ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

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Ms Michelle Calder
Manager
Corporate Governance and Reporting Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: insolvency@treasury.gov.au

Dear Ms Calder

Exposure Draft – Insolvency Law Reform Bill 2014

Please find following our submission in relation to this draft Bill.

ARITA has undertaken a detailed review of the draft Bill and the Insolvency Practice Rules and the following submission sits alongside comments you have already received from us following our recent meeting with you. We are grateful to Treasury to have had that opportunity to constructively work through the Bill with Treasury staff and staff from the Attorney-General's Department, ASIC and AFSA.

ARITA gave detailed comments and made submissions in response to the 2013 Insolvency Law Reform Bill. We have examined the 2014 Bill to see whether our suggestions were adopted. In so far as they were not, and our comments remain valid, we have restated them here.

We address the Exposure Draft in the same order that it is presented, in the Table of Comments at Appendix B, and also make a number of introductory and general comments. We point out that there are a number of substantial comments and suggested changes to the provisions of the Bill contained in Appendix B.

Key points:

Insolvency Practice Rules

We suggest that the Rules make provision for a rules committee to advise on and recommend changes to the Rules.

Practitioner conduct – remuneration and disbursements

We disagree with the general approach taken to the benefits provisions in the Bill. While the conduct they appear to proscribe – overcharging, secret commissions, kick-backs, secretly acquiring company property – is not lawful, there should be a better and more effective way to state the proscriptions. We again suggest that a parallel can be drawn with the principles-based drafting used in existing bankruptcy laws and in the bankruptcy performance standards.

How the passing of a resolution by a meeting of creditors is determined

We see it as essential that the process whereby creditors' views are determined should be clear, consistent between bankruptcy and corporate, and drafted so as to ensure that:

- only those properly entitled to vote can do so; and
- due regard is had to how votes are cast both on a numbers and value basis.

Directors

We note that you have not proceeded with clause 206BB which appeared in the 2013 version of the Bill. This proposed section provided that a director could be disqualified from managing a corporation where they failed to provide a report as to affairs (RATA) or the books and records to a liquidator in an external administration of their company. We disagree with the removal of that provision.

Ethics

While we agree that ethical behaviour should properly be a matter of expectation, its legal meaning is not clear.

An industry or a profession?

We think the term "professional body" should be used in describing ARITA and comparable bodies.

Qualifications

We do not disagree with the proposed broadening of the minimum tertiary qualifications, but we consider that the words "or equivalent" should be added.

In relation to receivers, we draw your attention to our comments and criticisms in the Table of Comments concerning the separate qualifications proposed for receivers.

Penalties

We note that there is a range of strict liability offences to be imposed on practitioners for various defaults. Further, we note that the Explanatory Memorandum remains in draft at this stage and no explanation for strict liability being imposed is offered.

Unfunded work

We consider that a general principle throughout these reforms should be that it is not reasonable for a practitioner to attend to tasks if there are no funds from which they will be remunerated, or for which no security can be taken. However, if the law is to require practitioners to undertake work for which they cannot be paid, it should clearly say so.

Role of contributories

We have pointed out in earlier submissions that there is generally no policy or legal reason for involvement of contributories in creditors' meetings or committees, unless they have a financial interest in the administration, which is rare.

Further assistance

ARITA remains available and committed to assist in the finalisation of the Bill, and in the consideration of the regulations and subsequent legislation.

We trust these comments assist. Should you wish to discuss any aspect of our submission, please contact us.

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents practitioners and other associated professionals who specialise in the fields of insolvency, restructuring and turnaround.

We have more than 2,000 members including accountants, lawyers, lenders and investors, academics and other professionals with an interest in insolvency and restructuring.

ARITA's mission is to support insolvency and recovery professionals in their quest to restore the economic value of underperforming businesses and to assist financially challenged individuals. 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.

Some 76 percent of registered liquidators and 86 percent of registered trustees are ARITA members.

ARITA promotes best practice and provides a forum for debate on key issues facing the profession. We engage in thought leadership and advocacy underpinned by our members' knowledge and experience.

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1 Overview

We make some comments about what we see as fundamental issues or concerns, along with more general issues relating to the Exposure Draft of the Insolvency Law Reform Bill 2014 (the Bill). This is followed by some additional points which we ask you to consider including in the Bill for the purposes of ensuring alignment between the personal and corporate insolvency systems.

We then provide detailed comments on the Bill, and on the consequential amendments and transitional arrangements for both Schedule 2 to the Bankruptcy Act and Schedule 2 to the Corporations Act in Appendix B.

2 Fundamental issues

2.1 Qualifiers

Our comments on the Bill are qualified by the fact that we do not yet have the proposed changes to the Bankruptcy and Corporations Regulations, nor the full set of Insolvency Practice Rules (Rules), or the complete Explanatory Memorandum. These are of course important because the approach taken in the Bill is to leave much of the detail to the Rules, for example as to the committee processes for the registration and discipline of practitioners, as contained in Division 40 of the Bill, and their procedural fairness requirements. We also would like to see the full Explanatory Memorandum, for example as to the explanation for the strict liability offences, their proportionality and consistency.

We do appreciate however that your task is large and that at this stage you are seeking our comments in particular on the Bill itself.

2.2 Insolvency Practice Rules

We understand the purpose of the proposed Rules is to allow more flexibility in any necessary changes that may be needed as law and practice progresses. We suggest that the Rules make provision for a rules committee to advise on and recommend changes to the Rules. We consider this would be “convenient in order to carry out or give effect to the Act” in terms of s 105-1(1)(b) of the Bill. The committee could comprise representatives of government and professional bodies, such as ARITA.

We note that the UK Insolvency Act 1986 has the equivalent structure in relation to its Insolvency Rules 1986, although they also include court rules. There is a UK Insolvency Rules Committee of judges, lawyers and insolvency practitioners which monitors and recommends changes to the rules.

2.3 Practitioner conduct – remuneration and disbursements ("benefits provisions")

We make particular comments on the *Practitioner conduct – remuneration and disbursements* provisions in Division 60 Subdivision E. We disagree with the general approach taken to these "benefits provisions". While the conduct they appear to proscribe – overcharging, secret commissions, kick-backs, secretly acquiring company property – is not lawful, there should be a better and more effective way to state the proscriptions.

We again suggest that a parallel can be drawn with the principles-based drafting used in existing bankruptcy laws. Section 19 of the *Bankruptcy Act* contains provisions that require a trustee to administer the estate as efficiently as possible by avoiding unnecessary expense, and to act in a commercially sound way. We gave other examples of principles-based drafting in relation to directors' duties in our 2013 submission.

These legislative principles could be supplemented by performance standards consistent with those in Schedule 4A to the Bankruptcy Regulations, and in regulator guidance and professional guidance such as found in the ARITA Code of Professional Practice (the ARITA Code). The courts have regard to professional standards in deciding on practitioner conduct.

These principles-based duties and responsibilities may then be enforced under proposed Division 40, Subdivision E in so far as it may be shown that the duties of a liquidator or a trustee were not carried out adequately and properly.

However, if the proposed approach is to be adopted, we make the following comments regarding issues with the practical application of the current drafting.

2.3.1 Related entity benefits – consent of creditors 60-20(4)(ii)

What is a "related entity"? The external administrator's firm is a related entity of the administrator (due to an insolvency appointment being to an individual practitioner, not to their firm) and section 60-20(4)(ii) would appear to prohibit any work being done by the firm until consent from the creditors is received. This would take time, the firm would be unable to assist the liquidator until such consent is received and all work would have to be undertaken personally by the liquidator. We suggest that this is an unintended consequence of the current drafting approach.

In our view, the current approach does not consider the practical impact on the external administration of the need for the practitioner to be able to obtain time sensitive advice or service (for example where the insolvent company's computers urgently need to be imaged on day one of the appointment and the practitioner has the expertise available in-house, but may struggle to obtain a third party service provider at such short notice).

The ARITA Code manages the problem of professional services provided by a related party by requiring that any such services are to be treated as remuneration and subject to the same reporting and approval process as the external administrator's remuneration. It is

ARITA's view that this is a better way to approach the provision of professional services by a related entity.

Disbursement type amounts paid to the firm or a related entity could also be subject to retrospective approval if consent is not received in advance.

Furthermore, it is unclear whether a specific resolution would be required for each individual service or whether a general resolution that covers all "related entity benefits" would be sufficient. Or is it envisaged that this will be dealt with through guidance issued by ARITA?

2.3.2 Giving up remuneration

These provisions appear to proscribe secret commissions and kick-backs.

Decisions of the courts have drawn some fine lines in whether a practitioner has given up their remuneration.[1] In one case, the Court held that although the appointments of the practitioner were personal appointments in his capacity as liquidator, his work in progress belonged to his practice company to which he had, in effect, "given up" his remuneration.[2] The proposed section would simply be re-introducing these legal uncertainties based on old inadequate law.

In our view, "give up" remuneration could also be interpreted as extending to payment for any services or disbursements.

We are concerned that any agreement to accept a lesser amount of remuneration (for example if creditors negotiate remuneration at the meeting and the external administrator agrees to accept a lesser amount which is approved by creditors) may breach the prohibition under section 60-25. We draw this conclusion as section 60-30(3) specifically gives an exclusion from breaching section 60-25 to a former administrator who agrees to accept a lesser amount of remuneration.

We again reiterate the need for principles-based drafting.

2.4 How the passing of a resolution by a meeting of creditors is determined

We note that it is proposed to bring the method of determining whether a "resolution" is passed at a meeting of creditors under the *Bankruptcy Act* into line with that under the *Corporations Act*.

[1] See for example *Re Dare* [1992] FCA 509 and *Wenkart v Pantzer* [2008] FCA 478.
[2] *ACN 079 638 501 Pty Ltd (in liq) (recs & mgrs apptd) v Pattison* [2012] VSC 445.

