
	Australia-based		Overseas-based		Total
Period	**Male**	**Female**	**Male**	**Female**	
2019-2020	576 (91.0%)	55 (8.7%)	2 (0.3%)	0	**633**
2020-2021	589 (90.8%)	57 (8.8%)	3 (0.4%)	0	**649**
2021-2022	585 (90.6%)	59 (9.1%)	2 (0.3%)	0	**646**

Our Balance Taskforce, chaired by ARITA Deputy President and Registered Liquidator, Rachel Burdett, believes that the representation imbalance within the restructuring, insolvency and turnaround (RIT) profession is largely a result of social bias, inflexible job demands and expectations, and entrenched cultures and stereotypes.

The Taskforce has undertaken research, discussions and reflection on the challenges to increasing gender and age diversity. The issues identified – which were fairly consistent, regardless of the location or gender of the Taskforce member – include:

- lack of visible gender representation (you can't be what you can't see)
- client social bias
- rigid ways of working, specifically lack of flexibility within the profession
- challenges in attracting diverse talent to our profession due to stereotypes and perception.

These observations lead directly to the four areas of focus for the Balance Taskforce that have been expanded into a number of proactive initiatives which are in the process of being adopted by us in all areas under our control.

Given ASIC's acknowledgement that "the gender balance of the registered liquidator population does not reflect society and it doesn't reflect business" and claim that it has "had some programs in place for some time to try and increase that", we were particularly disappointed by the evidence of ASIC's Mr Day who indicated that gender disparity may "just" be a reflection of the "work the industry has to do".[21]

This unfounded statement is reflective of the bias identified by ARITA's Balance Taskforce.

Further, despite ASIC's statements to the Inquiry, we are not aware of any programs that ASIC has in place to address the lack of diversity in the profession.

ASIC also made reference to the registration requirement that an applicant have, during the five years immediately preceding the day on which the application is made, engaged in at least 4,000 hours of relevant employment in the preceding 5 years of employment.[22] The 4,000 hours of relevant employment requirement came in as part of the ILRA. The intent was

[21] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Wednesday, 14 December 2022, Sydney, p71.
[22] Insolvency Practice Rules (Corporations) 2016, s20-1(2)(c)&(d)

to ensure that applicants to become Registered Liquidators had a high level of recent, senior experience in the administration of financially distressed business. While the intent here is obviously laudable and, largely appropriate, what wasn't fully considered is the impact that this would have on anyone who took one, let alone more than one, reasonable period of parental leave in the previous five years. This, unsurprisingly, acts as a signal, primarily to women in the profession who take parental leave breaks, that they will not be able to apply to be a registered liquidator.

For completeness, we note that the relevant employment criteria for registration as a liquidator was amended by Insolvency Practice Rules (Corporations) Amendment (Corporate Insolvency Reforms) Rules 2020 to expand the scope of employment covered by the 4,000 hours requirement. A registration committee may also decide to register an applicant even if the committee is not satisfied that they meet the criteria.[23]

[23] Corporation Act 2001 Schedule 2 – Insolvency Practice Schedule (Corporations), s20-20(5)

3 General questions to participants

The Committee has posed a number of general questions to all participants. Whilst many of these have been addressed in our written and oral evidence, for completeness we have set out our responses here and where possible, for the sake of brevity, provided references to our primary submission and oral evidence.

3.1 Root and branch review

(a) We have been a strong advocate for a root and branch review of Australia's insolvency system for many years and this remains our view.

(b) Whilst Australia's insolvency system in not fundamentally broken, it is our view that it is not best practice and is in need of fundamental reform. In particular:

- It lacks a well-articulated set of objectives.
- As identified by many participants, and recently by the ALRC, the *Corporations Act* as a whole, and the law that is derived from it, does not exhibit legislative best practice and this is noticeably the case for Chapter 5 which has been developed in an *ad hoc* and non-systematic way for decades. Not only does this mean the law is difficult for practitioners to work with, it is inaccessible to the vast majority of directors and creditors of businesses small and large alike.
- Australia's corporate insolvency system is directed at the insolvency of large business with directors whose financial affairs are largely separate to those of the business, and it is a system that works quite well. However, the vast bulk of insolvencies are small businesses. Not only should these businesses be the primary focus of the system but recent changes to simplify and quicken small business turnaround and liquidation, whist well motivated, have failed to meet the expectations of the PC who recommended them and the Parliament that legislated them.
- By separating personal from corporate insolvency, and failing to address trusts and partnerships at all, the regime as a whole fails to recognise the underlying legal and economic relationships within most Australian businesses.
- The administration of the corporate insolvency system by ASIC is inefficient and has not contributed to the development of a strong turnaround culture as hoped for by the PC and the Turnbull Government.
- The conduct of other government agencies, most notably the ATO and the FEG Recovery Unit, add significant additional costs for no apparent public or private (i.e. creditor and employee) benefit and indeed often run counter to the intent of the regime, for example, to maintain the *pari passu* status of the ATO with other unsecured creditors.

- International evidence, primarily from the OECD which post-dates the PC's inquiry report, suggests the sorts of reforms we have proposed will improve macroeconomic outcomes and may be more important to economic growth than policies to encourage business formation or artificially prevent business closure.[24]

(c) A number of parliamentary committees, the Treasury, the ALRC, ASBFEO and the PC have conducted reviews of various aspects of the insolvency system over the last four decades. Clearly, the most persuasive and impactful were the ALRC's review in 1988 and the PC's in 2015. Both institutions have strong reputations for independence, consultation and rigor in their own research and recommendations – with respect, the same cannot be said of the Treasury, ASIC or ASBFEO.

It seems to us that because the primary output of a root and branch review is a single fit for purpose insolvency law that the ALRC would be the better agency of these to conduct the review. The Chair and Acting Head of Office of the PC indicated in their evidence to the Committee, understandably, that the PC has given insolvency issues little consideration since 2015. This stands in contrast to the ALRC's ongoing work on the *Corporations Act* and the consideration of insolvency matters by its recently departed chair.[25]

Given the review is likely to touch on administrative, commercial and economic matters, it may be appropriate for the Attorney General to appoint suitable persons as part-time Commissioners pursuant to section 7(d) of the *ALRC Act.* If financial or economic staff resources were required, we are sure these could be seconded from the PC much in the same way it seconded legal officers from the Attorney General's Department to assist on its Access to Civil Justice Inquiry in 2013-2014.

We acknowledge the review may require budget supplementation as set out in our prebudget submission[26].

(d) Provided clear guidance is given by the government as to the objectives and outputs of this review, we believe the ALRC should be able to complete the contemplated review in 12 months.

We would expect that there would be consultation with the relevant professional bodies and other stakeholders, with a draft published after eight or nine months to which stakeholders would be given six to eight weeks to respond.

(e) We presume the United States review being referred to here is the *Commission to Study the Reform of Chapter 11* undertaken by the American Bankruptcy Institute. We would note that this review was available to the PC at the time of its inquiry in 2015 and was

[24] ARITA Primary Submission (2022), pp15-16, 21-22.
[25] See Derrington, S 2022, "The changing face of law reform in Australia", *ARITA Journal*, Vol. 34(1), p7.
[26] See Attachment A.

considered by it, along with views of participants.[27] In short, whilst not recommending the wholesale adoption of a Chapter 11 framework, the PC did "cherry pick" a number of features of Chapter 11 which were the basis of recommendations that were accepted by government, such as safe harbour and *ipso facto* reforms. Unless Chapter 11 was considered a real option by the Committee, we see little utility in revisiting this United States review.

In relation to Singapore, we presume the review in question was the one undertaken in 2013. It is important to understand the context of the development of insolvency law in Singapore. The 2013 review needs to be seen as supporting the work of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring, which was motivated by a wider economic development strategy to develop Singapore as a global centre for dispute resolution and a global restructuring hub, particularly in competition with Hong Kong.

This process led to major reforms to Singapore's corporations legislation and subsequently the *Insolvency, Restructuring, and Dissolution Act 2018* which came into effect in 2020. This legislation provides a framework that includes:

- A single legislative framework for all insolvencies
- Greater priority for lenders who support restructuring
- *Ipso facto* provisions similar to those recommended by the PC (which has since been implemented in Australia)
- Pre-packing
- Enhanced moratorium protection
- Adoption of UNCITRAL Cross Border Model Law
- Licencing of practitioners
- Judicially supervised schemes of arrangements.

It seems that the methodological approach adopted by Singapore is quite similar to that adopted by the PC – to maintain the underlying British framework whilst cherry-picking from the United States Chapter 11 framework. Our sense would be whilst Australia and Singapore have ended up with relatively similar frameworks, the differences are explicable, from a policy level, by Singapore having a stronger restructuring emphasis driven mainly by the economic development imperative mentioned above. Despite some discussion for Australian courts to play a greater role in international dispute resolution, no Australian government has seen the virtue or value in attempting to leverage

[27] Productivity Commission 2015, *Business Set-up, Transfer and Closure, Final Report 75,* Canberra, pp368-372.

Australia's significant expertise in insolvency and endeavour to create a legislative framework that could compete with these initiatives.

(f) Whilst we understand that the ALRC's review is currently focused on the financial services provisions of the *Corporations Act*, the article written by the immediate past Chair of the ALRC clearly indicates that complexity within the insolvency provisions of the *Corporations Act* is a matter of concern to the ALRC.

Despite our view that there needs to be a single, integrated insolvency law separate from the *Corporations Act*, we would expect that the approach to legislative design set out in the ALRC's Interim Report B would be the basis of the drafting of the new insolvency law.

(g) As noted above, the primary output of this review is a new law but it is acknowledged that it will necessarily encounter policy matters along the way, just as the PC encountered legal matters during its inquiry. However, to the extent possible, the ALRC should be given clear guidance of the general features of that law. It would be our expectation that the Government's response to the recommendations of the Committee would be a central part of that guidance. We would expect the vast bulk of policy issues, if not resolved by the Committee, will have been identified and options discussed in the Committee's final report.

We do not support the view of Professor Harris and Mr Murray that "a threshold financial and system analysis of the regime" needs to be undertaken prior to a legal review. It is our view that it is well within the capability of the ALRC, appropriately resourced as suggested above, to undertake such work in parallel with the legal work required. If it is considered necessary, issues such as the estimation of the efficient cost of the provision of public services by the insolvency profession and associated cost recovery issues could be referred to the PC, given that in 2015 it opined on the appropriate structural solution to these issues.

3.2 Purpose of Australia's insolvency laws

(a) We have noted elsewhere that Australia is generally regarded as having a corporate insolvency regime that gives primacy to the rights of secured and unsecured creditors to recover debts over the need to restructure viable yet distressed businesses[28] – a view shared by others, for example, the PC.[29]

That said, more recently a range of reforms such as safe harbour and small business restructuring have shifted the emphasis towards debtors whilst the development of the FEG regime has separated employees from other classes of unsecured creditors.

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[28] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Wednesday 14 December 2022, Sydney, p 10 – Mr John Winter.
[29] Productivity Commission 2015, *Business Set-up, Transfer and Closure, Final Report 75,* Canberra, pp351-352.

(b) Notwithstanding the above, as we note in our primary submission to the Committee, neither the *Corporations Act* nor the *Bankruptcy Act* have overarching statutory objectives (expressed in an objects clause) but certain parts, such as Part 5A of the *Corporations Act* which relates to voluntary administration, do.[30] As such, there is no clear articulation of the objectives of Australia's insolvency laws.

(c) We note whilst in 1988 the ALRC set out its view of what the objectives of the corporate insolvency system should be[31], these were not included in the *Corporations Act*. The PC offered an alternative formulation in its 2015 Report.[32] It seems to us whilst there has been no formal restatement of objectives, the expectations of the system now place greater emphasis on turning businesses around, the preservation of employment within those businesses, protecting workers (and particularly those in insecure work), and improving the efficiency of the system.

(d) Our view is that Australia's hybrid insolvency regime, at a structural level, strikes the right balance between the debtor-in-possession approaches available when businesses first experience difficulties through schemes of arrangement, informal (bank) workouts and safe harbour; through voluntary administration where creditors have a far greater role, the detection of malfeasance is at large but restructuring is still a viable option; to the liquidation frameworks that provide for the winding up of companies for the benefit of creditors. The need for arrangements to deal with small business is realised in principle but the law in these regards is in our view inadequate.

(e) A new Act requires a clear statement of objectives. To this end, in our primary submission we set out the following as objectives for a unified insolvency system, which we encourage the Committee to use as the basis for a recommendation for the objects clause of a new Act.

   (i) *to provide a genuine opportunity for the restructuring of economically viable businesses, without providing incentives for inappropriate behaviour by debtors and creditors*
   (ii) *where restructuring is not possible, to expeditiously and efficiently realise the value of the assets of the insolvent business for creditors at the lowest reasonable cost*
   (iii) *to ensure directors and other relevant persons have acted in accordance with their duties and where reasonable to do so identify any fraud or other malfeasance associated with the business*
   (iv) *where individuals become insolvent and have committed no offences, to discharge them from bankruptcy as soon as practicable*
   (v) *to ensure that where there is a public interest in the affairs of the distressed business extending beyond the enforcement of the law and the interests of the creditors (for example, the maintenance of critical supply chains or aviation*

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[30] ARITA Primary Submission (2022), p17.
[31] Australian Law Reform Commission 1988, *General Insolvency Report,* Canberra (the Harmer Report), p2.
[32] Productivity Commission 2015, *Business Set-up, Transfer and Closure, Final Report 75,* Canberra, p353.

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services), that this is made clear to all stakeholders, and is properly had regard to by the relevant insolvency practitioner; and

(vi) to support the development and best practice regulation of the insolvency profession.[33]

3.3 Major reforms

(a) Beyond the need to undertake a major restructuring of the insolvency law discussed above, Chapter 5 of our primary submission sets out a range of reforms that are needed irrespective of whether the root and branch review discussed in section 3.1 is pursued. These include reducing regulatory burdens, fixing small business restructuring and simplified liquidations, creating an unlawful phoenixing offence and related reforms, tidying up the *PPS Act* and related processes, addressing creditor knowledge and impacts of unfair preference matters and properly addressing trusts and partnerships in the insolvency law.

Further, Chapters 6 and 7 of our primary submission address matters relating to the registration and remuneration of the profession and the conduct of government agencies respectively.

(b) In relation to the matters set out immediately above, our primary submission sets out recommendations to address these issues.

(c) Section 5.7 of our primary submission sets out our thoughts and recommendations on addressing issues related to unfair preference claims.

As the Committee will be aware ARITA has made a number of submissions to it regarding litigation funding in recent years – the Committee will also recall Dr Mundy's evidence and submission to the Committee on this matter in 2020.

From a creditor perspective, it is important to note the use of litigation funding by a liquidator or voluntary administrator in no way absolves the liquidator or administrator from their statutory and fiduciary duties. The funding arrangement is between the funder and the insolvency practitioner (or several of them) to provide financial resources to pursue debts for the benefit of creditors which would otherwise not be pursued.

Litigation funding is vital to insolvency practitioners and to creditors. Where assets of an insolvent business may be limited at the time of appointment, litigation funding is the only viable way for liquidators to pursue directors and other parties who may have caused the collapse of the business and either have personal assets that should be available to creditors due to the malfeasance of those directors, or as a tool to recover assets that have been inappropriately moved out of the business for phoenixing or the improper personal benefit of directors.

[33] ARITA Primary Submission (2022), pp18-19.

ARITA strongly supports creditors, through administrators and liquidators, having access to litigation funding to pursue recoveries in the courts that would otherwise be left due to financing challenges. This is why we support the recent reforms made to the litigation funding regime by the Albanese Labor Government which removed significant uncertainty for external administrators who were party to litigation funding arrangements.

3.4 Public interest aspects of Australia's corporate insolvency laws

(a) Many participants (including ARITA) have discussed with, and made submissions to, the Committee on the extent or otherwise of work that is for a public (as opposed to creditor) purpose and the extent to which that work goes un- or under-remunerated.

It is important to note however that the insolvency system plays an important role in the integrity of the market economy by underpinning the expectations of trade creditors about how much they will be paid – rationally trade creditors will assume they will be less than fully paid by their customers (in aggregate) but it is their confidence in the insolvency system that sets that level of expectation.

At its simplest level, the Committee has heard from ARITA's President and others of the apparent extent that ASIC is using the routine reports of liquidators to identify and prosecute malfeasance on the part of directors, advisors and others. It is reasonable to assume on the basis of this evidence, and the extent of ASIC's enforcement activities, that it may be possible to significantly reduce that reporting burden without significantly impacting on ASIC's (low level) of enforcement activity – a point made by the PC in 2015.[34]

(b) Normally, markets do not provide services below cost in the long run. It is a legislative feature of the market for insolvency services in Australia that participation in the market may require practitioners to provide services at below cost or for free. This would not be efficient from an economic perspective if the revenue received was below the *marginal* cost of providing the service even if a contribution to fixed costs is not made.

It is likely the current remuneration framework is leading to an undersupply of insolvency services, particularly for smaller administrations and liquidations. New entrants (more in terms of individual insolvency businesses than individual practitioners working in larger firms) will be discouraged, as in their set-up phase they are less likely to have access to larger (and typically more profitable) insolvencies than incumbents.

The impact of this under-remuneration on the cost of other insolvency services is quite unclear. The extent and direction of such cost impacts are difficult to estimate, especially as many smaller practitioners are accountants operating in practices that provide a range

[34] Productivity Commission 2015, *Business Set-up, Transfer and Closure, Final Report 75,* Canberra, pp364-365.

of other professional services such as auditing, taxation, general business advice and statutory accounting. Further, as discussed above, there is no conclusive evidence that excessive fees are being charged on fully remunerated matters by the practitioners most likely to encounter this underfunding issue. Indeed, data relating to the remuneration of accountants who provide insolvency services as compared to other accounting services suggests the contrary.[35] It may well be the case that given competition for properly remunerated matters, proper remuneration of currently underfunded matters will have no impact on the cost of other matters, but rather simply reduce the aggregate amount of underfunding.

(c) See section 3.1(g) above.

(d) In our primary submission, we endorsed the PC's 2015 recommendations to this issue. Other than calibrating the scheme, this remains our preferred approach.

3.5 International best practice

(a) The UNCITRAL Legislative Guide on Insolvency Law provides a comprehensive statement of the key objectives and principles that should be reflected in a country's insolvency laws. It is extensive.

While Australia's current framework may address many, if not all, of the recommendations in the guide, the extent to which the actual processes reflect best practices and provide for simple, effective and efficient processes requires consideration. This is an extensive task that is best addressed as part of a root and branch review of Australia's insolvency framework.

The UNCITRAL Guide provides the following guidance in relation to the need for a well-developed institutional framework.

