ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

24 November 2020

Manager
Market Conduct Division
Treasury
Langton Cres
PARKES ACT 2600

By email: MCDInsolvency@Treasury.gov.au

Dear Sir/Madam

Insolvency reforms to support small business

Thank you for the opportunity to lodge a submission in the response to the draft subordinate legislation to support the reforms to Australia's insolvency framework to better serve Australian small businesses, their creditors and their employees.

We note the intent that 'the changes will introduce new [external administration] processes suitable for small businesses, reducing complexity, time and costs'.

This submission provides feedback on the draft Corporations Amendments (Corporate Insolvency Reforms) Regulations 2020 (Regulations) and Insolvency Practice Rules (Corporations) Amendments (Corporate Insolvency Reforms) Rules 2020 (Rules), as well as the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Bill) currently before the House of Representatives.

Restructuring reforms - Not fit for purpose

We have long been proponents for a small business restructuring process, having first put forward this idea in our 2014 thought leadership paper, "A Platform for Recovery". Now we have had the opportunity to review substantively all of the proposed restructuring reform package, we hold significant concerns that it will not be fit for purpose and fail to meet the stated intent.

In our expert opinion, we believe that the proposed restructuring reforms will be ineffective as:

- Few businesses will meet the eligibility criteria to appoint a restructuring practitioner to the company

- The level of uncertainty and possible complexity, including the potential for litigation, for a set fee is likely to dissuade many experienced practitioners from accepting an appointment as a restructuring practitioner. This may result in much of the work being undertaken by ill-informed practitioners with poor knowledge and understanding of the technical complexities.

- The inherent uncertainty for creditors is likely to lead to significant problems obtaining ongoing trade creditor support for the business through both the restructuring of the company and plan phases. Additionally, any lack of support by secured creditors is likely to be fatal to the process.

- We have identified that the process could be open to significant abuse.

In relation to the fixed cost nature of the remuneration for the restructuring practitioner for the company, we refer to our meeting with Treasury on 19 November 2020 and the request for details of possible circumstances where further remuneration may be warranted. Based on our understanding of the reforms, we believe that the following circumstances may lead to significant increases in necessary and proper costs for the restructuring practitioner:

- Litigation commenced by third parties where the restructuring practitioner is obligated to participate.

- Applications to the Court by the restructuring practitioner with the consent of the company.

- Material non-disclosures by the company (or its directors) about its business, property, affairs and financial circumstances prior to the appointment of the restructuring practitioner at the time when the initial fixed fee is set.

Maintaining professional standards

ARITA continues to hold significant concerns about the qualification, experience, knowledge and abilities requirements for applicants for registration to practice only as a restructuring practitioner. Additionally, having seen the proposed amendments to the Rules, we also hold concerns about the changes to the 'relevant employment' test for 'full' registered liquidators and those who only practice as receivers or receivers and managers.

The proposed reforms undermine much of the progress made to increase the competence and capability of the profession through the *Insolvency Law Reform Act 2016* (ILRA). The ILRA was enacted in response to two decades of reviews into the regulation of liquidators including the Australian Law Reform Commission; the Working Party to review the regulation of corporate insolvency practitioners; the Parliamentary Joint Committee on Corporations and Financial Services; and the Senate Economics References Committee (Senate Committee) in 2010.

The explanatory memorandum to the ILRA's predecessor bill noted:

> The insolvency profession must be skilled, honest and accountable in order for the insolvency regime to operate efficiently. …. Regulation that promotes a high level of professionalism and competence of insolvency practitioners is therefore essential to retaining confidence in the insolvency system as a whole. [5.5]

While we welcome an increase in the use of discretion by registration committees, we believe the proposed reforms are too broad and likely to lead to an increase the registration of under experienced practitioners which will adversely impact public confidence in the profession.

The registration requirements for restructuring practitioners require applicants to be 'recognised accountants', however they fail to recognise the specialised expertise of professional members of ARITA. ARITA professional membership can only be obtained following successful completion of the ARITA Advanced Certification, noting that two modules of this course meet the academic eligibility requirements to become a full registered liquidator. It would seem illogical if such members who may substantially meet the criteria for full registration could not seek registration as a restructuring practitioner.

