

19 July 2024

Meetings and Documents review
c/- Better Business Communications Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: meetingsanddocumentsreview@treasury.gov.au

Dear Dr Austin, Ms Bird and Ms Fox

Statutory review of the meetings and documents amendments

We refer to the current consultation in respect of the statutory review of the meetings and documents amendments (**Consultation**).

The Australian Restructuring Insolvency and Turnaround Association (**ARITA**) is Australia's largest professional representative body of insolvency practitioners representing over 80% of Australia's insolvency, turnaround and restructuring professionals.

Use of technology neutral provisions

The purpose of our submission is to highlight that on 15 September 2023, the *Treasury Laws Amendment (Modernising Business Communications and Other Measurers) Act 2023* came into effect, which *inter alia* repealed section 600G from Chapter 5 – External Administration of the *Corporations Act 2001* (Cth) (**the Act**). Prior to its repeal, section 600G facilitated the wholesale use of electronic signing and communications in external administrations.

External administrators are now captured by the provisions in “Part 1.2AA – Signing and sending documents” of the Act to provide documents to creditors and other stakeholders during the conduct of external administrations.

The provisions in Part 1.2AA work largely the same as the repealed section 600G and external administrators successfully use technology neutral signing and sending of documents to conduct external administrations efficiently and effectively.

We draw this information to the Panel's attention so that any recommendations regarding amendments to the Act have regard to the impact this may have on external administrators.

Nominated electronic address

One aspect of the amendments that we would like to raise that causes issues for insolvency practitioners is the definition of ‘nominated electronic address’ in section 110D of the Act.

‘Nominated electronic address’ is defined in section 9 of the Act to mean ‘in relation to the addressee of an electronic communication, means:

- (a) the most recent electronic address nominated by the addressee to the originator of the electronic communication as the electronic address for receiving electronic communications; or
- (b) if:
 - (i) the addressee has nominated an electronic address as mentioned in paragraph (a) and the originator knows, or there are reasonable grounds to believe, that the address is not a current electronic address for the addressee; or
 - (ii) **the addressee has not nominated an electronic address** as mentioned in paragraph (a);
an electronic address that the originator believes on reasonable grounds to be a current electronic address for the addressee for receiving electronic communications.’ [emphasis added].

The use of the word ‘nominated’ in the term, which is the same definition that applied to the repealed section 600G, often causes confusion for insolvency practitioners and has, on occasion, led to unnecessarily seeking court consent to send documents electronically.¹

We suggest that alternative term, possibly ‘designated electronic address’, be considered that more accurately capture the essence of the definition.

Associated area for reform

An area related to the matters being considered by the Panel where we have been seeking reform is the use of the proposal without meetings provisions². Proposals without meetings are a cost-effective way for external administrators to seek creditor approval of matters in external administrations without having to hold a meeting of creditors. At this time proposals without meetings can only be used to obtain creditors approval of:

- for all external administrations, a matter contained in Schedule 2 - Insolvency Practice Schedule (Corporations) to the Act, or
- for simplified liquidations only, contracts longer than 3 months³ or the compromise of a debt larger than \$100,000⁴.

¹ For example, *Dunn, in the matter Evolution Traffic Management Pty Ltd* [2022] FCA 411, noting that in this instance the application also sought other orders

² S 75-130 Insolvency Practice Rules (Corporations)

³ S 477(2B) of the Act

⁴ S 477(2A) of the Act

We are firmly of the view that proposals without meetings should be able to be used to compromise debts (s 477(2A)) and enter into agreements longer than three months (s 477(2B)) for all liquidations.

It is our understanding that the limitation on the use of proposals in these circumstances was due to a drafting error in the *Insolvency Law Reform Act 2016* and it is somewhat nonsensical that section 506(1A)(c) enables the use of a proposal without a meeting in accordance with Schedule 2 to be used to pass such resolutions in a simplified liquidation but not a traditional liquidation.

Requiring meetings to obtain creditor approval on these two matters results in significant increased costs for any liquidation. Outside of a simplified liquidation, creditors have the opportunity to object to the matter being dealt with without a meeting, giving them protection in instances where they believe that a meeting is required. However, for the vast majority of liquidations, approval will be able to be obtained expeditiously and at lower cost via approval using a proposal without a meeting.

Importantly, for a liquidator to be able to take action to recover property for the benefit of creditors (eg. uncommercial transactions, creditors-defeating dispositions and limited preferences) in an unfunded (or low funded) liquidation, they may need to seek funding and/or enter into contracts longer than 3 months. In most cases, this is the only likely avenue to take action against those that have unfairly benefited prior to the liquidation.

It is of paramount importance that this issue be resolved, and we see the review being undertaken by the Panel as an opportunity for a recommendation to be made to rectify an error which remains unresolved since 2016.

To discuss our submission further, please contact Ms Kim Arnold, ARITA's Policy & Education Director, on [REDACTED] or [REDACTED].

Yours sincerely

[REDACTED]
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.

We are a not-for-profit, incorporated professional association run for the benefit of our members.

Around 85% of Registered Liquidators and Registered Trustees choose to be ARITA members.

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

We achieve this by providing innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large. In 2023, ARITA delivered 94 CPE events with over 5,000 attendees.

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

We also engage in thought leadership and advocacy underpinned by our members' knowledge and experience. We represented the profession at 11 inquiries, hearings and public policy consultations during 2023.