> *The insolvency system will only be effective if the courts and officials responsible for its implementation have the necessary capacity to provide the most efficient, timely and fair outcome to those for whose benefit an insolvency regime exists … Although a detailed discussion of the means by which such institutional capacity can be developed or enhanced is beyond the scope of the Legislative Guide, a number of general observations can be made*.[36]

These general observations include the need to reduce the functions to be performed by the court under an insolvency law, but at the same time provide the necessary checks and balances by assigning specific functions of insolvency law to other participants, such as the insolvency representative and creditors, or to some other authority, such as an insolvency or corporate regulator.

[35] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Wednesday, 14 December 2022, Sydney, p12 – Mr John Winter.
[36] UNCITRAL Legislative Guide on Insolvency Law, p33.

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The INSOL International 'Insolvency Practitioners – Qualifications and Appointment Around the World' document annexed to ARITA's primary submission, shows that of those countries that have an insolvency regulator, only Australia is identified as having two insolvency regulators.

While a number of countries rely on the Courts and/or professional associations to regulate the conduct of insolvency practitioners, ARITA is firmly of the view that the establishment of a single dedicated agency for both corporate and personal insolvency in Australia will provide the necessary checks and balances while removing the inefficiencies and duplications currently experienced and, as importantly, produce the necessary education outcomes to promote a turnaround culture.

(b) In particular, the Committee queried whether there were one or more countries that have best-practice insolvency laws, with reference being made to the single regulatory regime in Canada and its associated insolvency framework.

As addressed in Mr Winter's evidence to the Committee, no country has a perfect insolvency system but there are clear examples that we can take from various jurisdictions that would improve Australia's regime, such as compulsory financial literacy education for bankrupt individuals.[37]

The Committee heard substantial evidence regarding the extent of unfunded insolvency work undertaken by the profession and how this can be addressed. The UNCITRAL Legislative Guide on Insolvency Law recommends that:

> *Where the insolvency law provides for an insolvency representative to be appointed to administer an estate with insufficient assets to meet the costs of administration, the insolvency law should also establish a mechanism for appointment and remuneration of that representative.*[38]

Australia's current framework only partially adopts this approach and needs to establish an effective mechanism for the remuneration of representatives that administer estates that have insufficient assets to meet the cost of administration. Recommendation 23 of our primary submission deals with this issue.

UNCITRAL's Legislative Recommendations on Insolvency of Micro- and Small Enterprises indicates that insolvency proceedings should be 'expeditious, simple, flexible and low-cost'. As we, and other participants, have already highlighted, Australia's current small business restructuring and simplified liquidation processes are not fit for purpose and do not meet these objectives. Recommendations 7 and 8 of our primary submission addresses these failures.

[37] Canadian law requires that a bankrupt attend two financial counselling sessions. The purpose of these sessions is to help the bankrupt understand the causes of their bankruptcy and to assist them in managing their financial affairs in the future.
[38] UNCITRAL Legislative Guide on Insolvency Law, Recommendation 125.

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3.6 Data and research

(a) A number of years ago AFSA prioritised the improvement of the statistical information it produces. As a result, it now produces high quality, detailed statistics about personal insolvency from information that it collects from both its own administration of regulated debtor estates and from private trustees and debt agreement administrators. Not only does AFSA provide reports on statistics, it also provides access to the underlying data sets[39].

By way of comparison, ASIC has recently taken steps to improve its reporting of statistics on the number of appointments. However, ASIC ceased reporting statistics from external administrators' reports after 2018/19. These statistics provided important information about matters such as assets and liabilities of companies in external administration, causes of failure, possible misconduct of directors, unpaid employee entitlements, unpaid taxes and remuneration. ASIC's website advises that it intends to provide this information in a different format in FY23, however, it is unclear whether information will be provided for the intervening years.[40]

ASIC needs to prioritise statistical reporting and make the underlying data sets available for further statistical analysis. Clearly, a single insolvency agency is likely to lead to more consistent data outcomes and potential scale benefits in the administration of these important data sets.

(b) To assist insolvency reform in a root and branch review, the following questions need to be addressed:

- There needs to be clarity around the nature of companies going into external administration (assets and different classes of liabilities, size of the company etc).
- Dividends paid from different sizes of companies (i.e. companies grouped based on assets) to each class of creditor so there is a better understanding of returns received by classes of creditors for different sizes of companies.
- Actual costs of insolvency administrations by company size and administration type so there is clarity around how much insolvency administrations cost for different sized companies.
- Amount of fees recovered and written off by company size and administration type so there is clarity around how much insolvency practitioners are paid and how much work is done but written off. This would assist with understanding funding requirements for assetless administrations.

[39] https://www.afsa.gov.au/about-us/statistics
[40] https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-3-external-administrator-reports/

- Analysis of the make-up of creditors by company size, industry and administration type so there is a better understanding of which creditors are affected by insolvency, particularly employees, sub-contractors, ATO and related parties.
- Analysis of reports lodged by liquidators under s533 of the *Corporations Act* showing numbers of alleged offences by type of offence and company size so there is a better understanding of director behaviour for different sized companies.

(c) Much of the information suggested above is collected by ASIC from information lodged by external administrators. Although some of this information which is held in the ASIC Register is available, it can only be accessed at significant cost, which limits the ability to access and use this information.

Open and free access to ASIC Register data would facilitate empirical and academic research. For example, there have been only a limited number of empirical studies of the performance of Australia's insolvency laws. The value of such research was borne out by the Productivity Commission's 2015 Report.[41]

ARITA has funded scholarships to promote empirical research into Australia's insolvency regime[42] and can confirm that the data-access costs of such studies are significant.

Better access to ASIC Register data would enable more empirical research which supports evidence-based policy and law reform. Law reform proposals have been known to be deferred due to the lack of evidence-based support, but the costs of empirical studies are a substantial obstacle to sustaining the case for change.

Additionally, ASIC collects substantial data on a non-structured basis which makes data access slow and means that many documents need to be accessed manually for any statistical analysis to be done.

It's important to note that the most crucial data in relation to external administrators is gathered from the lodgement of possible misconduct reports lodged pursuant to section 533 of the *Corporations Act*. These are not public reports and the information cannot be accessed from the ASIC Register and, as noted above, ASIC ceased reporting statistics from external administrators' reports after the 2018/19 financial year. COVID-19 emergency measures have had a distortionary effect on available data from the past three years and broader trends over the past decade. The number of appointments that occurred following the commencement of the COVID-19 emergency measures show that insolvency numbers were *down* around 50% on pre-COVID levels which will distort trend analysis for some time to come.

(d) In relation to assessing the effectiveness of legislation in place prior to March 2020, data prior to COVID could be used, excluding data during the affected period. However, in

[41] Productivity Commission 2015, *Business Set-up, Transfer and Closure, Final Report 75,* Canberra, pp363-364.
[42] Details and the research outcomes of ARITA's Terry Taylor Scholarship are available at http://www.arita.com.au/about-us/terry-taylor-scholarship

relation to the assessment of the small business restructuring and simplified liquidations reforms, the only data currently available will be that from during the COVID-affected period. As such, decisions about the effectiveness of and needed change to these reforms needs to be based on non-statistical evidence from the profession and others making submissions to this inquiry. In our view, the concerns raised regarding these reforms from a range of stakeholders are sufficiently compelling that to wait for a number of years until adequate (i.e. not contaminated by COVID) data is available would not advance the interests of struggling small businesses, their owners or creditors.

3.7 Harmonisation of corporate, personal, trust & partnership insolvency law

(a) The existence of the separate corporate and personal insolvency laws is a historic anomaly underpinned by a constitutional nonsense.

Despite the Australian Constitution in section 51(xx) providing powers to the Commonwealth Parliament to make laws in relation to “foreign corporations and trading or financial corporations formed within the limits of the Commonwealth” and more specifically in relation to “bankruptcy and insolvency” in section 51(xvii), Australian corporate insolvency law operated as a series of co-operative arrangements between the Commonwealth and the states until 1989. This stands in comparison to personal insolvency which the Commonwealth legislated for in 1924, replacing a range of state and colonial laws.

In 1989, in order to solve a range of problems, including the practical operation of the National Companies and Securities Commission, the Commonwealth legislated a single national corporations law. However, as alluded to by Dr Mundy in his evidence to the Committee, the law failed when the High Court found in *New South Wales v The Commonwealth 1990*[43] that the power conferred by s51(xx) did not extend to the formation of such corporations. Kirby J later described this decision as “a narrow constitutional decision”[44] which contributed to the “grotesque complications that exist in the regulation of corporations under Australian law”.[45]

As a consequence of this judgment, the Commonwealth enacted the *Corporations Act 1989* (Cth) to apply to the ACT which was followed by each state passing laws to apply this Act and the *Australian Securities Commission Act 1989* (Cth) in their respective jurisdictions. Each state law, and the Commonwealth law relating to the ACT, conferred jurisdiction on the Federal Court with respect to civil matters.

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[43] 169 CLR 482.
[44] *Byrnes v The Queen* (1999), 164 ALR 482.
[45] Ibid, 542.

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Whilst this provided a workable system, it was not seen to be entirely constitutionally robust.[46] In 2001 each state referred the text of the *Corporations Bill 2001* and the *Australian Securities and Investments Commission Bill 2001* to the Commonwealth under section (xxxvii) of the Constitution to the extent that they dealt with the legislative powers of the state concerned. Further, each state referred:

> *The formation of corporations, corporate regulation and the regulation of financial services … to the extent of the making of laws with respect to those matters by making express amendments of the corporations legislation.*[47]

As we noted in our primary submission, and Dr Mundy noted in his evidence to the Committee, the *Work Choices*[48] case has rendered this historic debate somewhat moot. In *Work Choices*, the majority of the High Court approved of Gaudron J's statement in *Re Pacific Coal Pty. Ltd.; Ex parte Construction, Forestry, Mining and Energy Union*, in which her Honour stated:

> *I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.*[49]

What distinguishes this judgment from that of *New South Wales v The Commonwealth 1990* is that it makes clear that section 51(xx) gives the Commonwealth Parliament power to regulate not only the external affairs of corporations but also the relationships within the corporation, the latter previously considered to be beyond the Commonwealth head of power. In doing so, *Work Choices* removes the constitutional need for any co-operative arrangements between the Commonwealth and the States in relation to corporations law.

But perhaps more importantly for the purposes of the Committee, *Work Choices* makes clear that the Commonwealth Parliament can make laws dealing with persons related to corporations – whilst the case was about industrial relations law, Gaudron J's observations make clear that other relationships are subject to the Commonwealth's jurisdiction. On this basis, there seems to be no reason why the Commonwealth cannot make laws that jointly deal with the insolvency of corporations and other persons (including trusts and partnerships) irrespective of commitments given to the states to

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[46] For more, see French R.S. (2003) "The Referral of State Powers", *Western Australian Law Review*, Vol 31, 22-24.
[47] Ibid 39.
[48] *New South Wales v Commonwealth*; *Western Australia v Commonwealth* [2006] HCA 52.
[49] *New South Wales v Commonwealth*; *Western Australia v Commonwealth* [2006] HCA 52 at [178]; *Re Pacific Coal Pty. Ltd.; Ex parte Construction, Forestry, Mining and Energy Union* [2000] HCA 34 at [83]. See also *Re Dingjan: Ex parte Wagner* [1995] HCA 16 at [30] [31] per Gaudron J; [2], [7] per McHugh J.

secure the referral of powers that led to the *Corporations Act*, such as those reflected in section 5G of that Act.

So why have separate regimes persisted since the *Work Choices* decision a decade and a half ago? We suspect the answer is simply policy inertia coupled with more urgent priorities. As we discuss in section 1.2 of this submission, when the opportunity presented itself to mount the case for a single framework in 2014 when the PC received its terms of reference, the level of advocacy was not what it is today. This may have been in part because the focus of that inquiry was more on the dynamics of Australian business formation and closure in the context of innovation rather than the insolvency system itself.

But as is always the case with microeconomic reform, longevity is not an argument against reform – after all, the Australian economy had to wait 70 years for the Whitlam Government to deliver it its first meaningful tariff reform.

(b) As we note in section 5.8 of our primary submission, there is essentially no statute law relating to insolvent trusts despite recommendations from the Harmer Report and subsequent inquiries to provide such in the *Corporations Act.* Section 5.8 of our primary submission sets out how this can be addressed. We believe that such an approach, which is consistent with Harmer, is relatively uncontroversial and will significantly reduce the cost of small business liquidations where trusts are involved by removing unnecessary court costs.

Mr Pitt has questioned what role trusts might play in asset protection in the event that the reforms we, Harmer and many others have advocated are implemented.[50] It is our view that it is not the policy intention that trust structures containing business assets are put in place to protect the businesses using those assets from their obligations to meet their debts as and when they fall due, nor to circumvent economy-wide insolvency processes. Indeed, this is the long-standing view of the courts, and the principal argument for reform in this area is to reduce the costs involved in getting access to these assets to meet the business' debts – access which the Courts almost always grant.

This law reform will not impact on the legitimate uses of trusts, including to enable:

- transmission of assets, such as farms and other small businesses, from one generation to the next
- the operators of businesses to separate their personal assets from those of a business held in trust (something not possible for sole traders and done in a different way to companies)
- the distribution of trust income to the economic owners in ways not possible with corporations or sole traders; and

[50] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Wednesday 14 December 2022, Sydney, p12.

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- efficient tax structuring of small and large business.

The recent decision in *Lawrence, in the matter of Ozifin Tech Pty Ltd (in liq) v AGM Markets Pty Ltd (in liq)* [2022] FCA 1478, together with the related predecessor decisions, outlines the complexities associated with external administrations involving trusts.

As assets were held on trust by the three related companies being liquidated, the liquidators were required to make an application to the Court seeking authority and guidance on how to deal with the trust funds, including their entitlement to be remunerated from the funds. We are aware that one of the liquidators in this matter incurred $500,000 in legal costs as a result of the extensive involvement of the Court required. These are costs that would be significantly reduced as a result of the amendments recommended by ARITA in our initial submission.

In a somewhat extraordinary approach, while ASIC instigated the application to have the companies liquidated, it intervened in the Court process seeking to restrict the liquidators' ability to recover their general liquidation costs from the trust funds. This is despite the fact that there were no other assets available to meet these costs and, if successful, ASIC's actions would have left the liquidators unpaid for these costs. One of the liquidators reliably estimates that ASIC's unsuccessful intervention forced the liquidators to incur additional costs in excess of $70,000 (and possibly up to $100,000).

(c) Partnerships are dealt with in the *Bankruptcy Act*, as partnerships are not a separate legal entity from the underlying individuals making up the partnership. Any issues in respect of the administration of insolvent partnerships can be resolved as part of the root and branch review and the bringing together of Australia's insolvency laws into one legislation.

(d) In Canada the legislation is aligned by a person being defined in the *Bankruptcy and Insolvency Act*[51] as:

> *includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person.*

This definition captures all forms of structure that may become insolvent or experience financial distress and brings them into the one insolvency process.

Whilst Australia has two separate statutory frameworks, which is not optimal, there is a degree of alignment between processes contained in the *Corporations Act* and the *Bankruptcy Act*, as shown in the table below.

[51] Bankruptcy and Insolvency Act (justice.gc.ca).

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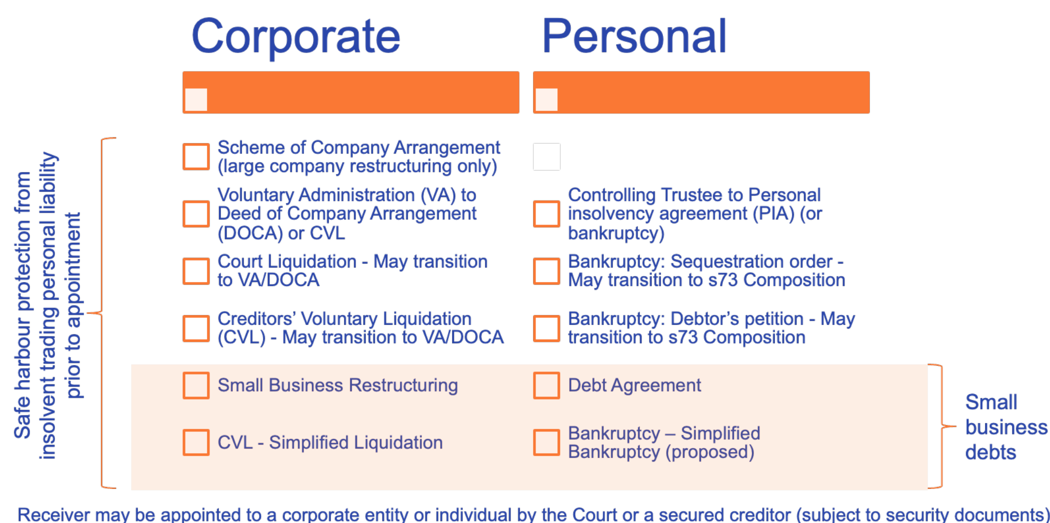

(e) Most importantly, a harmonised law would reflect the contemporary realities of Australian business and would be accessible to those who operate and own Australian businesses. We have outlined in detail in this submission, our primary submission and our oral evidence the underlying policy propositions a uniform law should reflect.

In terms of the drafting approach of the new law, we would strongly support the legislative model proposed by the ALRC in relation to Chapter 7 of the *Corporations Act*. The details of that approach are set out in much detail in various reports and consultation documents available on the ALRC's website.

(f) As discussed in section 3.7(a) of this submission, we do not consider there to be any constitutional obstructions to a single insolvency law.

Given that the population of bankruptcy trustees is essentially a subset of the population of registered liquidators, the staff of both work across both areas at the moment, and there are strong similarities between the corporate and insolvency frameworks at the moment (see section 4.3 of our primary submission) the costs of training the insolvency workforce in the new regime should be small and likely to be absorbed via the industry – submissions to the Committee clearly indicate that the profession is on for this challenge.

There are likely to be few negative impacts on businesses, small and large, and individuals. Indeed, we expect small businesses, both creditors and debtors, will be the primary beneficiary of these reforms.

Putting aside the issue of appropriate remuneration of practitioners dealing with small insolvencies, which is a feature of the current separated framework and requires addressing in all circumstances, the fiscal costs of this law reform should be one-off and limited to those associated with consultation around, and drafting of, the new law and transitional costs in the formation of a single agency. These are no different to those of any law reform project and would not constitute a barrier.

We would not expect an ongoing increase in staff numbers as a result of this reform, although the operation of a best practice regulator across the entirety of the insolvency space may lead to small increases in systems, consultation and education costs which we would expect to be justified on a benefit cost basis and capable of recovery from businesses and practitioners. As such, any additional costs should not be seen as a barrier to the scheme as they are small and justified by the benefits they generate.