Given the complexities of the restructuring process, including mirroring many voluntary administration provisions, at a minimum we suggest that some specific academic requirement be added to the restructuring practitioner registration criteria. Similarly to the academic requirements for full registration (and that for receivers or receivers and managers), ARITA would be able to offer such training, however funding would be required to have a new education offering available for future applicants in a timely fashion.

We are also concerned about the integrity of the registration committee process in the short-term following commencement. ASIC is required to refer an application that is properly made out to a committee for consideration and does not have any discretion on such a referral. This includes where an applicant fails to meet a mandatory registration criterion, or a recent previous application was unsuccessful. With the proposed temporary waiver of costs associated with registration as a registered liquidator, we believe that no barrier will exist for deficient applications to unduly inundate the committee process.

Need for full two-year sunset of legislation

We remain concerned that there is a profound risk of errors and problems that will not be picked up due to the rushed nature of the reforms. We again call for the addition of a two-year sunset to the legislation, which will mandate a proper review after a suitable time.

It is our fervent belief that the Government should support a root and branch review of our entire insolvency framework to be completed before the sunset date. It would be most preferable if this whole-of-regime examination was undertaken independently by the Australian Law Reform Commission, as was the last genuine review – the Harmer Inquiry – in the 1980s . This would ensure that Australia develops a future-fit framework that would drive our economic prosperity and ensure our international competitiveness.

Identified issues

We have attached a detailed table of issues identified through our review of the Bill, Regulations and Rules at Appendix A, but specifically highlight the following issues:

- The extent of 'inquiries' and 'reasonable steps' required by the restructuring practitioner to verify 'the company's business, property, affairs and financial circumstances' for their certification. While no requirement exists to report on these matters, investigations will still have to be done and we note that the wording of the requirements has substantial similarity to requirements for a voluntary administrator's report. The failure to undertake this work is a strict liability offence.

- Provisions which undermine the current independence standards, including the ability to pay 'kickbacks' for the referral of restructuring appointments as long as the details are disclosed. This is completely contrary to the legislated position in section 595, which is to be amended to include restructuring practitioners (new s 595(1)(ca)&(cb)).

- Fundamental flaws in the ability to commence and conduct simplified liquidations, including a fatal timing issue in their operation.

- Inconsistencies in the eligibility threshold between the restructuring and simplified liquidation processes and uncertainty regarding what liabilities are included. Further concerns are held about the lack of consequences for the failure to include all liabilities.

- Poor drafting which makes it unnecessarily difficult to understand the operation of the provisions, including excessive use of double negatives.

As always, we look forward to continuing to work closely with Treasury and the Government generally to ensure that this legislation is workable, efficient and effective and the profession is able to implement it in a timely fashion to assist in driving economic recovery from the COVID-19 crisis.

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

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

We have more than 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Some 82% of Registered Liquidators and 87% of Registered Trustees choose to be ARITA members.

ARITA's ambition is to lead and support appropriate and efficient means to expertly manage financial recovery.

We achieve this by providing innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large. In 2018, ARITA delivered 183 professional development sessions to nearly 6,000 attendees.

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

We also engage in thought leadership and public policy advocacy underpinned by our members' needs, knowledge and experience. We represented the profession at over 20 inquiries, hearings and public policy consultations during 2018.

