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### **Options for improving the Unclaimed Bank Account**

The Australian Restructuring Insolvency and Turnaround Association (ARITA) appreciates the opportunity to comment on this discussion paper. ARITA is the professional body representing company liquidators and trustees in bankruptcy, and lawyers, financiers academics and others practising in or otherwise interested in insolvency law and practice.

We address two aspects of your paper and make recommendations in respect of one, in relation to:

1. bank accounts of insolvency practitioners;
2. the *Bankruptcy Act* process for claiming unclaimed moneys compared with that under the *Corporations Act*.

#### **1. Extended time period of administration of insolvencies**

The external administration of a company, or a bankruptcy, can continue for some years, well over three, and with apparent inactivity in the bank account of the company. In that respect, we understand interest and transaction fees do not count as activity. However we now note that section 69(1D) of the *Banking Act* 1959 excludes from the 3 year regime an account specified in the regulations. Under reg 20A, if the holder of an account has notified the ADI, within the previous 3 years, that the holder wishes to treat the account as active, the account is thereby specified.

We therefore propose to advise our insolvency practitioner members that they should notify the bank of any account that may be needed beyond 3 years and thus that it should remain open. If you have any comment on this please let us know.

#### **2. Recovery of unclaimed moneys**

Under the heading of 'regulatory burden', the paper says that in addition to seeking feedback on the policy issues of unclaimed bank accounts, the government is seeking comment on the need for any further amendments to reduce the regulatory burden of the unclaimed moneys provisions.

In that respect, we point out an unsatisfactory state of bankruptcy law, particularly in comparison with corporate insolvency law. Bankruptcy law requires a claimant for unclaimed moneys to apply to the court; corporate insolvency law requires only that the claimant apply to ASIC.

## **Bankruptcy**

Dividends or moneys in a bankruptcy are to be paid to the Commonwealth by the trustee if they remain unclaimed for six months, or cannot be distributed: s 254 of the *Bankruptcy Act*. At the time of payment, the trustee must provide a statement showing each person who, so far as the trustee is aware, is entitled to the moneys: reg 12.01(1)–(2) of the *Bankruptcy Regulations 1996*.

A person claiming those moneys must apply to the Federal Circuit Court or the Federal Court for an order declaring that person is entitled to those moneys: s 254(3)–(4). For example, unclaimed moneys from an unrepresented dividend cheque that were paid by the Official Trustee to the Commonwealth over 15 years earlier were successfully claimed under s 254, see *Application of Tsantis (In the Matter of Bauer)* [2010] FMCA 112.

Any court application involves cost and time and it is apparent that such applications would not be made unless the amount claimed was substantial. Many unclaimed moneys in bankruptcy are for small dividend payments. The cost of court proceedings means that recovery by the claimant is effectively ruled out.

For your information, AFSA has guidance - see IGPD 20 *Guidelines for the Payment of Monies to the Commonwealth Pursuant to section 254 of the Bankruptcy Act 1966* - on processes expected of trustees in locating payees of moneys, and in dealing with unrepresented cheques.

## **Company insolvency**

Such unclaimed dividends and other moneys in corporate insolvency are to be paid to ASIC which then deals with the moneys in accordance with Pt 9.7 — unclaimed property — of the *Corporations Act* (see s 544).

In contrast with bankruptcy, a creditor may apply to ASIC, not the court, for payment if the creditor claims to be entitled to that money, and to appeal to the court to disallow or vary the decision of ASIC (s 1341).

An application to ASIC obviously involves less cost and time than a court application.

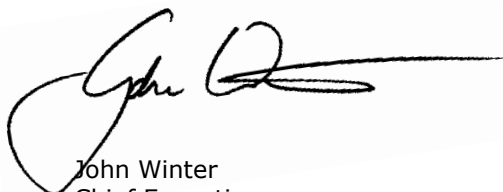
## **Recommendation**

We recommend that the *Bankruptcy Act* be amended to introduce the same regime as applies in corporate, with AFSA determining the claim to the moneys. We have raised this issue before in submissions to government.

Given that we recommend amendment of the *Bankruptcy Act*, we have copied this to the Attorney-General's Department.

Please contact ARITA's Legal Director Mr Michael Murray on 02 9080 5826 or [mmurray@arita.com.au](mailto:mmurray@arita.com.au) if we can assist further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Winter', with a long horizontal flourish extending to the right.

John Winter  
Chief Executive



cc Carmen Miragaya  
Principal Legal Officer  
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