(g) Given our views expressed in section 3.7(e), we see no downsides to this reform beyond those generally associated with transitions around major law reforms.

The benefits of a unified insolvency law primarily arise for the opportunity to have a modern law that reflects from its core principles the underlying nature of the majority of Australian businesses, i.e. they are small or medium in size and their operations, successes and failures are often intimately involved with the financial affairs of their owners and managers, and particularly in insolvency.

From this will flow:

- Through a single best practice insolvency agency, a better understanding of the insolvency system, and the options available to struggling businesses and their creditors, which should lead to a higher rate of small business turnaround and therefore a lower rate of insolvency.
- Reduced insolvencies will lead to less dislocation of employment.
- By reducing the cost of liquidating those businesses which have failed, improved efficiency of the insolvency system in reallocating resources to their most efficient uses.
- Reduced uncertainty and distress for those involved in business insolvency.

We believe this can be done without impacting on the “big end” of the system which, since the implementation of safe harbour as an alternative to voluntary administration, is servicing the economy well.

3.8 COVID-19 emergency reforms

(a) It is useful at the outset to summarise the temporary COVID measures that influenced insolvency:

- JobKeeper
- Cash boost payments
- Statutory demands – increase in the statutory minimum from $2,000 to $20,000 and an increase in the time to respond from 21 days to 6 months
- Liability for insolvent trading suspension – in respect of debts that are incurred in the ordinary course of the company’s business during the prescribed period

- Guaranteed SME loans
- Suspension of debt recovery and enforcement by the ATO
- Commercial rental relief
- Forbearance by major lenders.

The introduction of these temporary measures, together, had the immediate impact of halving the pre-COVID level of corporate insolvencies. Liquidators (and bankruptcy trustees) reported that their inquiry levels from financially distressed directors and individuals effectively ceased.

These measures had three primary impacts:

- Financial boosts to the cash positions of businesses, at least temporarily supporting their profitability and/or solvency.
- Delaying the capacity for enforcement of debts that couldn't be paid.
- A psychological effect wherein directors of businesses in distress believed that they couldn't be chased for payment and could give creditors less attention than normal.

We note that Australia was not alone in either the broad policy choices or their resultant impact on insolvency levels. Most developed economies saw similar stimulus being deployed and a similar radical reduction in insolvencies.

At this point, it is important to consider ARITA's prior evidence to the Inquiry and from our primary submission, that a natural level of insolvency is important to the proper and efficient operation of the economy. When interventions keep unproductive businesses operating they reduce economy-wide productivity. Those interventions can also harm creditors (and cause their future insolvency) and create unfair playing fields for businesses not receiving the same protections.

So "saving" all businesses is not necessarily a good outcome for society or the economy, while an effective exit system is.

Ongoing impacts of the temporary changes

As an initial general comment, it is important to note that there was no appreciable change in the level of insolvencies once the temporary measures relating to statutory demands, insolvent trading and rental relief were lifted. As a result, it may be posited that they had little direct impact on their own beyond creating a mindset in directors that they could keep trading.

Stimulus payments. JobKeeper and cash stimulus payments have had a long-tail impact in enhancing the balance sheets of a huge number of businesses, including those who were in genuine need and (as has been widely reported) others not so in need. The stimulus allowed many non-viable companies to continue to operate regardless of

whether that lack of viability was caused by COVID or not. This impact is still evident in the economy. We remain concerned that "zombie" companies propped up by the stimulus may cause greater impacts on creditors further down the track, however, this risk reduces over time.

Statutory demands. In July 2021 it was announced that the minimum Statutory Demand would rise from $2,000 to $4,000 permanently. This was widely accepted by insolvency experts and creditors as having little real impact. The reality is that enforcement actions for less than $4,000 were uncommercial when a creditor considered court and enforcement costs, alongside their potential recoveries. So, this increase had little impact but to remove more aggressive practices.

Liability for insolvent trading. From the feedback we have received from liquidators who were engaging with directors and creditors, there is little doubt that this temporary measure had a profound behavioural change on director behaviour. For some it gave confidence to trade sensibly through tough times; for others it emboldened poor behaviour and disregard for their creditors. While it is often suggested that our insolvent trading regime may be too tough, it acts as an important brake on poor behaviour and seeks to redress some of the information asymmetry that is in favour of directors and against creditors. All anecdotal information we've received from our network is that the return of normal insolvent trading rules led to better decisions being made by directors.

Guaranteed SME loans. We note that the take-up of these was far less than was anticipated. We've therefore seen few impacts from the program. We do remain concerned as to how they will be treated if the borrower becomes derelict.

Suspension of debt recovery and enforcement by the ATO. As the committee is now aware, the ATO did not engage in any significant recovery actions from March 2020 through to March 2022. This had the single most profound impact alongside stimulus payments in the economy. As was referenced in our testimony, the ATO's former mantra of "right amount, right time and no unfair advantage to non-payers" was set aside. As expected, this has provided a long-term advantage to non-payers and a disadvantage to those doing the right thing. While the ATO returned after April 2022 to start issuing warning letters (over 50,000) and issuing up to 150 Director Penalty Notices per day, we have not seen any real follow through from the ATO on this. The ATO was the major issuer of winding up notices in the economy pre-pandemic. Even nine months after their warning campaign resumed, they are taking very few winding up actions. This is, self-evidently, problematic. We are very concerned that the ATO's lack of action causes major risks to other creditors and to the long-term behaviour of directors.

Commercial rent relief. The lifting of the commercial rent relief arrangements had little direct impact. We expect that the real impact will be felt when commercial leases come to term and tenants find that what they thought was a rent-holiday, was actually a simple rental deferral. This initiative certainly had an unsustainable impact on landlords and, noting that many landlords are small investors (including self-managed superannuation funds), its lifting at the earliest possible time was appropriate. We do believe that it

helped some tenants have useful discussions with their landlords about their lease arrangements.

Forbearance by major lenders. It is our view that this initiative, while a genuine attempt to be good corporate citizens, was also driven by major lenders responding to the reputational lessons arising from the Royal Commission. But most importantly, it was driven by the need to prevent shocks to their balance sheets of moving large numbers of loans into distress and the capital provisioning required. It also, astutely, ensured that their borrowers could remain future customers and reduce losses for lenders and borrowers alike out of having to move to enforcement and distressed asset sales. All parties won from these arrangements, with lenders able to make very informed decisions about individual borrowers based on the increased access to information they have about borrowers compared to other lenders. We would also note that, despite frequent speculation to the contrary, lenders are well aware that it is in their absolute best interest to keep a borrower afloat in all but the most dire situations.

(b) Outside of the permanent change to statutory demands, we don’t believe that any of the temporary measures illustrated a need for permanent change.

However, we remain seriously concerned that there may be a permanent change to creditor behaviour due to the mindset shift that occurred during COVID. Creditors certainly felt that their capacity to enforce payment of debts was undermined, limiting their commercial options. All anecdotal information points to a continuation of this mindset and a lack of willingness to initiate formal recovery actions against debtors. This makes the absence of the ATO all the more keenly felt.

The upshot of creditors not feeling that they can viably enforce their debts will be a reduced willingness to provide credit and that has a flow-on impact on productivity.

The most critical area for normalisation is the urgent need for the ATO to properly return to the market, ensure payment of outstanding debts and act as a model creditor as described in our primary submission.

3.9 Recent reviews

Whittaker Statutory Review of the *Personal Property Securities Act 2009*

The Whittaker Review commenced on 4 April 2014 with the final report by Mr Whittaker tabled before Parliament on 18 March 2015.

The Terms of Reference required Mr Whittaker to consider the interaction between the PPSA and other laws. An issue raised by us in our submission was the same issue as raised in our primary submission to this Committee at 5.6:

> *Recommendation 12: That the Committee should recommend that the insolvency law allow an external administrator to give notice to claimants on the PPS Register to verify their claims within a set period, failing which their claims will be treated as unsecured or not at all.*

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On consideration of this issue, Mr Whittaker formed the view that this issue should be referred to the arm of government responsible for insolvency law reform for its consideration[52].

The ASBFEO Insolvency Practices Inquiry

This inquiry was self-initiated by the previous Ombudsman in October 2019 and reported in July 2020 – this was not an inquiry sought by the Australian Government. Having participated in a vast range of inquiries over many years, we found the engagement approach, and the testing of evidence, to be inferior to what we have generally experienced with inquiries conducted by most Parliamentary Committees, the ALRC and PC. We would also note that despite the significant internal resources of ASBFEO, the quality of its internal research was substantially inferior to that of the ALRC and the PC.

We would further note that this inquiry did not, because it was unable to, consider the small business restructuring and simplified liquidation reforms contained in the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020.* As such, this inquiry has diminished relevance to the matters that are under consideration by the Committee simply as a result of the passage of time.

At the time of release of the report we prepared a summary response to the findings and recommendations of this inquiry for advocacy and membership information purposes which we have included in this submission as Attachment B. It should be noted that this appendix has not been reviewed in the light of more recent events and in particular, whether or not in subsequent work the current Ombudsman has clarified, developed or repudiated the positions of his predecessor. If there are any specific recommendations of this inquiry the Committee would like us to reconsider in light of current circumstances, we are happy to do so.

The Insolvent Trading Safe Harbour statutory review

As indicated in our primary submission, we support all the recommendations of this review and can see no reason (other than the availability of drafting resources) why a bill implementing them should not be progressed through the parliament at the earliest opportunity.[53]

3.10 Small business restructuring and simplified liquidation reforms

We have long advocated for reforms such as these that were recommended by the PC. Unfortunately, as many participants have identified, their implementation has not been successful. In sections 5.3 and 5.4 of our primary submission (and the related appendices)

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[52] Recommendation 365 Review of the Personal Property Securities Act 2009 – Final Report: https://www.ag.gov.au/sites/default/files/2020-03/ReviewofthePersonalPropertySecuritiesAct2009FinalReport.pdf
[53] ARITA Primary Submission (2022), pp42-43.

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we set out the problems with small business restructuring and simplified liquidation and our recommendations to fix them.

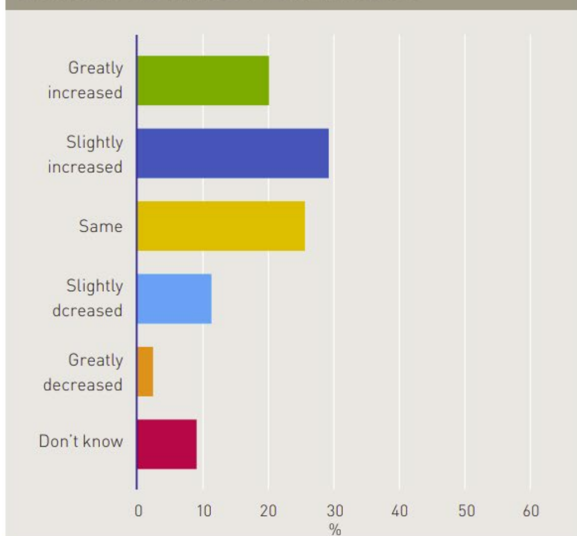
As far as table 2.1 in Treasury's submission is concerned, we do not believe that three quarters of data is sufficient to properly evaluate the efficacy of the small business restructuring regime given the likely overhang of COVID, the expiration of COVID-related support measures, and the inherent seasonality in insolvency statistics. We think to draw any meaningful conclusions from these data would require of at least two years of quarterly data, probably three.

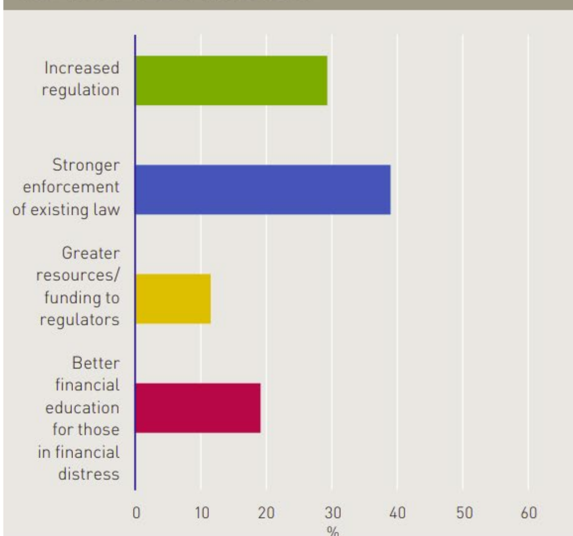
3.11 Regulation of pre-insolvency advisors

(a) In the ARITA Journal of March 2019, ARITA's CEO published an article "No-one's problem. Everyone's problem – the destructive rise of pre-insolvency advisers". That article is appended to this submission as Attachment C.

Mr Winter's article states:

> *ARITA's 2019 Member Survey sought to quantify how problematic the rise of pre-insolvency advisers has become. Compiling the views of over 300 ARITA members and subscribers, the survey is a broad and valid insight.*
>
> *Twenty percent of respondents indicated that the extent of influence of pre-insolvency advisers had greatly increased over the last two years. A further 29.5% reported it had slightly increased. (See graph 1.)*
>
> *Aligning with ARITA's stance, 38.6% of survey respondents held the view that stronger enforcement of existing law was the single best way of reducing the influence of pre-insolvency advisers. (See graph 2.)*
>
> *Another 29.5% believed that increased regulation was required, while only 12.5% thought greater resource or funding to regulators was the cure. Nineteen percent advocated for better financial education for those in distress."*





In ARITA's *"Financial Recovery 2020 - an 8-point plan to improve Australia's business rescue culture, better help indebted individuals back onto their feet, and ensure that creditors get a fairer deal from insolvency"* (see Attachment D), which was sent to all Senators and Members in August 2019 we stated:

> *A 2015 ARITA survey found that 78% of liquidators had encountered liquidations where the company had seen a dodgy pre-insolvency advisor.*

This remains an alarming statistic.

Given that the business model for dodgy pre-insolvency advisers has two aims: either "asset protection" or illegal phoenixing, the committee can rely on the 2018 report by PwC commissioned by the ATO, the Fair Work Ombudsman and ASIC which found that the direct cost of illegal phoenixing on Australian businesses, employees and government was in the range of $2.85 to $5.13 billion.[54]

Our recommendations to the ALRC's Corporate Criminal Responsibility report[55] issued in April 2020 submitted that (and referenced in its final report) licensing is only one piece of the puzzle in fighting illegal phoenixing as shown in the following figure.

[54] PricewaterhouseCoopers Consulting (Australia) Pty Limited, 2018 Taskforce Report – The Economic Impacts of Potential Illegal Phoenix Activity (2018).
[55] Australian Law Reform Commission, Corporate Criminal Responsibility ALRC 136 – Final Report, April 2020.

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The ALRC's report also noted:

> *The Law Council of Australia supported licensing requirements for pre-insolvency advisors, along with the Construction & General Division of the CFMMEU.*[56]

(b) What would be the benefits and disadvantages of regulating pre-insolvency advisors?

Given the above, the benefits for the regulation of pre-insolvency advisers are many but they include:

- Reduction in the facilitation of illegal phoenix and reduction in the significant cost to the economy of, potentially, over $5 billion annually.
- Preservation of the interests and viability of creditors and their own businesses harmed by illegal phoenix activity.
- Preservation of jobs and employee entitlements harmed by illegal phoenix activity.
- Greater confidence in the insolvency system by all stakeholders – a reduced expectation of poor behaviour and of being ripped off.
- More directors being steered to legitimate advisers who can offer genuinely expert advice that might save their business and associated jobs.

We note that the advice provided by pre-insolvency advisors constitutes financial advice, legal advice and/or tax advice. The provision of this type of advice is already

[56] Australian Law Reform Commission, Corporate Criminal Responsibility ALRC 136 – Final Report, April 2020 p522.

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covered by licensing requirements and legitimate providers should already hold an AFSL or be subject to one of the specific exemptions (such as lawyers, registered liquidators and registered trustees), be a registered tax agent or be a lawyer with a practising certificate. We note that there has been almost no enforcement action against pre-insolvency advisers using these three regulatory options.

Given the above, while some may find the need for registration burdensome, we suggest that this is a very small population considering the outsized benefits of the approach.

One might consider the creation of an alternate class of registered liquidator (or indeed it may create the catalyst for a modernisation of that term to facilitate this). Any provider must be able to demonstrate appropriate qualifications (including in insolvency and restructuring law – or recognition of current competency) and, most critically, coverage of appropriate professional indemnity.

The disadvantages of regulation are limited and relatively easily addressed. We note that there are also many legitimate providers of pre-insolvency advice. Some of these are already ARITA members who specialise in well-structured, ethical and legal turnaround advice. Some major management consulting firms also do this work. Most of these firms and their employees could be subject to a simple registration regime. This would be welcomed by our members because, despite the administrative impact, it would ensure that their service offering was clearly differentiated from those offered by poor and less reputable advisors.

(c) Australia's registered insolvency practitioners are subject to some of the strictest independence requirements in the world. This is primarily reflective of the need for practitioners to act in the best of interests of creditors. While we do not suggest a change in this approach, it unequivocally prevents Australian registered practitioners from having pre-appointment involvement with financially distressed businesses and individuals beyond making basic assessments and advice regarding appointment alternatives.

As this limitation does not exist in economies that have debtor-focused approaches, it is arguable that there is a more limited opportunity for untrustworthy pre-insolvency advisors to leverage off the inability to provide comprehensive advice prior to taking the appointment.

As such, we are unaware of any specific legislation overseas or in the UNCITRAL principles that address pre-insolvency advisors. We do however note that Part 4 of the UNCITRAL Legislative Guide on Insolvency Law focuses on directors' obligations in the period approaching insolvency. Specifically, the guide notes the need for directors: "'To act reasonably and take adequate and appropriate steps to monitor the situation so as to remain informed and thus be able to act to minimize losses to creditors and to the

company (including to its shareholders), to avoid actions that would aggravate the situation, and to take appropriate action to avoid the company sliding into insolvency."[57]

The guide goes on to specify that adequate and appropriate steps might include:

> *Specialist advice or assistance, including specialist insolvency advice could be sought. While legal advice may be important for directors at this time, key questions relating to the financial position of the company are typically commercial rather than legal in nature. It is desirable that directors examine the company's financial position and assess the likely outcomes themselves, but also seek advice to ensure that any decisions taken could withstand objective and independent scrutiny. In this instance, the directors, either collectively, as inside directors or as independent directors, may retain independent accountants, restructuring experts, or counsel to provide separate advice as to the options available to the board to determine the viability of any proposals made by management.*[58]

Similarly, the UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises notes that: "The law relating to insolvency should specify that, at the point in time when the persons exercising control over the business knew or should have known that insolvency was imminent or unavoidable, they should have due regard for the interests of creditors and other stakeholders and take reasonable steps at an early stage of financial distress to avoid insolvency and, where it is unavoidable, to minimize the extent of insolvency. Reasonable steps might include … Seeking professional advice where appropriate."[59]

A professional has been defined as "one who makes a public commitment to adhere to high standards, independence, integrity and ethical conduct, all the while, building their professional 'kit-bag' of knowledge currency, innovation, and expertise"[60].