Appendix A – Table of Issues

General questions/comments

- There is no requirement for the restructuring practitioner to express an opinion to creditors as to whether the plan is in their best interests or to provide a comparison to potential returns in a liquidation if the company were to be liquidated. How are creditors meant to make an informed decision as to the best course of action when they are provided with limited information (no requirement to provide information on assets) and no analysis of that information?
- While we note that the Court may vary a plan, there does not appear to be any capacity to ask creditors to agree to an amendment of the plan once it is made. There should be capacity to request creditors to consider an amendment to the plan. If creditors don't accept the amendment and the company is not able to comply with the plan in its current form, then an application to Court for variation under 5.3B.52 may be made, or the plan terminates under 5.3B.30.
- There is no requirement for the company to account to security holders for proceeds on the sale of secured assets sold in the ordinary course of business. This is an important requirement to ensure ongoing support of secured creditors.
- No carve out or amendment has been made for restructuring practitioners from the requirement to issue an initial remuneration notice (IRN) pursuant to IPR 70-35. Given the prescribed remuneration requirements for restructurings, we suggest that it would be more appropriate to include details of how remuneration is determined with the notice to creditors of appointment under regulation 5.3B.45.
- We are concerned that the amendments include many offence provisions for the restructuring practitioner but include limited consequences for directors beyond their existing director duties. Specifically, we are concerned about the lack of penalty for being misleading during the development of the plan.
- There is nothing to prevent a restructuring practitioner from collaborating with directors to authorise the sale of the company's assets and the payment of certain of the company's creditors and then not put a plan to creditors. Transactions approved by the restructuring practitioner (453N) are valid and effectual and are not liable to be set aside in a winding up of the company unless not done in good faith. Overturning these types of transactions would require:
    - a liquidator to be appointed (which is not automatic and if directors wished to delay scrutiny, would rely on a creditor taking the matter to Court),
    - the liquidator to source funding (noting that currently they would be unable to obtain litigation funding due to problems with amendments to litigation funding provisions)
    - the liquidator to prove that questionable transactions were not in good faith, and
    - undertake expensive litigation to recover the transactions.

Comments about the exposure draft

Key: Significant issues

Section/ Item #	Comment
Corporations Amendment (Corporate Insolvency Reforms) Bill 2020	
Debt restructuring - core provisions	
91	The relation back definition still fails to deal with situations where the restructuring plan fails, and a liquidator is appointed.
453D	While this requirement is included in the 'Restructuring of company' schedule, it refers to the 'restructuring practitioner'. It is unclear if separate declarations are required for both the restructuring of the company and restructuring plan. There is also no requirement for replacement restructuring practitioners to complete and lodge a declaration.
s453N	Fails to validate transactions undertaken by the company in the ordinary course of business. Creates uncertainty that these transactions can be set aside in a subsequent winding up.
455B(4)	Notes that the regulations may make provisions in relation to the identification, rights, obligations and liabilities of contributors. No regulations have been proposed.
456N	There should be no comma after the second mention of restructuring practitioner. The inclusion of the comma changes the meaning of the provision.
468(2)(ac) and (ad)	By failing to include transactions undertaken by the company in the ordinary course of business, all transactions undertaken by the company in the ordinary course of business during the restructuring will be void under s468 (where liquidation is a court liquidation) - they are not exempt and they have been undertaken after the commencement of the winding up (new 513CA). Noting that there is no protection under s453N either.
588FE(6B) **(c)(iiia) and (iiib)**	By failing to include transactions undertaken with the consent of the restructuring practitioner and in the ordinary course of business, these transactions could be voidable in a subsequent liquidation.
Debt restructuring - consequential amendments	
4 / s9	The definition of decision period for secured creditors provides that in relation to a company under restructuring begins on the day when, a notice of appointment must be given under the regulations, such a notice is given or otherwise, when the restructuring begins. There is no specific requirement in the regulations to notify secured creditors beyond the general notification to creditors in regulation 5.3B.45. It is noted that specific notification requirements for secured creditors apply in voluntary administrations (refer s450A(3)).

