

# GOOD PRACTICE



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A quarterly round-up of the ARITA Specialist Team's work on law and practice issues.

With the passing of the first anniversary of the commencement of the external administration reforms of the *Insolvency Law Reform Act 2016* (ILRA), and the end of many of the tricky transitional provisions, the Specialist Team continue to assist members with operational queries via the Ask ARITA web page.

We continue to consult and make submissions on many ancillary insolvency law reforms as well as complete the final stage of our precedent offering (Release 3 of the precedents covering bankruptcies), focus on our education offering and prepare for our milestone 25th anniversary National Conference.

We also welcomed our new Legal Director, Natasha McHattan, to ARITA's Technical Specialist team. Natasha is already known to, or has since met, many ARITA members and looks forward to fostering more relationships at the National Conference, where she will be moderating the Case Law Update panel.

## SUBMISSIONS & CONSULTATION

### Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme

As well as participating in round table discussions in Sydney and Melbourne, ARITA made a detailed submission in response to draft legislation on reforms to address corporate misuse of the Fair Entitlements Guarantee (FEG) scheme.

Our submission addressed the following points:

- **Safe harbour reforms** – When considered alongside the intention of the new safe harbour and ipso facto reforms to create a stronger restructuring and turnaround culture in Australia, we are concerned that there is a risk that the proposed provisions could, in certain instances, capture a genuine attempt at business restructure which has not been successful. Careful consideration needs to be given to ensure that this is avoided.
- **Part 5.8A amendments** – There is a need for the amendments to be

clear in their operation to capture the activities of pre-insolvency advisors.

- **Contribution orders** – The changes to provide for contribution orders from members of corporate groups are supported in principle, but there is a need for clarification around the approach to quantification of such orders.
- **Director disqualification** – To ensure that these provisions act as a deterrent to the 'sharp corporate practices' targeted by the amendments, consideration should be given to making the ASIC disqualification automatic in operation (subject to some tightening of the trigger requirements).

A copy of ARITA's submission is available on the ARITA website.

### Review of ATO's use of garnishee notices

The Inspector-General of Taxation is undertaking a review into the ATO's use of garnishee notices.

ARITA's submission stressed that the ATO's use of garnishee notices in the insolvency context is of particular

concern to ARITA and its members. The submission focused on two areas:

1. The use of garnishee notices in voluntary administrations, and
2. The fact that payments received by the ATO as a result of a garnishee notice cannot be recovered as a preferential payment in a subsequent liquidation.

A copy of ARITA's submission is available on the ARITA website.

### **Superannuation guarantee integrity**

ARITA made a submission and also appeared before the Senate Economic Legislation Committee on 1 June strongly supporting the measures in the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 to improve the integrity of the Superannuation Guarantee system.

It was our view that the measures under the Bill will assist with resolving the issue of employers using unpaid superannuation as an easy source of funding which arises because of the current lack of transparency around outstanding superannuation obligations.

Improved reporting will also assist insolvency practitioners and the ATO in quantifying the amount of outstanding superannuation, and each employee's entitlement to superannuation, in the event of a formal insolvency appointment.

A copy of ARITA's submission is available on the ARITA website.

### **Exclusions from new stay on the enforcement of ipso facto clauses**

In April 2018 The Treasury announced consultation on exposure draft regulations (and declaration) which exclude certain contracts and contractual rights from the new stay on the enforcement of ipso facto clauses now provided for in the *Corporations Act* (which commenced on 1 July 2018).

The Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018 (the Regulations) and

the Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (the Declaration) purport to 'recognise that in some circumstances it is necessary or desirable for ipso facto clauses to continue to operate, for example, where there is an established market mechanism already in place or where it would be a commercial nonsense for an ipso facto clause to be stayed.'

ARITA made a submission (available on the ARITA website) which focused on concerns identified in the terms and scope of some of the exclusions in the Regulations and the Declaration which, in ARITA's view, have the potential to run counter to the intention and objectives of the new stay on the enforcement of ipso facto clauses.

