

18 December 2018

Mr Matthew Sedgwick  
Consumer and Corporations Policy Divisions  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [regmod@treasury.gov.au](mailto:regmod@treasury.gov.au)

Dear Mr Sedgwick

### **Modernising Business Registers Program – Review of Registry Fees**

Thank you for the opportunity to lodge a submission on the above consultation paper.

As you are aware, ARITA - Australian Restructuring Insolvency & Turnaround Association has been highly involved in providing feedback, consultation and input into a variety of matters relating to the Modernising Business Registers Program (MBR) and also the Productivity Commission inquiry into data availability and use.

Throughout the course of these previous submissions ARITA has consistently addressed issues concerning the need for open access, free of charge, to business data stored on the registers currently maintained by ASIC. The basis of this approach is the recognition that free access to information creates better markets and measurably reduces insolvency risk by reducing counterparty risk.

The issues raised by the current consultation within the MBR significantly overlap with matters and materials previously submitted by ARITA. Therefore, in responding to this consultation we have largely drawn on those previously provided.

We also note that, in responding to this submission, ARITA has focussed on the issue of search fees and the need for open and free access to business registry data.

### **Key points**

ARITA strongly supports steps to make the availability of business data within the Australian economy simpler, more open, transparent and efficient. These principles should underlie any new modernised registry system put in place under the MBR, including the removal of search fees for business data which have the effect of limiting business access to economic

information. This approach has been successfully adopted in the UK by Companies House with demonstrable benefits.

Further, and importantly for our members, insolvency practitioners are obligated under legislation to conduct investigations into the business affairs of entities to which they are appointed, and to report investigations to the regulator. They should not be unreasonably burdened by additional cost to complete this work for the benefit of the regulator when they already have to write off over \$100 million of unfunded work in assetless administrations.

Given the key role which insolvency practitioners play in aiding the efficient and transparent operation of the economy it is key that they are adequately and equitably supported in their role by having free and open access to business data.

If you have any queries concerning this submission please contact Natasha McHattan, Legal Director on 02 8004 4347 or [nmchattan@arita.com.au](mailto:nmchattan@arita.com.au).

Yours sincerely

A handwritten signature in black ink, appearing to be 'John Winter', with a long horizontal stroke extending to the right.

**John Winter**  
Chief Executive Officer



## About ARITA

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

We have more than 2,400 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Around 84 percent of registered liquidators and 87 percent of registered trustees are ARITA members. We represent firms of all sizes, from small practice through to multi-national firms, with the majority of our membership being drawn from those in small-medium practice.

ARITA's ambition is to lead and support appropriate and efficient means to expertly manage financial recovery.

We deliver this through the provision of 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 2017, ARITA delivered close to 300 professional development sessions to around 5,000 attendees.

The Association 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 23 inquiries, hearings and public policy consultations during 2017.

# 1 Open and free access

ARITA strongly supports steps to make the availability of business data within the Australian economy simpler, more open, transparent and efficient.

The provision of accurate information and data on business operations allows participants to properly assess business and counterparty risk, and transparency also assists in combatting unscrupulous business activities - especially illegal phoenixing.

The free availability of business data also allows businesses to make more informed choices about parties they do business with (based on their past business records), reducing the financial risk to those businesses. This openness of information has benefits across the wider economy but is particularly of benefit to small businesses.

## 1.1 Questions 1 & 7

Fundamentally, completely removing search fees for accessing business data held on registers makes the most sense in terms of simpler and more equitable outcomes and economy wide benefits.

Indeed, the charging of fees for information goes fundamentally against all economic principles for the operation of perfect markets.

Noting that search fees amount to 7% of the total revenue pool earned by ASIC Registry Fees for 2017-18<sup>1</sup> the respective benefits of making the information freely available far outweighs the revenue being earned from the charging for this material.

The benefits to this approach are detailed in the following material from a number of previous submissions.

### 1.1.1 [Extract from ARITA submissions to Productivity Commission inquiry on "Data Availability & Use" – June 2016](#)

***What benefits would the community derive from increasing the availability and use of the public sector data?***

We believe open access, free of charge, to ASIC Register data would deliver the following benefits:

- (a) empowering business and public to scrutinise corporate conduct
- (b) improving empirical and academic research on corporate conduct, and
- (c) improving the efficacy of external administrations.

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<sup>1</sup> Fig. 2 at page 8, Treasury, 'Modernising Business Registers Program Review of Registry Fees – Consultation Paper' November 2018.

## **Empowering businesses and public to scrutinise corporate conduct**

The Report of the Senate Economics References Committee on *Insolvency in the Australian construction industry* recommended 'ASIC and Australian Financial Security Authority company records be available online without the payment of a fee.'<sup>2</sup>

The Committee noted that free data would enable small business operators to conduct due diligence and protect themselves against unscrupulous phoenix activity. ARITA agrees with this recommendation of the Senate Committee.