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65 / **s588GAAB**	No regulations have been drafted for the purposes of s588GAAB(3)
Temporary relief for companies seeking a restructuring practitioner	
3 / s588GAAC	No regulations have been drafted for the purposes of s588GAAC(3)
Simplified liquidation	
Proposals without meetings	There is no scope to hold meetings, even at liquidator's discretion, in a simplified liquidation, with sole reliance on the existing provisions for proposals without meetings in the Insolvency Practice Schedule (Corporations) (IPS) and Insolvency Practice Rules (IPR). These provisions have not been amended for simplified liquidations and include references to meetings (IPS 75-40(2)(c)) and the ability for creditors to object to the use of proposals (IPR 75-130). This may render simplified liquidations ineffective. In addition, a liquidator will not be able to get certain approvals from creditors (compromise of debts, agreements longer than 3 months). There are only limited options for being able to convert from a simplified liquidation to a creditors' voluntary liquidation. If a company has a debt that the liquidator wants to compromise, they will be unable to do so and will have to continue to pursue recovery or write it off in full. It would also restrict any ability to seek litigation funding to pursue preferences (even in the more limited form) as the agreements ordinarily extend beyond 3 months
Replacement of liquidator	While the current replacement provisions in IPS 90-35 remain applicable in simplified liquidations, such a replacement must take place via a 'resolution at a meeting.' As no meetings apply in a simplified liquidation, creditors will be unable to seek to replace appointees.
489F	No regulations have been drafted for the definition of triggering event for items (g) and (h).
500A and 500AB	An amendment to section 500AB now gives creditors 20 business days to direct the liquidator not to adopt the simplified liquidation process. Unfortunately, liquidators only have 20 business days in which to adopt the process (s 500A(2)(a)). So, in our view, **a liquidator will never be in a position to be able to adopt the simplified liquidation process**. This position is reinforced by the explanatory memorandum which states that '[t]he power for creditors to direct the liquidator to not follow the simplified liquidation process is limited to the period **before** the simplified process is adopted' [at 3.60 emphasis added].

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Virtual meetings	
105B	Proposed s105B does not recognise communication from an external administrator. Where communication is sent in relation to an external administration or receivership, the electronic communication should be taken to be sent from their primary place of business which is registered with ASIC.
Corporations Amendments (Corporate Insolvency Reforms) Regulations 2020	
Contingent debts	Not a defined term and not necessarily certain - will create litigation as creditors either want or not want to be classified as contingent depending on what they see the better outcome is. The accounting concept of a contingent liability is different to the legal concept. A contingent claim – like a right to terminate for breach and claim compensation – might lie at the very heart of a company's financial distress or insolvency. Not sure if it is expected that leases will be contingent? Based on case law rent/lease payments are not. We have significant concerns about how an insolvent small business is going to be able to pay any contingent claims that become due and payable during the restructuring noting that they are an ordinary course of business payment per reg 5.3B.04(2)(a). Not clear if owners and lessors are bound by the restructuring as not mentioned in 5.3B.27 (which is a similar provision to s444D for VAs but s444D mentions owners and lessors). They are mentioned in 5.3B.28 with regards to protection of company property. This creates significant uncertainty around the status of owners and lessors.
s453J	s453J states that the regulations may provide further grounds for termination of the restructuring. The regulations do not provide any further grounds; however, we believe they should. If the directors fail to provide necessary information to the restructuring practitioner, fail to provide access to the company's books and records, mislead the restructuring practitioner, these should form grounds for the restructuring practitioner to be able to terminate the restructuring. We suggest that something similar to reg 5.3B.18(2) (termination of the restructuring proposal) should be provided for the restructuring period.
5.3B.01	Definition of excluded creditor. We note that an excluded creditor includes a creditor of the company who was, on becoming an affected creditor, a related entity of the restructuring practitioner. We are concerned that the limitations in s456C would not prevent the firm of the restructuring practitioner being a creditor (potentially large creditor) in the restructuring (for example as a result of being the company's accountant prior to the restructuring) as only a person (not their firm) is excluded if they are owed more than $5,000. We note that as

