



17 April 2015

Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
By email

Inquiry into insolvency in the Australian construction industry

The Australian Restructuring Insolvency and Turnaround Association (ARITA) makes the following brief submission to this inquiry.

The essence of our response is that while many of our practitioner members have considerable experience in handling the insolvencies of businesses in the construction and related industries, many of the issues about which the Committee is inquiring, in particular in relation to statistics and related information, cannot be readily answered, at least by ARITA.

ARITA would of course like to assist and we invite contact from the Inquiry if there are any particular issues on which the Committee requires comment or information.

In that respect, we gave assistance to the inquiry of Mr Bruce Collins QC on NSW construction insolvencies, in 2012, and met regularly on a consultation committee with him and other industry and professional bodies. A stated purpose of that inquiry was to "safeguard the interests of sub-contractors in the sector" because of concerns about that and the flow on impacts of non- or delayed payment.

In particular, senior members of our profession were able to give particular information and input into the recommendations of that committee in relation to particular construction company collapses in NSW. These included Reed Constructions, Hastie Group, Kell & Rigby and St Hilliers. ARITA continued to provide advice during the framing of those NSW reforms. A key recommendation of the report, which we understand is being implemented in NSW, is the establishment of a retention money trust account regime, the aim of which is, in particular, to protect sub-contractors.

We assume your inquiry will have submissions from the relevant agencies in NSW about those reforms, and any early impact and benefit of those. In any event we refer you to the Collins Report and those later reforms. We also note that NSW and other States do have laws that focus on the construction industry in relation to the security of payment regimes which seek to provide for the prompt adjudication of payment disputes in the industry.

So called Phoenix activity is an issue on which ARITA has made law reform submissions and comment in the past. These are with government. ARITA has generally said that there are existing laws to deal with breaches of the law associated, it is a matter of those being



enforced, in particular by the ATO and ASIC. We do acknowledge the cost of investigating and pursuing such proceedings, particularly in the context of an assetless liquidation. We also note that the construction industry's standards of commercial integrity were the subject of comment in the Collins report and remain so in relation to that industry generally.¹

We note the Committee has a submission from the University of Melbourne on its current 'phoenix' research project and its outcomes reported so far. While that useful report looks at phoenix conduct generally, it does examine whether the construction industry is one that particularly suffers from unlawful phoenix conduct, as did the NSW Collins report.

As to the incidence and nature of criminal and civil misconduct related to construction industry insolvencies, insolvency practitioners are required to investigate and report unlawful misconduct to ASIC in reports required by section 533 and other sections of the *Corporations Act*. As the recipient of those reports, ASIC should have access to the information you seek.

As to the adequacy of the current law and regulatory framework to "reduce the level of insolvency in the construction industry", we do not see the law as necessarily being available to reduce or increase insolvencies. The numbers depend on market and economic factors; the insolvency regime is accessible to any creditor whose debt is unpaid.

However we mention two points. As we said earlier, a major recommendation of the NSW Collins report in NSW was the establishment of a retention money trust account regime that would serve to ensure sub-contractors were protected and paid throughout the construction process. Their non- or delayed payment was found to be an issue in the industry and a cause of their insolvency, including personal bankruptcy.

Also, ARITA's own reform proposals – in our *Platform for Recovery 2014* paper, with government and also available on our website – seek to provide a more streamlined and efficient restructuring and insolvency regime, including one that allows more flexible restructuring with a view to avoiding a formal insolvency appointment. To that extent, our reforms may assist the earlier resolution of financial distress and/or insolvencies in the construction industry. Our paper also proposed a system whereby directors would be able to obtain a director identity number, upon their first proving their identity, address and other details, that would then allow their further company directorships to be based simply on that number.²

As to the statistical and other information generally that you seek, ARITA has made many submissions to government on the inadequacy of corporate insolvency statistics in Australia.³ We mention that this issue was again recently raised during the Senate inquiry into ASIC in 2014, including by academic members of ARITA. At the invitation of the Committee, senior insolvency academics, supported by ARITA, made a detailed submission to the inquiry as to what corporate insolvency data should be gathered and maintained. The resulting Committee report made no mention or recommendation on that issue. We do

¹ See generally *Developing an Australian Code of Construction Ethics*, McCarthy, S F (2012) 12(2) *Australasian Journal of Construction Economics and Building* 87-100.

² This is based on a paper published in our journal from Associate Professor Helen Anderson of the University of Melbourne: *An ounce of prevention: practical ways to hinder phoenix activity* 25(3) *A Insol J* 16.

³ Insolvency statistics in the UK are superior and are used to inform law reform debate and implementation.



acknowledge the higher quality personal insolvency information statistics provided by AFSA and that AFSA has now opened up access to its data to academics for research purposes.⁴

Generally, we are aware from ASIC's statistics that the percentage of construction companies being placed into insolvency is high, over 20% annually, and a figure has been given of over \$2.6 billion⁵ as the estimated amount of money lost by creditors in construction related insolvencies annually. In personal insolvency, construction trade workers are the highest component of business related bankruptcies, with "economic conditions" being given as the main cause.⁶

This is also the case in the UK, with insolvencies in the construction industry regularly being the being the highest in proportion of any industry.⁷ The UK also confronts many of the problems faced here.⁸

Beyond that, we cannot assist you further in relation the statistics you obviously need for this inquiry.

ARITA is ready to assist with any further information as the Committee considers we may be able to provide.

Yours sincerely

John Winter
Chief Executive Officer

⁴ 'Provision of non-standard data and information for research purposes', at afsa.gov.au. AFSA says that it "is committed to providing publicly available statistical information at no cost regarding the Personal Insolvency and Personal Property Securities systems. AFSA does this to build knowledge and understanding of those systems and to assist with related economic analysis and research".

⁵ Senator Douglas Cameron, Senate, Hansard, 26 August 2014, p 5624

⁶ See 'The occupations of debtors in business related and non-business related personal insolvencies', afsa.gov.au

⁷ Insolvency Statistics – October to December 2014 (Q 4 2014), the Insolvency Service, UK: www.gov.uk

⁸ See generally, *Construction Insolvency: Security, Risk and Renewal in Construction Contracts*, Richard Davis. London: Sweet & Maxwell. 4th edition. 2011. The book also compares the position in Australia and other comparable countries.