To assist, in Appendix A, we:

- discuss the different approaches under the personal and corporate insolvency systems for both resolutions at meetings and resolutions put without a meeting as they currently stand;
- highlight their differences;
- detail why the proposed approaches will not work; and
- suggest new approaches for both resolutions with and without meetings that ensure regard is had to how votes are cast both on a numbers and value basis.

Apart from the fact that they should both be aligned, and we see no reason why they should not be, we have recommended some wholesale changes to protect the integrity of the meeting process.

As is apparent from the Bill, more authority is given to creditors, consistent with a view that they are the main stakeholders and ones interested in the financial outcome of the insolvency; although generally subject to the authority of the practitioner. We therefore see it as essential that the process whereby creditors' views are determined should be clear, consistent between bankruptcy and corporate, and drafted so as to ensure that only those properly entitled to vote can do so. The integrity of the meeting and voting process is fundamental to the integrity of the insolvency regime.

In that respect, we acknowledge that while the law should be consistent and clear, it cannot anticipate all abuse of the voting process. At the same time, some discretion and responsibility should be reserved for the practitioner. Court review and oversight is also essential.

2.5 Directors

We note that you have not proceeded with clause 206BB which appeared in the 2013 version of the Bill. This proposed section provided that a director could be disqualified from managing a corporation where they failed to provide a RATA or the books and records to a liquidator in an external administration of their company. That disqualification could be simply reversed by the director's compliance. Due process was to be provided for.

We disagree with the removal of that provision and ask the reasons why, and on what representations. We see the obligation of a director to provide both a RATA and the company's books and records as a fundamental obligation of a director in relation to the failure of their company, and there is rarely any reasonable basis for a director to not comply.

It must be remembered that a liquidator comes to a winding up with no knowledge of the company, its assets, liabilities, trading history, etc. The liquidator is completely reliant on obtaining information from the directors to enable the liquidator to make decisions, take

control of assets, undertake investigations and communicate with creditors. Without this information, many of the proposed reforms around communication with creditors will be worthless, as the liquidator will not know with whom to communicate if the RATA is not provided.

Under the proposed regime, a liquidator's registration could be terminated for such a serious breach. We see the failure of directors to comply with a statutory obligation as an equally serious breach.

We also point out that that the removal of this disqualification provision in relation to directors is not comparable with the law in bankruptcy. A bankrupt who fails to file a statement of affairs (the personal administration equivalent of a RATA) is not only subject to a criminal penalty but has the period of their bankruptcy extended pending their compliance; this could be months or years. Necessarily, if that bankrupt were also a director, the prohibition on their managing corporations would likewise be extended.

The Bankruptcy Act also provides a regime whereby the Official Receiver is given power to demand the statement of affairs, with appropriate criminal sanctions: s 77CA. This power of the Official Receiver is exercised in effect on behalf of the trustee appointed to the estate. This additional power given to the regulator, beyond the authority of the appointed trustee, reinforces the importance of the statement of assets and liabilities being provided by an insolvent, whether a debtor or a director. AFSA has issued detailed guidance on the use of this power.[3]

Also, we note that ASIC has commissioned research into ensuring directors' compliance with their RATA and other obligations. We assume you have had regard to the outcome of that research, and any recommendations, in removing section 206BB.

In any event, we make this general suggestion in relation to both bankruptcy and corporate: a director (as a creditor or member) or a bankrupt if they are in default of compliance with their obligation to file a RATA or SOA, has no right to request information of the practitioner under the relevant inquiry provisions (Division 70, Subdivision D and section 70-56). That is not unreasonable and in fact would prevent the ludicrous situation where a non-compliant director or bankrupt could demand a list of the company's creditors from the liquidator or trustee. Such provisions may relevantly be provided for as "unreasonable" requests under the Rules.

We consider that a power equivalent to s 77CA in bankruptcy also be provided to ASIC in order to enforce director compliance.

[3] See ORPS 10 – afsa.gov.au

3 General issues

3.1 Clause 1-1 – ethics

This clause states that the object of Schedule 2 is to ensure that persons registered as practitioners behave "ethically", a term not used in the existing laws, or the earlier Bill. While we do not say that ethical behaviour should not properly be a matter of expectation, its legal meaning is not clear. It is a concept not necessarily contained in the long established standard of conduct expected of insolvency practitioners under the "rule in *Ex parte James*"[4].

The law has typically not referred to ethics as a standard of conduct, including in the context of trustees and liquidators. While "legal rights can be determined with precision by authority … questions of ethical propriety have always been, and will always be, the subject of honest difference amongst honest men."[5] In the more complex legal obligations of a trustee or liquidator, a legislative ethical overlay may distort or disturb the established thinking in *Ex parte James*.

3.2 An industry or a profession?

The Bill refers to yet to be prescribed "industry bodies", for example to provide information about potential breaches of the *Bankruptcy Act* and *Corporations Act* by a trustee/liquidator to the regulators. It is proposed that the following industry bodies be prescribed: ARITA, CPA Australia, the Institute of Chartered Accountants in Australia (now CAANZ), and the Institute of Public Accountants.

The use of the term "industry" – the dictionary meaning of which is the commercial manufacture and sale of goods – is misplaced. That term typically is found in business laws concerning competition, agriculture and production; rather than concerning law, accounting and insolvency e.g. *Australian Meat and Live-stock Industry Act* 1997.

In other parts, ARITA is referred to as a prescribed body. The Explanatory Memorandum to the 2007 Insolvency Law Reform Bill refers to "self-regulatory oversight of the Insolvency Practitioners Association and professional bodies". ASIC Regulation 8AA already refers to CAANZ, CPA and IPA as "professional bodies".

Here is Professions Australia's definition of a profession:

> A profession is a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others.

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[4] (1803) 32 ER 385
[5] *Re Wigzell; ex parte Hart* [1921] 2 KB 835 at 845

> It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community.[6]

Each of the prescribed bodies mentioned in the Bill meets the accepted definition above, especially in regard to the setting and oversight of professional standards and the standards and ongoing education required of all of the prescribed body's members.

We think the term "professional body" should be used.

3.3 Qualifications

We note that paragraphs 19 and 101 of the proposals paper for the Rules state that an applicant for registration, as a trustee or liquidator, "must hold one or more degrees that represent three years of full time study in commercial law and accounting, but with no less than one year of equivalent full time study in either".

Currently, reg 8.02 of the *Bankruptcy Act* and section 1282 of the *Corporations Act* refer to "a course of study in accountancy of not less than 3 years and a course of study in commercial law of not less than 2 years".

We do not disagree with this broadening of the minimum tertiary qualifications, but we consider that the words "or equivalent" should be added. For example ACCA[7] and CIMA[8] – both globally recognised and acknowledged as comparable professional bodies – offer degree equivalents.

Paragraph 21 says that the Rules will require that the applicant has completed tertiary study in insolvency administration, in addition to the tertiary requirements. We agree with these changes, noting that the registration decision for a committee is based on a number of criteria, of which qualifications is only one.

In relation to receivers, we draw your attention to our comments and criticisms in the Table of Comments concerning the separate qualifications proposed for receivers.

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[6] Adopted, Professions Australia Annual General Meeting, 26 May 1997
[7] Association of Chartered Certified Accountants.
[8] Chartered Institute of Management Accountant.

3.4 Penalties

We note that there is a range of strict liability offences to be imposed on practitioners for various defaults. We note the requirements of the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* of 2011 and the requirement, among others, for the parliament to explain the need for strict liability being imposed, including in comparison with other Commonwealth laws. In that respect, we note that there is a maximum of 1000 penalty units for failure to have insurance, which we assume, is in line with comparable other Commonwealth and state laws.

We will assess the Explanatory Memorandum when it is released in final form; however, we note that it remains in draft at this stage and no explanation is offered.

3.5 Unfunded work

The laws proposed will impose additional obligations on practitioners, as well as remove other obligations. These include the notification of creditors of the insolvency, the calling of meetings, the provision of information and so on. We are particularly concerned about the costs that both trustees and liquidators will have to potentially bear in processing and responding to creditor requests for information and meetings, even in instances where those requests are considered unreasonable under the Rules.

ARITA and its members accept that in some cases such work must be done even if no funds are available. However, we consider that a general principle throughout these reforms should be that it is not reasonable for a practitioner to attend to tasks if there are no funds from which they will be remunerated, or for which no security can be taken. However if the law is to require practitioners to undertake work for which they cannot be paid it should clearly say so.

We note that some attention will be given to this in the Rules, in the proposed definition of “reasonable” and “unreasonable” requests, etc. However, we again say that section 545 of the Corporations Act should be adapted and clarified for this purpose, and applied to both regulated debtors’ estates and all external administrations.

3.6 Role of contributories

We have pointed out in earlier submissions that there is generally no policy or legal reason for involvement of contributories in creditors’ meetings or committees, unless they have a financial interest in the administration, which is rare. Although many references to contributories have been removed in the 2014 version of the Bill, many still remain (section 28-15, as one example). We understand you are reconsidering this as a general issue.

3.7 Terminology

There should be consistency in describing certain terms in the Bill. One example we raise is in relation to remuneration (of a practitioner) and expenses (or disbursements, that is, moneys paid by the practitioner for the purposes of the administration such as advertising costs, search fees, legal costs, agents fees, etc.) and costs (being legal costs ordered by a court to be paid).

For example section 32-23 refers to "remuneration, costs or expenses which the liquidator is appointed to review". Section 28-50 refers to "costs in relation to meetings of creditors", but under section 17-5 the court may order that a person's "costs" of and incidental to a court application be paid by another person.

4 Additional areas for consideration

4.1 Related party votes

In our members' experience, particularly in the SME and personal insolvency sectors, related parties often play a significant role in influencing the outcome of any voting by creditors, often to the extent that they control the outcome of the meeting.

In our view, this is often to the detriment of unrelated creditors. Whilst we recognise the rights of creditors in corporate insolvency administrations to take court action to overturn such resolutions, this is often not financially practical, particularly in the smaller end of the market which is most affected.

Whilst not dealt with in the proposed reforms, we recommend consideration be given to removing the rights of related party creditors to vote.