The United Kingdom in 2015 established a 'truly open register of business information' when its Companies House (the equivalent of the ASIC Register) made its digital data available free of charge. Like the ASIC Register, this data includes basic information about companies and their accounts and electronic images of lodged documents.

This reform was a response to the UK's House of Commons Public Administration Select Committee Report on Open Data and Statistics of 17 March 2014 which recommended that charging for government data 'should become the exception rather than the rule.'

In announcing the change to open and free access to Companies House data, the UK Government stated that consequently 'it will be easier for businesses and members of the public to research and scrutinise the activities and ownership of companies and connected individuals' and that it was 'a considerable step forward in improving corporate transparency'.<sup>3</sup>

ARITA submits that the UK Companies House model of free and open access to data should be adopted in respect of the ASIC Register.

As an extension to this, we would add that free and open access to company data also facilitates journalists being able to uncover and report on corporate and director misconduct. We note that the Government has already granted journalists free registry search access. That this has been already been offered proves the case for why all market participants should have equal, free access to this information.

We see this as a critical aspect of maintaining confidence in market operations and in supporting legitimate whistleblowing activities.

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<sup>2</sup> Report of the Senate Economics Reference Committee, 'Insolvency in the Australian Construction Industry', December 2015, p 188. It should be noted that AFSA records relate to personal insolvency (bankruptcy) and not companies.

<sup>3</sup> Press Release, 'Free Companies House data to boost UK economy', 15 July 2014 available at <https://www.gov.uk/government/news/free-companies-house-data-to-boost-uk-economy>.

## **Improving empirical and academic research on corporate conduct**

Open and free access to ASIC Register data will also 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 Report on 'Business Set-up, Transfer and Closure' dated 30 September 2015.<sup>4</sup>

ARITA has funded scholarships to promote empirical research into Australia's insolvency regime<sup>5</sup> and can confirm that the data-access costs of such studies are significant.

Free and open 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.

## **Improving the efficiency of external administrations**

Open and free access to ASIC Register data would also address an anomaly in the conduct of external administrations.

Insolvency practitioners are duty-bound to conduct certain investigations relating to the affairs of companies to which they are appointed. For example, under s 533 of the *Corporations Act 2001* (Act) a liquidator is obliged to lodge with ASIC a report with respect to any possible breaches of duty or offences committed by a person involved in the management of a company.

Liquidators must comply with this duty even if this means incurring expenses which cannot be met out of available company property: s 545(3) of the Act. If the company being liquidated has assets, a liquidator is entitled to apply those assets toward the payment of expenses incurred in complying with the liquidator's statutory reporting duties. However, often there are insufficient company assets to cover these costs, leaving the liquidator personally 'out of pocket'.<sup>6</sup>

Consequently, in cases where there are no or limited company assets, liquidators must pay fees - at their own personal expense - to access ASIC Register data, investigate and then lodge the necessary report with ASIC. For example, if property of the company being liquidated has been transferred for no value to another company with a common director, the cost of a company search is required to verify

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<sup>4</sup> Productivity Commission, 'Business Set-up, Transfer and Closure', Report No.75, 30 September 2015, in particular pp 363 and 364.

<sup>5</sup> Details and the research outcomes of ARITA's Terry Taylor Scholarship are available at <http://www.arita.com.au/about-us/terry-taylor-scholarship>

<sup>6</sup> See the February 2013 report of Amanda Coneyworth (nee Phillips) 'An analysis of official liquidations in Australia' at [4.10.1], available at <http://www.arita.com.au/about-us/terry-taylor-scholarship/past-recipients>. This research was conducted with the support of ARITA's Terry Taylor Scholarship.

the 'related party' status of that recipient in order to confirm an apparent case of a breach of that director's duties. In effect, ASIC charges fees for access to its own data where that data is required by the accessing party to report back to ASIC on a review of that same data.

ARITA submits that this is an inequitable situation which should be rectified by a move to open and free access to ASIC Register data.

### **Australian Financial Security Authority (AFSA) Records**

While AFSA records - primarily the National Personal Insolvency Index (NPII) - do not have the same scope of application and utility as ASIC Register data, NPII data can similarly be used for small business due diligence inquiries and insolvency practitioner investigations. Accordingly, ARITA submits that open and free access to AFSA's NPII data will deliver similar benefits.

