

27 January 2022

The Hon Michael Sukkar MP  
Assistant Treasurer  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [prebudgetsubs@treasury.gov.au](mailto:prebudgetsubs@treasury.gov.au)

Dear Assistant Treasurer

**2022-23 Pre-Budget Submission:  
Conduct a comprehensive ALRC review of Australia's personal and corporate  
insolvency laws to ensure they are simple, efficient and effective**

In 2020, prior to the pandemic, the Australian Restructuring Insolvency & Turnaround Association - ARITA published an 8-point plan to improve Australia's business rescue culture, better help indebted individuals back onto their feet, and ensure that creditors get a fairer deal from insolvency.

The foundation of the plan was the need for a comprehensive review of Australia's personal and corporate insolvency laws to ensure they are simple, efficient and effective.

You may recall, at an ACCI event last year, you agreed with me that you suspected time for a "root and branch" review was coming.

In agreement with you on this, the Hon Justice S C Derrington, President of the Australian Law Reform Commission (ALRC) and Federal Court of Australia highlighted the ALRC's support of a comprehensive review in a speech to an ARITA event, and also [covered in the Australian Financial Review](#):

"In light of changes to business and personal finances, it is crucial that the insolvency system is regularly reviewed to keep pace with modern commercial imperatives. As recognised in ARITA's 8-Point Plan, Australia's insolvency system 'is far from broken, but it can be improved to be better suited to our 21st century economy'. Given that the nature of financial markets has changed drastically since the Harmer Report, the

ALRC is supportive of a call to Government to conduct a comprehensive review of Australia's insolvency laws to ensure they are 'simple, efficient and effective'.<sup>1</sup>

ARITA remains firmly of the view that now is the time for the comprehensive review and calls on the Government to prioritise it as part of the 2022-23 budget by tasking the ALRC with a more fundamental insolvency law review of this kind.

While some insolvency reforms have been implemented in recent years, most notably your Government's small business restructuring and simplified liquidation processes in response to the pandemic, there remains outstanding a clear elephant in the room: that insolvency, as a legal process, has been entirely lost in the public consciousness over the last 30 years.

It is now regarded as an intangible and esoteric, overly technical system and attempting to 'fix' particular drafting issues – typically in a reactive manner in the absence of careful and considered consultation with specialists and experts working in the insolvency system – within the framework of the existing Act and supporting regulatory scheme is akin to building upon a rotten foundation.

Indeed, if the legal system is not understood by those it regulates, the object of that system in an insolvency context, in guiding appropriate behaviour and achieving the most optimal and efficient outcomes for stakeholders and the broader economic and financial system, has necessarily failed. As Chief Justice Allsop noted in his 2018 Annual Quayside Oration, 'the rule of law is not a law of rules' and 'at some point in the expression of the rule, clarity is best achieved by ceasing to define'.

Continuing to try and 'fit' insolvency law, an area of specialty and considerable technical expertise, within smorgasbord corporate and financial services regulations and multiple incoherent 'tacked on' supporting rules under the existing structure will continue to lead to the very outcome the Chief Justice cautioned against in the Oration: the law will simply 'lose community consent and respect'. On a doctrinal level, legal theorists from John Rawls to Ronald Dworkin and Joseph Raz – whose works can be regarded as shaping the modern legal system in the common law world – have been clear that the law must be 'something more than a random assemblage of unrelated and inconsistent rules'.

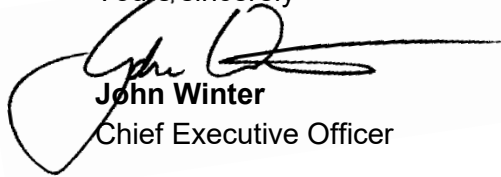
In the absence of holistic review and change – beyond tinkering with the branches of a broken tree – the existing inefficiencies and unnecessary costs in Australia's insolvency system will continue to proliferate and will negate any genuine progress towards a more flexible, innovative and entrepreneurial culture and the economic and financial stability that is so critical at this time in the unique and challenging global circumstances that we face. An efficient, fair and working insolvency system is at the very core of achieving those legitimate and valuable public policy outcomes.

---

<sup>1</sup> Justice SC Derrington, President of the ALRC, presented at the ARITA Expert Series: Insolvency on 11 November 2021

Accordingly, as part of the upcoming budget we urge you to consider funding and commissioning that Australian Law Reform Commission to undertake this “root and branch” review as they last did in ALRC 45 – the Harmer Inquiry – in 1988.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Winter', with a long horizontal line extending to the right.

**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 2,200 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Around 80% 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 2020, ARITA delivered 70 professional development sessions to over 8,200 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' knowledge and experience. We represented the profession at 15 inquiries, hearings and public policy consultations during 2020.