At the very least, related party creditors in external administrations should be required to disclose the fact that they are a related party of the company subject to the external administration. This is in line with the current requirements in the Form 7 Statement of Claim under the Bankruptcy Act.[9]

[9] AFSA has explained its concerns in this area and the reason for the introduction of this requirement – see https://www.afsa.gov.au/practitioner/pir-newsletter/jun-2013-pir-newsletter/13.-form-7-statement-of-claim-and-proxy-form . It may be that ASIC has similar concerns.

4.2 Purchased debt

Under the current s 64ZB(8) of the *Bankruptcy Act,* if a creditor has purchased a debt, they are only entitled to vote for the value paid for the debt, rather than the face value of the debt. Information about the purchase of the debt must be provided in the Form 7 Statement of Claim.

By purchasing large amounts of debt for relatively small amounts, creditors can influence the outcome of voting.

We agree with the approach taken under the *Bankruptcy Act* and suggest that it be extended to all external administrations under the Corporations Act.

Alternatively, at the least, there should be disclosure of the amount for which the debt was purchased.

We point out that this does not and should not impact the amount for which that creditor can claim for the purpose of receiving a dividend. The regime under s 64ZB(8) applies only in the decision making processes, for example where creditors are able to vote to accept a composition and annulment, or to accept a Part X agreement.

4.2.1 The general law

In that respect, we note that the general law provides some protection for the integrity of the process. In the recent decision in *Canadian Solar*[10], in a challenge to creditors' decision to accept a deed of company arrangement, the Judge referred to "a number of deeply troubling aspects surrounding the circumstances in which the [deed] came to be approved". These involved the apparent misuse of general proxies, directors' inducements to creditors, and other misconduct. As a general statement of the law, the Judge accepted that solicitation of votes by way of secret deals serves to "corrupt the voting process", is "deeply inimical to the spirit and objectives of statutory regimes such as Part 5.3A and its equivalents in the bankruptcy laws", and is "a species of equitable fraud".

Therefore, while we make these submissions for reform of the provisions in the legislation, we see the statement of law in this case as ensuring the integrity of the important decision making powers given to creditors in insolvency.

[10] *Canadian Solar v ACN 138 535 832 Pty Ltd (SDOCA)* [2014] FCA 783

5 Other inquiries

5.1 Financial System Inquiry report

We note the recommendation of the Financial System Inquiry report and that the Government has sought submissions on the issues it raises by 31 March 2015. Generally, the Report does not address issues the subject of this Bill and we therefore do not see the need to address any other issues in this submission.

The Report does of course raise a number of fundamental issues about insolvency law reform and we will be addressing those in a further separate submission in 2015.

5.2 Other law reform issues

That submission will also address other issues that we consider need law reform, many of which have been the subject of comment by ARITA and others for some time. One example is the law in relation to the entitlements and priorities of employees in concurrent liquidations and receiverships. These are the subject of a submission from the Law Council of Australia to the Assistant Treasurer, of March 2014. We have also raised this in our submission to the current Senate inquiry into forestry managed investment schemes, the issue being one that has caused difficulties in the administration of Great Southern.

The alignment of employee priorities and entitlements between personal and corporate insolvency also needs attention.

Appendix A – How the passing of a resolution is determined

We note that it is proposed to bring the method of determining whether a resolution is passed at a meeting of creditors under the *Bankruptcy Act* into line with that under the *Corporations Act.*

In our submission we highlight that we have concerns about the approach taken in the exposure draft of the Bill with regards to resolutions and special resolutions both at meetings and where they are put to creditors without a meeting. In this Appendix we seek to provide you with the detailed analysis to support our view,

Resolutions at a meeting of creditors

To assist, we provide this summary of the two voting approaches as they currently stand:

Bankruptcy "value" based approach

- a resolution is first put to the voices and can be determined on number;
- a poll can be requested by any creditor and then the vote is determined by poll;
- at the poll:
    - a resolution is passed by a majority in value of creditors voting in favour;
    - a special resolution is passed by a majority in number and at least three fourths in value of those creditors voting, voting in favour;
- a resolution cannot be "hung" (does not pass or fail), due to the fact that only the value of creditors is taken into account, not a combination of number and value;
- a special resolution can be "hung";
- there is no provision for use of casting vote by the chair of the meeting;
- there are no provisions to challenge the passing of a resolution as a result of the votes of related parties.

Corporate "numbers" based approach

- a resolution is first put to the voices and can be determined on number;
- a poll can be requested only by the chairperson, at least 2 creditors, or a creditors with more than 10% of the voting rights at the meeting; and then the vote is determined by poll;
- at the poll:
    - a resolution is passed by a majority in number and at least half the total debts of those creditor voting, voting in favour;
    - a special resolution is passed by a majority in number and at least three fourths in value of those creditors voting, voting in favour;

- a resolution can be “hung” (does not pass or fail), due to having to obtain both the requisite number and value (i.e. could get the required number, but not value and vice versa);
- special resolutions are not used in meetings of creditors under Chapter 5 of the Corporations Act. They are used only by the members to appoint a liquidator in a members’ voluntary liquidation or a creditors’ voluntary liquidation (which is a pre-insolvency meeting of members) or to approve a scheme of arrangement under Part 5.1 (where it is described as such but not actually called a special resolution). The definition in section 9 only applies to company meetings of members under ss 249L and 252J – it does not apply to creditors meetings under Chapter 5;
- there is a casting vote by the chair of the meeting;
- there are provisions to challenge the passing of a resolution as a result of the votes of related parties or the use of the casting vote.

The significant differences are:

- it is easier for creditors to request a poll under the bankruptcy system;
- under the bankruptcy system a resolution is passed based only on value, therefore the resolution cannot be “hung” and there is no need for a casting vote to resolve deadlocks;
- there is no definition of special resolution in relation to creditors meetings under Chapter 5 of the Corporations Act (notwithstanding that the proposals paper for the Rules indicates that there is);
- there are no provisions in bankruptcy to challenge resolutions passed by related parties.

We are a strong supporter of the principle of alignment between the two systems, and we consider that voting and the passing of resolutions is a fundamental process in insolvency and should be consistent between the two. As such, we suggest that rather than simply aligning bankruptcy with corporate; consideration be given to using the best of both systems:

- a resolution is first put to the voices and can be determined on number;
- a poll can be requested by any creditor and then the vote is determined by poll;
- at the poll:
    - a resolution is passed by a majority in value and number of creditors voting in favour;
    - a special resolution is passed by a majority in number and at least three fourths in value of those creditors voting, voting in favour;
- there is provision for use of casting vote by the chair of the meeting (other than in respect of resolutions regarding remuneration and replacement of the incumbent external administrator/trustee which is a change already proposed in the Bill);
- there are provisions to challenge the passing of a resolution as a result of the votes of related parties or the use of the casting vote.

In our opinion it is important for the external administrator or trustee to have regard to both the number and value of creditors voting and, in situations where the resolution is hung,

have discretion as to the outcome of the resolution. The ability to challenge the use of the casting vote will be available and is the appropriate protective resolution mechanism.

A dual system such as we propose makes it much more difficult for an individual creditor, small group of creditors or related party creditors to manipulate or control the outcome of voting and gives regard to the interests of the whole body of creditors, which is in line with the intentions of the Bill.

Resolutions without a meeting of creditors

In relation to creditors' resolutions without meetings, which currently operates within the bankruptcy system and is proposed to be implemented in the corporate system, it currently works as follows:

- As long as at least one creditor votes and no creditors object to the proposal being resolved without a meeting:
    - a special resolution is passed by a majority in number and at least 75% in value who **voted** within the required time;
    - a resolution is passed by a majority in value who **voted** within the required time.

As mentioned above, it is proposed to implement the same process for corporate, and align the bankruptcy and corporate system. However, it is proposed that there be changes in relation to how it is determined that an ordinary resolution will pass.

Ordinary Resolution

As currently proposed, a resolution will be passed if:

- at least one creditor votes (same);
- no creditors object in writing to the proposal being resolved without a meeting of creditors (same); and
- there is a Yes vote by a majority in **number** who voted (different).

Members have raised concerns about this change as, in their view, it will be easier to stack the voting with related party or friendly creditors when "numbers" rather than "value" determine the passing of the resolution. As can be seen from the discussion above, at this time there is no situation under either system where a resolution is passed simply on numbers where a poll is held, there is always a requirement to take into account the value of creditors. In our view, voting without a meeting is largely similar to a poll, in that the external administrator or trustee can easily have regard to the value of debt of each creditor when determining the outcome of the vote.

As such, we strongly disagree with the voting framework proposed in the Rules for the passing of a resolution without a meeting. It is essential that a resolution only pass with a majority in number and value of creditors voting.

Furthermore, in our view, it is necessary to require creditors to prove their debt for voting purposes prior to being able to cast a vote in respect of a resolution without a meeting, in the same way that creditors have to prove their debt for voting purposes prior to being able to vote at an actual meeting (Corporations Act regulation 5.6.23, Bankruptcy Act section 64D).

Special resolutions

Special resolutions proposed without a meeting are proposed to remain the same according to the Rules proposal paper.

However, we are confused as to why special resolutions without a meeting are proposed to remain the same, when special resolutions at a meeting are proposed to align with section 9 of the Corporations Act. As noted above, section 9 refers to meetings of members held outside of Chapter 5 and we question the relevance of this definition to the insolvency process in both the Bankruptcy Act and Chapter 5 of the Corporations Act. Furthermore, we reiterate our concerns that the definition in section 9 is a numbers based determination (due to the fact it relates to members and the number of shares held) and not a value based approach, which in our view is necessary in creditors meetings in insolvency.

Number of resolutions

In the Table of Comments, at 75-40, we suggest that this process under s 64ZBA should not be limited to one resolution at a time. The process has now successfully operated in bankruptcy for some years, to the benefit of trustees and creditors, as a valid streamlining and cost saving measure. However the one resolution limit results, as we understand, in unnecessary multiple “virtual meetings” in order to deal with all of the matters on which the trustee requires resolutions. This is impractical for creditors and the trustee and we suggest that a maximum of three resolutions would be more appropriate.

