Responses from ARITA to questions placed on notice by Senator Malcolm Roberts; received 3 November 2017.

Question 1

The committee received a response from Rural Bank to submission 80 that contained the following information:

> On 21 November 2014, the Queensland Court of Appeal unanimously dismissed Mr Wallace's appeal and ordered that he pay Rural Bank's costs. Those costs are yet to be assessed and remain recoverable from Mr Wallace…
>
> A copy of the Court of Appeal order and judgement can be provided. We draw your attention to the following parts of the judgment:
>
> [9] [Mr Wallace's] contentions that the deed was entered into as a result of some form of unconscionable conduct on the part of [Rural Bank], cannot be sustained. There are several reasons for the conclusion.
>
> [10] First, the receivers were appointed on 6 January 2014, and on 8 January [Mr Wallace] was notified of their appointment, by email. **[Mr Wallace] was given a copy of the Deed of Appointment, which stated in clause 2, that the receivers "Shall be the agent of the Mortgagor and neither the Receiver nor the Bank shall be personally liable for the Receiver's acts or omissions"**. [emphasis added]
>
> [11] That mirrored the provisions of the relevant security, under which the respondent could appoint receivers once an Event of Default had occurred. There was no serious issue that an Event of Default had occurred as at 6 January 2014. **As such the receivers acted as agents of the mortgagor [Mr Wallace], not the mortgagee ([Rural Bank]). Thus [Mr Wallace] cannot lay [the receiver's] conduct at the feet of [Rural Bank]…** [emphasis added]

a) Is this kind of clause (i.e. that neither the receiver nor the bank can be held liable for the conduct of the receiver) usual in deeds of appointment?

b) Who decides upon the terms of a deed of appointment? Is there any consultation with the mortgagor?

c) In your view, are such indemnity clauses appropriate? If so, why?

d) If the deed of appointment is structured so that neither the receiver nor the bank can be held liable for the receiver's conduct, what avenues of recourse does a mortgagor actually have if a receiver acts inappropriately?

ARITA response

a) As advised by Mr McClymont during our appearance, a clause providing that receivers “shall be the agent of the Mortgagor and neither the Receiver not the Bank shall be personally liable for the Receiver’s acts or omissions” is usual in a Deed of Appointment.

b) The Deed of Appointment is a contract between the Bank and the Receiver, however the terms are governed by the powers in the security documentation entered into between the borrower and the Bank at the time of taking out the loan. As noted in paragraph [11] of the extract provided with the question, the clause "mirrored the provisions of the relevant security, under which the respondent [the Bank] could appoint receivers once an Event of Default had occurred".

c) Agency in a receivership is very complicated. While a receiver is appointed by the Bank and acts for benefit of the Bank, they are generally the agent of the borrower as stipulated in the security documentation, however, they do not work for the borrower. Such an agency, often referred to by the courts as a 'special' or 'limited' agency, protects the receiver from personal liability for breaches of a company contract. Without such clauses the ability of receivers to achieve the objectives of their appointment, namely to recover money from the secured assets for the lender, would be severely hampered.

   Subject to our comments at d) below, we do believe that such clauses are both essential and appropriate.

d) The agency clause discussed above will only offer protection to a receiver where they act within the limits of their powers and authority. As Mr McClymont mentioned during our appearance, if the receiver acts outside of their powers, then the clause will not offer any protection.

Question 2

What external dispute resolution mechanisms there are for individuals with complaints about receiver behaviour?

ARITA response

Complaints raised in relation to the actions taken by a Bank, including their ability to appoint a receiver, should be directed the Financial Ombudsman Service.

To act as a Receiver, you must be a Registered Liquidator. The registration and conduct of Registered Liquidators is rigorously overseen by ASIC. Registered liquidators are one of the most regulated professions in the country and ASIC has a dedicated team constantly reviewing liquidators (in fact they have a staff member for every 50 liquidators) and a budget of $10.5 million per year which the industry now pays for.

The *Insolvency Law Reform Act 2016*, a very large portion of which is dedicated to the registration and regulation of insolvency practitioners, was 10% of all legislation passed in the Senate in 2016. The ILRA provides very significant new powers to creditors and to the regulator. These changes only came into full effect in September 2017 and need time to take effect.

Since 2015 ARITA has had, as part of our strategic plan, the intention to develop an Alternative Dispute Resolution (ADR)/External Dispute Resolution (DER) scheme to

support our members in reducing disputes. Implementation of this was delayed due to resources being diverted to meet the Government's implementation of the ILRA.. We emphasize that our planned scheme is voluntary and observes the proper right of the liquidators/receivers to refuse to enter ADR/EDR if they consider that it conflicts with their statutory obligations or it would result in an unreasonable burden or impact on creditors (the latter being in line with elements of the *Insolvency Law Reform Act 2016*).