We believe that unregulated and untrustworthy pre-insolvency advisors do not meet the UNCITRAL threshold for taking adequate and appropriate steps.

3.12 Recommendations in submissions and timing of reforms

Resources prevent us from undertaking a comprehensive mapping exercise of the suite of proposals we have advanced with those of other participants. Even if this was possible, such an exercise may be problematic in that participants may present "packages" of recommendations that are interdependent or, that a mapping exercise may exaggerate what are otherwise superficial differences.

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[57] UNCITRAL Legislative Guide on Insolvency Law — Part four, p12.
[58] UNCITRAL Legislative Guide on Insolvency Law — Part four, p13.
[59] UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises, para 102.
[60] Amelia Hodge, Chief Executive Officer, Australian Property Institute.

ARITA

However, the following recommendations present us with significant concerns from a policy and/or implementation perspective. It should be noted that this is not an exhaustive list and we are happy to provide considered feedback on any particular proposal that has been advanced by others.

Submission recommendation	ARITA comment
Government liquidator[61]	ARITA disagrees. The private profession has the expertise to undertake this work and recommendations have been made on funding the profession to resolve the identified issue of unfunded work. This is a much more cost-effective resolution of the issue than the establishment of a government liquidator. This also ensures a healthy, robust and skilled profession to manage funded insolvency work and provide restructuring resources, particularly in times of economic turmoil when a skilled insolvency profession is key.
Raising the threshold of liabilities for small business restructuring[62]	Great care should be taken in raising the threshold. The purpose of Part 5.3B is to be a simple, straightforward way for small business to restructure. Although not currently meeting this objective, we believe that with legislative amendment the process can. However, with increased debt comes increased complexity that should not be dealt with in this simplified format. It will also significantly increase the risk of SBRs being used to facilitate illegal phoenixing. We have instead suggested excluding related party creditors from the threshold.
Introduction of a pre-pack regime[63]	ARITA disagrees. Pre-packs involve an insolvency practitioner assisting the company to achieve a sale of the business before a formal appointment and then the same practitioner taking the formal appointment (Administration) and effectuating the sale immediately on appointment. Given the investigations functions of a registered liquidator once they take a formal insolvency appointment, the liquidator would find themselves having to investigate their own actions. This is clearly untenable and goes to our earlier comments regarding the requirements of independence of registered liquidators. Pre-packs are distinct from pre-positioned sales as recommended by the PC's 2015 Report, which

[61] Submissions 18, 20 & 39
[62] Submissions 11, 18, 31 & 38
[63] Submission 70

ARITA

Submission recommendation	ARITA comment
	provided a comprehensive analysis of the submissions made in support of pre-packs and we continue to concur with the recommendations made by the PC[64]. We also note that directors of a financially distressed business can either themselves, or with expert assistance, prepare a business for orderly wind-down including by effectively pre-packing a business for the insolvency process. While there can be no guarantees that a formally appointed liquidator would expect this pre-pack offer, a well-structured pre-pack could certainly be in the best interests of creditors and the business.

If the Government were to pursue a root and branch review as advocated by ourselves and others, and it is well resourced, we believe that it would be possible to introduce a bill into the Parliament for the Spring session of 2024 and for it to be passed by the end of that year. We say this on the basis that the consensus that has already developed will be strengthened through the remainder of this inquiry and the root and branch review, which should see such a bill well understood, even if all issues are not resolved. The roundtable on personal insolvency announced by the Attorney General on 2 February will also be helpful in this regard.

In any case, there is merit in immediately implementing the reforms recommended by the Safe Harbour Review as well as our, or something similar to our, recommendations relating to small business restructuring and simplified liquidation as these will have immediate positive impacts on the cost of small business restructuring and will hopefully save some viable small businesses from liquidation.

We would also suggest that those recommendations that go to the collection and publication of information, and the conduct of, government agencies (such as our recommendations 3, 11, 27, 28, 31, 32, 34, 35 and 36) can be implemented immediately as no-regrets measures without legislation.

The Commonwealth should proceed with our recommendation 16 relating to the interaction of state and territory laws with the insolvency system – the PC would be a suitable body to conduct this review.

[64] Productivity Commission 2015, *Business Set-up, Transfer and Closure, Final Report 75,* Canberra, p387–394.

ARITA

4 Observations on the evidence of other participants

4.1 Treasury evidence regarding simplified liquidation

In his evidence to the Committee on 13 December 2022, Mr Dickson from Treasury stated:

> *People can choose the [liquidation] process they want to go through. If somebody wants to go through the simplified process, they can. If they want to go through the full process, they can do that too.*[65]

We believe that this evidence is misleading in that it simply is not correct. While a director may wish that the liquidation of their company be completed via the simplified process, the legislation currently requires the liquidation to commence as a standard creditors' voluntary liquidation and for the liquidator to choose to adopt a simplified process, subject to eligibility criteria and requisite creditors not objecting to the adoption of the simplified process within a specified period. This is an opt-in process available to creditors and liquidators, not one to be used by companies and directors as suggested by Mr Dickson in his evidence.

As set out in our primary submission, this process can be made simpler to generate improved usage and outcomes. We recommend that on appointment to a creditors' voluntary liquidation or court liquidation a liquidator may, subject to eligibility, commence a simplified process. Creditors may then contest the adoption and seek to have the liquidator opt out of it. This amendment would provide more certainty to the liquidator and director about the process to be followed.

Mr Dickson also added that:

> *another anecdote we've received is that, from the point of view of the liquidator, there's very little incentive for a liquidator to go through the simplified system because the remuneration possibilities in there are low, and it's perhaps in the interest of some of the players in the system to encourage people towards the fuller liquidation pathway.*[66]

This is also misleading. ARITA has already provided the committee evidence that the simplified liquidation process is, in fact, more complex than the primary process. The committee has also rightly recognised that so many small liquidations go unfunded – it would be irrational for a liquidator not to attempt to use a simplified process if it were available in these circumstances, yet the clear evidence of appointment data since the inception of simplified liquidations shows that it can't be deployed even in these situations.

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[65] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Tuesday, 13 December 2022, Canberra, p14.
[66] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Tuesday, 13 December 2022, Canberra, p15.

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4.2 Productivity Commission 2015 Inquiry

As the Committee is aware, much reference has been made to the work done by the PC in its 2015 Inquiry, including in our primary submission. Despite the views recently expressed by the Small Business and Family Enterprise Ombudsman[67], this was a significant and major review that led to substantial reform.

ARITA has closely followed the progress of the insolvency-related recommendations in the PC's report and provides the below summary of the current status of them.

Productivity Commission 2015 proposals	Status as at 2023	ARITA's view
Safe harbour	Implemented	Supported (original ARITA policy)
Ipso facto	Implemented	Supported (original ARITA policy)
Streamlined SME reforms	Implemented (poorly)	Supported (original ARITA policy)
Public interest administration fund	No	Supported
Pre-positioned sales	No	Supported (original ARITA policy) – note this is different to "pre-packs"
VA - one month for a company to show its viability	No	Supported
Scheme of arrangement moratorium	No	Supported (original ARITA policy)
Receiver's duty to unsecured creditors	No	Not supported by ARITA
Review of the Fair Entitlements Guarantee (FEG)	No	Supported
Director identity number	Implementation underway	Supported (original ARITA policy)
One-year bankruptcy	Proposed (ongoing consultation)	Not supported by ARITA
Bankruptcy contributions to continue after bankruptcy	No	Supported

In referencing the PC's report, the Chair of the Committee noted:

> *Compared to the UK where about 8 percent of companies had receivership as an option, about 16 percent of Australian companies entered insolvency having a receiver appointed. That's double the number'.*[68]

[67] https://www.theaustralian.com.au/business/economics/give-restructuring-a-chance-before-rushing-business-into-insolvency/news-story/429d40060bbec82bf8cf38fb049162c7?btr=78ed4d9aeacc0ae18733a6a6877938e0

[68] See comment by the Chair, Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Tuesday, 13 December 2022, Canberra, p21.

She queried if this means Australian companies, small businesses, are subject to more aggressive engagement from financial providers than other jurisdictions?

As noted in the PC's report, reforms in 2003 effectively removed receivership as an option in the UK. Receivership appointments in the UK are now rare, since use of this procedure is restricted to certain types of company, or to floating charges, created before September 2003. It is key to note that the use of pre-pack sales via the UK's administration process effectively replaced receivership appointments and can leave unsecured creditors not only without a return, but without any say in the process.

The below table shows receiverships as a percentage of Australian external administrations in the period since the release of the PC's report.[69]

Financial year	Total external administrations	Receiverships (& other secured creditor appointments)	
2013-14	13,983	2,326	16.63%
2014-15	12,726	1,804	14.18%
2015-16	13,853	1,449	10.46%
2016-17	11,298	1,006	8.90%
2017-18	11,057	1,068	9.66%
2018-19	10,747	1,047	9.74%
2019-20	10,063	1,361	13.52%
2020-21	6,072	845	13.92%
2021-22	6,555	739	11.27%

While the general sentiment in the profession is that receivership appointments are now used less frequently, receivership remains an important feature of Australia's insolvency framework as recently noted by a leading insolvency lawyer and former ARITA President Ross McClymont (Office Managing Partner, Ashurst Melbourne).

> *Over the last few years many people have told me that Receivership has largely gone the way of cassette tapes and fax machines, given the growing focus on "preserving value" and "stakeholder engagement". However, as Mike Tyson famously said everyone has a plan until they get punched in the face – as we head into a period of growing economic turbulence it remains an important part of any secured creditor's enforcement toolkit.*[70]

[69] And other forms of corporate controllership appointments initiated by secured creditors sourced from ASIC Insolvency statistics - Series 2 External administration and controller appointments: Table 2.3 - All external administrator and controller appointments–Appointment type, ANNUAL, QUARTERLY.
[70] https://www.linkedin.com/feed/update/urn:li:activity:7021291176238469120/

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4.3 ASBFEO case study on practitioner fees

In its written submission, ASBFEO sets out a number of very brief case studies. One of these, case study 6, relates to practitioner fees. It seems to us that some reliance has been placed on this case study.[71]

This case study, perhaps because of its brevity, is misleading. The case study notes that having corresponded about the specific matter with the insolvency association (actually, ARITA) "there was nothing to be done regarding the fee increase". This statement is incorrect and apt to mislead the Committee.

We are happy to provide the Committee with our correspondence with ASBFEO and the practitioner concerned but for convenience we set out the facts of the matter here.

As noted in our primary submission, concerns expressed regarding remuneration often overlook a great deal of detail. In particular, we would observe that the costs incurred by practitioners, as opposed to their remuneration, is often confused. In relation to the specific concerns raised in this case study, at the time ARITA responded to ASBFEO advising that:

- Having reviewed the substantial information provided by the complainant and corresponded with the liquidator, including attending their office to inspect files in relation to the matters raised, a comprehensive response was provided to the complainant, including:
    - That the liquidator advised that he believed he was significantly undersold by the complainant in respect of the amount of work that was required to be done in relation to liquidation of the four companies in question.
    - While there was an error in some documentation, the initial remuneration estimate for the liquidations was $100,000 and the complainant voted to approve this amount.
    - While ARITA did not identify any misconduct, we did raise a number of concerns regarding administrative oversights with the liquidator for specific attention. We are aware that the liquidator made some internal changes to mitigate the chance of similar oversights occurring in the future.
- In responding to the complainant's concerns regarding the quantum of remuneration drawn by the liquidator for each of the appointments, ARITA noted that the *Corporations Act 2001* provides a mechanism for creditors to seek a review of remuneration determinations by the Court pursuant to section 60-11 of Schedule 2 – Insolvency Practice Schedule (Corporations) and that was the proper avenue for the consideration of any concerns regarding overcharging and/or over-servicing, and a review of the remuneration in this regard is not something ARITA could consider.

[71] See comment by the Chair, Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Tuesday, 13 December 2022, Canberra, p34.

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- We understand that the liquidator has made an application to the Court for the approval of remuneration in one of the liquidations and the complainant has the opportunity to raise any concerns with the Court via this process. The application includes details of the time spent by the liquidator dealing with the complainant (who is a director of the company), his claims and his lack of cooperation.

This case illustrates a more general issue that it is often the case that the conduct of stakeholders has a significant impact on the costs of a liquidation or bankruptcy. Our members regularly observe dealing with unreasonable and excessive expectations of directors, creditors and/or solicitors result in substantial increases in costs. Some examples are:

- In the liquidation of a residential home builder the major creditor (who sought and achieved the replacement of the initial appointee) refused to support commercial settlement proposals made by the director in relation to recoverable transactions, pushing the matter into litigation. Whilst it was the major creditor's desire for the matter to be enforced to the fullest extent possible (ie director made bankrupt and his wife's property sold), the creditor declined to provide funding to the second liquidator which caused him to incur more than $70,000 in legal and professional costs which were not recovered in full.
- Over $200,000 in legal fees incurred defending a matter involving an Eastern European solicitor who has received an 18-month ban in the UK from bringing court cases. That cost will be borne personally by the appointee.
- A bankruptcy matter where a two-day examination ended up taking 22 days, including two arrest warrants being issued to a party who claimed to be a "sovereign citizen". The legal bill amounted to over $600,000 and is currently being covered personally by the appointee.

4.4 ASIC Automated response to Liquidator reports of alleged misconduct

In his evidence to the Committee, Mr Michael Brereton referenced ASIC's automated response to possible misconduct reports lodged by liquidators noting:

> *We've recently lodged a report with ASIC. Within 45 seconds we got a 'no further action' response from ASIC—so, clearly, they've got an AI system in the background that's automated that reviews the reports, and you get an instantaneous response that no further action is being undertaken in relation to that particular report.*[72]

This concern was raised by the Committee during ASIC's evidence with the below exchange.

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[72] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Wednesday, 14 December 2022, Sydney, p8.

CHAIR: We actually had evidence that there's market failure and that what's happening is businesses that are successful in insolvency are across subsidising compliance with paperwork, reporting to ASIC and maintaining their accreditation to comply with the law. Providing an assessment to ASIC of businesses—$5,000 is the lowest quote that we've had for the work that needs to be done. Within 40 seconds of them putting that through the portal, they get an AI generated response that just says 10,000 have gone in and there's been virtually no action. Is that true? Is that what happens?

Mr Day: My initial answer to that is I don't think that is true. External administrators, whatever type they are, are under an obligation to report to us if they suspect misconduct, and the form that they fill in is pretty simple and straightforward, and the level of detail is pretty low. This idea that it might cost $5,000 to do the work to provide that initial report I don't think is true. [73]

Attachment E provides a copy of a report lodged by Mr Brereton (redacted for confidentiality). The report notes possible misconduct in relation to directors' duties, insolvent trading, and the requirement to provide the liquidator with the company's books.

This report was lodged on 18 October 2022 at 4:21:10pm. Also attached is a response to the lodgement advising the '[a]fter considering your report, ASIC has decided not to commence an investigation into the matters raised' which was received on 18 October 2022 at 4:21:48pm – a mere 38 seconds after the report was lodged.

Despite Mr Day's evidence doubting the cost of the work required to complete this report, we highlight the extensive questions contained in the report and the required declaration that to the best of the knowledge of the liquidator, the information contained in the report is complete, true and correct, and they have taken reasonable steps and made reasonable inquiries to confirm this.

The failure of a liquidator to adequately investigate the circumstances and affairs of companies to which they are appointed, and inaccurately report to ASIC and creditors can have serious consequences and can, and has, lead to disciplinary action by ASIC.

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[73] Proof Committee Hansard, Parliamentary Joint Committee on Corporations and Financial Services, Corporate Insolvency in Australia, (Public), Wednesday, 14 December 2022, Sydney, p63-64.

ARITA

Attachment A – ARITA 2023 Pre-budget Submission

18 January 2023

Hon Stephen Jones MP
Assistant Treasurer and Minister for Financial Services
Parliament House
Canberra ACT 2600

By email: PreBudgetSubmissions@treasury.gov.au

Dear Assistant Treasurer

Pre-budget Submission

The Australian Restructuring Insolvency & Turnaround Association is pleased to provide this submission to the Government relating to the funding of insolvency law reform.

We are Australia's largest representative body of insolvency practitioners, covering some 80% of registered liquidators and bankruptcy trustees as well as insolvency lawyers and other experts in the field of business rescue.

As you are aware the Joint Parliamentary Committee on Corporations and Financial Services (the "JPC") has commenced an inquiry into the corporate insolvency law. ARITA has been an active participant in this inquiry and has had significant engagement with several of your cabinet colleagues and a number of government agencies on our views and the importance of law and policy reform in this area. Again we would request a meeting with you at the earliest opportunity to discuss these matters.

There is an emerging consensus from the JPC's inquiry that substantial reform of Australia's insolvency system is needed. Broadly:

- Australia's insolvency system is too complex from the perspective of small and medium businesses and this is leading to excessive cost, reduced incentives and likelihoods of business turnaround, and low returns to creditors.
- The primary cause of this is the legislative complexity, particularly in relation to small business restructuring and simplified liquidations, no statutory treatment of trusts (as recommended in 1988) and the separation of personal and corporate insolvency.
- The cost of small insolvency administration could be reduced by more nuanced, risk-based reporting requirements and the bringing together of personal, corporate, trust and partnership insolvencies under a single law administered by a single, best practice, dedicated insolvency agency.

- Practitioners are not being remunerated properly for the work they do in relation to small insolvencies. This may be leading to inefficiency in the market for insolvency services as a result of practitioners cross-subsidising to fund smaller matters. This inefficiency would be reduced by reducing costs and developing a more appropriate funding model.
- Directors of smaller businesses are generally unaware of their obligations and options for dealing with financial distress and generally don't distinguish between their personal and corporate financial circumstances.
- The system seems to be generally working well for listed and other large business – safe harbour and voluntary administration are clear policy successes – although legislative simplification and better education of both directors and creditors would be welcomed.
- A substantial (root and branch) review is generally preferred over piecemeal reform to legislation and it seems that the Australian Law Reform Commission is the body best suited to undertake that work.

There appears to be little utility in speculating broadly on the budgetary implications of the consensus above until such time as the Government has responded to JPC's report, which is expected to be tabled in May.

That said, given the wide support for reform, it would be prudent for the Government to make provision for the funding on a comprehensive review by the ALRC in the next financial year from which we expect would come funding estimates for reform costs in subsequent years. In our previous submission to you dated 15 August 2022 we suggested an amount of $3m would be appropriate to undertake such a review and it remains that this is an adequate sum to be provided to the Attorney General's portfolio budget.