Appendix B – Table of Comments

Key: *Significant issue*
Moderate issue
Other issue

Corporate	
Proposal	**ARITA Issue**
Inclusion of Contributories	We have pointed out in this submission (paragraph 1.10) and earlier submissions that there is generally no policy or legal reason for involvement of contributories in creditors meetings or committees, unless they have a financial interest in the administration, which is rare. Division 80 – Committees of Inspection excludes contributories but they continue to be referenced in other provisions (70-5, 70-6, 75-40, 75-50, 80-26, 90-21).
Use of the term "person with a financial interest in the external administration"	At various places throughout the schedule this term is used (60-11, 65-45, 70-20, 90-10, 90-20, 90-23, 90-28). Whilst we recognise that this would rightly include creditors, it may also, in our view inappropriately, include a party against whom the external administrator is taking legal action. These various review sections may be inappropriately used to delay or obstruct the liquidator. Some of these provisions already specifically identify creditors, others do not. Where creditors are identified, then the reference to person with the financial interest should be removed. If not specifically included, then the provision should be changed to specifically list who is entitled to apply, e.g. creditors.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
Part 1 - Introduction	
1-1 Objective of this schedule	Refer to paragraph 3.1 of our submission regarding use of the term “ethics”.
Division 20—Registering liquidators	
20-20 Committee to consider applications	45 business days is too long. We suggested 20 days in our 2013 submission but we recognise that that may not be long enough and as such we now recommend 30 business days.
Division 35 – Notice requirements	
35-1 Notice of significant events	• Is “lodge” now the correct term rather than file or give? • How does the external administrator know when a bankruptcy notice is “issued”? • How is adequate and appropriate professional indemnity and fidelity insurances determined? We note the large penalties for non-compliance on this matter as well (s25-1).
35-5 Notice of other events	Where a matter is not a significant event, the period for lodgement should be longer than 5 business days. We suggest a minimum of 10, but preferably 20 business days.
Division 40—Disciplinary and other action	
Prescribed body	Who will be a prescribed body for the purposes of this part?
Ability to appeal decisions of disciplinary committees	Appeals to AAT - not covered by proposed amendments to 1317A to 1317D? Though we note that CALDB has changed to CADB in these provisions, the decision of a Committee doesn’t seem to have been included. There must be some appeal route. We note that the simplified outline at 40-1 refers to the fact that a decision about suspension or cancellation of registration is reviewable by the AAT – this has not been effectuated by the Bill. We note that in Schedule 2 to the Bankruptcy Act the appeal process is specifically dealt with in Division 96 – but there is no similar provision in Schedule 2 to the Corporations Act.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
Due process	There is currently no mention in the Schedule of due process, right to silence and right to counsel, etc.
40-5 Registered liquidator to remedy failure to lodge document or give information or documents	Why has "registered" been removed from "registered liquidator" in (2) and (4), but the term "registered liquidator" has been retained in (1) and (3)?
40-25 ASIC may suspend registration, 40-30 ASIC may cancel registration, 40-40 ASIC may give a show-cause notice	There seems to be some overlap and discretion regarding the suspension or cancellation of registration or issuing of a show cause notice. • Suggest that some tiering of offences should apply (i.e. a matter should only appear in one of the categories rather than there being discretion as to what action is taken)
40-45 ASIC may convene a committee	Is there a need to define "convene"? We don't want any confusion over the obligations of disciplinary committees – the process must be very clear. As advised in our previous submission, there has previously been some doubt over the word "convene". The word "convene" should be defined and its meaning made clear in particular if the convening of a committee must happen within a set period of time. See *Burke v Inspector-General in Bankruptcy* [2014] FCAFC 112.
40-50 ASIC may refer matters to the committee	Registered Liquidator should have the right to be heard (interview or make submission) – there is currently no requirement for the liquidator to be heard before the decision is made in 40-55. Not consistent with other requirements for committees where there is a requirement for the registered liquidator (or applicant) to be interviewed. Note that there is currently no statement in the Schedule about due process, etc.
40-55(1)(g) Decision of the committee	Is this meant to exclude *any* employment by another external administrator? And are the periods to be concurrent?

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
40-55(2) Decision of the committee	"Publish" where? Or is this something that the Committee would specify?
40-60 Committee to report	There should be a time period for which the committee must respond in, or must notify that further time is required, with limits imposed on further time that can be taken before notice is again required.
Subdivision G – Action initiated by Industry Body	Refer to paragraph 3.2 of our submission regarding the use of the term "industry body"
Division 45—Court oversight of registered liquidators	
45-5 Court may make orders about costs	But may the registered liquidator recoup their own remuneration and expenses from the administration? Unclear due to uncertainty associated with the term "costs".
Division 50—Committees under this Part	
50-01 Simplified outline of this Division	The end of the second paragraph refers to "bankruptcy", should this refer to "insolvency"?
50-10 Minister appointing a person to a committee	The delegation of powers under this section to ASIC per 50-10(3)(a) could result in ASIC being in a position to appoint two of the three members of the committee. We think there needs to be controls around the pool of people that ASIC can draw from if the Minister does delegate the power. We note that there is not a similar power of delegation in the proposed Schedule 2 for the Bankruptcy Act and question why it is necessary to have it in corporate?
Division 60—Remuneration and other benefits received by external administrators	
60-1 Simplified outline of this Division 60-05 External administrator's remuneration	When making a determination or conducting a review of remuneration, the court must have regard to whether the remuneration is reasonable, which ARITA agrees is appropriate. We also agree that a practitioner should be entitled to reasonable remuneration for necessary and proper work performed in relation to the external administration. However, ARITA is concerned to ensure that there could be no interpretation that reasonable remuneration for the purposes of a court determination starts at the default amount of $5,000, due to the fact that reasonable is also used in the context of the

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
	default remuneration amount (in ss 60-1 and 60-5(2)). We suggest that the Simplified outline be amended as follows to ensure "reasonable" relates to all remuneration entitlements, rather than, as it currently is, appearing to be specifically linked with the default remuneration amount: Paragraph 1 - The external administrator of a company is entitled to receive reasonable remuneration for the necessary and proper work performed by the external administrator in relation to the external administration. Paragraph 3 – However, if there has been no remuneration determination made for the external administration, the maximum amount that the external administrator may receive in this way is $5,000 (exclusive of GST and indexed). We also suggest the following amendments to the Bill: 60-5(1) An external administrator of a company is entitled to receive reasonable remuneration for the necessary and proper work performed by the external administrator in relation to the external administration, in accordance with the remuneration determinations (if any) for the external administrator (see section 60-10). 60-5(2) If no remuneration determination has been made in relation to the reasonable remuneration for the necessary and proper work performed by the external administrator of a company in relation to the external administration under section 60-10, the external administrator is entitled to receive once: (a) remuneration that must not exceed the maximum default amount (see section 60-15); or (b) if the external administrator determines a lesser amount – that lesser amount of remuneration. We believe that there is a lack of clarity in the current drafting of 60-5(2) regarding use of the default remuneration entitlement. The above amendment to 60-5(2) ensures clarity that the default remuneration amount can only be used once and cannot be used if a remuneration determination has been made in the external administration at any time.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
60-11 Review of remuneration determinations	(1)(d) – the word “external” is missing before the word “administration”. As currently drafted this would suggest voluntary administration.
60-12 Matters to which the Court must have regard	60-12(k) refers to receivers and receivers and managers. We suggest that this should simply be controllers.
60-20 External administrator must not derive profit or advantage from the administration of the company	Please refer to our discussion of this important issue at 2.3 of our submission.
60-20 External administrator must not derive profit or advantage from the administration of the company	60-20(4)(c)(ii) uses the term “consent”, shouldn’t it more accurately say “resolve” to indicate that a resolution is required to be passed?
60-25 External administrator must not give up remuneration	Please refer to our more detailed commentary at 2.3 of our submission.
60-30 Remuneration for former external administrators	No mechanism for resolving if no agreement reached - if agreement can’t be reached, then external administrator should be able to apply to Court to make a determination or have access to the default remuneration amount ($5,000). 60-30(5) regarding determination of remuneration when the external administrator’s role changes – the provision should extend to a creditors committee or the court having the power to determine remuneration – not just the creditors.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
60-35 Expenses of former external administrators	Why is creditor approval required for approval of expenses of a former administrator? There is no precedent in the current legislation or the Bill for expenses to be approved in any other circumstance. This provision is of concern as there is no limit on what expenses have to be approved, therefore it appears that it would be all expenses – even those that have already been paid. An example of why this is problematic would be the situation of a trade-on voluntary administration. Even if the administrator was replaced at the first meeting, he or she could have incurred significant expenses trading-on the business. These expenses should not be at risk of not being approved, or agreement not being reached with the new administrator.
Division 65—Funds handling	
65-1 Simplified outline of this Division	Should reference that you can have more than one account.
65-5 The administration account	Reference to “one or more other persons” in 65-5(5), should it be “one or more other companies” or does persons cover companies? Should also specify that the external administrator can have more than one bank account to remove any doubt.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
65-10 External administrator must pay all money into the administration account	Money is required to be deposited within 5 days after receipt – this should, as a minimum be business days (for consistency and also from a practical perspective). Due to public holidays around the Easter and Christmas period it may actually be impossible to comply with an outright 5 day requirement. We also raise the issue of office closures over the Christmas period. It is common for professional offices to close for a 2 week period. Is receipt from when the cheque is delivered by post or when the mail is collected and processed by the office? These issues are of concern due to the significant penalty that can arise both in penalty units and penalty interest under section 65-20. We are also concerned about what the position is if the external administrator maintains an old bank account in order to ensure collection of pre-appointment EFT transactions. This is a practical step that an external administrator would take to ensure security of assets of the administration, but it would breach the requirements of 65-10 as it would not be an administration bank account. This is just one example of practical steps that may be taken that may inadvertently breach these requirements.
65-20 Consequences for failure to pay money into administration account	65-20(3) – according to the Rules proposal paper this should be payment to the company not the Commonwealth.
65-30 Payments by cheque or electronic transfer	65-30(2) should simply note that all payments must be authorised by the external administrator – current wording is unnecessarily prescriptive.
65-35 Receipts for payments into and out of the administration account	Remove section – unnecessarily prescriptive.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
65-40 Handling securities	How is it an offence of strict liability when deposit required "as soon as practicable". Inconsistent with 65-10 which requires cheques (a type of security) to be deposited within 5 days. We suggest delete this section and leave it as a matter of good financial practice. We also note that the types of items specified in this section differ to the same provision in Schedule 2 of the Bankruptcy Act and we query why they are different.
Division 70—Information	
70-5 Annual administration return	70-5(2) – we do not understand why there are different requirements for part of a year where an appointee is the administrator at the end of the administration as compared to part of the year when the appointee is not the administrator. We cannot see a reason for differentiation or the different time period (1 month of financial year end versus 3 months of financial year end). It is unnecessarily confusing, unless it be changed so that finalised administrations or administrations where the appointment ends before the end of the financial year have to be lodged within 1 month of finalisation. In our opinion 70-5(2) and 70-6 are unnecessary and should be removed. Then all external administrators will be required to lodge returns for full or part years within 3 months of the end of the financial year. This is consistent with the Bankruptcy Act which does not specify different treatment for full or part years. 70-5(5)(b) & (c) – remove reference to contributories. There should be no notification if this is an annual requirement. We note that notification is not required under the Bankruptcy Act.
70-6 End of administration return	Refer to the discussion above at section 70-5 – we suggest that this provision be deleted. 70-6(6) – remove reference to contributories.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
70-10 Administration books	70-10(3) – "reasonable excuse" should be changed to "valid reason" or definition of reasonable excuse (reasonable person test?).
70-15 Audit of administration books—ASIC	70-15(5) – who pays if no funds? We note advice from CAANZ that the section refers to an "audit" as defined in the Corporations Act but this is not such an audit and a different term should be used.
70-25 External administrator to comply with auditor requirements	70-25(3) – "reasonable excuse" should be changed to "valid reason" or definition of reasonable excuse (reasonable person test?) 70-25(4) – should be subject to (3).
70-30 Transfer of books to new administrator	We agree with the principle of this provision, however, we are concerned that a strict timeframe of 5 business days to transfer all books may be problematic in a situation where the former administrator has been trading the business and requires some/all the books and records in order to finalise matters. We suggest that the timeframe should be 5 business days, or as otherwise agreed between the former administrator and new administrator. Should not only be a requirement that the former administrator transfer, but that the new administrator accept the books and records.
70-35 Retention and destruction of books	Needs to specifically stipulate that it's the pre-appointment books of the company (not post appointment books and the administrator's records) that can be destroyed early.
70-36 Books of company in external administration—evidence	What is the purpose of this section and why is it only limited to contributories?