#### **1.1.2 Extract from ARITA Submission to Modernising Business Registers Program— August 2018**

##### **Free access strongly preferred**

ARITA's strong position is that open access, free of charge, to data held in business registers provides the greatest benefits to the business community and the broader Australian economy. Free access is also more aligned with the stated statutory objectives of ASIC, particularly as they relate to promoting "confident and informed participation of investors and consumers in the financial system."<sup>7</sup>

Free use recognises that a fundamental assumption in economic theory to create "perfect" markets is free and open access to information for participants. Placing obstacles in the way to this free and open access necessarily leads to market inefficiencies and failures. Costs also disproportionately harm those in small business who are less likely to be able to absorb search costs or to employ expensive third-party, for-profit data providers.

It is also noted that both the United Kingdom and New Zealand provide for free access to company and business data held in their government-based registries.

## **1.2 Alternative to open and free access**

In the event that fees are maintained for searches of business data, ARITA's alternative submission is that insolvency practitioners should be exempt from any search fees in a manner similar to the exemption announced for journalists.

The reasoning for this position has also been detailed in ARITA's recent submissions on the MBR.

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<sup>7</sup> See s 1(2) of the *Australian Securities and Investment Commission Act 2001* (Cth), in particular at s 1(2)(b).

### 1.2.1 [Extract from ARITA Submission to Modernising Business Registers Program– August 2018](#)

#### **Requirement of access for insolvency practitioners**

If, however, a user pays model is maintained for any modernised business registries, ARITA's alternative position is that insolvency practitioners, in particular registered liquidators and registered trustees (who, as noted above, bear significant statutory investigatory responsibilities), should be provided free access to ASIC databases to support them in carrying out their statutory functions.

As noted earlier, The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, recently announced improved access to ASIC searches<sup>8</sup> by a reduction in search costs and the provision of free access to journalists.

ARITA strongly advocated for the provision of free access to be immediately extended to include insolvency practitioners and has written to the Minister accordingly. Regrettably, the Minister did not acknowledge this very reasonable request.

### 1.2.2 [Extract from ARITA submission to Modernising Business Registers & Director Identification Numbers – draft legislation – October 2018](#)

#### **Access for external administrators**

To the extent that there is to be a spectrum of access to data in the new register under the MBR, it is critical that insolvency practitioners are given access as “trusted users” to obtain full access to detailed business data, free of charge, in order to carry out their work.

At present insolvency practitioners must pay to conduct searches of business data held on the ASIC registers (this is despite recent announcements by the now former Minister for Revenue and Financial Services which granted free access to journalists). This is deeply at odds with the role played by insolvency practitioners who conduct the majority of investigations into malfeasance in company failures on behalf of regulators.

Detailed below is a summary of usual searches which are conducted by insolvency practitioners in carrying out their statutory duties upon appointment as an external administrator.

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<sup>8</sup> See <http://kmo.ministers.treasury.gov.au/media-release/091-2018/> for media release of the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services made on 30 July 2018.



### **Example: Costs to Liquidator for company and related searches in a typical appointment**

An insolvency practitioner is required, by the nature of their role and the statutory requirement for investigations, to conduct a large number of searches for various information detailed in numerous business registers. At this point they are charged for each search.

- Current and historical company search for company to which they will be appointed (which is particularly important for assessing potential issues as to independence).
- Further company searches of related companies to determine corporate structure.
- Name searches on directors of company (to confirm contact details and information of any other directorships).
- Searches of real property registers to assess what real property may be held in the name of the company.
- Searches of the PPSR to assess security interests asserted over company property.
- Searches to determine asset holdings of directors (which can be relevant to pursuit of recovery actions).

These searches may be repeated a number of times throughout the course of an appointment, so the costs can readily multiply throughout the course of an otherwise straightforward external administration appointment.

The costs associated with these searches will vary depending on the size and complexity of the searches and whether they are undertaken by a data provider. However, the current search costs (which have only recently been reduced) are:

- A) ASIC searches: range from \$9 to \$43 per search
- B) PPSR searches: range from \$2 to \$7 per search
- C) Property searches: from \$14.50 per title search.

These significant search costs form part of the fees and expenses which are generally unrecoverable and borne by insolvency practitioners each year for properly fulfilling their statutory duties under the Act. In addition, legislation does not allow for the recovery of any searches conducted prior to the appointment of the insolvency practitioners in preparation for their appointment.

Empirical research conducted of ARITA members suggest that up to \$100 million in fee revenue is written off by insolvency practitioners annually due to work done on files which is unrecoverable. Fees for necessary searches of the business registers forms a significant part of this amount and are especially onerous on liquidators when undertaking assetless administrations in which they have no prospect of recovering any administrative costs, let alone being able to recover fees for the work they are

statutorily required to undertake. Indeed, ensuring free access to searches for liquidators in these assetless scenarios is likely to encourage more active searching of databases, closing off another avenue often exploited by illegal phoenix facilitators.

These fees and write offs are also in addition to the ASIC industry funding charges for insolvency practitioners for which registered liquidators will be charged an average fee of \$16,500 each to maintain their registration.