The regulations and declaration providing for exclusions from the new stay on the enforcement of ipso facto clauses have now been finalised and are in force.

The final regulations incorporate some changes from the previous exposure draft on which the Government consulted. Members are advised to review the terms and details of the final exclusions carefully.

Two changes we note are:

- Clarification of the exclusions provided for special purpose vehicles (SPVs). The regulations make it clear that the ipso facto stay will not apply to arrangements involving a SPV, where those arrangements provide for securitisation, a public-private partnership (PPP) or project finance.
- The exclusion for the novation, assignment or variation of pre-1 July 2018 contracts has been limited in duration (to five years). The Explanatory statement states that the exclusion 'only applies to renewals or novations entered into on or after 1 July 2018, but before 1 July 2023' and that 'this five year period for the operation of the provision will allow parties

to consider how to structure their affairs in the future'.

ARITA's submission on the exposure draft legislative instruments expressed concern regarding these two issues and so we welcome these changes to the final terms of the regulations as made.

You may note that the regulations on the Federal Register of Legislation are 'no longer in force'. This is because the amendments are now effective and have been incorporated into the *Corporations Act 2001* and *Corporations Regulations 2001*.

### **Single Touch Payroll exemption for insolvency practitioners**

The ATO has confirmed that if you are an insolvency practitioner for an employer with 20 or more employees, you will not be required to report through Single Touch Payroll (STP) on their behalf in 2018-19.

However, if the employer was using STP-enabled software to pay their employees and report to the ATO, the insolvency practitioner can choose to continue STP reporting if they have access to the same software.

It's not necessary to apply for the insolvency practitioner exemption or advise the ATO. However, if insolvency practitioners do decide to make use of this exemption they should keep records that support their decision.

This and other STP exemptions are detailed in a release on the ATO website.

Insolvency practitioners will need to report their own employees' tax and super information through STP if they're an employer with 20 or more employees.

### **ASIC Revision of Form EX01, Schedule B of Regulatory Guide 16 Report to ASIC under s 422, s 438D or s 533 of the Corporations Act 2001 or for statistical purposes**

ASIC has advised that one of its important projects is revising the Form EX01.

ASIC is seeking to improve liquidator statutory reporting, including to obtain better information about illegal phoenix activity and director offences. It is intended that the revised form will assist ASIC's decision-making about the conduct of parties involved in insolvency as well as enhance publicly available information.

At the invitation of ASIC, ARITA participated in a workshop and provided feedback.

### APES 330

At the request of the Accounting Professional & Ethical Standards Board (APESB), ARITA has provided feedback on APES 330 – Insolvency Services. ARITA's feedback has been provided to the APESB for consideration and ensures ongoing alignment of the requirements of APES 330 with the ARITA Code of Professional Practice, having regard to the current review of the ARITA Code.

### Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry commenced on 12 February. While the terms of reference do not specifically include insolvency services, we will continue to monitor the Royal Commission closely should our involvement become warranted.

### LIAISON MEETINGS

Members are welcome to raise any issues of concern with ARITA to be discussed with AFSA, ASIC or FEG at our liaison meetings. These issues should be directed to the ARITA Specialist Team: [SpecialistTeam@arita.com.au](mailto:SpecialistTeam@arita.com.au)

### AFSA & ASIC

A combined ARITA/AFSA/ASIC liaison meeting was held on 19 June 2018.

Discussion points from the meeting are available on the ARITA website and included insolvency law reform; untrustworthy pre-insolvency advisors and illegal phoenix activity; AFSA's personal Insolvency practitioners' compliance programme 2017-18; communications with practitioners and creditors; mental health working group; and gender and age diversity.

A joint ASIC/ARITA/AFSA guidance/education sub-committee (comprising one representative from each organisation) was established to assist with information sharing and communications, so each organisation knows what the others are planning to work on and to help ensure the focus is on key issues.

ARITA is scheduled to hold individual liaison meetings with AFSA and ASIC on 11 September 2018 and 16 October 2018 respectively, and collectively on 13 December 2018.