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
70-70 ASIC may direct external administrator to comply with the request for relevant information	Section 70-75 provides that ASIC must give notice that they are going to serve notice under 70-70 to the external administrator, and the external administrator can advise why they object to the provision of the information. But if ASIC decides that the information should be provided, there is no ability for the external administrator to appeal ASIC's decision to the AAT (per Item 238 adding this matter to the list of excluded decisions in s1317C). We can see instances where the provision of such information may be of significant detriment to the external administration and the external administrator should have the power to appeal ASIC's decision if ASIC decides that the information should in fact be provided. The external administrator needs to have an appeal option – this could be the court so that orders can be made for costs to be borne personally by the external administrator if the challenge is spurious.
Division 75—Meetings	
75-15 External administrator must convene meeting in certain circumstances	75-15(1)(e)(iv) 14 business days for creditors to notify that they want a meeting is insufficient time given the timing of the RATA (5 business days) and the sending of first notice (10 business days). We therefore • suggest 20 business days (needs to be a multiple of 5) • Refer new section 497 S 70-15 should exclude MVLs.
75-25 External administrator's representative at meetings	What meetings are to be prescribed?

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
75-40 Proposals to creditors or contributories without meeting	This process should not be limited to one resolution at a time. Our understanding from the use of this process in bankruptcy is that it results in unnecessary multiple "virtual meetings" in order to deal with all of the matters that the trustee requires resolutions on. This is impractical and we suggest that a maximum of 3 resolutions would be more appropriate. There should be a requirement that creditors must have proved their debt prior to their vote being able to count in a resolution without a meeting. This proof would be like what is required for voting at an actual meeting (i.e. not for dividend purposes), and could be sent in with their vote. Creditors should not have a right to vote without proving the validity of their claim. Remove references to contributories.
75-41 Outcome of voting at creditors' meeting determined by related entity—Court powers	External administrator should have power to apply to court if dissatisfied with outcome of meeting due to related entity voting. 75-41(2)(a) – should be able to consider benefits wider than to the related creditor - should extend to directors and other related parties. This is an issue with the current provision in the legislation that this new section is replicating - that the court cannot take into account the benefit to other related parties (who may not be creditors but, for example, may be subject to recovery actions that they are seeking to obstruct) of the way the vote was cast.
75-45 Order under section 75-41 or 75-42 does not affect act already done pursuant to resolution	Should it include the making of an interim order under 75-44?

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
Division 80—Committees of inspection	
80-5 Creditors may request meeting to establish committee of inspection	There are no limits imposed under this proposed section regarding when the meeting must be called – it just says "a creditor". The main meeting provision at 75-15 puts certain limiting factors in place such as creditors direct by resolution, 25% in value request, security for costs being provided, etc. There need to be limiting factors for the meeting to establish a COI. There needs to be an ability for the external administrator to refuse to hold the meeting if the request is not reasonable.
80-6 Companies under administration	Why has this section been separated from other VA first meeting requirements? It is confusing to have one of the reasons for the first meeting separate from the other reasons (i.e. to replace the VA). The primary purpose of this meeting is to consider the replacement of the voluntary administrator – the appointment of a COI is ancillary to that. This section should remain in Part 5.3A.
80-15 Appointment and removal of members of committee of inspection by creditors generally	Subsection (4) does not require the words "for which there is a committee of inspection". The provision will not apply whether the pooled group already has a COI or not. Section 86-26 is the relevant provision for a pooled group to appoint a COI.
80-20 Appointment of committee member by large creditor	If there is no COI appointed by resolution of creditors, then a large creditor (or employees) should not be able to create a COI by appointing one person.
80-20 Appointment of committee member by large creditor - Subsection (2)	Why do they have to remove and replace their member of the COI by resolution? They don't appoint a member of the COI initially by resolution (80-20(1)), and if a large creditor is a single entity - don't think it is possible for it to pass a resolution? Should just be in writing.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
80-20 Appointment of committee member by large creditor – Subsection (3)(a)	Not allowing a large creditor to appoint a member to the COI once creditors have passed a resolution appointing a COI may be problematic in practice – it means that a large creditor (or group of creditors) would have to know exactly what they are going to do regarding a COI appointment prior to the meeting (which means knowledge and understanding prior to the meeting) and getting those appointments made prior to the resolution being put to the meeting. Why not make it that they can't appoint their own member to the COI if they have already voted under 80-15 to appoint a COI. Then if they abstain from voting under 80-15, they could maintain their right to appoint under 80-20. A further possible limit may be that the appointment must be made prior to the conclusion of the meeting at which the COI is appointed, though we are not convinced that this would be necessary. There needs to be a limit on a large creditor being able to appoint a member to a COI if there is no COI. What might be the issues (either of the provision in its current form or as per suggested amendment) if the external administrator holds the meeting by circularisation? There would not be an opportunity for a large creditor to appoint a COI member prior to the resolution or before the conclusion of the meeting. Will the provision at 80-20(3)(a) prevent the appointment of a replacement COI member under 80-20(2) if the creditors have already passed a resolution under 80-15(1)?
80-20 Appointment of committee member by large creditor – Subsection (4)	Subsection (4) does not require the words "for which there is a committee of inspection". The provision will not apply whether the pooled group already has a COI or not.
80-25 Appointment of committee member by employees	The same drafting issues as with 80-20(2), (3) and (4) above.
80-26 Committee of Inspection – pooled groups	Same issue as 80-5 above.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
80-26 Committee of Inspection – pooled groups, Subsections (5) and (6)	These provisions seem to be about meetings of pooled groups generally, rather than in relation to COI of a pooled group. Suggest they better belong with the other general meeting provisions in Division 75.
80-55 Obligations of members of committee of inspection	This appears to mirror the external administration requirements and has many of the same issues highlighted at 60-20 above – though sensitivity associated with timing of approval may not be as big an issue for COIs as the appointee. Purchase from a retail operation is an issue – though question whether there is a "profit or advantage" derived? Not clearly prohibiting purchase of assets is an issue as members of the COI need to clearly understand this limitation. Some edits suggested: (6)(c)(i) – the exception should be worded as "the member does not know, and could not reasonably be expected to know, that the external administrator has employed or engaged a related entity of the member". It is more reasonable that the member of the COI would not even be aware of the engagement of the related entity than not knowing that the person engaged was a related entity (which assumes that the member knows that the related entity was engaged in the first instance). (6)(c)(ii) – this exception says the prohibition will not apply if the member discloses that the person engaged by the external administrator is a related entity as soon as they are aware, but there is no approval requirement. This would be an easy exception to manipulate in its present form. There should be an approval requirement post disclosure.
Division 90—Review of the external administration of a company	
90-21 Meetings to ascertain wishes of creditors or contributories	Remove reference to contributories. We do not think that contributories have a role to play in insolvent external administrations. This requirement to ascertain the wishes of creditors should apply also in bankruptcy, for the sake of alignment.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
90-23 Appointment of a reviewing liquidator by ASIC or the Court	We think that there should be a period specified within which such a review may occur, otherwise there is a risk that a reviewing liquidator could be appointed years after the conclusion of the external administration which would be unreasonable.
90-25 Reviewing liquidator must consent to appointment	There should be a disclosure/independence requirement for the reviewing liquidator. • We note that section 90-29(2)(c) states that the Rules may provide for a Declaration of Relevant Relationships to be made in relation to reviews. We agree that this should be the case.
90-27 Who pays for a review?	There appears to be a drafting error in (1)(a). We believe that the reference should be to 90-24(4) where the appointment is by an individual creditor with the external administrator's consent, rather than 90-24(3) which is by resolution of creditors (no consent required). We note that the section does not specify what priority is afforded to this cost – it should. Refer Item 166 below where we discuss that the referencing might be incorrect and that if corrected the priority will be given to costs under 90-27(1)(b).
90-35 Removal by creditors	We note that this provision is worded differently to the bankruptcy provisions. Who gives the notice of the meeting under s 90-35? Should there be a reference or a note to the general meeting provisions in Division 75? The provision should specify that the notice of meeting has to give notice of the intention to put a resolution to the meeting to replace the incumbent external administrator. We also suggest that along with the notice of meeting, the DIRRI of the proposed replacement external administrator be provided to creditors so that they can make an informed decision as to who they wish to act. A creditor should have the right to apply to court to reappoint the former administrator.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
	Inconsistent use of “costs” which is a term that has not been fixed – is it remuneration and expenses. If so should say that or define the term. Why are costs recorded separately under 90-35(5)? There is no mention in the provision about entitlement to recovery of those costs. Either there needs to be something added in about when the former administrator would be entitled to recover “costs” or there should be an addition to (7) that the Court may make such other order in relation to the application and the former administrator’s “costs” as it thinks fit.
Division 100 – Other matters	
100-5 External administrator may assign right to sue under this Act	We are not sure what the purpose of the notification requirement is. The external administrator must give notice to creditors of the proposed assignment under (3) but there is no provision for the creditors to be able to do anything about it if they disagree. Maybe they could force the holding of a meeting if there are enough of them?

