ARITA

27 June 2024

Attorney-General's Department
By email: economiccrime@ag.gov.au

Dear Sir/Madam

Reforming Australia's anti-money laundering and counter terrorism financing regime

We refer to the current consultation in respect of reforming Australia's anti-money laundering and counter-terrorism financial regime (**consultation**). We appreciate the extension provided until 28 June 2024 in which to make our submission and the opportunity to meet and discuss how the proposed reforms will impact insolvency and business restructuring practitioners

The Australian Restructuring Insolvency and Turnaround Association (**ARITA**) is Australia's largest professional representative body of insolvency practitioners representing over 80% of Australia's insolvency, turnaround and restructuring professionals.

We have focused our submission on insolvency and business restructuring, specifically the discussion in Paper 2 on "Proposed designated service 3" (**Paper 2**).

It is our view that the money-laundering and terrorism financing risk of services provided by insolvency and business restructuring practitioners is low, due to:

- the high level of regulation and oversight by the Australian Securities and Investments Commission as the regulator of registered liquidators and the Australian Financial Security Authority as the regulator for registered trustees,
- the role of ARITA in setting high professional standards and quality educational offerings for the profession,
- the legislative requirements imposed on insolvency practitioners during the conduct of their administrations,
- the role of the Court in overseeing the conduct of registered liquidators and trustees, and
- that insolvency practitioners will comply with any anti-money laundering reporting requirements imposed in relation to the businesses that they trade during an insolvency administration.

As such, there is no need to impose additional regulatory burdens on insolvency practitioners.

In this submission we set out:

- the services that insolvency and business restructuring practitioner provide, and the types of transactions undertaken during the provision of those services,

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- key risk areas that may be considered to arise in relation to these services,
- the materiality (or lack thereof) of these risks, and
- risk mitigation that is already undertaken by insolvency practitioners.

This information clearly sets out why further regulation is not required beyond that that naturally related to the businesses under control of insolvency practitioners and will provide no benefit to the creditors that bear the cost of the insolvency process nor contribute to the economy-wide benefits of an efficient insolvency system.

It should be understood that the vast majority of appointments of insolvency practioners are to entities with assets less than the Austrac cash reporting threshold of $10,000 and as such should be excluded from any anti-money laundering policy applied to insolvency practitioners.

Services offered

During our meeting we were asked to comment on the types of transactions undertaken by insolvency and business restructuring practitioners that would be captured by this proposed designated service. We have attached at Appendix A a matrix which considers each type of transaction set out in Paper 2 and whether they are undertaken by the different types of services offered by insolvency and business restructuring practitioners.

Due to the nature of restructuring services provided, an insolvency practitioner is highly unlikely to be undertaking transactions of the type indicated in Paper 2. As such, the balance of this submission will focus on insolvency appointments under the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) (collectively referred to as insolvency appointments).

Key risk areas

The first issue to consider is what are the key risk areas for money laundering and terrorism financing in the work done by insolvency and restructuring practitioners. ARITA suggests that the following areas may be relevant:

- the insolvency practitioner continues to trade the business and thus collect cash from trading
- the insolvency practitioner continues to trade the business and pays creditors for goods and services provided to the insolvency administration.
- the insolvency practitioner pays a dividend to creditors, and
- the insolvency practitioner distributes capital to shareholders.

As insolvency practitioners are required under law to only pay insolvency administration funds into the administration's bank account (s65-5 Insolvency Practice Schedule (Corporations) and s65-5 Insolvency Practice Schedule (Bankruptcy)), insolvency practitioners should not be paying administration funds into and out of their firm's trust account.

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Materiality and risk mitigation

The second issue to consider is the materiality of transactions that occur in each of these key risk areas and any mitigation steps that insolvency practitioners already take, to determine the overall risk and thus the steps that need to be taken to mitigate the risk.

Collection of cash during a trade on

If an insolvency practitioner chooses to trade on a business of an insolvent company/debtor and as part of conducting that business cash is collected, as mentioned above, the insolvency practitioner is required under law to only pay those monies directly into the administration's bank account. This deposit must occur within five business days and it is a strict liability offence if the insolvency practitioner fails to do so.

Cash is a high-risk asset in any insolvency administration and an insolvency practitioner will implement appropriate controls to manage this risk as the insolvency practitioner is a fiduciary and is responsible to protect, collect and control the assets of the company/debtor during the appointment[1].

Paying creditors for goods and services provided during a trade on

If an insolvency practitioner chooses to trade on a business of an insolvent company/debtor, the insolvency practitioner will be responsible to pay for any goods purchased or services provided to the insolvency practitioner as the external administrator, controller or trustee of the company/debtor.

In a receivership or voluntary administration, the insolvency practitioner is personally liable for goods purchased and services rendered to the receiver or administrator. In the other types of appointments there is not personal liability, but these amounts have the highest priority for payment from available funds in the administration and if the insolvency practitioner acts inappropriately (for example outside their powers or with the knowledge that there will be insufficient funds to meet the debts), the courts can make the insolvency practitioner personally liable.