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	a result of being an excluded creditor they do not receive information or have a right to vote, but they do appear to have a right to participate in the plan (noting that only related creditors seem to be excluded from the plan (reg 5.3B.29). Is it the intent of the legislation that a registered liquidator from the company's accounting firm could act as the Restructuring Practitioner for the company? The Explanatory Memorandum for the Bill states: *To ensure the independence of the small business restructuring practitioner, a person who is connected with a company must not seek or consent to be appointed as, or act as, the small business restructuring practitioner for that company. This rule does not apply if the Court gives leave to the person. A person is connected with a company and subject to this disqualification if the person … is a creditor of the company or of a related body corporate in an amount exceeding $5,000…"* Due to the role of the restructuring practitioner being substantially different to other external administrators (noting that they are there to assist the company), we are not sure what independence requirements the Court will place on restructuring practitioners. Who can be appointed needs to be clarified - ie. can they appoint a restructuring practitioner from their accounting firm?
5.3B.02(1)(f)	An administrator cannot be appointed under s436B as a liquidator cannot be acting.
5.3B.02(2)	We disagree that the director's declaration to end the restructuring should specify a future date (notice must be given before the day specified in the declaration). The restructuring should be able to be brought to an end on the same day as the declaration is given.
5.3B.03(5)	The proposed definition of liability would include employees accrued entitlements. Consider whether accrued entitlements should be excluded from the liability eligibility cap. Regulations 5.3B.12 and 5.3B.22 also indicate that outstanding employee entitlements only need to be paid prior to the proposal of the plan, it appears that these may also be captured in the liability eligibility cap. Is the whole amount of secured creditor debt to be included in the calculation of liability for eligibility - noting that it is not excluded or limited to the deficiency over value of secured assets.
5.3B.04(2)(a)	The 'ordinary course' exclusion for the "payment of a debt or claim (other than a contingent debt or claim) that arises because of a contract or arrangement entered into before the restructuring began" may inappropriately capture ongoing trading arrangements with the company for future supplies where

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	trading accounts were established prior to the restructuring. The exclusion should only apply to admissible debts or claims.
5.3B.05(3) & (4)	If notice is provided in writing under (2), why does a written record have to be provided again under (3). A written record under (3) should only have to be provided when the consent in (2) is given orally.
5.3B.13 (2)	We note that there is no requirement to lodge with ASIC the approved form in (2) and therefore we question whether ASIC has the power to make the form. We suggest the obligation to lodge is added to 5.3B.19.
5.3B.14	There should be an obligation for directors to include details of the company's assets in the restructuring proposal statement.
5.3B.14(2)(b)	We note that there is no requirement to lodge with ASIC the prescribed form in (2)(b) and therefore we question whether ASIC has the power to make the form. We suggest the obligation to lodge is added to 5.3B.19.
5.3B.15	We also believe creditors should be notified of any extension to the proposal period, or at a minimum a notice should be published on the ASIC published notices website. There should be a limit on how long the Court can extend the proposal period under (4), noting that restructuring is different to VAs as there is no external administrator personally liable to protect creditors for debts incurred during the period.
5.3B.16(1)	We note that s453E refers to the restructuring practitioner for the company making 'a declaration to creditors in accordance with the regulations'. This regulation states that the 'company's restructuring practitioner must prepare a certificate'. Is this certificate the same as the declaration - consistent terminology should be used.
5.3B.16(2)(d)	We are very concerned about this provision, especially in light of the amendment to s595 which specifically prevents inducements for all external administrators, including restructuring (new 595(1)(ca) & (cb)). This regulation should be removed.
5.3B.16(4)	Serious concerns regarding the extent of 'inquiries' and 'reasonable steps' required by the restructuring practitioner to verify 'the company's business, property, affairs and financial circumstances' for their certification. While no requirement exists to report on these matters, investigations will still have to be done and we note that the wording of the requirements has substantial similarity to requirements for a voluntary administrator's report.
5.3B.16(4) and (5)	We query how a strict liability offence can be determined from subjective standards of conduct.
5.3B.18	The lapsing of the plan should be notified to creditors, ASIC and advertised on the ASIC published notices website.