Part 2 – Amendments consequential on the introduction of the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
Australian Securities and Investments Commission Act 2001	
Item 10 - 30B Notice to registered liquidators concerning information and books	Subsections (4)(d) and (e), and (5) refer to receivership. Does this need to be more widely written (i.e. controller, which is defined) or defined?
Item 14 - 39C ASIC may give information and books in relation to Chapter 5 bodies corporate	Subsections (1), (2)(c), (3)(b)(iii), (4), (4)(b), (5), (6) refer to receivership. Does this need to be more widely written (i.e. controller, which is defined) or defined?
Item 18, 20	Who are the prescribed bodies referred to? Note: IPAA/ARITA is a "prescribed body" under reg 8B for the purposes of appointing a member to the CALDB.
Corporations Act 2001	
Item 61 – Section 9 definition of Chapter 5 body corporate	Why does the definition not include controllers? Why only Receivers and Receivers and Managers? Note that this is the same as the old definition of "externally-administered body corporate".
Item 87 – Section 415A Outcome of voting at creditors' meeting determined by related entity – court powers	Not sure that the lead in to subsection (2) is correct? Subsection (1) says (2) applies if the court is satisfied of the following matters ...and then lists the matters. And then (2) says the matters are. This does not seem to make sense as both (1) and (2) list matters. I think (2) should be factors that the court can take into account.
Item 87 – Section 415C Order under section 415A does not affect act already done pursuant to resolution	Should this section also refer to an interim order under s 415B?
Item 88 – section 422A Annual return by receiver	Should this be more widely written to include controllers? What about part years? Note that we cannot see the repeal of s 432 which is the existing provision for controllers accounts (6 mthly receipts and payments)?

Part 2 – Amendments consequential on the introduction of the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
Item 118 – 447D	Has this section been replaced with a general court directions provision - is it 90-15?
Item 147 – s495 Appointment of Liquidator (note to section)	The note states that "for rules about convening meetings, see Division 75 of Part 3 of Schedule 2". However, general meetings of the company held to appoint a liquidator are held in accordance with the company's constitution. The meetings referred to in the note are those held once the company is in liquidation.
Item 147 – s496(8)	In light of the amendment to subsection 496(8), is it necessary to retain subsection 496(6)? Note too that the requirements with regard to information, etc when converting a MVL to a CVL do not mirror the requirements with a straight CVL. We suggest that the requirements should be the same regarding the summary of affairs, list of creditors, lodgement of documents, etc.
Item 149 – s497 Information about company's affairs (CVL provision)	We think there should be a positive requirement in this provision that the liquidator notify the creditors of their rights to require a meeting be held under s 75-15(e).
Item 152 – deletion of s 505 Acts of liquidator valid	Has this been replaced?
Item 166 – s 556(1)(db)	Should this priority include the cost of any court ordered reviews? Not sure that the reference to s90-26 is correct, as 90-26 is about the review – not the costs. Think that maybe it should be 90-27 Who pays for a review?
Item 181 – new section 599 Appeals from decisions of receivers	What about other types of Controllers?
Item 238 – decisions excluded from appeal to AAT	It is proposed to prevent a practitioner from being able to appeal a decision by ASIC to the AAT that the practitioner has to provide information, even if he or she has objected and provided reasons. Linked to 70-70 above.

Part 2 – Amendments consequential on the introduction of the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
Item 250 – penalties	It is odd that the penalty for a director or secretary being late with providing a RATA is 50 penalty units with no imprisonment, but for persons other than a directors or secretary the penalty is 25 penalty units or imprisonment for 6 months or both. Why would they be subject to potential imprisonment when directors and secretaries are not?
Transitional provisions – Corporations Act relating to ILRA 2014	
S1580 – Application of Division 60 of the IPS – General rule	Does this mean that if a new IP replaces an old IP on an administration that commenced prior to the commencement of the ILRB, the new provisions apply?
S1585 – Application of new provisions about vacancies of court-appointed liquidator	How can a new provision apply before commencement?
S1594 – Accounts and administration returns	This is around the transition from the six monthly receipts and payments to the new annual administration returns. As written, the requirement is that every administration on foot at the 30 June 2016 will need to lodge a part period receipts and payments for the period to 30 June 2016. Receipts and payments are currently required under s438E, 445J and 539 to be lodged within 1 month of the end of the period. Therefore, within 1 month of 30 June 2016, receipts and payments for all administrations will be required to lodged. This is a more onerous process than the proposed annual administration returns. Furthermore, this will place a big strain on AISC's electronic lodgement system. We suggest that the transitional arrangement provide for a period of at least 3 months to lodge this final receipts and payments.
S1603 – Application of Division 75 of the IP Schedule	Will the use of the word "convene" cause interpretation problems?
S1606 – Old Act continues to apply in relation to companies	What does "fully wound up" mean?

Part 2 – Amendments consequential on the introduction of the Insolvency Practice Schedule (Corporations)	
Proposal	**ARITA Issue**
S1623 – outcome of voting at creditors' meeting determined by related entity or on casting vote	There is a reference to "proposed resolution". I would have thought that since the resolution has actually been put to a meeting that it is no longer "proposed".
S1624 – annual return by a receiver	No mention of the part year return like there is for external administrations in s1594.

Bankruptcy	
Proposal	**ARITA Issue**
Use of the term "administration"	There seem to be interchangeable use of the terms regulated debtor's estate and administration in Schedule 2 to the Bankruptcy Act. Use of terminology should be consistent or at least "estate" rather than administration which infers a corporate voluntary administration.
Use of the term "person with a financial interest in the external administration"	At various places throughout the schedule this term is used (60-11, 65-45, 70-20, 90-10, 90-20, 90-23, 90-28). Whilst we recognise that this would rightly include creditors, it may also, in our view inappropriately, include a party that the external administrator is taking legal action against. These various review sections may be inappropriately used to delay or obstruct the liquidator. Some of these provisions already specifically identify creditors, others do not. Where creditors are identified, then the reference to person with the financial interest should be removed. If not specifically included, then the provision should be changed to specifically list who is entitled to apply, e.g. creditors.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
Part 1 - Introduction	
1-1 Objective of this schedule	Refer to paragraph 3.1 of our submission regarding use of the term “ethics”.
Division 5 – Definitions	
5-5 Definition of end of administration of a regulated debtor’s estate	We have a number of concerns in respect of this definition: a) A bankruptcy does not necessarily end on the discharge or annulment of the bankrupt. It is not unusual for a trustee to continue to administer an estate, realising assets and taking recovery actions subsequent to the discharge of the bankrupt. There can also be work done post-annulment. We are concerned that this new definition may prevent this occurring. b) The provision says that a Part X administration doesn’t end for three years, however it would not be unusual for a Part X to be completed much quicker than this, or alternatively it may go longer than this. Three years is not a relevant period. We also note that although defined, this term is not used within Schedule 2 and we query why it is necessary at all?
Division 20—Registering trustees	
20-20 Committee to consider applications	45 business days is too long. We suggested 20 days in our 2013 submission but we recognise that that may not be long enough and as such we now recommend 30 business days.
Division 30 – Annual trustee returns	
30-1 Annual trustee returns	This should be 25 business days in order to be the same as the period for lodgement of this form by Registered Liquidators.
Division 35 – Notice requirements	