We look forward to meeting with you to discuss these matters further. If you require any further information, please contact Dr Warren Mundy at wmundy@arita.com.au or on 0409911554.

Yours sincerely

John Winter
Chief Executive Officer

Cc: Hon Mark Dreyfus KC, Attorney General
Hon Julie Collins, Minister for Small Business
Senator Deborah O'Neill, Chair, Joint Parliamentary Committee on Corporations and Financial Services.

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Attachment B – ARITA Response 2020 ASBFEO Inquiry

<table>
<tr><th>ASBFEO</th><th>ARITA Response</th></tr>
<tr><td colspan="2">Access to timely support</td></tr>
<tr><td>Finding: Small business owners know their business best and know when to seek advice. However, suitable professional advice can be hard to find and difficult to fund.</td><td>• ARITA agrees that it is important that all businesses need to be able access the right advice at the right time – though it is ARITA's view that when a business is in financial distress, advice on viability, turnaround and exit options should be provided by a registered liquidator or an ARITA Professional Member (including lawyers and turnaround experts).

At a minimum advice should only be provided by suitably qualified and regulated advisors with adequate and appropriate professional indemnity insurance.</td></tr>
<tr><td colspan="2">Recommendation 1: Small Business Viability Review</td></tr>
<tr><td>a) Establish a Small Business Viability Review program where small business owners in significant financial stress – for example, a 20% reduction in cashflow on a rolling 12 month basis – or where a systemic shock has been declared can obtain a voucher of up to $5,000 to access tailored advice on how to improve the operation of their business, or, where the advice is to wind up the business, to implement that.
i. A business owner (or their representative, for example, their accountant) would apply for an initial voucher of up to $3,000 with services provided by an appropriately accredited professional. The services provided would assess the current financial position of the business, its viability as an ongoing concern and advising on issues and options of turnaround or exit.
ii. Should the advice indicate that the business should be wound up, an additional $2,000 will be made available for a registered liquidator.
iii. For services provided, payment will be made directly by government up to the maximum allowable value.</td><td>• We question how such a voucher be funded?
• What information will have to be provided on application noting that many micro and small businesses fail to keep adequate financial records on an ongoing basis?
• How would an appropriately accredited professional be determined to ensure integrity of the system?
• How does the $2,000 payment to the liquidator fit with the $10,500 payment referred to in Recommendation 5 for a simplified liquidation? We note that $2,000 will barely cover the costs of the ASIC Industry Funding Levy imposed on liquidators for each liquidation and disbursements for searches (including ASIC and assets searches) making the proposal loss-making for any liquidator from the outset.</td></tr>
<tr><td>b) Expand the existing concierge service offered by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to support the Small Business Viability Review program to help small business prepare for and access the</td><td>• How would ASBFEO choose an appropriately accredited professional that would be suitable for a particular business?</td></tr>
</table>

ASBFEO	ARITA Response
program where a small business does not already have a trusted financial advisor.	
c) The Australian Taxation Office (ATO) and Australian Securities and Investments Commission (ASIC) should include details of the Small Business Viability Review program and the ASBFEO concierge service in current ATO and ASIC compliance notices. In addition, the ASBFEO will work with the ATO to update the ATO's business viability assessment tool for the new system and ensure that the tool works appropriately in times of crisis, such as natural disasters, and in the current COVID-19 pandemic.	• ARITA has no comment on this recommendation.
d) The Small Business Viability Review scheme program will be reviewed after 2 years of operation and every 3 years thereafter to assess the effectiveness of the scheme and to consider amendments where needed.	• ARITA has no comment on this recommendation.
Respond to systemic shocks	
Finding: Australian businesses have always had to respond to natural disasters such as drought, floods, and bushfires. The COVID-19 pandemic, which has come on the back of wide-spread natural disasters, has shown that businesses need a mechanism where they can take stock of their situation and prepare for the re-opening of trade.	
Recommendation 2: Small Business Debt hibernation	
a) Establish a Small Business Debt Hibernation instrument accessible to small businesses where a State, Territory or the Federal Government has declared a systemic shock such as those experienced during natural disasters, pandemics, significant economic downturns or other crises. b) A minimum hibernation period of 90 days applies with Federal, State or Territory Governments able to increase that period. i. During the Business Debt Hibernation period, small business owners will engage with creditors to reach an agreed period of hibernation of at least the minimum period, during which time payments on loans, rent, tax and other ongoing payments can be deferred. ii. When the business returns to trading, extended repayment of debts at the time of entering hibernation will be accommodated. c) During the period of the declared hibernation: i. New transactions with unrelated parties in the ordinary course of	• Who determines when these systemic shocks have occurred? If it is the Government, isn't it better that they develop a customised response to the particular problem rather than relying on a generic procedure which may not be suitable for the particular problem? • What are the thresholds for eligibility? • Are all MSMEs to be eligible for hibernation? Or will the company have to prove that there is a viable business to hibernate? If unviable businesses are able to hibernate, they will just continue to accrue debts for another 3 months with no responsibility of the directors for the debt due to proposed suspension of insolvent trading. There will be no incentive to obtain proper advice and deal with the problem. • Individual temporary debt protection mechanisms in line with personal options available under the *Bankruptcy Act* may be preferable to a broad instrument. Creditors still have rights under this process. • Blanket moratorium from insolvent trading should not be provided, but protection should be obtained via existing safe

ASBFEO	ARITA Response
business are excluded from the voidable payments regime. ii. There will be a moratorium on personal liability for insolvent trading. iii. The ATO must not charge or must remit any interest and penalties related to the hibernation period. iv. Small businesses will be able to utilise the Small Business Viability Review voucher during this period.	harbour mechanisms so as to ensure that companies are obtaining appropriate advice about their future. • What is the position if creditors do not agree to hibernation? How is creditor agreement to be achieved? What happens if all creditors but one agree and that creditor proceeds with a winding up application? • What is the effect on creditors that may have already commenced enforcement action (e.g. winding up application has been made – noting that voluntary winding up is not allowed once a winding up application is made but VA appointment is. Also note ongoing issues with VAs being appointed at the last minute before winding up applications are heard)? • Extended repayment terms on debts at the time of entering hibernation, plus deferred hibernation amounts will create a significant burden on MSME enterprises to be repaid. There needs to be an integration of any “hibernation” with a compromise regime in order to manage these debts. • Will new transactions excluded from the voidable payments regime include payments of pre-hibernation debt? If it does, this could be used to manipulate the current recoveries regime?
Recommendation 3: Limit small business bank debt escalation	
The Australian Banking Association should amend subparagraph 179A(a) of the Banking Code of Practice such that it applies to small businesses generally as follows: *Where you are a farmer or small business and we have provided you with a loan for the purposes of your operation, we will not charge default interest (or any fee in lieu of default interest) on that loan during any period that your business is impacted by drought or natural disaster (which includes epidemics and pandemics).*	• ARITA has no comment on this recommendation.
Cost effective insolvency processes	
Finding: External administrations are focused on maximising the return to creditors, irrespective of the cost of the process or the effect on the business. However, a restructure of business affairs, managed by the small business owner and with approval from a registered liquidator could have more positive outcomes, including providing a greater return to creditors. Where businesses do need to be wound up, there is a concern that the cost of the process far outweighs any benefit to creditors, even	• The statement fails to recognise a Registered Liquidators’ statutory obligation to investigate the affairs of the company and report misconduct. Not all the work required by law to be undertaken by a Registered Liquidator results in a benefit to creditors. • Australia’s insolvency regime is a creditor-focused regime – it is a significant question regarding the change of approach and is not one that should be taken in isolation from consideration of Australia’s insolvency

ARITA

ASBFEO	ARITA Response

where liabilities are small, and a business structure is simple.	regime as a whole. The cost and efficiency of insolvency processes is not isolated to MSME insolvency.
	• Insolvency necessarily means that there are not enough assets to meet the liabilities of the company – there will always be people who do not get paid.
	• Costs of the insolvency process can only be recovered from the assets of the company. ASIC statistics show that 37% of external administrations have no assets and 21% have less than $10,000. The ASBFEO Report suggests that the proposed streamline liquidation would cost $10,500 which is more than what is available in 58% of liquidations done under the current system. We are unsure how ASBFEO sees that creditors will be better off in these administrations – if the company has no assets, then there is nothing to distribute, notwithstanding how efficient and effective the insolvency system is.
	• Assets often cannot be sold for what they are purchased for due to:
	  ○ a simple deterioration in the value of the asset through time and use
	  ○ change in economic circumstances
	  ○ financial distress of the seller (there is an obligation under law for external administrators to disclose their appointment),
	  ○ the need to sell assets promptly as delays can escalate costs and risks.
	• Businesses in financial distress are often difficult to sell, particularly small businesses, as:
	  ○ they are not attractive to a purchaser (they have been losing money), or
	  ○ the economic climate means buying a business is not an attractive option (eg current COVID-19 environment) or
	  ○ due to the intertwined nature of MSMEs with their owners (refer World Bank Report into MSMEs in 2018 entitled "Saving Entrepreneurs, Saving Enterprises: Proposals on the Treatment of MSME Insolvency")
	• We disagree with the comment on page 15 of the report which states that the statistics provided for companies in liquidation relate to companies that in most cases will be in liquidation after administration or

ARITA

ASBFEO	ARITA Response
	receiverships during which assets are sold and the proceeds distributed to priority and secured creditors. This is simply not the case. In the 2018/19 financial year there were: o 249 receiverships (including receiver and manager) o 1,226 voluntary administrations o 6,307 court and creditors' voluntary liquidations. Clearly, nowhere near a majority of the companies in liquidation could have been in receivership or voluntary administration first – even if every receivership and voluntary administration was followed by liquidation, which they aren't. • We disagree with the comments on page 26 that registered liquidators in Australia could not have the expanse of knowledge and experience to manage the businesses that make up the majority of the 7,000-plus liquidations each year. RLs are highly qualified professional with unique skills to assess all businesses in financial distress. Where a company in liquidation is trading, and where possible, a RL will try to engage with key management of a business to maximise return, however many business owners simply do not accept that control has now passed to the liquidator. • Based on ASIC statistics the majority in fact have few to no assets. As a result of this (which is nothing to do with the registered liquidator but rather the conduct of business owners in the lead-up to the failure of the business) in most liquidations a liquidator's principal job is to investigate and report, and wherever possible recover assets for the benefit of the administration – not to trade a business and or sell assets. However, a number of insolvency firms have industry experts within their firms or have focused on developing industry expertise themselves. Liquidators also have a wide range of commercial skills and a deep understanding of Australia's complex insolvency processes which makes them a valuable source of assistance for companies in financial distress.

ARITA

<table>
<tr><th>ASBFEO</th><th>ARITA Response</th></tr>
<tr><td colspan="2">Recommendation 4: Directors' Insolvency Agreement</td></tr>
<tr><td>Establish a Directors' Insolvency Agreement instrument for small businesses where owners of a business can provide a proposal to a registered liquidator on the best way to manage the business. The proposal may seek to restructure or to wind up the business, where a restructure must retain the existing company and a sale of the business and/or its assets must be to an unrelated party.
i. Once the small business owner and liquidator enter into a Directors' Insolvency Agreement, an automatic 30-day moratorium from creditor actions and relief from insolvent trading commences.
ii. Provided the liquidator is satisfied that there is no criminal misconduct and it is in the best interests of creditors after considering other alternatives, the liquidator would then approve the small business owner's proposal and report to creditors the estimated net benefit for each alternative considered and the rationale for approving the owner's proposal.
iii. As part of the report to creditors, the liquidator would seek appointment to finalise the agreement with expenditure capped at their estimated total expenditure.</td><td>• A substantial issue is that most MSMEs value is attached to the "owner" of the business (tie up of goodwill, brand and customers with the identity and personal networks of the owner), as such it is unlikely that the business would be attractive to an arms-length purchaser (issue identified in World Bank Report).
• Akin to ARITA's micro restructuring proposal, but needs to adopt our more considered/measured recommendations.
• Limiting the identification of misconduct to criminal misconduct inappropriately allows civil misconduct to go unquestioned.
• Registered liquidator undertaking review must be independent and not involved in the formulation of the proposal (how do you objectively assess it as being in the interests of creditors if you take part in the development of the proposal?).
• What are the proposed thresholds for eligibility for a DIA?
• There should be limits on how many times a director can do a DIA.
• Who is responsible for debts that the company continues to incur during the moratorium and DIA? If the company is insolvent, it will not have the money or assets to meet the liabilities that it is continuing to incur and directors have no personal liability.
• In order for a liquidator to be satisfied and certify that there is no criminal misconduct, the liquidator will need to undertake an investigation, obtain valuation of assets to determine if any sales were at market value (this also assumes that tax affairs are up to date, which often they aren't).
• In order to be able to report on the alternatives, the liquidator will need to determine the likely position in a liquidation.
• The proposal is for the use of templates and standard procedures and yet this has been criticised in the report for liquidations as it provides generic information not directly relevant to creditors.
• How is the DIA agreed to by creditors – is it a majority? If agreement is not obtained is the company liquidated or can a new proposal be offered? Related party creditors should not be entitled to vote and bind unrelated creditors.
• What happens in the event of default – is it liquidation?</td></tr>
</table>

ASBFEO	ARITA Response
	• How will a secured creditor recover their debt if they are prevented from taking enforcement action? Such a position will encourage secured creditors to take action earlier as if they wait and try to assist their customer and the customer proposed a DIA, they would then be prevented from taking enforcement action. This will also impact on the provision of credit to small businesses as the ability of secured creditors to recover their debt is significantly impacted.
Recommendation 5: Simplified liquidation	
For a small business where the deficit of the business (i.e. total liabilities less total assets) can be shown to be less than $50,000 the owner may appoint a registered liquidator to commence a simplified liquidation where: i. The process will take no more than 30 days. ii. Costs will be capped at no more than $10,500 and rise in line with the capped total as nominated by ASIC in its funding guidelines for registered liquidators under the Assetless Administration Fund.[1] iii. Secured creditors are prohibited from taking enforcement action to recover their debt. iv. A registered liquidator will, without the requirement to rebuild any company books, realise the assets of the business, and distribute funds realised to all creditors, proportionate to the level of debt held, irrespective of ranking, once employee entitlements have been paid. v. The recovery of such assets must exclude the sale of the principal places of residence of company officers and guarantors.	• We believe the threshold for assessment of eligibility is unworkable. How are asset values to be determined and how is there certainty of debt levels? • Akin to ARITA's streamlined liquidation proposal, but needs to adopt our more considered/measured recommendations. • Is it proposed that ASIC will meet the cost of simplified liquidations from the Assetless Administration Fund? If so, it is unfair that the fund should meet the cost of these liquidations if there are funds in the insolvency to cover the cost. It is also unfair that in liquidations that do not meet the threshold, the liquidator would remain unpaid if it is assetless (noting that the AAF does not actually pay for assetless insolvencies currently). • If it is proposed that this is a set fee to be paid from the assets of the company, note statistic about that 37% would have no assets to do this and a further 21% would have some, but then no assets to make a distribution to creditors. • A liquidation cannot be completed in 30 days if there are assets to sell, debtors to recover and a dividend to be paid. • Why would secured creditors be prohibited from enforcement action to recover their debts? Secured creditors stand outside the liquidation process. Removing secured creditors' rights will impact on small business access to credit. Note that secured creditors can include other SMEs that have secured their provision of goods through a PMSI registered on the PPSR. • In an ordinary liquidation, most creditors do rank equally – other than secured creditors, the cost of the insolvency and employees? How is the proposal different unless secured creditors are expected to rank equally with unsecured creditors?

ARITA

ASBFEO	ARITA Response
	• A principal place of residence would only be recoverable by a liquidator if it was owned by the company or purchased using company funds. It is not appropriate that such a residence would not be available to the creditors of the liquidation. If it is the subject of a personal guarantee, then the secured creditor would need to have rights to enforce its security interest. It is important to note that, absent of this type of security offering, small business loans would be far less accessible. • Prohibitions on recoveries against principal places of residence of company officers and guarantors will significantly impact the ability of MSMEs to obtain credit and will also detrimentally affect other MSMEs that rely on guarantees to protect their provision of credit. This will also encourage directors to abuse the system in order to claim eligibility for the streamlined liquidation process in order to protect their home against guarantees that they have provided. Also, why should a director in a streamlined liquidation have this protection but a director in a standard liquidation does not? • The capping level of $10,500 is not much more than the cost of a non-regulated individual undertaking an MVL, noting that as a solvent liquidation, an MVL requires no investigation, no reconstruction of books and records and has no parties in dispute. The amount is simply not viable.
Recommendation 6: Update statutory demands	
For statutory demands served under section 459E of the *Corporations Act*, increase the statutory minimum to $5,000 and the statutory period to 30 days	• Agree.
Recommendation 7: Ensure proportionate recoveries	
Registered liquidators may only pursue recoveries during external administration where the expected net financial benefit to creditors is estimated to be at least 10% greater than the cost.	• This is impossible to determine without undertaking investigations, possibly examinations and obtaining legal advice – all of which cost money which may then not be recovered. • This is a highly subjective issue and has no relevance to creditors where funding for any action may be provided by 3rd parties. • These types of recoveries are inherently uncertain. • Such actions cannot be judged with the benefit of hindsight and there are wider community benefits to the actions taken by liquidators to hold poor corporate behaviour to account.
Modernised approach to information	

ASBFEO	ARITA Response
***Finding**: Small business owners and other creditors believe that too much information is currently provided to all creditors, including where the information is of little relevance to some creditors. There is consensus that all reports should be available, by default, electronically. The requirement to attend meetings in person disadvantages creditors outside of capital cities. There is a lack of clear information, available from a trusted, centralised point, regarding the process, objectives, implications, and impacts of external administration processes.	• We agree that reporting should be electronic • The amendments made as a result of the ILRA in September 2017 have resulted in additional information being provided to creditors regarding their rights and powers, along with mandatory information to be provided on appointment and 3 months after appointment (for liquidations). These reporting requirements are only new and thus should be considered “modern”. • We note that ASBFEO proposes that the external administrator’s annual administration return should be automatically provided to creditors which will increase the amount of information provided.
Recommendation 8: Simplify information	
a) ASIC should revise the *Insolvency Practice Rules (Corporations) 2016* to restrict the detailed information provided to creditors to the matters on which they can vote, relevant to the specific business under external administration.	• This is the role of government not ASIC. • In a standard small liquidation, creditors would be required to vote on very limited matters (remuneration, destruction of books and records and, in some instances, the replacement of the liquidator). This would mean that no information about likely returns/dividends, investigations, recovery actions, asset realisations, history of the business etc would be provided to creditors.
b) The initial creditors report to be prefaced by a clearly titled summary of not more than two pages outlining the strategies considered, expected total cost and net return to each rank of creditor for each strategy, and the reason for the proposed course of action pending creditors approval. The report will provide links for creditors who are interested to access and navigate the historical information on the business and generic information about creditors rights and insolvency processes.	• This information could not be provided in the initial report to creditors as the liquidator would not have sufficient time to gather the necessary information. The initial report in a CVL is sent out in 10 business days from appointment and in a Court Liquidation in 20 business days from appointment.
c) ASIC should create plain-language fact sheets targeted to small business owners which explains the different external administration options, legal implications of each and the obligations of, and impact on, the owner, their business, and any directors of the business.	• We agree that such information is necessary though we are not sure that ASIC is the best body to provide that information. ARITA is working on a series of plain English information sheets for stakeholders in the insolvency process. ARITA has sought support from the government to complete these information sheets, but it has not been forthcoming.
Recommendation 9: Electronic Communication	
Communications regarding external administrations and all reporting should, by a default opt-out process, be electronic with amendments including: i. Section 600G of the *Corporations Act* to require all notices, reports, and	• Agreed that electronic communication should be provided unless there is a specific request otherwise. However, this depends on the company having electronic contact details for all creditors.