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5.3B.19	A copy of the director's declaration under 5.3B.44 should be provided to creditors when proposing a restructuring plan. Details of the company's assets should be included in the restructuring proposal statement (5.3B.14) and provided to creditors when proposing a restructuring plan.
5.3B.20	No mention of the consequence of a creditor failing to dispute the company's assessment of the value of its admissible debt or claim within the 5 business day period. Is that creditor then bound by that assessment? Is there some sort of 'deeming' of the value of the debt or claim?
5.3B.20(5)(b)	There is an obligation for the restructuring practitioner to notify creditors if the variation in the schedule of debts is significant. What is significant? It would be better to submit a percentage amount of variance where notification has to be made.
5.3B.22(a)(i)	Accrued entitlements should be excluded along with contingent entitlements. Annual leave and long service leave are accrued entitlements, not contingent entitlements.
5.3B.23(2)(a)(2)	The amount that a creditor should be entitled to vote for where a debt is purchased, should be the lesser of the amount paid or the value of the debt - not the value of the purchase price. This is to ensure that creditors only get to vote for amounts that are actually paid or the value of the debt where the value of the purchase price is higher.
5.3B.25	A secured creditor proves for the amount that the debt exceeds the value of the security. How is the value of the security determined? What is the process if the company/restructuring practitioner disagrees with a secured creditor's determination of value (noting that in liquidation there is a right to redeem the security for the value given by the secured creditor s554F). We think that this is likely to be a very contentious area and there needs to be a process to follow to resolve disputes about value of securities and we do not think the process in 5.3B.20 for disputing the schedule of debts and claims is sufficient.
5.3B.29	The effectiveness of this provision is dependent on creditors being aware of this requirement. While we note that there is a requirement for the appointment to be advertised on the ASIC published notices website, no requirement exists for the lodgement of a notice of appointment with ASIC to update the company's register.
5.3B.29(6)	We are concerned that the operation of 5.3B.29(1)(b) to calve out related creditors may affect the exclusion in (6). Notwithstanding the above, an admissible debt or claim does not exclude a related party creditor (5.3B.01). All debts or claims rank equally in the standard terms for a restructuring plan (5.3B.25), but under 5.3B.29(6) claims of related party creditors received late must be rejected. Is this to prevent related party

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	claims from being left off the schedule of debts and claims and then later admitted under 5.3B.29(7)? Note our concerns about 5.3B.29(7)(b) below.
5.3B.29(7)(b)	We strongly object to this provision as it allows for abuse of the system. This provision encourages companies to leave creditors off the schedule of debts and claims in order to come below the $1 million eligibility threshold, with no adverse consequence for doing so. There needs to be a consequence either against the company or the directors which deters the manipulation of the eligibility threshold but allows for genuinely disputed debts.
5.3B.30	There is no ability for the restructuring practitioner for the plan to terminate a plan for misleading information being provided by the directors. The restructuring practitioner only has the ability to terminate a proposal for misleading information (5.3B.18). The restructuring practitioner should have the ability to either terminate the plan or refer the matter to the creditors for them to consider whether to terminate the plan - the matter should not have to go to the court to terminate the plan as that is too costly.
5.3B.30(1)(c) and (d)	It may be inappropriate that the plan terminates "on the next business day". If a weekend of public holiday intervenes, safe harbour protection shouldn't continue for that period - particularly for companies that are trading in industries where weekend trade is commonplace (eg hospitality).
5.3B.30(1)(e)	An administrator cannot be appointed under s436B as a liquidator cannot be acting.
5.3B.32	It is unclear whether the resolution for the appointment of an alternative person as a restructuring practitioner for the plan is a resolution by the directors or members of the company.
5.3B.33	Does the requirement to hold funds on trust require them to be held in a trust account, rather than an account in accordance with IPS 65-1? If this is the case, IPS Division 65 needs to be amended otherwise the restructuring practitioner will be in breach of the funds handling requirements, which are a strict liability offence.
5.3B.39(5)	We don't understand the purpose of this provision when a restructuring practitioner does not have the power to borrow money.
5.3B.40(1)	"Restructuring practitioner" should be "restructuring practitioner for the plan"
5.3B.42(2)(b)	An administrator cannot be appointed under s436B as a liquidator cannot be acting.
5.3B.42(2)(d)	The restructuring practitioner for the plan is more likely to know whether the matters under (d) have been satisfied than the directors so we do not understand why the directors would be required to notify the restructuring practitioner of this.
5.3B.44	This declaration should be made at the same time as appointing the restructuring practitioner. Directors should not be eligible to appoint a