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
35-1 Notice of significant events	• Is "lodge" now the correct term rather than file or give? • How does the trustee know when a bankruptcy notice is "issued"? • How is adequate and appropriate professional indemnity and fidelity insurances determined? We note the large penalties for non-compliance on this matter as well (s25-1).
35-5 Notice of other events	Where a matter is not a significant event, the period for lodgement should be longer than 5 business days. We suggest a minimum of 10, but preferably 20 business days.
Division 40—Disciplinary and other action	
Prescribed body	Who will be a prescribed body for the purposes of this part?
Due process	There is currently no mention in the Schedule of due process, right to silence, right to counsel, etc.
40-5 Registered trustee to remedy failure to lodge document or give information or documents	Why has registered been removed from "registered trustee" in (2) and (4), but the term "registered liquidator" has been retained in (1) and (3)?
40-25 IG may suspend registration, 40-30 IG may cancel registration, 40-40 IG may give a show-cause notice	Seems to be some overlap and discretion regarding the suspension or cancellation of registration or issuing of a show cause notice. • Suggest that some tiering of offences should apply (i.e. a matter should only appear in one of the categories rather than there being discretion as to what action is taken).
40-40 IG may give a show-cause notice – subsection (4)	Subsection (4) is included in Bankruptcy Act but is not in Corporations Act. Why is it necessary in Bankruptcy Act. Also is it relevant to the section which is about show-cause notices and (4) is about standards applicable to the powers, or the carrying out of duties, of registered trustees.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
40-45 IG may convene a committee	Is there a need to define "convene"? We don't want any confusion over the obligations of disciplinary committees – the process must be very clear. As advised in our previous submission, there has previously been some doubt over the word "convene". The word "convene" should be defined and its meaning in particular if the convening of a committee is to happen within a set period of time. See *Burke v Inspector-General in Bankruptcy* [2014] FCAFC 112.
40-50 IG may refer matters to the committee	Registered Trustee should have the right to be heard (interview or make submission) – there is currently no requirement for the trustee to be heard before the decision is made in 40-55. Not consistent with other requirements for committee where there is a requirement for the registered trustee (or applicant) to be interviewed. Note that there is currently no statement in the Schedule about due process, etc.
40-55(1)(g) Decision of the committee	Is this meant to exclude *any* employment by another registered trustee? And are the periods to be concurrent?
40-55(2) Decision of the committee	"Publish" where? Or is this something that the Committee would specify?
40-60 Committee to report	There should be a time period for which the committee must respond in, or must notify that further time is required, with limits imposed on further time that can be taken before notice is again required.
Subdivision G – Action initiated by Industry Body	Refer to paragraph 3.2 of our submission regarding the use of the term "industry body".
Division 45—Court oversight of registered liquidators	
45-5 Court may make orders about costs	But may the registered trustee recoup their own remuneration and expenses from the estate? Unclear due to uncertainty associated with the term "costs".
Division 60—Remuneration and other benefits received by external administrators	

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
60-1 Simplified outline of this Division 60-05 Trustee's remuneration	We suggest that changes be made to the simplified outline and section 60-05 to mirror the changes to these provisions suggested for external administrations (above). We note that the simplified outline refers to the Court review of remuneration, though there does not appear to be any provisions in this Division providing the Court with this power. Those provisions appear to be in Division 90, but the simplified outline infers that the powers appear both in Divisions 60 and 90.
60-20 Trustee must not derive profit or advantage from the administration of the estate	Please refer to our discussion of this important issue at 2.3 of our submission.
60-20 Trustee must not derive profit or advantage from the administration of the estate	60-20(4)(c)(ii) uses the term "consent", shouldn't it more accurately say "resolve" to indicate that a resolution is required to be passed?
60-25 Trustee must not give up remuneration	Please refer to our more detailed commentary at 2.3 of our submission.
60-26 Payments in respect of performance by third parties	This section is unique to Schedule 2 to the Bankruptcy Act and is not included in the Corporations Act Schedule 2. It also does not appear to be based on a current provision in the Bankruptcy Act. We do not understand the purpose of the section and have concerns that it would prevent a trustee from using the staff of their firm. We think this section should be removed.
60-30 Remuneration for former trustee	No mechanism for resolving if no agreement reached. • if can't agree then should be able to apply to Inspector-General to determine or choose to access default maximum amount of $5,000 Note that this is a weakness with the current legislation too.
60-35 Expenses of former trustee	Why is creditor approval required for approval of expenses of former administrator? There is no precedent in the current legislation or the draft bill for expenses to be approved in any other circumstance.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
Division 65—Funds handling	
65-1 Simplified outline of this Division	Should reference be made that a trustee can have more than one account?
65-10 Trustee must pay all money into the administration account	Money is required to be deposited within 5 days after receipt – this should, as a minimum be business days (for consistency and also from a practical perspective). Due to public holidays around the Easter and Christmas period it may actually be impossible to comply with a straight 5 day requirement. We also raise the issue of office closures over the Christmas period. It is common for professional offices to close for a 2 week period. Is receipt from when the cheque is delivered by post or when the mail is collected and processed by the office? These issues are of concern due to the significant penalty that can arise both in penalty units and penalty interest under section 65-20. We are also concerned about what the position is if the trustee maintains an old bank account (for example a business account operated by the bankrupt) in order to ensure collection of pre-appointment EFT transactions. This is a practical step that a trustee would take to ensure security of assets of the estate, but it would breach the requirements of 65-10 as it would not be an administration bank account. This is just one example of practical steps that may be taken that may inadvertently breach these requirements.
65-30 Payments by cheque or electronic transfer	65-30(2) should simply note that all payments must be authorised by the external administrator – current wording is unnecessarily prescriptive.
65-35 Receipts for payments into and out of the administration account	Remove section – unnecessarily prescriptive.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
65-40 Handling securities & 65-45 Handling of money and securities – Court directions	Different items are specified in this provision in the Bankruptcy Act to the same provision in the Corporations Act. Why? How is it an offence of strict liability when deposit required "as soon as practicable". Inconsistent with 65-10 which requires cheques (a type of security) to be deposited within 5 days. We suggest delete this section and leave it as a matter of good financial practice.
Division 70—Information	
70-5 Annual administration return	We note that the section refers to the requirement to lodge with 25 days – we suggest that this should be 25 business days (which is 5 weeks) as the current requirement under s170A is 35 days (5 weeks). If 25 days is retained, that is only 3 weeks and 4 days.
70-10 Administration books	70-10(3) – "reasonable excuse" should be changed to "valid reason" or definition of reasonable excuse (reasonable person test?)
70-11 Trustee's books when trading	We don't understand why there is a separate requirement around books and records if the trustee is trading. There is no separate requirement in a corporate external administration. If the trustee has to keep books under 70-10 (the same as an external administrator) there should be no requirement for the additional 70-11.
70-15 Audit of administration books - IG	(4)(b) should the reference to "report" properly be "audit" (6) should there be a reference to the Corporations Act? 70-15(5) – who pays if no funds? We note advice from CAANZ that the section refers to an "audit" but this is not actually a proper audit and a different term should be used.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
70-25 Trustee to comply with auditor requirements	70-25(3) – "reasonable excuse" should be changed to "valid reason" or definition of reasonable excuse (reasonable person test?). 70-25(4) – should be subject to (3).
70-30 Transfer of books to new trustee	We agree with the principal of this provision, however, we are concerned that a strict timeframe of 5 business days to transfer all books may be problematic in a situation where the former trustee has been trading the bankrupt's business and requires some/all the books and records in order to finalise matters. We suggest that the timeframe should be 5 business days, or as otherwise agreed between the former trustee and new trustee. Should not only be a requirement that the former trustee transfer, but that the new trustee accept the books and records.
70-70 Inspector-General (IG) may direct trustee to comply with the request for relevant information	Section 70-75 provides that IG must give notice that they are going to serve notice under 70-70 to the trustee, and the trustee can advise why they object to the provision of the information. But if the IG decides that the information should be provided, there is no ability for the trustee to appeal the IG's decision. I can see instances where the provision of such information may be of significant detriment to the external administration and the trustee should have the power to appeal the IG's decision if the IG decides that the information should in fact be provided. The trustee needs to have an appeal option – could be the court so that orders can be made for costs to be borne personally by the trustee if the challenge is spurious.
Division 75—Meetings	
75-25 Trustee's representative at meetings	What meetings are to be prescribed?

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
75-40 Proposals to creditors without meeting	This process should not be limited to one resolution at a time. Our understanding from the use of this process in bankruptcy is that it results in unnecessary multiple "virtual meetings" in order to deal with all of the matters that the trustee requires resolutions on. This is impractical and we suggest that a maximum of 3 resolutions would be more appropriate. There should be a requirement that creditors must have proved their debt prior to their vote being able to count in a resolution without a meeting. This proof would be like what is required for voting at an actual meeting (i.e. not for dividend purposes), and could be sent in with their vote. Creditors should not have a right to vote without proving the validity of their claim.
Resolution passed/not passed because of casting vote (75-42 and 75-43 of Schedule 2 to Corporations Act)	We suggest that 75-42 and 75-43 of the Corporations Act be replicated for bankruptcy to assist with resolving issues where resolutions pass or fail due to related party votes. The Inspector-General may be the appropriate person to whom to appeal for Bankruptcy Act matters.
Division 80—Committees of inspection	
80-5 Creditors may request meeting to establish committee of inspection	There are no limits imposed under this proposed section regarding when the meeting must be called – it just says "a creditor". The main meeting provision at 75-15 puts certain limiting factors in place such as creditors direct by resolution, 25% in value request, security for costs being provided, etc. There need to be limiting factors for the meeting to establish a COI. There needs to be an ability for the trustee to refuse to hold the meeting if the request is not reasonable.
80-20 Appointment of committee member by large creditor	If there is no COI appointed by resolution of creditors, then a large creditor (or employees) should not be able to create a COI by appointing one person.
80-20 Appointment of committee member by large creditor - Subsection (2)	Why do they have to remove and replace their member of the COI by resolution? They don't appoint a member of the COI initially by resolution (80-20(1)), and if a large creditor is a single entity - don't think it is possible for it to pass a resolution? Should just be in writing.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
80-20 Appointment of committee member by large creditor – Subsection (3)(a)	Not allowing a large creditor to appoint a member to the COI once creditors have passed a resolution appointing a COI may be problematic in practice – it means that a large creditor (or group of creditors) would have to know exactly what they are going to do regarding a COI appointment prior to the meeting (which means knowledge and understanding prior to the meeting) and getting those appointments made prior to the resolution being put to the meeting. Why not make it that they can't appoint their own member to the COI if they have already voted under 80-15 to appoint a COI. Then if they abstain from voting under 80-15, they could maintain their right to appoint under 80-20. A further possible limit may be that the appointment must be made prior to the conclusion of the meeting at which the COI is appointed, though we are not convinced that this would be necessary. There needs to be a limit on a large creditor being able to appoint a member to a COI if there is no COI. What might be the issues (either of the provision in its current form or as per suggested amendment) if the external administrator holds the meeting by circularisation? There would not be an opportunity for a large creditor to appoint a COI member prior to the resolution or before the conclusion of the meeting. Will the provision at 80-20(3)(a) prevent the appointment of a replacement COI member under 80-20(2) if the creditors have already passed a resolution under 80-15(1)?
80-25 Appointment of committee member by employees	The same drafting issues as with 80-20(2), (3) and (4) above.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
80-55 Obligations of members of committee of inspection	This appears to mirror the trustee requirements and has many of the same issues highlighted at 60-20 above – though sensitivity associated with timing of approval may not be as significant an issue for COIs as the appointee. Purchase from a retail operation is an issue – though question whether there is a "profit or advantage" derived? Not clearly prohibiting purchase of assets is an issue as members of the COI need to clearly understand this limitation. Some edits suggested: (6)(c)(i) – the exception should be worded as "the member does not know, and could not reasonably be expected to know, that the trustee has employed or engaged a related entity of the member". It is more reasonable that the member of the COI would not even be aware of the engagement of the related entity than not knowing that the person engaged was a related entity (which assumes that the member knows that the related entity was engaged in the first instance). (6)(c)(ii) – this exception says the prohibition will not apply if the member discloses that the person engaged by the trustee is a related entity as soon as they are aware, but there is no approval requirement. This would be an easy exception to manipulate in its present form. There should be an approval requirement post disclosure.
Division 90 – Review of the administration of a regulated debtor's estate	
90-21 Meetings to ascertain wishes of creditors or contributories	This is a provision in the Corporate schedule and we see no reason why it shouldn't apply also in bankruptcy, excluding the reference to contributories, for the sake of alignment.