ARITA

ASBFEO	ARITA Response
correspondence in relation to external administrations to be electronic unless the intended recipient requests otherwise. ii. Section 497 of the *Corporation Act* to require the notice of a meeting to include details to attend by electronic means such as teleconference or video conference.	• Note that s 497 does not have any meeting requirements since the ILRA amendments from 1 September 2017. Meetings requirements are dealt with in Division 75 of the IPS and IPRs.
Proactive and targeted handling of complaints	
Finding*:* Small business owners can understandably feel that an external administration has worked against their best interest. This does not necessarily mean that a registered liquidator, nor, indeed, a director, has been entirely without fault. The current system of investigating complaints regarding external administrations is opaque, with improvement required on who can complain and the manner in which those complaints are investigated.	• Why would a liquidator be at fault for completing an insolvency process in compliance with their statutory obligations and duties which requires them to serve the creditors and not the directors? • ARITA members are subject to robust and active conduct processes. All complaints are assessed and investigated by insolvency professionals and complainants are notified of outcomes. Full details of ARITA's conduct processes are available on the ARITA website. • The overview of conduct outcomes for 2019 as reported in the ASBFEO report provide transparency to the matters dealt with by ARITA.
Recommendation 10: Better targeted investigation and recording of misconduct	
a) Where a Director's Information Number (DIN) record shows a director has been involved in three or more external administrations, or if there are more than three complaints about a director, over a rolling five-year period, ASIC must investigate the conduct of that director.	• ASIC already has powers to investigate and disqualify company directors. • Liquidators already have an obligation to report misconduct to ASIC.
b) The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) should be designated a priority complainant under the ***Corporations Act***. i. As a priority complainant, the ASBFEO would be empowered to substantiate serious complaints concerning practices of registered liquidators and office bearers. ii. The ASBFEO will lodge a complaint with ASIC together with appropriate evidence. iii. ASIC would be required to investigate the complaint and report its findings and proposed actions to the ASBFEO within 90 days.	• ASBFEO has no industry expertise to warrant this designation. • There is no barrier to ASBFEO making a complaint to ASIC regarding the conduct of a registered liquidator. • There is no obligation on ASIC to report back to complainants on the outcome of their complaint. • Registered liquidators are a highly regulated population with ASIC estimating to spend $7.76m regulating approximately 640 registered liquidators in the 2019/2020 financial year (approximately $12,000/liquidator). • There is no barrier to ASBFEO making a complaint to ARITA regarding the conduct of an ARITA member. ARITA has a clear complaints handling process and deals with every complaint received using that process. Each complainant is provided with an explanation of the outcome of the complaint.

ARITA

ASBFEO	ARITA Response
	• The priority complainant process currently in the *Corporations Act* does not relate to office bearer misconduct – that misconduct is investigated and reported by external administrators.
c) When an external administration uncovers possible misconduct by a director or a registered liquidator the cost of the investigation into that possible misconduct should be borne by ASIC.	• In order to identify and report misconduct, the external administrator needs to undertake a certain amount of investigations. • At this time, under the law as it stands, ASIC expects regulated liquidators to thoroughly investigate and report on director offences and suspected phoenix activity. There are instances of regulated liquidators being pursued for misconduct breaches if ASIC perceives that they have not performed an thorough enough investigation. There is no obligation on ASIC to action the reports of liquidators. • If ASIC is to take responsibility for conducting more of the investigation work, who is to bear the cost of that considering that ASIC operates on a user pays basis under the Industry Funding Model?

ARITA

Attachment C – ARITA Journal, March 2019, No-one's problem. Everyone's problem – the destructive rise of pre-insolvency advisers

JOHN WINTER
CEO, ARITA

feature

NO-ONE'S PROBLEM. EVERYONE'S PROBLEM

The destructive rise of pre-insolvency advisers.

They are widely recognised as the greatest threat to the proper operation of Australia's insolvency regime and, therefore, to the resilience of our economy itself. Yet the exponential rise of so-called 'pre-insolvency advisers' over the last five years has been met with tepid action from regulators and a lack of ownership of the problem.

WHO ARE 'PRE-INSOLVENCY ADVISERS'?

Firstly, it's important to make a distinction between 'pre-insolvency advisers' – a pejorative label – and other professionals who provide legitimate restructuring and turnaround advice.

The latter is about the provision of specialised, informed advice that is within the limits of the law, benefits creditors *pari pasu*, and is intended to help revive struggling businesses and protect jobs.

This type of advice can come from a range of qualified and experienced specialists from ARITA Professional Members (both accountants and lawyers) through to management consultants of the McKinsey style. Most in this space are regulated or provide advice well prior to a point of insolvency. The safe harbour laws of 2017 – an ARITA advocacy initiative – were formed to encourage the giving of, and acting on, this proper advice.

In contrast, pre-insolvency advisers are ambulance chasers who prey on people and businesses in financial distress. They claim to be able to remove the worry of a dire financial situation and to help clients avoid legal duties they may owe.

They are rarely properly qualified and invariably unregulated. Often the advice they provide is intended to benefit directors over creditors, recommends hiding or stripping assets and, at best, skirts the law if not flagrantly violates it.

WHY THE LACK OF REGULATION?

Because of the nature of the illegal or at-the-margins advice they give, pre-insolvency advisers would prefer to remain unregulated. It's also fair to observe that some of these advisers hold lofty views of their advice and are overt in their positioning of how they arbitrage the proper operation of the insolvency regime.

It is clear that these advisers are not registered liquidators or trustees. They aren't lawyers, AFSL holders or tax practitioners. Thus, they have been allowed to fall through the cracks. Seemingly, they are no-one's problem despite them clearly being a huge and growing problem.

We believe regulators need to focus on substance not form. Clearly some pre-insolvency advisers are giving legal advice without a lawyers' practicing certificate. They are providing tax advice without being tax practitioners. And they are providing financial product advice without holding an Australian Financial Services Licence.

That places them squarely in the jurisdiction of state law regulators, the Tax Practitioners Board or ASIC.

It's important to note that liquidators and trustees are, rightly, carved out to be able to provide advice to financially distressed individuals and businesses due to their regulated positions.

PUBLIC CONFUSION

Pre-insolvency advisers exploit the complexity of, and people's unfamiliarity with, the insolvency law regime. Sometimes they take advantage of those in financial distress and sometimes they are complicit with them.

Experienced IPs know that desperate people in financial distress will often only hear the advice they want to hear. Marketing that promises to save assets – the family home being paramount – and livelihoods even when they are clearly gone can be cruelly effective to those in hardship.

The public often can't discern between unregulated, unqualified advisers and reputable, legitimate advisers, such as ARITA Professional Members. In part, this is because pre-insolvency advisers utilise slick advertising and websites that make them appear to be legitimate and trustworthy.

At the end of 2017 and start of 2018 ARITA ran an advertising campaign across financial and trade press around the commencement of the Safe Harbour legislation. It promoted ARITA Professional Members as the best qualified and most appropriate advisers for people in financial distress.

Regrettably, ARITA's ability to fund this advertising was limited. Nonetheless, it did seek to delineate our members' services from the troublesome advisers.

Government really needs to step up here. From the range of Government provided and subsidised services, including financial counselling and financial literacy and onwards, to launching new direct education campaigns, government should be seeking to inform the wider community about where they should be getting insolvency advice from.

And clearly that should only come from ARITA Professional Members, Registered Liquidators or Trustees, or lawyers with additional insolvency law qualifications.

THE SCALE OF THE PROBLEM

ARITA's 2019 Member Survey sought to quantify how problematic the rise of pre-insolvency advisers has become. Compiling the views of over 300 ARITA members and subscribers, the survey is a broad and valid insight.

Twenty percent of respondents indicated that the extent of influence of pre-insolvency advisers had greatly increased over the last two years. A further 29.5% reported it had slightly increased. (See graph 1.)

Aligning with ARITA's stance, 38.6% of survey respondents held the view that stronger enforcement of existing law was the single best way of reducing the influence of pre-insolvency advisers. (See graph 2.)

Another 29.5% believed that increased regulation was required, while only 12.5% thought greater resource or funding to regulators was the cure. Nineteen percent advocated for better financial education for those in distress.

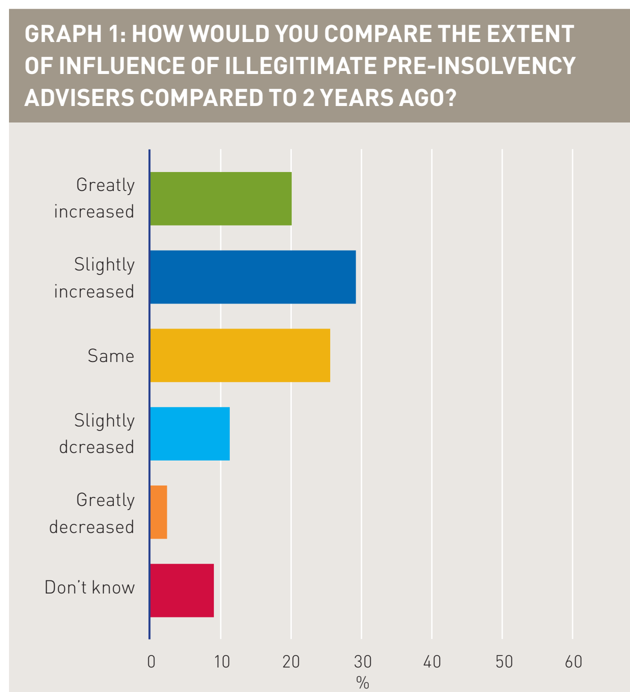
CURRENT LAW REFORM

The recent implementation of Single Touch Payroll requirements for firms is likely to have a much greater impact on reducing the capacity of dodgy pre-insolvency advisers by shining a light on the accumulation of tax and employee entitlements. This will more readily crystallise outstanding tax issues and remove one string of the pre-insolvency advisers' bow.

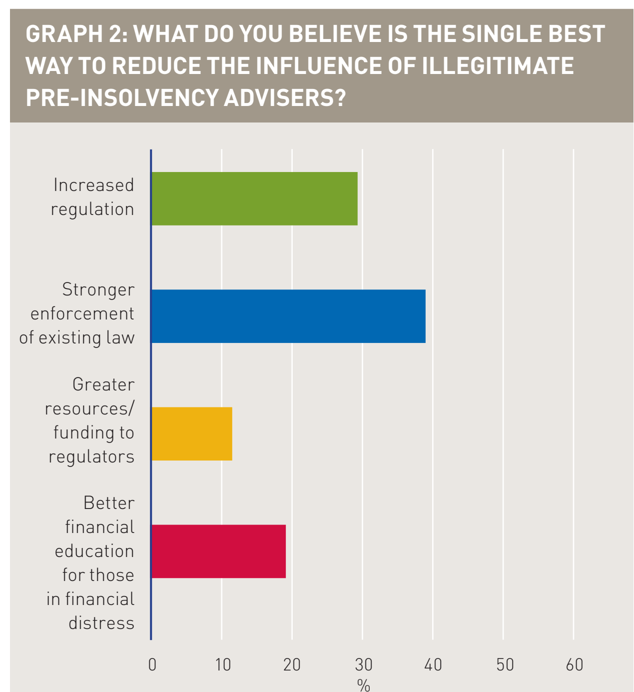
The Federal Government's proposed anti-phoenixing laws in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 which was read into Parliament in February this year, may assist in taking more of pre-insolvency advisers' tools away. Some of the relevant key measures are:

- Introduces new phoenix offences to prohibit creditor-defeating dispositions of company property, penalise those who engage in or facilitate such dispositions, and allow liquidators and ASIC to recover such property.

GRAPH 1: HOW WOULD YOU COMPARE THE EXTENT OF INFLUENCE OF ILLEGITIMATE PRE-INSOLVENCY ADVISERS COMPARED TO 2 YEARS AGO?



GRAPH 2: WHAT DO YOU BELIEVE IS THE SINGLE BEST WAY TO REDUCE THE INFLUENCE OF ILLEGITIMATE PRE-INSOLVENCY ADVISERS?



We will be advocating during the upcoming Federal election campaign for limiting the scope of who can give advice in order to protect the integrity of the system.

- Ensures directors are held accountable for misconduct by preventing directors from improperly backdating resignations or ceasing to be a director when this would leave the company with no directors.
- Allows the Commissioner to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances.
- Authorises the Commissioner to retain tax refunds where a taxpayer has failed to lodge a return or provide other information that may affect the amount the Commissioner refunds.
- Prevents related creditors facilitating illegal phoenix activity by unduly influencing voting at creditors meetings in an external administration. This is implemented through the Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018, which commenced on 7 December 2018.

ARITA'S NEXT MOVES

ARITA is well aware that we need to continue to advocate on behalf of the profession for a stronger government response to the scourge of pre-insolvency advisers.

In particular, we will be advocating during the upcoming Federal election campaign for limiting the scope of who can give advice in order to protect the integrity of the system. In addition, we will be seeking Government to be more directive to regulators about enforcement in this area and to better fund financial literacy education.

We are also working on another major initiative to publish easy-to-understand, plain English guides to insolvency designed to help those in financial distress get ahead of dodgy advisers. These may be simplified to the point of being heavily reliant on cartoons or images to cut through the daunting complexity that most people face in an insolvency.

When these guides are released, we will accompany them with a search engine marketing campaign in an endeavour to disrupt pre-insolvency advisers' online marketing funnel, which relies on paid Google advertising to attract people in financial distress who turn to Google for information.

Members will be encouraged to send these guides to stakeholders in any appointment and to link to them from their websites to assist our search engine marketing campaign.

ARITA's 'Safest Harbour' ad campaign.

ARITA

Attachment D – ARITA Financial Recovery 2020 - an 8-point plan to improve Australia’s business rescue culture, better help indebted individuals back onto their feet, and ensure that creditors get a fairer deal from insolvency

FINANCIAL RECOVERY 2020

AN **8-POINT PLAN** TO IMPROVE AUSTRALIA'S BUSINESS RESCUE CULTURE, BETTER HELP INDEBTED INDIVIDUALS BACK ONTO THEIR FEET, AND ENSURE THAT CREDITORS GET A FAIRER DEAL FROM INSOLVENCY.

August 2019

THE AUSTRALIAN RESTRUCTURING, INSOLVENCY & TURNAROUND ASSOCIATION
LEVEL 5, 191 CLARENCE STREET, SYDNEY NSW 2000 | 02 8004 4344 | ADMIN@ARITA.COM.AU

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THE AUSTRALIAN RESTRUCTURING, INSOLVENCY & TURNAROUND ASSOCIATION
LEVEL 5, 191 CLARENCE STREET, SYDNEY NSW 2000 | 02 8004 4344 | ADMIN@ARITA.COM.AU

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Find out more page 16

Australia's next downturn is coming... are we ready?

Australia is enjoying one of the longest runs of economic growth of any developed nation in modern history.

'The Lucky Country' has had over 28 years of uninterrupted growth including largely dodging the worst effects of the Global Financial Crisis.

But history shows that every run of growth must come to an end. And if these recent headlines are anything to go by, our next downturn may well come sooner rather than later:

FINANCIAL REVIEW

Australia risks 'slow decline' without reform

John Kehoe *Senior Writer*

Jun 18, 2019 — 12.00am

news.com.au

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economy ▸ world economy

Experts warn the world is on track for a new global financial crisis

Alexis Carey

news.com.au OCTOBER 22, 2019 1:58PM

THE AUSTRALIAN BUSINESS REVIEW

≡ All sections HOME THE NATION WORLD BUSINESS COMMENTARY

Economic concern as consumers see dark clouds ahead

By ADAM CREIGHTON, ECONOMICS EDITOR

12:00AM JULY 11, 2019 · 7 COMMENTS

The Sydney Morning Herald

Australia's 'perfect economy' set for a wake-up call - and the world is watching

By Daniel Moss

April 30, 2019 — 11.16am

There are also signs the next downturn could be a bad one.

Bricks and mortar retailers are already struggling to survive the relentless shift to online retailing. The current downturn in the property market will have a knock-on effect in the construction sector.

And because interest rates have been so low for so long, a lot of businesses have been able to keep their heads above water, but they have not been thriving. A drop in consumer spending or an interest rate rise of only two or three percent would put them under significant financial stress.

Many will become insolvent (bankrupt) leaving staff unemployed and creditors unpaid. In a dynamic, market-based economy, insolvency is a fact of life. And when economic conditions become more challenging insolvencies inevitably rise.

“In a dynamic, market-based economy, insolvency is a fact of life. And when economic conditions become more challenging insolvencies inevitably rise.”

Working at the frontline of financial distress

When people and businesses get into financial distress or become insolvent, insolvency practitioners are the professionals at the frontline.

Their job is to:

- help people choose the best option for their circumstances
- try to rescue viable, but financially distressed businesses, and
- if insolvency can't be avoided, ensure it's resolved in a timely, efficient and impartial manner.

ARITA is the professional body that represents insolvency practitioners. Our profession plays a vital role in maintaining a business environment in which creditors are willing to lend, entrepreneurship is encouraged, and the economy can flourish.

An insolvency system fit for the 21st century economy

Although the cost of living struggles attract plenty of comment from policymakers and media commentators, relatively little attention is paid to what happens once people enter a formal insolvency.

The challenges that face business and personal finances are constantly changing and it is crucial that the insolvency system is regularly reviewed and updated to keep up with the pace of change.

Australia's insolvency system has developed in bits and pieces over the last three decades. It is far from broken, but it can be improved to be better suited to our 21st century economy.

