

19 December 2019

FMI Regulatory Reforms Consultations Submissions  
FMI Section, Payments Policy Department  
Reserve Bank of Australia  
GPO Box 3947  
SYDNEY NSW 2001

By email: [FMIconsultation@cfr.gov.au](mailto:FMIconsultation@cfr.gov.au)

Dear Sir/Madam

**Financial Market Infrastructure Regulatory Reforms –  
Crisis management and resolution**

ARITA – Australian Restructuring Insolvency & Turnaround Association represents insolvency practitioners and associated professional who specialise in the fields of restructuring, insolvency and turnaround. Further information about ARITA is included at the end of this letter.

ARITA has reviewed the Council of Financial Regulators’ recent “Financial Market Infrastructure Regulatory Reforms” consultation paper and also noted the previous paper from 2015 (Reports).

We acknowledge the overall importance of specific regimes for key areas of financial infrastructure which are vital to the operation of Australia’s economy. However, ARITA wishes to highlight some matters concerning the proposed reforms and potential uncertainties which may arise in the, hopefully unlikely, event that a resolution regime may be necessary. In particular, we note that there may be areas of potential difficulty or confusion concerning the interaction of the proposed crisis management powers and the operation of the external administration regimes in the *Corporations Act 2001* (Cth) (Act).

**Interaction with existing external administration laws**

An event impacting the solvency of a financial market infrastructure participant is unlikely to be an isolated event and the operation of the statutory management regime and the proposed powers detailed in the Reports are unlikely to be occurring in isolation.

Given this, and the proposed extension of the crisis management powers to “related bodies corporate”, it is important to consider the interaction between the proposed crisis

management powers and the existing external administration laws in Chapter 5 of the Act. Particularly given the statutory regimes under the Act are structured to advance the interests of creditors of the company.

In this regard we note the following matters.

### **Compulsory written notice**

The Reports propose a requirement for a Domestic CFSL, or their related bodies corporate, to give one week's written notice of the appointment of an external administrator. While we acknowledge that notice is important, ARITA has concerns over the mandating of a compulsory one-week period.

We are concerned that this may create an unnecessary delay in the appointment of an external administrator, which may have detrimental flow on effects for creditors. This risk may be amplified given the extension of the obligation to related bodies corporate (which themselves may not otherwise be subject to any licence conditions).

The similar power in s 62B of the *Banking Act 1959* (Cth) is a strict liability offence. The fact that a failure to give notice may result in criminal sanction highlights the need for balance in the timing.

### **Moratorium**

The Reports suggest an indefinite moratorium against the exercise of contractual rights during the resolution process.

In the event that a resolution process becomes a lengthy exercise then a significant moratorium period could have detrimental impacts on creditors and other stakeholders. For directors of impacted companies, the delay of a week in the appointment of a voluntary administrator has the potential to expose them to significant insolvent trading liability.

### **Transfer powers**

The Reports propose broad powers of transfer for the shares of a Domestic CFSL but also for the transfer of shares, or all or part of the business of a related body corporate, where this is considered necessary for the resolution of the Domestic CFSL.

Such broad powers of transfer are likely to have a significant impact on the creditors of a company which may otherwise be in financial distress and other key stakeholders, in particular employees. The relevant conditions and processes to be adopted for the exercise of such powers of transfer will likely require careful consideration.

### **Offer of expertise**

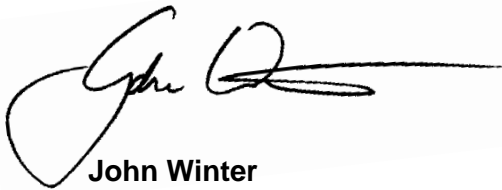
ARITA has established experience and expertise is participating in the law reform process, having regularly consulted on a number of important reforms.

ARITA members have also been at the forefront of responding to the financial difficulties which have impacted a number of domestic stockbroking firms in recent years.

We are happy to assist or discuss these matters or the Reports generally.

Please contact myself ([jwinter@arita.com.au](mailto:jwinter@arita.com.au) or 02 8004 4355) or ARITA's Legal Director, Natasha McHattan ([nmchattan@arita.com.au](mailto:nmchattan@arita.com.au) or 02 8004 4347) if you wish to discuss these matters further.

Yours faithfully

A handwritten signature in black ink, appearing to read 'John Winter', is written over a light grey rectangular background.

**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 2,400 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Around 84 percent of registered liquidators and 87 percent of registered trustees are ARITA members. We represent firms of all sizes, from small practice through to multi-national firms, with the majority of our membership being drawn from those in small-medium practice.

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

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. In 2017, ARITA delivered close to 300 professional development sessions to around 5,000 attendees.

The Association 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 23 inquiries, hearings and public policy consultations during 2017.