Schedule 2 – Amendments relating to the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
90-35 Removal by creditors	We note that this provision is worded differently to the corporate provisions. Who gives the notice of the meeting under s90-35? Should there be a reference or a note to the general meeting provisions in Division 75? The provision should specify that the notice of meeting has to give notice of the intention to put a resolution to the meeting to replace the incumbent external administrator. A creditor should have the right to apply to court to reappoint the former administrator. Inconsistent use of "costs" which is a term that has not been fixed – is it remuneration and expenses. If so should say that or define the term. Why are costs recorded separately under 90-35(5)? There is no mention in the provision about entitlement to recovery of those costs. Either there needs to be something added in about when the former trustee would be entitled to recover "costs" or there should be an addition to (7) that the Court may make such other order in relation to the application and the trustee's "costs" as it thinks fit.
Division 100 – Other matters	
100-5 Trustee may assign right to sue under this Act	We are not sure what the purpose of the notification requirement is. The trustee must give notice to creditors of the proposed assignment under (3) but there is no provision for the creditors to be able to do anything about it if they disagree. Maybe they could force the holding of a meeting if there are enough of them? We suggest that the trustee should not be able to sell a right to sue back to the bankrupt during the period of the bankruptcy.

Part 2 – Amendments consequential on the introduction of the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
Bankruptcy Act	
Item 14(5)(b)	Why is the reference to "prescribed professional disciplinary body". Why not simply to "prescribed professional body"?
Items 26 to 37	These amendments are in relation to a composition within bankruptcy. These provisions are substantially repealed and it is unclear what the new provisions will look like until we have seen the Rules.
Item 77	Why are provisions about timing of s188 meeting (s194), tabling obligations (s194A) and the debtor's obligation to attend the meeting (s195) being removed from Part X? These are specific obligations associated with Part Xs, not general meeting obligations, therefore they should remain in Part X (similar issue to removing purpose of first meeting in a VA from Part 5.3A of the Corporations Act).
Transitional provisions – Bankruptcy Act relating to ILRA 2014	
105 Applications for extension of registration under the old Act	Subsection (3) infers that the Inspector-General will renew registration – it doesn't seem to give any choice to refuse the renewal. We suggest that it include something to the effect of "where a decision is made to renew a person's registration, ...".
119 Matters not dealt with by a committee before the commencement day	As the Committee process under the existing Bankruptcy Act is largely the same as that under the new Schedule 2, we question the need for this provision. If a matter has been heard but a decision has not been made by the Committee under the old process, per this transitional provision, it will need to be heard again by essentially the same Committee under the new process. We would have thought from a cost and time perspective that the matter could be finished under the old process, since they are essentially the same. This is very different to Corporate where the new process is completely different to the old process.
132 Payment for performance by third parties	The reference in (2) and (3) is to payments received, however we think this should be "payments made" or "payments made or received", as the section is about payments by the trustee to third parties, not payments received by the trustee.

Part 2 – Amendments consequential on the introduction of the Insolvency Practice Schedule (Bankruptcy)	
Proposal	**ARITA Issue**
147 Audit of administration books	We do not see the need for subsection (2) if (1) is to apply to both books kept under the Insolvency Practice Schedule and the old Act. Subsection (2) seems to apply to books kept under the old Act, but this is covered by (1). If it is intended that (2) is to apply when an audit under the old Act was started prior to the commencement date, it should specify that.
160 Directions by creditors and committees of inspection	How can provisions under the Insolvency Practice Schedule apply to a direction given before the commencement date? How far back can this direction be given and the new provision still apply? This transitional provision is impractical.
175 Purchases of property of the bankrupt by a member of the COI	We think that this should be in relation to purchases after the commencement day, not before.

Insolvency Practice Rules	
Proposal	**ARITA Issue**
2.1 Register of Trustees & 3.1 Register of Practitioners	3.1 should probably be Register of Liquidators in the title. There should be a time limit (say 10 years) for the particulars of past disciplinary action or suspension.
2.7.1 Paying money into administration account	It is proposed that there be a requirement in the Rules for administration funds to be held in an interest bearing account. Whilst we recognise the reasoning behind this requirement (due to remission of interest earned to the Commonwealth), this requirement does not recognise the practicality of the current situation regarding interest bearing accounts. Interest bearing accounts usually mean that higher bank fees are payable. With current very low interest rates, this would mean that for low balance accounts, very little interest is earned, but higher bank fees are paid due to this requirement. Where this occurs, the burden is borne by the creditors, or by the trustee with available funds to meet the costs of the administration being eroded by bank fees. The Commonwealth is also not receiving any interest remittance, as bank fees are able to be offset against the interest earned. We suggest that to offset this burden, a requirement that only funds above a certain level are required to be held in an interest bearing account (say $1,000). We recognise that trustees are entitled to maintain a combined account for more than one estate which may minimise costs; however, for control reasons, some firms choose to not use this option.

Insolvency Practice Rules	
Proposal	**ARITA Issue**
2.12 Definitions & 3.11 Definitions	We note the reference to Reg 5.5.19 at paragraph 91 – this appears to be an incorrect reference as there is no 5.5.19 and we suggest that it should be 5.6.19. We are not sure if 5.6.19 is, at least by itself, the correct reference. Regulation 5.6.19 deals with passing resolutions on the voices and calling for a poll. Reg 5.6.20 and 5.6.21 deal with the poll process and when a resolution is passed via a poll. These regulations are not currently referenced but are also necessary to the proper operation of reg 5.5.19. We note that the definition of special resolution in section 9 is limited in application to pre-insolvency meetings under s 249L and 252J. The term "special resolution" is used in s491 in relation to placing the company into voluntary liquidation (pre-insolvency administration meeting) and in schemes under section 411(4)(a) though we note it is not called a special resolution but rather describes it as a majority in number and 75% in value. We do not consider that the definition in s9 is appropriate as it is dealing with members meetings and not creditors meetings in an insolvency situation. The requirements in s 411(4)(a) are more appropriate and line up with the current requirements for a special resolution in the Bankruptcy Act. We also refer you to point 2.4 of our submission for a detailed discussion on the important issue of passing of resolutions.
3.2. Registering liquidators – para 101	Footnote 3 to this paragraph refers to "provided by the Queensland of Technology" (sic). We suggest that this be removed and that it simply refer to ARITA's program which is 2 university insolvency specific subjects of a semester each in length that run over 1 year. Rather than requiring experience at a full-time basis for a total of not less than three years in the preceding five years, we suggest that a model such as that used for audit where a certain number of audit specific hours worked are required.

Insolvency Practice Rules	
Proposal	**ARITA Issue**
3.2. Registering liquidators – para 103	We suggest that rather than having separate categories of registration, that this better be dealt with by committee imposed conditions on the registered liquidator's registration. If different categories of registration do proceed, we suggest that there only need be two categories – full registered liquidators and those registered liquidators only able to take receiver or receiver and manager appointments. We see no value in separating out the two categories of receivers.
3.7.1 Unreasonable request for information from liquidator	Para 123 - Unreasonable repeated request • 10 business day timeframe is too short, plus easily subject to abuse by delaying request till 11th day • more reasonable to stipulate if request previously dealt with within 3 months (whether by information being provided or request being determined to be unreasonable). Would place an inappropriate burden on the liquidator to deal with and respond to repeat requests if the period is too short.
3.7.2 Inherently reasonable request for information.	Para 125 • Query any privacy implications re provision of creditor lists, particularly where individuals are creditors. • information regarding "work under way" and "work still to be undertaken" could be expensive and difficult to prepare within 5 business days and we suggest should not be considered to always be reasonable – balance of information is reasonable and could be provided at low cost within the required timeframe.
3.8.1 Creditor or creditors' request for a meeting	Unreasonable repeated request • 10 business day timeframe too short, plus easily subject to abuse by delaying request till 11th day • more reasonable to stipulate if the request was previously made and responded to within 3 months. Para 141 – The reference to meeting of directors should be meeting of creditors.