The new parliament provides politicians and policymakers an opportunity to address the most pressing issues. If we can strengthen our insolvency regime now, we can help minimise the fallout from the next downturn and ensure the economy returns to growth as soon as possible.

Using the insight and experience of ARITA Professional Members, we have drafted this brief 8-point plan suggesting ways that policymakers and regulators can enhance Australia's business rescue culture, better help indebted individuals back onto their feet, and ensure that creditors – from small businesses to the taxpayer – get a fairer deal from insolvency.

A few facts about Australia's insolvency regime:

- Insolvency practitioners (IPs) and restructuring professionals play a vital role in ensuring that Australia maintains its reputation as one of the best places in the world to do business. The insolvency and restructuring profession:
  - » rescues businesses and saves jobs
  - » creates the confidence to trade and lend by returning money to creditors after insolvencies
  - » investigates and disrupts fraud
  - » helps indebted individuals get back on their feet.
- Insolvency often doesn't mean permanent financial failure; insolvency procedures are a solution to debt worries.
- There are around 650 Registered Liquidators and 220 Registered Trustees in Bankruptcy in Australia. Around 6,000 people are estimated to work in the industry.
- Most IPs are accountants and they are supported by specialist insolvency lawyers.
- IPs are regulated by the Australian Securities & Investments Commission (ASIC) and the Australian Financial Security Authority (AFSA) and have a statutory objective to maximise returns to creditors.

> "If we can strengthen our insolvency regime now, we can help minimise the fallout from the next downturn and ensure the economy returns to growth as soon as possible."

1. Conduct a comprehensive review of Australia's personal and corporate insolvency laws to ensure they are simple, efficient and effective.

The last comprehensive and focussed review of Australia's insolvency laws – the Harmer Report – was launched in 1983 and delivered in 1988. **This was a time of bricks and mortar businesses compared to the service-based economy and virtual marketplace that exists now.**

As it stands, Australia's insolvency law is amongst the most complex and voluminous in the world. It's fair to say that only our tax laws are more complex. Also, the separation of Australia's personal and corporate insolvency systems is poorly understood, even by many policymakers.

Existing insolvency laws also do not support micro and small to medium business insolvencies. This not only puts us out of step with global best practice but also, in effect makes our system unresponsive to 97% of Australia's businesses. Additionally, our laws fail to grapple with the heavy overlap of small business insolvencies and any associated personal bankruptcy for the directors of those businesses. This adds a further significant burden for small business people in financial distress as they have to navigate through two different insolvency regimes.

ARITA believes now is the time for a comprehensive review of Australia's insolvency system. It's high time to set some clear and obvious principles that all insolvency law reform must follow:

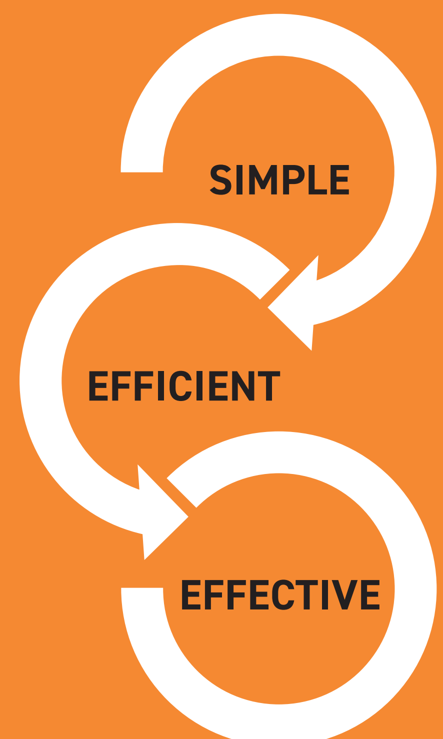
SIMPLE – how do we justify having so much disjointed legislation rather than a single 'Insolvency Act' – as the UK has had for the past 30 years?

EFFICIENT – complexity comes at a cost. We need a system that delivers value to creditors and facilitates efficiency for insolvency professionals.

EFFECTIVE – substantial failings in the first two principles – simple and efficient – undermine insolvency practitioners' ability to deliver effective outcomes for insolvency stakeholders.

ARITA is prepared to lead and drive this. We have announced that we will be creating a Financial Recovery Law Reform Commission which will be led by eminent commissioners and will aim to create a template for reform that will deliver a world's best practice system. While, as a profession, we will primarily fund this important endeavour, we will be seeking the support of government to assist in properly resourcing it.

ARITA advocates three fundamental principles for any legislative or administrative reform in the insolvency space:



2. Create a single, focussed and efficient insolvency regulator.

At the moment there are two insolvency regulators. ASIC regulates Registered Liquidators who administer corporate insolvencies. AFSA regulates Registered Trustees in Bankruptcy who take care of personal insolvencies.

The thing is, **around 95% of Registered Trustees in Bankruptcy are also Registered Liquidators**, which means the regulation structure is completely duplicated.

How can we justify having two expensive regulators dealing with personal and corporate insolvency almost entirely separately?

A single focussed regulator across corporate and personal insolvency (with a single set of laws) would:

- ensure an efficient and coordinated approach
- reduce red tape and cost
- deliver better outcomes for all insolvency stakeholders.

> "In most other jurisdictions a single regulator oversees both personal and corporate insolvency."

3. Cut ASIC's Industry Funding Model for liquidators to zero.

ASIC funds its activities by collecting a levy from the industries it regulates. This is called the 'Industry Funding Model'.

According to the ASIC website: 'An "industry pays" model means that the funding of regulatory activities undertaken by ASIC is met by those creating the need for regulation, rather than the Australian taxpayer.'

Sounds fair enough. However, liquidators – the professionals who deal with corporate insolvencies – are unique amongst all the industries that ASIC regulates.

That's because in certain circumstances they are required by law to do work for ASIC for free!

Here's how it works:

1. A liquidator's work is paid for out of the money left in the insolvent company (called the 'estate').
2. The law requires liquidators to do certain tasks on behalf of ASIC, including:
   i. investigate the history of the company
   ii. investigate and report on possible misconduct by company directors.
3. If there isn't enough money left in the estate to pay for the liquidator's work, they don't get paid (or not in full).

We estimate liquidators do $100 million of unpaid work on ASIC's behalf each year. That works out to over $150,000 per liquidator. Shockingly, that's more than many liquidators earn, especially those who service small-to-medium businesses.

On top of this $100 million worth of unpaid work, liquidators are now being asked to pay over $8 million a year in fees to ASIC – close to $12,500 per liquidator.

Common sense suggests that an 'industry pays model' must take into account contributions made by the industry to the regulator. Otherwise it's not fair.

Given their special role in the insolvency system – effectively working as an extension of the regulator for free – liquidators should be exempted from ASIC's Industry Funding Model.

Liquidators save jobs

It seems counterintuitive... liquidators just shut businesses and fire people, don't they?

The first priority a liquidator has, at law, is to **maximise the return to creditors** of financially distressed businesses.

One of the best ways to do this is to rescue viable but distressed businesses and keep them operating. That saves jobs. Lots of jobs.

4. Clamp down on dodgy directors and illegal phoenixing.

Illegal phoenixing is a widespread swindle where directors intentionally shut down their companies after shifting their assets for little or no payment to new companies to avoid paying employees, creditors and the Australian Taxation Office.

A 2018 report by PricewaterhouseCoopers for the Australian Taxation Office, Fair Work Ombudsman and ASIC estimated that in 2016–17 illegal phoenixing cost the Australian economy up to $5 billion:

- $3.2 billion in unpaid trade creditors
- $300 million in unpaid employee entitlements
- $1.7 billion unpaid taxes and compliance costs.

According to Professor Helen Anderson of Melbourne Law School, the problem of illegal phoenixing exists because: 'it is easy to do, cheap, highly profitable, relatively invisible and rarely pursued by regulators.'

> "It is estimated illegal phoenixing costs the Australian economy up to $5 billion each year."

Liquidators report around 10,000 suspected cases of illegal director activity to ASIC each year. Yet very few dodgy directors are ever prosecuted.

We need to send stronger signals to the market that poor director behaviour won't be tolerated, so we don't give an unfair advantage to people who don't play by the rules.

The following measures are a good place to start:

Create an illegal phoenix offence with appropriate penalties to send a strong message to the market that this behaviour has consequences.

Ensure ASIC is committed to prosecuting dodgy directors and advisers – more focus on enforcement actions will have a deterrent effect.

Overhaul ASIC's Assetless Administration Fund so liquidators can more easily access funds to investigate dodgy directors.

We note that the Government has reintroduced the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 into the House. This Bill goes some way to addressing this issue and is worthy of support but much more focus is still needed to protect the community as a whole from this scourge.

5. Shut down dodgy, unregulated 'pre-insolvency advisors'.

Insolvency practitioners are becoming increasingly concerned about the rise of the largely unregulated 'pre-insolvency' advice market.

Not to be confused with qualified professionals giving lawful advice, these 'pre-insolvency advisors' counsel their clients on how to avoid paying their debts and meeting their legal obligations.

They are ambulance chasers who prey on people and businesses in financial distress. They claim to be able to remove the worry of a dire financial situation, but they often encourage unlawful conduct such as hiding or stripping assets and illegal phoenixing.

These pre-insolvency advisors are not Registered Liquidators or Trustees. They aren't lawyers or tax practitioners and don't hold Australian Financial Services Licences. This means they are totally unlicensed and operate without scrutiny from any regulator.

The lack of regulation also means that there is no accountability and no recourse. They are generally not members of any professional bodies, hold no professional registrations and therefore do not have any indemnity insurance should things go awry.

They all exploit one thing: they know that the regulators are unlikely to chase them. While a 2015 ARITA survey found that 78% of liquidators had encountered liquidations where the company had seen a pre-insolvency advisor, there have been few prosecutions to date.

"A 2015 ARITA survey found that **78% of liquidators** had encountered liquidations where the company had seen a dodgy pre-insolvency advisor."

We need effective enforcement action to shut down these dodgy advisers. We believe the advice being offered by pre-insolvency advisers should be considered corporate or personal insolvency advice. Therefore, pre-insolvency advisers should be licensed and subject to the same legal duties as insolvency practitioners or lawyers.

6. Give liquidators free access to all ASIC database searches.

One part of the mandatory work that liquidators do involves searching ASIC's databases, for which ASIC charges a fee.

So, in the case where there's no money left in the insolvent company's estate, a liquidator must pay ASIC for the database searches, even though they won't be paid back by the estate.

In other words, liquidators are paying for ASIC database searches out of their own pockets, so they can do the work that ASIC requires them to do.

In this situation, why should ASIC profit at the liquidator's expense?

That's why we strongly advocate that Registered Liquidators and Registered Trustees should be provided free access to ASIC databases to support them in carrying out their statutory duties.

Not only would this mean a fairer deal for liquidators, it would also help them investigate corporate misconduct more fully. Journalists currently get free access. How is it that liquidators can't get the same?

> "In 2016, the UK Government made a strategic decision to provide company financial information for free to aid corporate transparency and boost the country's economy."

7. Create an effective director identity number (DIN).

It's hard to believe that it's more difficult to get a driver's licence or open a bank account than it is to become a company director. No identity or background checks are required for company directorship.

This helps dodgy directors and fraudsters to fly under the radar, flouting the law with little chance of being detected.

We believe all company directors should have a director identity number (DIN) linking their past and present directorships to help prevent illegal phoenixing and limit the damage done by inept entrepreneurs.

So, we ask the government to adopt Recommendation 15.6 from the *Productivity Commission Inquiry Report on Business Set-up, Transfer and Closure* and create an effective DIN system.

Also, directors should not be able to abandon companies (resigning to leave them without directors) and former directors should still be able to be held to account for past misconduct.

Director resignations shouldn't be able to be backdated and any director registrations should be confirmed between the company and the director and vice versa, to help stop phoenixing.

> "Why is it easier to become a company director than to open a bank account?"

We note that the Government has reintroduced the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 into the House. While this Bill will create a DIN, and is therefore worthy of support, resourcing and prioritising a complete overhaul of the ASIC register is imperative in order to make a DIN workable.

8. Provide better guidance for businesses and consumers on how to manage financial distress, insolvency options and the importance of seeking the right advice as early as possible.

Insolvencies are complex and can be difficult to navigate for everyone involved. Government should review the information on insolvency and financial distress it provides and provide plain English guides for these groups:

Company directors – need to better understand how insolvencies work and the importance of seeking advice as early as possible when faced with financial difficulty. The earlier a business seeks advice, the more likely it will be saved.

Creditors & employees – also need to understand how insolvency works and how they can recover the money they're owed.

People with unmanageable debt – need to understand what debt relief is available, what their options are and whether bankruptcy is suitable for their situation.

At the moment, the information that is available from various government websites is confusing and complex. There are no financial literacy initiatives targeting how to manage financial distress, leaving individuals and small businesses at genuine risk.

ARITA is intending to produce a range of plain English guides, but government needs to do much more in this space, including additional financial literacy initiatives and funding increased support to financial counsellors and their training, helping to stave off dodgy pre-insolvency advisers.

> "In 2017–2018, around 69% of complaints to ASIC about Registered Liquidators were resolved by providing information about the normal practice of the insolvency process to the complainant."

Want to find out more?

For a briefing with **ARITA's CEO, John Winter**, on **how politicians and policymakers can help improve Australia's business rescue culture**, better help indebted individuals back onto their feet, and ensure that creditors get a fairer deal from insolvency please email **admin@arita.com.au** or call **02 8004 4344**

ARITA – Australian Restructuring Insolvency & Turnaround Association represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have more than 2,100 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Some 82% of Registered Liquidators and 87% 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 2018, ARITA delivered 183 professional development sessions to nearly 6,000 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' needs, knowledge and experience. We represented the profession at over 20 inquiries, hearings and public policy consultations during 2018.

ARITA

Attachment E – Redacted s533 Report on Possible Misconduct and ASIC Response

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Submit insolvency initial statutory report

Document Number	
Reference Number	
Create Date	
Lodgement Date	18/10/2022 4:21:10 PM

Reporting provisions

* Under what provision are you lodging this report?	Section 533 (liquidator reports)

Registered liquidators

Liquidator registration number	
* Given name	Michael
Other given name(s)	CRAIG
* Family name	BRERETON

We have pre-filled the information above from ASIC records. If the pre-filled information is incorrect, you will be unable to make the required declaration as to the truth and accuracy of the information in this document. In this case, you must not submit the document until the information ASIC holds is corrected and then pre-filled into this document.

For more information, see https://asic.gov.au/for-finance-professionals/registered-liquidators/changing-or-cancelling-your-liquidator-registration/

Company details

* Enter the Australian Company Number (ACN) or Australian Registered Body Number (ARBN) of the company you are reporting	
Company name	

Australian business number (ABN)	
Date of incorporation	
Which of the following best describes the company? Select all that apply.	
$50 million in consolidated revenue	
$12.5 million or more in consolidated gross assets	
50 or more employees	
None of the above	checked
* Type of appointment	Liquidation
* Date of appointment	

Purpose of report

Reason for the report (you can select more than one)	
Reporting alleged misconduct against company officer(s)	checked
Dividend in liquidation - company may be unable to pay its unsecured creditors more than 50c in the dollar	checked
For statistical purpose only	

Company information

* What is the size of the company in full-time employees (FTE)?	Less than 5 FTE
* Select an industry that best describes the service/s the company provides	Other (business and personal) services
* Select an industry that best describes the service/s the company provides	
* At any time prior to your appointment, was the company operating a business?	No
* Did the company cease trading its business prior to your appointment?	

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A business **asset** is a piece of property or equipment purchased for business use. These can include current and non-current, short-term and long-term, operating and capitalised, and tangible and intangible assets.	
* Did the company sell/transfer/grant/give a security interest over all or part of its business assets outside the ordinary course of business prior to your appointment?	No
* Select the most appropriate time-period prior to your appointment that the business assets were transferred	
* Is someone else carrying on all or part of the business the company previously conducted?	
* Enter the Australian Business Number (ABN), Australian Company Number (ACN) or name of the entity now carrying the business the company previously conducted (if known)	
* Is the entity now trading the business related to the company or its officers?	
* Is the entity now trading the business using one or more of the same employees?	
* Was the company entitled to receive, any consideration for the transfer/assignment of its business assets?	
What was the estimated value of assets transferred, including intangible assets such as goodwill?	
* Did the company receive any consideration for the transfer of its business assets?	
* What was the nature of the consideration?	
* Specify other consideration	
* Who gave the consideration?	
* What was the value of the consideration?	
* In your opinion, was the consideration paid or payable adequate?	
More information on Purchase Money Security Interests	

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* Were there any interests registered in the Personal Property Securities Register in place in the 12 months prior to your appointment, excluding Purchase Money Security Interests?	No
* Was there a new secured debt or increase in existing secured debt on or after the date of insolvency, whether registered or unregistered?	No
* Do you believe the company may have engaged in illegal phoenix activity?	Yes

Company officers

Current Director(s)/Secretary/(ies)

Given name	
Other given name(s)	
Family name	

Previous Director(s)/Secretary/(ies)

* Is this director relevant to this insolvency initial statutory report?	Yes
Given name	
Other given name(s)	
Family name	
Date of cessation	

Defacto/shadow directors

* In your opinion, are there defacto/shadow directors?	No

* Given name	
Other given name(s)	

* Family name	
Date of birth (if known)	
Is the defacto/shadow director currently residing in Australia?	
Where is the defacto/shadow director currently residing?	
Type in an Australian address (if known)	
* Why have you identified this person as a shadow director (you can select more than one)?	
* Specify other reason	

You can find the definition of a triggering event in section 489F of the *Corporations Act 2001*.	
* Has a current director, or any past director for the 12 months preceding the day on which the triggering event occurred been a director of another company that has undergone restructuring within the period of the preceding 7 years; or been the subject of a simplified liquidation process within the period of the preceding 7 years?	
* Explain why the company is eligible for the simplified liquidation process	
* Has the company undergone restructuring or been the subject of a simplified liquidation process within the period of the preceding 7 years?	
* Explain why the company is eligible for the simplified liquidation process	

Advisors

An advisor is a person or entity who may have assisted the company's directors deal with its financial activities at a time when the company may have been experiencing financial distress. While not all advisers do the wrong thing, some suggest that directors take actions which could be considered illegal (such as transferring assets into another company without paying them). Advisers can include a website service that refers matters.	
* Are you aware of an advisor(s) assisting the	No

company prior to your appointment?	