In such a situation, the insolvency practitioner will implement controls to ensure that obligations are tracked and only amounts properly authorised are paid:

- on appointment the insolvency practitioner will close the business' existing accounts with creditors and open new accounts
- a limited number of people will be authorised to issue purchase orders on these new accounts (usually only the insolvency practitioner and their staff)
- purchases of goods or services will require an authorised purchase order

[1] Refer paragraphs 3.103 to 3.107 of the Senate Standing Committee of Economics report "The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework": https://www.aph.gov.au/parliamentary_business/committees/senate/economics/completed_inquiries/2008-10/liquidators_09/report/c03#:~:text=Fiduciary%20duties,whom%20a%20duty%20is%20owed.

- a register of purchase orders issued will be maintained, and
- payments will only be made in respect of authorised purchase orders issued.

Dividends to creditors

ASIC's Insolvency statistics for the financial year 2022/23[2] indicate that of the 5,440 reports for failed companies lodged by external administrators and controllers:

- 2,959 (54.4%) had assets of less that $10,000 and 4,494 (82.6%) had assets less than $100,000
- 2,963 (54.5%) had liabilities between $100,000 and $1million
- 3,567 (65.6%) had a deficiency more than $250,000 and 1,619 (29.8%) had a deficiency of more than $1million, and
- 4,522 (89.3%) paid no dividend[3].

This indicates that there is a very low risk of money laundering or terrorism financing occurring via dividends to creditors in the vast majority of insolvency administrations where a dividend can be paid.

Furthermore, before paying a dividend, insolvency practitioners are required under law to verify the claim (r75-90 and r75-95 Insolvency Practice Rules (Corporations) and r75-90 and r75-95 Insolvency Practice Rules (Bankruptcy)).

Distributions of capital to shareholders

The liquidator will rely on information in the company's share register or as recorded in the ASIC company register to determine who is entitled to the distribution of the company's capital. This process occurs in a members' voluntary winding up, which is a solvent winding up of the company.

Other issues to consider

As discussed at our meeting, there are a number of other issues unique to insolvency practitioners which should be borne in mind when making decisions about imposing additional legislative requirements:

- Work undertaken by insolvency practitioners on insolvency appointments is already heavily legislated under the Corporations Act and Bankruptcy Act. Care needs to be taken to ensure that there are no conflicts between the existing requirements and any new requirements.
- Excessive regulatory burdens with no or little value should not be imposed to the detriment of creditors who have already experienced loss as a result of the insolvency.

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[2] https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-3-external-administrator-reports/

[3] Of the 5,440 reports lodged, 375 relate to external administrations or controllerships where dividends are not applicable. As such the percentage is determined based on the 5,065 reports where dividends are applicable.

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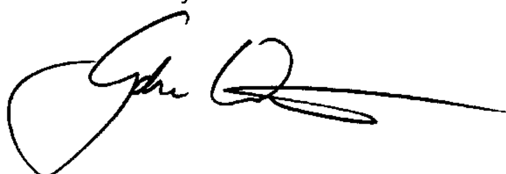
- Do not impose obligations which delay the timely completion of insolvency administrations.
- Bear in mind that many insolvency administrations are without funds, or low on funds, with insolvency practitioners completing the administration with no or only partial payment of fees associated with undertaking the administration. Care needs to be taken in imposing further obligations, which result in additional costs, on insolvency administrations where there are no monies in the administration to fund them.

We would be pleased to assist the department with any further information needed to ensure that the reforms operate effectively and efficiently in relation to insolvency and business restructuring professionals. To discuss our submission further, please contact Ms Kim Arnold, ARITA's Policy & Education Director, on 02 8004 4340 or 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 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

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

Around 85% 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 2023, ARITA delivered 94 CPE events with over 5,000 attendees.

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

We also engage in thought leadership and advocacy underpinned by our members' knowledge and experience. We represented the profession at 11 inquiries, hearings and public policy consultations during 2023.

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Annexure B – Examples of funds handling in insolvency, restructuring and turnaround

	Appointments under the Corporations Act							Appointments under the Bankruptcy Act		
	Court Liquidation	Creditors' Voluntary Liquidation	Members' Voluntary Liquidation	Voluntary Administration	Deed of Company Arrangement	Small Business Restructuring	Receivership	Bankruptcy	Part X	Advisory engagement
Holds funds for a client in the accounting firm's trust account for purposes other than the payment of the accounting firm's fees	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
Has authority over a client's bank account (administration bank account) and makes payments from that account on behalf of a client (for example expenses of operating the business)	✓	✓	✓	✓	✗	✗	✓	✓	✓	✗
Has authority over a client's bank account (administration bank account) and makes payments from that account on behalf of a client, (for example payment of a dividend to creditors OR distribution of funds to a secured creditor)	✓	✓	✗	✗	✓	✓	✓	✓	✓	✗
Has authority over a client's bank account (administration bank account) and makes payments from that account on behalf of a client, (for example distribution of capital to members of the company)	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗
Handles and banks cash takings belonging to a client (for example administration funds from the trading of the business during the insolvency administration)	✓	✓	✗	✓	✗	✗	✓	✓	✓	✗