

25 February 2022

Mr Matt Corrigan
General Counsel
Australian Law Reform Commission

By email: financial.services@alrc.gov.au

Dear Mr Corrigan

ARITA submission on the ALRC’s Review of the legislative framework for corporations and financial services regulation Report A

We welcome the release of the Financial Services Legislation Interim Report A. We wholeheartedly agree with the statement that “the complexity of the [*Corporations Act 2001* (Cth) (the Act)] likely has a significant effect on businesses, consumers, legal professional, and the judiciary”.¹

As you would be aware, the Australian Restructuring Insolvency & Turnaround Association (ARITA) continues to call for a comprehensive review of Australia’s personal and corporate insolvency laws to ensure they are simple, efficient and effective.

We have directly urged the Government to consider funding and commissioning Australian Law Reform Commission (ALRC) to undertake this “root and branch” review as they last did in ALRC 45 – the Harmer Inquiry – in 1988.

Notwithstanding the above, we acknowledge and support the work undertaken by the ALRC in its current inquiry and make the following submission in response to the proposals and questions in Report A that directly impact the insolvency sector.

¹ Financial Services Legislation Report A: Summary, ALRC Report 137, November 2021 p 10.

ALRC Proposal or Question	ARITA Response
When to Define: Chapter 4	
<p>Question A2: Would application of the following definitional principles reduce complexity in corporations and financial services legislation?</p> <p><i>When to Define (Chapter 4):</i></p> <ol style="list-style-type: none"> In determining whether and how to define words or phrases, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation. To the extent practicable, words and phrases with an ordinary meaning should not be defined. Words and phrases should be defined if the definition significantly reduces the need to repeat text. Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes. <p><i>Consistency of Definitions (Chapter 5):</i></p> <ol style="list-style-type: none"> Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act. Relational definitions should be used sparingly. To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation. <p><i>Design of Definitions (Chapter 6):</i></p> <ol style="list-style-type: none"> Interconnected definitions should be used sparingly. Defined terms should correspond intuitively with the substance of the definition. It should be clear whether a word or phrase is defined, and where the definition can be found. 	<p>ARITA strongly supports the application of the proposed principles.</p> <p>We do however highlight that their application to existing provisions would require careful and precise consideration to ensure inconsistencies in definition which currently exist are not inadvertently impacted.</p> <p>For example, the use of ‘External administration’ in Chapter 5 of the Act as compared to Schedule 2 of the Act and Insolvency Practice Rules as outlined in detail in our previous submission.²</p> <p>We also raise concerns regarding the use of signposted definitions which are not fit for purpose. As noted in our previous submission, the immensely complex and signposted general definition of ‘associate’ in the Act is not fit for the unique and specific purpose of identifying associates of a company in Chapter 5.</p>

² ARITA Submission on the ALRC’s review of the legislative framework for corporations and financial services regulation, 22 June 2021

ALRC Proposal or Question	ARITA Response
Definitions of ‘financial product’ and ‘financial service’: Chapter 7	
<p>Proposal A3: Each Commonwealth Act relevant to the regulation of corporations and financial services should be amended to enact a uniform definition of each of the terms ‘financial product’ and ‘financial service’.</p>	<p>ARITA has previously expressed concerns to the ALRC³ regarding illegal phoenix activity and the rise of this unregulated ‘pre-insolvency’ advice market.</p> <p>We continue to maintain that the advice these advisers provide constitutes financial or legal advice covered by existing licencing requirements, specifically as a registered liquidator or trustee, lawyer or holder of an Australian Financial Services Licenses (AFSL) (noting that insolvency practitioners are subject to a limited exemption from AFSL requirements). We would like to see the definition strengthened to ensuring that debt management advice of all types is fully captured, thereby reducing the capacity of unregulated pre-insolvency advisers to continue to subvert the system.</p> <p>We support the simplification of the definition of ‘financial product’ and ‘financial service’ to remove any uncertainty created by the current complexities with the definitions.</p> <p>For example, in the matter of <i>Business and Personal Solutions Pty Ltd v John Clive Witherspoon & Ors</i> [2022] QSC 10 the sole director of the plaintiff, Mr Geoffrey Shannon, assisted the defendants with a dispute against their financier. While these proceedings assert that neither the plaintiff nor Mr Shannon were entitled to engage in legal practice within the meaning of the <i>Legal Profession Act 2007</i> (Qld), we suggest that the debt management ‘consultancy services’ being provided by Mr Shannon should alternatively constitute a financial service.</p>

³ ARITA submission to ALRC’s Australia’s corporate criminal responsibility regime Discussion Paper 87, 30 January 2020

Exclusions, Exemptions, and Notional Amendments: Chapter 10

Proposal A9: The following existing powers in the Corporations Act 2001 (Cth) should be removed:

- a. powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and
- b. powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.

Proposal A10: The Corporations Act 2001 (Cth) should be amended to provide for a sole power to create exclusions and grant exemptions from Chapter 7 of the Act in a consolidated legislative instrument.

ARITA supports the clarification and consolidation of the powers to grant and amend exemptions.

In providing clarity in relation to the exemptions, we note that the general exemption from licensing requirements for registered liquidators and trustees in regulation 20 of the National Consumer Credit Protection Regulations 2010 only applies to the extent that the person is engaging in the specified credit activity.

The exemptions apply to the specific types of insolvency appointments noted while the appointee is "performing functions, or exercising powers" in that role or "performing functions, or exercising powers, incidental to the person's appointment".

We suggest that the definition should extend to an exemption for registered liquidators or trustees who provide debt management assistance outside of a formal appointment. Registered liquidators and trustee are ASIC and AFSA regulated experts in the area of debt management assistance and the law must accommodate their ability to provide this advice outside of a formal appointment without requiring licencing.

In addition to the above, specific responses to Report A, we also refer to the 'key points' outlined in our previous submission to the inquiry which address particular instances of definitional uncertainty and legislative complexity in the existing insolvency regulatory scheme under the Act), the supporting Corporations Regulations 2001 (Cth), the Insolvency Practice Schedule (Corporations) and the Insolvency Practice Rules (Corporations) 2016 (Cth). While some of the points are addressed by recommendations and proposals in Report A, we acknowledge that others fall within the scope of the ongoing Terms of Reference and we look forward to the further reports in this this inquiry.



As always, we look forward to continuing to work closely with the ALRC and should you wish to discuss any aspect of our submission, please contact Ms Narelle Ferrier, Technical & Standards Director, on [REDACTED]

Yours sincerely

[REDACTED]

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 2020, ARITA delivered 70 professional development sessions to over 8,200 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 2020.