* What best describes who the advisor was?	
Specify other advisor	
Given name	
Other given name(s)	
Family name	
* Firm name	
Type in an Australian address	
Business phone number	
Mobile phone number	

Details of insolvency

Books and records

* Have you obtained all the company books and records?	No
* Give reasons why you do not have all the books and records (you can select more than one)	Director(S) Has Not Provided Books And Records, Other
* Specify other reason	Director and former director claim records belong to [redacted] Trust and are not Company records as new Trustee Company appointed
* Have you applied to ASIC for external administration compliance assistance?	No
* Submission number	
External administration compliance assistance More information on how you can obtain assistance from ASIC	
* Provide details of why you have not applied for external administration compliance assistance	Letter of demand has been issued to new Corporate Trustee, who has so far failed to respond
* In your opinion, are the books and records adequate?	

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* For a company of this size and given the business it operates or operated, in your opinion, what books and records are missing (you can select more than one)?	

Assets and liabilities

* Estimate of total realisable assets (subject to your appointment)	Less than $1
* Estimate of total liabilities	$100,001–$250,000
To be eligible for the simplified liquidation process, liabilities of the company must not exceed $1 million.	
* Estimate of total deficiency (liabilities less assets)	$50,001–$250,000

Employee entitlements

* Are there unpaid employee entitlements relating to this company?	No
* Select the types of employee entitlements that are unpaid (select all that apply)	
* Select the amount of unpaid wages	
* Specify amount	
* Select the amount of unpaid annual leave	
* Specify amount	
* Select the amount of unpaid pay in lieu of notice	
* Specify amount	
* Select the amount of unpaid redundancy pay	
* Specify amount	
* Select the amount of amount of unpaid long-service leave	
* Specify amount	
* Select amount of unpaid superannuation	
* Specify amount	

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Secured creditors

* Are there amounts owed to secured creditors over the whole or substantially the whole of the company's assets?	No
* Select the amount currently owed over the whole or substantially the whole of the company's assets	
* Specify amount	

Statutory creditors

* Select the amount of unpaid taxes and other statutory debt, excluding superannuation guarantee charge	$1–$100,000
* Specify amount	

Unsecured creditors

* Are there amounts owed to unsecured creditors?	Yes
* Select the total number of unsecured creditors (excluding employee entitlements and statutory creditors)	Less Than 25
* Select the total amount owed to unsecured creditors (excluding employee entitlements and statutory creditors)	$100,001–$250,000
* Specify amount	
* Is more than 50% of the total amount owed to unsecured creditors owed to related parties?	No
* Does it appear to you that the company may be unable to pay its unsecured creditors more than 50 cents in the dollar?	Yes
* What do you estimate the 'cents in the dollar' the company will be able to pay its unsecured creditors (excluding priority creditors)?	Nil

Causes of failure

What do you consider are the causes of failure?

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Under capitalisation	
Poor financial control including lack of records	
Poor management of accounts receivable	
Poor strategic management of business	
Inadequate cash flow or high cash use	
Poor economic conditions	
Natural disaster	
Fraud	
Deed of Company Arrangement failed	
Dispute among directors	
Trading losses	
Industry restructuring	
Business restructuring	
Other	Checked
Specify other causes	

You must cease to follow the simplified liquidation process if you believe on reasonable grounds that the company, or a director of the company, has engaged in conduct involving fraud or dishonesty that has had, or is likely to have, a material adverse effect on the interests of creditors as a whole or a class of creditors as a whole.

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Transfer of assets and business of the company for no/inadequate consideration and/or creditor defeating dispositions should be included here.

Possible misconduct

* Are you reporting possible misconduct?	Yes
* Details of possible misconduct (you can select more than one)	Directors Duties, Insolvent Trading, Requirement To Provide Liquidator With Company'S Books
You must cease to follow the simplified liquidation process if you believe on reasonable grounds that the company, or a director of the company, has engaged in conduct involving fraud or dishonesty that has had, or is likely to have, a material adverse effect on the interests of creditors as a whole or a class of creditors as a whole.	
* Give details of other misconduct	
* Give reason for why you did not report insolvent trading?	
* Specify other reason	

Directors duties

Failure to act with care and diligence

This question relates to section 180 of the *Corporations Act 2001* (civil obligation).	
* Did the director or other officer fail to exercise their powers and discharge their duties with care and diligence?	Yes
* Do you have documentary evidence to support this allegation?	Yes
* Are you aware of evidence in the possession of another which supports this allegation?	No
* From the information you have seen, do you believe the director or other officer may be able to rely on the Business Judgement Rule in defence of this allegation?	No

Failure to act in good faith and for a proper purpose

This question relates to section 181 of the *Corporations Act 2001* (civil obligation).	
* Did the director or other officer fail to exercise their powers and discharge their duties in good faith in the best interests of the corporations and	Yes

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for a proper purpose?	
* Do you have documentary evidence to support this allegation?	Yes
* Are you aware of evidence in the possession of another which supports this allegation?	No

Improper use of position

This question relates to section 182 of the *Corporations Act 2001* (civil obligation).	
* Did a director, other officer or employee of the corporation use their position improperly to gain an advantage for themselves or another, or to cause detriment to the corporation?	Yes
* Do you have documentary evidence to support this allegation?	Yes
* Are you aware of evidence in the possession of another which supports this allegation?	No

Improper use of information

This question relates to section 183 of the *Corporations Act 2001* (civil obligation).	
* Did a past or present director, other officer or employee of the corporation obtain information in their position and improperly use the information to gain an advantage for themselves or another, or to cause detriment to the corporation?	No
* Do you have documentary evidence to support this allegation?	
* Are you aware of evidence in the possession of another which supports this allegation?	

Good faith, use of position and use of information

This question relates to section 184 of the *Corporations Act 2001* (criminal obligation).	
* Did the director or other officer fail to use good faith, use of position or use of information in discharging their duties?	Yes
* Do you have documentary evidence to support this allegation?	Yes
* Are you aware of evidence in the possession of another which supports this allegation?	No

Obligations to keep financial records

This question relates to section 286/344 of the *Corporations Act 2001* (civil obligation).	
* Has a director failed to take all reasonable steps to ensure the company has kept written financial records that correctly record and explain all its transactions and financial position and performance and would enable true and fair financial statements to be prepared and audited?	
* Do you have documentary evidence to support this allegation?	
* Are you aware of evidence in the possession of another which supports this allegation?	

Insolvent trading

This question relates to section 588G(1)(2) of the *Corporations Act 2001* (civil obligation) or section 588G(3) of the Corporations Act 2001 (criminal offence).	
* In your opinion, did one or more of the directors fail to prevent the company incurring a debt or debts at a time when the director suspected or ought reasonably to have suspected that the company was insolvent or would become insolvent as a result?	Yes
* Do you have documentary evidence to support this allegation?	Yes
* Are you aware of evidence in the possession of another which supports this allegation?	No
Indicate the period, which, in your opinion, the company became unable to pay all its debts as and when they became due and payable	Over 2 years prior to appointment
How did you determine the date on which, in your opinion, the company became unable to pay all its debts as and when they became due and payable?	
Cash flow analysis	
Trading history analysis	
Balance sheet analysis	
Informed by director(s)	

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ASIC
Australian Securities & Investments Commission

Other	checked
* Specify other method	Lack of Company financial records and no bank account
Based on what indicators of insolvency do you believe the director (or a reasonable person in a like position would have reason to suspect) would have had reasonable grounds to suspect the company was insolvent or would become insolvent by incurring further debt (you can select more than one)?	
Financial statements that disclose a history of serious shortage of working capital, unprofitable trading	
Poor or deteriorating cash flow or evidence of dishonoured payments	
Difficulties in paying debts when they fell due (e.g. evidenced by letters of demand, recovery proceedings, increasing age of accounts payable)	checked
Non-payment of statutory debts (e.g. PAYGW, SGC, GST)	
Poor or deteriorating working capital	
Increasing difficulties collecting debts	
Overdraft and/or other finance facilities at their limit	
Evidence of creditors attempting to obtain payment of outstanding debts	checked
Other	
* Specify other indicators	
* Estimate the approximate amount of debts incurred after the date (in your opinion) of insolvency	$0–$250,000
Do you have an aged creditors' list as at (you can select more than one):	
Date of insolvency	
Date of appointment	
Other date	
No aged creditor list	checked

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* Specify other date	
* Are you aware of any reasonable defences available to the director/s (refer to s588H of the Corporations Act)?	No

Disqualified persons not to manage corporations

This question relates to section 206A of the *Corporations Act 2001* (civil obligation).	
* Do you have reason to believe a person who is disqualified from managing corporations under Part 2D.6 of the Act (e.g. s206B criminal convictions, bankruptcy, personal insolvency agreement, s206C Court-imposed disqualification) has engaged in acts of management during the period of their disqualification?	
* Do you have documentary evidence to support this allegation?	
* Are you aware of evidence in the possession of another which supports this allegation?	

Exercise of powers while under external administration

This question relates to section 198G of the *Corporations Act 2001* (civil obligation).	
* Do you have reason to believe that while the company was being wound up, a person other than the liquidator performed or exercised, or purported to perform or exercise, a function or power as an officer of the company, including removal or disposal of property and assets, collection of debts and entering into contracts?	
* Do you have documentary evidence to support this allegation?	
* Are you aware of evidence in the possession of another which supports this allegation?	

Report on Company Activities and Property

This question relates to Sections 475, 429 and 438B of the *Corporations Act 2001* (civil obligation).	
* Has a company officer completed the Report on Company Activities and Property?	

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* Have you sought ASIC's assistance to obtain compliance?	
External administration compliance assistance More information on how you can obtain assistance from ASIC	

Officers to help liquidator – failure to assist

This question relates to section 530A of the *Corporations Act 2001* (civil obligation).	
* Have company officers failed to assist you in your administration?	
* Have you sought ASIC's assistance to obtain compliance?	
External administration compliance assistance More information on how you can obtain assistance from ASIC	

Requirement to provide liquidator with company's books

This question relates to section 530B of the *Corporations Act 2001* (civil obligation).	
* Have you been provided with the company's books?	No
* Have you sought ASIC's assistance to obtain compliance?	No
External administration compliance assistance More information on how you can obtain assistance from ASIC	

Offences by officers or employees

This question relates to section 590 of the *Corporations Act 2001* (criminal obligation).

Offences include:

- failure to disclose the existence of property
- failure to disclose of details of property disposed of within 10 years of the relevant date (usually the appointment date), outside the ordinary course of business
- within 10 years of the relevant date or after that time, made false entries into the books of the company
- fraudulently concealing or removing property of the company (including concealing debts), fraudulently obtained credit on behalf of the company or property the company had not paid for, or participated in the fraudulent alteration of, or omission from, the books relating to the company

ASIC
Australian Securities & Investments Commission

• tampering with, disposing of or preventing production of a company book • obtaining in credit, pawning, pledging or disposing of the property the company did not pay for • fraudulently obtaining the consent of one or more creditors to an agreement relating to the affairs of the company, within 10 years before the next relevant day, or at a time after that day.	
* Does it appear that a past or present officer or employee of the company acted in any of the ways described above?	
* Do you have documentary evidence to support this allegation?	
* Are you aware of evidence in the possession of another which supports this allegation?	

Agreements to avoid employee entitlements

This question relates to section 596AB of the *Corporations Act 2001* (civil obligation).	
* Does it appear that a person entered into an agreement (formal or informal, written or oral) or a transaction, with an intention of preventing the recovery of entitlements (usually includes wages, superannuation contributions, amounts due for injury compensation, leave, termination payments) of employees of the company, or significantly reducing the amount of entitlements of employees of the company that can be recovered?	
* Do you have documentary evidence to support this allegation?	
* Are you aware of evidence in the possession of another which supports this allegation?	

Offences under the Act or another Commonwealth or state or territory law not addressed elsewhere in this report

* Does it appear to you that a past or present officer or employee, or a member of contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a state or territory not addressed elsewhere in this report?	
* Give a brief description of the alleged offence	
* Do you have documentary evidence to support	

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this allegation?	
* Are you aware of evidence in the possession of another which supports this allegation?	
* Does it appear to you that a person who has taken part in the formation, promotion, administration or winding up of the company may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; and/or may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company in a way that is not already dealt with elsewhere in this report?	
* Do you have documentary evidence to support this allegation?	
* Are you aware of evidence in the possession of another which supports this allegation?	
* Have you referred or are you intending to refer this to any other authority apart from ASIC?	
* Select authority/ies (you can select more than one)	
* Specify other authority	

Other action

* Have you conducted a public examination of a company officer or any other person?	No
* Do you propose to make an application to the Court for an examination under either section 596A or 596B of the Act?	No
* Do you propose to make an application to the Court for an order under section 597 of the Act?	No
* Have you initiated, or are you considering initiating, recovery proceedings under part 5.7B of the Act?	No
* Reason for initiating proceeding?	
* Specify other reason	

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* Reason for not initiating proceedings?	Insufficient Funding, Other
* Specify other reason	Not Able As Yet To Obtain Company Or Trust Records From New Corporate Trustee
* Has a creditor commenced, or indicated that they intend to commence, action to review compensation for loss resulting from insolvent trading?	No

Remuneration

* Choose the estimated collectible amount of your remuneration (including GST) to be drawn from external administration funds?	$0

Time to complete

* What is the expected time to complete this external administration from the date of this report?	3–less than 6 months

Contact details

Contact for this transaction

We will send an email **Notification** to both the submitter of this transaction and the entity Senior administrator/s for which it is submitted if we send any **Messages** about this transaction in the portal. If you wish for someone other than the submitter or the entity Senior administrator/s to respond to **Messages** in the portal, you should invite them to connect to your entity and give them Approve access or above. They will not receive **Notifications** but will be able to view and respond to messages about the transaction.

Note: **Messages** about a transaction are disabled once a transaction is finalised.

Declaration

For the purposes of this transaction, Regulated Entity means the external administrator (e.g. liquidator, receiver, administrator).	
Capacity	
* In what capacity are you submitting this document to ASIC:	On my own behalf as the Regulated Entity myself
Privacy Collection Notice	

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The Privacy Collection Notice given under APP 5 of the *Privacy Act 1988* applies to your provision of personal and sensitive information below.	
For the purpose of these declarations, please provide your name and address:	
* Given name:	Michael
* Family name:	Brereton
* Are you an Australian resident?	Yes
Please type in an Australian address	[redacted]
I can't find my address in the search results	
Building/Property name	
Floor/Level	
Unit/Office	
* Street number	
* Street name	
* Street type	
* Suburb/City	
* State/Territory	
* Postcode	
* Address Line 1	
Address Line 2	
City / Municipality	
* Province / County / State	
* Postal Code / ZIP Code	
* Country / Territory	
* Other Country	

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Declarant and authority	
* I am logged into the Portal with my personal log in details. I submit this document and make the following declarations.	checked
* I am logged into the Portal with my personal log in details. I am authorised by the Regulated Entity to submit this document and any attachments and am authorised to make the following declarations.	

Confidential and personal information	
The information provided to ASIC in this document may include confidential, personal or sensitive information. The Privacy Collection Notice for the ASIC Regulatory Portal describes how we will use and disclose the information collected through the Regulatory Portal. The Privacy Policy contains information about how ASIC handles personal information generally and sets out how you can request access or correction to your personal information and how to make a complaint if you think your privacy has been breached.	
* I have read and understood ASIC's Privacy Collection Notice for the Regulatory Portal and Privacy Policy.	checked
* I consent to ASIC collecting, using and disclosing my confidential, personal or sensitive information for the purposes set out in the Privacy Collection Notice for the ASIC Regulatory Portal (including information in this document on the Portal to any person authorised to view it in the Portal).	checked
* I have read and understood ASIC's Privacy Collection Notice for the Regulatory Portal and Privacy Policy and I have obtained confirmation from the Regulated Entity that it, or an officeholder or partner of the Regulated Entity (or of its trustee), has read and understood ASIC's Privacy Collection Notice for the Regulatory Portal and Privacy Policy.	
* I consent to ASIC collecting, using and disclosing my confidential, personal or sensitive information for the purposes set out in the Privacy Collection Notice for the ASIC Regulatory Portal (including information contained in this document on the Portal to any person authorised to view it in the Portal).	

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True and correct	
I make the following declarations:	
* I understand that giving false or misleading information or documents to ASIC is a serious offence.	checked
* I understand that failure to give information, which renders the information or documents given to ASIC false or misleading, is also a serious offence.	checked
* I understand that giving false or misleading information or documents to ASIC could lead to a criminal prosecution of myself personally.	checked
* To the best of my knowledge and unless otherwise stated in this transaction, the information contained in this document, including any attachments, is complete, true and correct, and I have taken reasonable steps and made reasonable inquiries to confirm this.	checked
I understand that, and I have obtained confirmation from the Regulated Entity that it, or an officeholder or partner of the Regulated Entity (or of its trustee) understands that:	
* giving false or misleading information or documents to ASIC is a serious offence.	
* failure to give information, which renders the information or documents given to ASIC false or misleading, is also a serious offence.	
* giving false or misleading information or documents to ASIC could lead to a criminal prosecution of myself personally and the Regulated Entity on whose behalf I am acting.	

* To the best of my knowledge and unless otherwise stated in this transaction, the information contained in this document, including any attachments, is complete, true and correct, and I have taken reasonable steps and made reasonable inquiries to confirm this including obtaining confirmation from the Regulated Entity that to the best of their knowledge, or the knowledge of an officeholder or partner of the Regulated Entity (or of its trustee) the information contained in this document, including any attachments, is complete, true and correct, and they have taken reasonable steps and made reasonable inquiries to confirm this.	

Confirmation

You have submitted your transaction.
Reference number:

Date and time:
18-Oct-2022 16:21

What happens next?

You can view the status of this transaction on the **View all transactions** page for this entity in the portal.

If required, we will direct you to a payment page when you click Finish. Otherwise we will return you to your dashboard.

If we need to contact you about this transaction we will do so through the portal.

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From: no-reply-regulatory-portal
To: Michael Brereton
Subject: No requirement to submit supplementary report for [redacted]
Date: Tuesday, 18 October 2022 4:21:48 PM

For your information

Our Reference: [redacted]

18/10/2022

Dear MICHAEL CRAIG BRERETON

[redacted]

We refer to your initial report of 18/10/2022.

After considering your report, ASIC has decided not to commence an investigation into the matters raised.

Accordingly, ASIC does not require you to submit a supplementary report. It is now a matter for you to determine how you should proceed with your administration.

If, however, during your administration you find further evidence of offences, you should submit a supplementary report identifying the specific issues or concerns you wish to bring to ASIC's attention.

ASIC assistance

This decision does not impact any request you may have made to ASIC's External Administrator Compliance Assistance Program to obtain books and records, or for assetless administration fund (AAF).

If you require this assistance and have not lodged a request with ASIC, you should do so as soon as possible.

For more information visit asic.gov.au

Please do not reply to this message. This is an automated notification, which is unable to receive replies.

Regards

Assessment and Intelligence

Australian Securities and Investments Commission

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