

7 May 2019

Australian Law Reform Commission  
PO Box 12953,  
George Street QLD 4003

By email: [corporatecrime@alrc.gov.au](mailto:corporatecrime@alrc.gov.au)

Dear Commissioners

**Review into Australia's corporate criminal responsibility regime**  
**Scope of terms of reference**

We refer to the recent commission to the Australian Law Reform Commission (ALRC) to undertake a comprehensive review of Australia's corporate criminal responsibility regime, (Review) announced by the Attorney-General in April 2019. We understand this Review will include a detailed assessment of the Part 2.5 of the Commonwealth Criminal Code (Code) contained in Schedule 1 of the *Criminal Code Act 1995* (Cth).

ARITA - Australian Restructuring Insolvency and Turnaround Association - makes this submission on the scope of the terms of reference for the Review. More information about ARITA is provided at the end of this submission.

ARITA's membership is comprised of registered liquidators who play an important gatekeeping role in investigating the reasons for corporate failure and identifying potential misconduct and offences to report to ASIC.

***Illegal phoenix activity and unregulated pre-insolvency advisers***

In carrying out their investigatory functions, imposed by the *Corporations Act 2001* (Cth) (Act), our members are the frontline in uncovering conduct which is suggestive of illegal phoenix activity and often also see evidence of unregulated pre-insolvency advisers being involved in advising or assisting company directors on how to phoenix their businesses. ASIC describes liquidators as "gatekeepers" in this regard.

Given the costs to the Australian economy of illegal phoenix activity is estimated to be between \$2.85 billion and \$5.13 billion per year, any assessment of the adequacy of Australia's corporate criminal responsibility regime will, ARITA submits, need to include an examination of combatting illegal phoenix activity and the unregulated pre-insolvency advisers who facilitate it.

### ***Suggestions for scope of review***

Against this background, ARITA proposes two key areas which should be specifically considered as part of the terms of reference for the Review. These are an assessment of the effectiveness of each of:

- (a) the interaction between the Code and the enabling offence provisions within the Act, including an assessment of the inconsistencies in approach between the two; and
- (b) the operation and effectiveness of section 79 of the Act in extending criminal responsibility to those “involved” in contraventions of the Act.

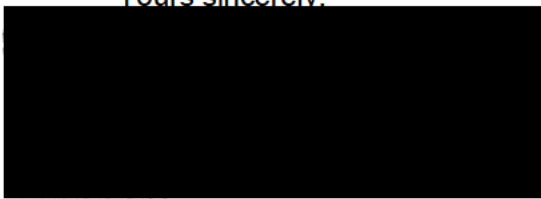
In this regard, we note that it was suggested that the reforms proposed in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019<sup>1</sup> (Bill) were necessary to combat deficiencies in the operation of section 79. However, there is a divergence of views as to whether the proposed reforms in the Bill were necessary, or likely to be effective.

ARITA submits that there are a number of existing mechanisms within the Act which cover illegal phoenix activity, and what is needed is an increased focus on enforcement action, particularly against facilitators, to have a deterrent effect. In its current form s 79 of the Act is not achieving this. The need for a critical assessment of the effectiveness of enforcement in this area is further support for the inclusion of these specific issues in the terms of reference for the Review.

In addition to these specific issues, ARITA encourages the ALRC to liaise with us to obtain a deeper understanding of what is occurring ‘at the coalface,’ as this knowledge is likely to assist with a critical evaluation of the effectiveness of the current corporate criminal responsibility regime and thereby inform how it can be reformed and improved.

Please contact us if you would like any further information or assistance.

Yours sincerely,



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<sup>1</sup> This Bill lapsed at the dissolution of Parliament on 11 April 2019 and is not proceeding



## 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 2,400 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.