Dear Mr Hobbs

In response to issues raised by Senator Cameron, ARITA makes this further submission in response to matters raised.

Senator Cameron asked for details of disciplinary conduct take against our members in relation to issues of independence. These outcomes, few as they are, can be found here: http://www.arita.com.au/insolvency-you/complaints-and-member-discipline/arita-action

We point out that some 76 percent of registered liquidators and 86 percent of registered trustees are ARITA members. Those members choose to take on higher standards and obligations than non-members and, in particular, subject themselves of ARITA's world leading approach to professional conduct. The extent of our conduct requirements of members can be found here: http://www.arita.com.au/about-us/arita-publications/code-of-professional-practice

We emphasize that despite what has been recently revealed as being a $9 million annual spend by ASIC in "regulation" of liquidators, ASIC achieves only 6.3 outcomes per year against liquidators (or less than 0.9% of registered liquidators), more than half of which are simple "administrative remedies". Given the small number of substantial actions taken against insolvency practitioners, and the relatively minor sanctions usually imposed when misconduct is found, it is reasonable to assume that:

- there is no significant problem of insolvency practitioner misconduct, or
- if there is a misconduct problem, ASIC is failing to prosecute it.

We again submit that the root cause issue here is director misconduct. Liquidators submitted some 7,218 possible misconduct report to ASIC last year, highlighting 18,195 breaches – this covered a staggering 76.3% of all external administrations. Yet ASIC only has successful actions against directors, on average, 20.5 times per year.

By targeting director misconduct – where directors may attempt to siphon assets, act to avoid prosecution or unlawfully phoenix a business – the regulator would remove any incentive for directors to seek facilitators of this behaviour and, even if provided with inappropriate advice by a practitioner (registered or unregulated), directors would be more likely to reject that inappropriate advice for fear of prosecution.

As to the regulation of the profession, we refer you to this Committee's recommendations in its 2010 report, many of which were not accepted by government and none of the others of which have been implemented. ARITA itself has tried to fill that vacuum through its education and guidance, its Code and its conduct regime; and it continues to do so.

As to phoenix activity, ARITA has made six submissions on the government's various ideas over recent years. None have been implemented.

Senator Cameron asked about s596AB of the Corporations Act. Having taken that provision on notice, we now confirm that it has been little used, and in fact that Part 5.8A has been, in the words of informed academic comment, "completely ineffective in providing a means of recovery of employee entitlements", and that it may even be counterproductive of a beneficial restructuring. The parliamentary debates leading to Part 5.8A indicates confusion about what was to be achieved.

The 2004 Parliamentary Joint Committee Report recommended (recommendation 43) that a review of these provisions be undertaken to determine their effectiveness "in deterring companies from avoiding their obligations to employees". That review was never conducted.

Nevertheless, Insolvency Practitioners reported 13 alleged criminal breaches of s 596AB in 2012-2013 and claimed to hold documentary evidence in 12 of those. It appears that ASIC took no action on those.

The Kingsway Report was referred to; at the time we could not recall what it was about. It is an analysis of ASIC insolvency data from 2010 – 2011. ARITA points the Committee to the current data from ASIC which is produced twice annually and can be found on their website.

At the hearing in Brisbane on 31 August, the president of ARITA Mr M McCann, was asked if ARITA could offer assistance on the important issues before the Committee. It was with that request in mind that we had both Mr Mark Robinson and Mr John Melluish available for the hearing on 28 September. Both gave considerable input into the Collins Inquiry, and both are highly experienced in construction insolvency.

Yours sincerely

John Winter
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Australian Restructuring Insolvency & Turnaround Association

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