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	restructuring practitioner without being able to declare that there are reasonable grounds to believe that the eligibility criteria for restructuring are met at the time of making the appointment.
5.3B.44(2)	We query a director's ability to have sufficient knowledge of s 588FE to provide this declaration. Is it intended that the restructuring practitioner would be able to assist with this determination? The exclusion of preferences from this declaration should not include preferences to related parties (ie. the directors should have to declare whether any preferential payments have been made to related parties).
5.3B.45	To ensure the smooth progress of the restructuring, we suggest that as part of the initial notice of appointment, creditors be asked to submit details of their claim to the restructuring practitioner within 5 business days. This will enable any issues with creditor claims to be identified earlier.
5.3B.45(2)(i)	The obligation to provide creditors with information about their right to request information in accordance with IPR 70-40 and 70-45 will unnecessarily increase costs in the process as every request is likely to be deemed unreasonable on the basis that the restructuring report will be issued within 20 business days. Any request outside of this is likely to trigger one of the other categories for unreasonableness.
5.3B.46	There is no obligation to advertise on the ASIC notices website about the lapsing. This should be advertised.
5.3B.47	There is no obligation to advertise on the ASIC notices website about the making of a restructuring plan. This should be advertised. The obligation to notify creditors of the plan being made is 5 business days. What is the position with creditor trading etc during these 5 business days?
5.3B.48	There is no obligation to advertise on the ASIC notices website about the contravention of the plan. This should be advertised.
5.3B.49	There is no obligation to advertise on the ASIC notices website about the termination of the plan. This should be advertised.
Temporary relief	
5.4.01AAA	How are creditors to know whether the company is eligible for temporary restructuring relief?

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Schedule 3 - Simplified liquidation	
5.5.02	Directors will be unable to make a declaration regarding s 588FE without specialist advice and review of company records. Independence standards would prohibit the liquidator assisting with this, particularly given this information is material to the liquidator's decision whether to adopt the simplified liquidation process.
5.5.03(1)	The determination of total liabilities for simplified liquidations will be different to the determination for restructuring as s558 deems the termination of employees, triggering liabilities for entitlements payable on termination (long service leave, redundancy & payment in lieu of notice). These liabilities would no longer be contingent.
5.5.03(5)(b)	This is another timing issue. A liquidator is, in our opinion, currently unable to adopt simplified liquidation due to a conflict between the period for adoption and the period for creditors to object. The timeframe in 5.5.03(5)(b) cannot be correct as simplified liquidation cannot be adopted until after the period for creditors to object (20 business days - 500AB). A longer timeframe needs to be prescribed. Alternatively, it could be rephrased as the company went into liquidation within 1 business day of the restructuring or restructuring plan failed. The liquidator then only has a limited time period with which to elect to use simplified liquidation. The provision should also provide for a terminated restructuring plan - not just restructuring.
5.5.04	This provision is very difficult to read and we are still not certain what is intended. The Exposure Draft Explanatory Statement provides no clarity.
5.5.09	5.5.09 in conjunction with 500AD. It should be clarified that it is provable debts that are taken into account, otherwise it is not clear whether the total amount of secured debt should be included.
5.6.67A	Does regulation 5.6.67 need to be excluded from simplified liquidations?
Insolvency Practice Rules (Corporations) Amendments (Corporate Insolvency Reforms) Rules 2020	
Schedule 1 - Corporate insolvency reforms	
3/20-1	This is missing a reference to (2) in the heading - should say 20-1(2)
4 / 20-1(3) & (4)	Amendments to ss 20-1(3) and (4) change the relevant employment test from 'and' requirements to 'or' requirements and add experience doing informal restructuring work and Part 5.7B restructures. This amendment enables an applicant to be registered by meeting only one of these requirements (including the 'any other relevant employment' test) and undermines the integrity of the process. It is essential that registered liquidators have broad experience in undertaking formal insolvency appointments before being registered. It must be remembered that on registration, a registered liquidator