### FEG

FEG continues to be an active creditor and is engaging with the profession in relation to both the payment and recovery of entitlements.

ARITA maintains its close liaison with both divisions of FEG and is working with them to clarify the expectations for practitioners. ARITA continues to discuss matters with FEG on an as-needed basis, but also holds formal liaison meetings with FEG twice a year.

### MEMBER CONDUCT AND QUALITY ASSURANCE

#### Complaints and concerns

To 7 August 2018, 16 complaints about members have been received and nine concerns have been identified.

One complaint and five concerns are currently with the Professional Conduct Committee for ongoing consideration, although the complaint and one concern are in respect of the same matter.

A summary of the complaints and concerns currently being dealt with by ARITA, including any matters being considered by the Professional Conduct Committee, is provided below.

Details of the outcome of complaints and concerns are provided on the ARITA website, either on a names or no-names basis, where it is considered appropriate. Full details of ARITA's complaints and concerns processes are available on the ARITA website.

#### Putting ARITA logo & membership details on your website

ARITA continues to contact members who incorrectly identify their membership status, and firms that display the ARITA logo on their websites.

While we encourage members to reference their ARITA membership, it is expected that any such reference should specifically refer to the membership category (i.e. Fellow, Professional, Associate or Life Member).

#### A summary of the conduct matters currently being dealt with by ARITA

Year	Complaints under way		Concerns under way *	
	Current period	Last report	Current period	Last report
2018	2	6	8	2
2017	2	5	4	6
2016	–	–	–	2
2015	–	–	–	1
<b>Total</b>	<b>4</b>	<b>11</b>	<b>12</b>	<b>11</b>

\* Including disrepute investigations

As a result of recent Constitutional changes, Graduates and Students are now Subscribers rather than Members. Any Graduate or Student Subscribers should ensure that their status is correctly described.

**The ARITA Constitution does not allow for the use of the ARITA logo without permission, including by ARITA members, and we routinely and comprehensively enforce this.**

This is distinct from associations such as CAANZ which offers firm-based membership for public practices, which is subject to quality review processes. As ARITA doesn't undertake any corporate membership or firm-based certification we can't provide an endorsement for firms, only individuals based on their level of membership.



ARITA logo -  
not for your website!

Any firm displaying the ARITA logo is asked to immediately remove it.

Member conduct is overseen by Narelle Ferrier: [nferrier@arita.com.au](mailto:nferrier@arita.com.au)

#### Quality assurance review reports

ARITA continues to liaise with CAANZ and CPA regarding their Quality Assurance Programs for insolvency practitioners, including outcomes from reviews completed. ARITA members are reminded that where they have had

a Quality Assurance Review conducted by CAANZ or CPA, they are obliged under the ARITA Constitution to provide a copy of the review report (not just the outcome letter) to us.

Reports can be sent to Narelle Ferrier: [nferrier@arita.com.au](mailto:nferrier@arita.com.au)

#### CONTACT US

ARITA encourages Professional Members to consult with its Specialist Team on queries related to the law and practice of insolvency, including the application of the ARITA Code of Professional Practice.

Please note this is a service provided only to Professional Members and we are unable to answer queries of others, including staff who call on behalf of Professional Members.

See [arita.com.au/ask-ARITA](http://arita.com.au/ask-ARITA) for details. 

## NATIONAL CONFERENCE SYDNEY | 24-25 OCTOBER 2018

ARITA's National Conference is the leading professional development event for restructuring, insolvency and turnaround professionals. In 2018, we are celebrating its 25th anniversary.

### HEADLINE SPEAKERS



#### THE HON. JAMES M PECK

Former U.S. Bankruptcy Judge for the Southern District of New York

LESSONS FROM LEHMAN'S



#### HOLLY RANSOM

CEO, Emergent

THE NEW TRUST LANDSCAPE



#### ADAM FERRIER

Consumer Psychologist

FINANCIAL DISTRESS ISN'T COOL

 25<sup>th</sup>  
2018 ARITA  
NATIONAL  
CONFERENCE



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