ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

26 February 2021

Data Economy Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: mbcomms@treasury.gov.au

Dear Sir/Madam

Modernising Business Communications – Improving the Technology Neutrality of Treasury Portfolio Laws

Thank you for the opportunity to lodge a submission in the response to the Treasury's discussion paper of December 2020 on improving the technology neutrality of Treasury portfolio laws.

As the principal professional body for insolvency practitioners that work with the *Corporations Act 2001 (Act)* on a daily basis, we strongly support steps to further improve the technology neutrality of this legislation. We recognise the significant progress made to improve technology neutrality in respect of insolvency requirements as a result of the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020*.

Our submission focuses on suggestions for further improvement that relate to the work done by registered liquidators as external administrators and receivers of companies.

Communicating with Regulators

Forms

Insolvency practitioners find that ASIC's technology for forms lags behind that of the Australian Financial Security Authority (AFSA), which is the other regulator for insolvency practitioners in respect of personal insolvency. For example, looking at two similar forms used in personal and corporate insolvency – AFSA has moved the Statement of Affairs to online preparation and lodgement, whereas the Report on Company Activities and Property developed by ASIC is a standalone PDF file which must be printed and completed manually.

At the very least, any ASIC forms that are not prepared and lodged online should be smart PDF files that can be electronically completed and signed and then lodged with ASIC.

We understand that ASIC's system does not allow for the lodgement of documents with electronic signatures. This needs to be changed to enable technology changes to be leveraged and noting recent changes to s600G of the Act.

Additionally, many of the forms lodged with ASIC by registered liquidators require population of information already held in the company register. Technology should be implemented to facilitate the pre-population of information already held, with the ability to amend and update the information should it be required.

These suggested changes will improve the flow of information to both the registered liquidator and ASIC.

Company searches

Liquidators should have open and free access to ASIC Register data 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 and then provide that information to ASIC. For example, under s 533 of the *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'.

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 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.

Australia is one of the few jurisdictions that enforce fees for essential searches of government data such as this. Notably, the UK moved several years ago to free and open access of these searches due to the obvious public benefits. In an environment in which the government is moving away from the more traditional creditor-focussed insolvency regimes of the past, it is essential that creditors can access data on their trading partners in a free and open way.

Signatures

Being able to use electronic signatures would be of significant benefit to external administrators and receivers in the conduct of their administrations, improving efficiency and reducing costs. ARITA strongly supports the adoption of an overarching principle that technology may be used to verify a person's identity and receive their agreement, provided that the electronic method used provides at least the same level of validity as a physical signature. Traditional signatures offer absolutely no additional benefit of identity verification compared with digital verifications.

Record-Keeping Requirements

External Administrators are required to retain books and records of the company and the external administration for five years from the end of the external administration (IPS 70-35).

The *Act* should be amended to make it clear that the *Electronic Transactions Act 1999* applies in respect of a liquidator's record keeping requirements.

Other

Proposals without meetings

We again draw your attention to the drafting issue that arose in the *Insolvency Law Reform Act 2016* with the current proposals without meeting process.

Being able to obtain the approval of creditors without holding a meeting is an important step forward in modernising communications in insolvency administrations.

Unfortunately, proposals without a meeting are only available for use on matters voted under the Schedule 2 - Insolvency Practice Schedule (Corporations) and Insolvency Practice Rules – not matters dealt with in the body of the *Act*. **This needs to be urgently addressed**, not just for the issue that it continues to cause in all other insolvencies but for the significant impact it has on the small business reforms which commenced on 1 January 2021, where meetings are not contemplated to be held in the ordinary course.

Corporations and Insolvency Reforms

While we note that significant improvement was made to the use of technology in external administrations as part of the small business reforms, we note that the following measures, as raised in our submissions, still require attention to ensure efficient operation of the reforms:

- s 105B of the *Act* - does not recognise communication from an external administrator. Where communication is sent or received in relation to an external administration or receivership, the electronic communication should be taken to be sent from the appointee's primary place of business which is registered with ASIC, not their usual residential address.

- s75-75(6)(a)(i) to Schedule 2 of the *Act* - The place of the meeting is to be the company's registered office. This should be the principal address of the external administrator as notified to ASIC. The external administrator may be located in Sydney and the registered office of the company could be in Perth - resulting in a 3 hour time difference for the purposes of the time of the meeting under 75-75(6)(b).

Access to company books and records

The *Act* should be amended to explicitly state that a liquidator's right to access a company's books and records (s 530B) extends to books and records that are held electronically by a software provider such as MYOB, XERO, etc (whether on a server or in a cloud), in the same way that a company's accountant cannot withhold physical books and records. Furthermore, a liquidator should not be required to pay outstanding fees (also known as ransom payments) or ongoing fees in order to be able to do so.

This right to access should include company information that is held under the company accountant's name or in the name of any director(s).

Liquidator's need access to company books and records to be able to undertake the investigation and reporting work that they are required to do. Now that it is common practice for companies to use online software providers to maintain their company accounts, liquidators are increasingly having significant and unreasonable difficulties accessing this information.

Technology neutrality should mean that notwithstanding how a company maintains its accounts, access to that information cannot be withheld from a liquidator.

We look forward in continuing to work with the Treasury to improve the technology neutrality of the *Act* and improve the efficiency of Australia's insolvency regime. Should you wish to discuss any aspect of our submission, please contact Kim Arnold, Policy & Education Director, at karnold@arita.com.au.

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

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

We have more than 2,200 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Around 80% of Registered Liquidators and 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 2019, ARITA delivered 118 professional development sessions to over 5,300 attendees.

ARITA promotes best practice and provides a forum for debate on key issues facing the profession.

We also engage in thought leadership and public policy advocacy underpinned by our members' knowledge and experience. We represented the profession at 15 inquiries, hearings and public policy consultations during 2019.