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	can operate as a sole practitioner and may be without the support of other registered liquidators or a firm structure - therefore experience and knowledge is essential to protect the integrity of the system. It would not be appropriate for an applicant who only has experience as a restructuring practitioner to qualify for full registration as a liquidator.
5 / 20-2(2)(b)	The qualifications, experience, knowledge and abilities requirement for a restructuring practitioner application do not reflect the requirements and obligations of these practitioners. The legislation and processes are complex. Practitioners undertaking these appointments require extensive knowledge in insolvency, particularly given Part 5.7B appointments mirror many technical and statutory obligations of Part 5.7A appointments, without the commercial trading obligation. In order to be able to certify the restructuring proposal and advise directors regarding voidable transactions (for the purposes of the director's declaration), the restructuring practitioner will have to have an in-depth understanding of these types of transactions. 20-2(2)(b) refers to demonstrated capacity to perform satisfactorily the functions and duties of a registered liquidator. The exposure draft does not specify that this is in the capacity as a small business restructuring practitioner (although the explanatory statement does specify this - page 5).
7 / 60-1C	We are concerned that there is no flexibility to revisit remuneration once set prior to actual appointment. The complexity of the process and the potential extent of court involvement (which is unlikely to be anticipated or known at the time of appointment), mean that it is unlikely that the conduct of these administrations will be certain or will always follow a standardised process. For example, directors provide a list of creditor claims. In our experience, it is unlikely that this list will be correct. There is then a back and forth process to correct amounts with creditors and a possible need to communicate information back to the creditor body. The current remuneration setting process means that practitioners will have to factor in a large contingency - this is not in the interests of the company or creditors. If they don't factor in enough of a contingency, there is a risk that the proposal will fail as the practitioner will not be in funds to take matters to court.
7 / 60-1C	No provision has been made for remuneration of a replacement restructuring practitioner if the incumbent dies or resigns and the company appoints a new restructuring practitioner under s456E.
7 / 60-1D	The entitlement to remuneration should be linked to payments by the company under the plan to be drawn as amounts are received (this aligns to the provision in Debt Agreements). Linking the remuneration for the restructuring plan to payments made to creditors does not take into account circumstances where significant work may have been undertaken but the plan terminates without any distributions being

Section/ Item #	Comment
	made. The lien providing for remuneration is of no utility if there is no entitlement to remuneration as the trigger event has not occurred.
9 / 70-60(2A)	We recommend that the restructuring plan is lodged with ASIC once made.
10 / 115-1	The transitional provision only applies the new triennial CPE requirements to new registrations, not renewals of existing registrations (IPS 20-70 and 20-75) done after the commencement of the reforms. The reforms should apply to new registrations and renewals.
	Does there need to be a transitional provision in relation to the application of the amendments for applications and disciplinary actions (ie. virtual meetings)
Schedule 2 - Virtual meetings	
7 / 50-80(3)	Applicants should only be able to participate in an interview by virtual means at the discretion of the committee
9 / 50-85(3)	Liquidators should only be able to participate in an interview by virtual means at the discretion of the committee
18 / 75-75(6)(a)(i)	The place of the meeting is to be the company's registered office. This should be the principal address of the external administrator as notified to ASIC. The external administrator may be located in Sydney and the registered office of the company could be in Perth - resulting in a 3 hour time difference for the purposes of the time of the meeting under 75-75(6)(b).
21 / 75-110(2)	We don't know how an external administrator could run a poll with a combination of creditors and members, as creditors polls are number and value and members are number.
27/75-146	We note that the minutes must be lodged with ASIC (IPR 75-145) and will not be able to be lodged as an electronic recording, therefore it is not appropriate that minutes are only kept in an electronic recording.

Public register

It is vital that a company's details on the public register maintained by ASIC accurately and fully disclose current information about a company and provide access to pertinent documents. The draft reforms are deficient in the following aspects, many of which are inconsistent with other external administration processes.

- There are no amendments to Regulation 9.1.02 adding the restructuring of a company and plan to the prescribed information which may be included in a company's public register maintained by ASIC.
- No requirements regarding the lodgement of Notices of Appointment and Cessation with ASIC for the restructuring processes (company and plan) and simplified liquidation.

- No lodgements specified where a restructuring ends for the circumstances noted at 5.3B.02(b), (d), (e), (f), (g), (h) or (i).
- While a copy of a Court order must be lodged in accordance with 5.3B.51, there are no similar lodgement requirements for 5.3B.52, 5.3B.53 or 5.3B.54.
- No requirement for the lodgement of the restructuring proposal or plan (although 5.3B.47 requires the lodgement of a notice of making a restructuring plan).
- The directors' declaration of eligibility for restructuring and simplified liquidation should be lodged with ASIC. If it is not to be lodged, it cannot be in a prescribed form (refer 5.3B.44)