We also note that any ADR/EDR scheme would be limited to commercial disputes. Importantly, such an ADR/EDR scheme would be complimentary to ARITA's existing and extensive complaints and conduct processes, including the enforcement of our Code of Professional Practice. Where EDR can offer an expeditious and agreed outcome between parties, this is valuable both to our members and, most particularly, to the complainant. While we note that all ARITA members are currently required to have a complaints management arrangement in place, the value of our ADR scheme initiative comes from the independence of the review.

ARITA will commence a trial of our ADR service in 2018. The trial will offer both binding and non-binding options to the complainant. The ADR arbitrator will be an independent, eminent person with either legal or insolvency experience whose appointment would be subject to the agreement of the complainant.

If a complaint has been reviewed by a regulator (ASIC or AFSA) and/or ARITA and, with the benefit of their extensive subject matter expertise, a determination has been made that there is no merit in the allegations raised, then there should be no avenue for further action.

Question 3

The ARITA website states that ARITA has powers to investigate complaints against members in relation to their professional conduct as practitioners. It also states that if ARITA is not able to receive and investigate a complaint, it will assist the complainant in finding the right regulator (e.g. ASIC or AFSA).

a) Given that ASIC does not necessarily investigate individual complaints lodged by members of the public, does ARITA think that simply referring complainants on to ASIC is an adequate dispute resolution mechanism?

The ARITA website states that complaints generally fall into three categories:

1) misunderstanding of the processes being undertaken, often caused by a failure of effective communication by the appointee
2) matters that can be readily resolved by following informal inquiry by ARITA
3) serious matters requiring further action.

b) In the past three years, how many complaints has ARITA had in total? Please provide a breakdown of these into the three categories.

c) How many of these complaints have related to receiverships in the primary production sector? Again, please provide a breakdown of these into the three categories.

d) Please provide examples of what would constitute a 'serious matter' and what options of 'further action' ARITA considers in such situations.

e) What disciplinary action is available to ARITA should a member be found to have breached professional standards?

f) In the past 3 years, has ARITA ever expelled a member due to unprofessional conduct? If yes, please provide the year and broad reason for expulsion.

ARITA response

a) ARITA is a membership association representing practitioners and other associated professionals in Australia who specialise in the fields of restructuring, insolvency and turnaround. We have some 2,500 members including accountants, lawyers, bankers, academics and other related professionals and approximately 84 percent of registered liquidators choose to be ARITA Professional Members.

ARITA has a comprehensive and widely regarded Code of Professional Practice which its members must abide by. Much of the Code was adopted as law in the recent ILRA. We take compliance with our Code very seriously and enforce it via rigorous conduct processes, which, as you have noted, includes the investigation of complaints made against our members.

As a membership association we only have the ability to investigate the conduct of our members. ARITA has made a number of submissions in relation to ASIC's capabilities and its enforcement activities of the insolvency industry.

b) ARITA publishes details of its activities in maintaining professional standards and conduct oversight in its Annual Reports.

Our Annual Reports for the last three years can be accessed via the following links:

- ARITA Annual Report 2016
- ARITA Annual Report 2015
- ARITA Annual Report 2014

We do not report our conduct oversight with reference to the three specific categories you have requested, but highlight that those matters referred to our Professional Conduct Committee (PCC), as disclosed in the Annual Reports, would generally represent 'serious matters requiring further action,' although the PCC may, and has, determined that some matters referred to it not to be substantiated.

c) We do not maintain complaint information based on appointment type or industry sector and are unable to collate this data in the time provided. Notwithstanding, we are confident that only minimal complaints regarding receiverships in the primary production sector have been received in the last three years (reasonably estimated to be less than 4 complaints).

d) Serious matters which require further action would relate to substantive breaches of insolvency law or the ARITA Code of Professional Practice. Historically, such breaches may relate to independence of an appointee or remuneration reporting and/or approval.

   Very few matters of such substance are brought to ARITA's attention by way of complaints, with most serious matters being addressed via our 'concerns' processes. A concern is similar to a complaint, but arises from information available to ARITA about the professional conduct of a member as a practitioner other than by way of a complaint.

   Circumstances giving rise to a concern may be identified to or by ARITA via a number of means. This includes, but is not limited to:

   - Recorded judgments or other court documents or transcripts that relate or refer to the conduct of a member;
   - Announcements or advice of action taken by a regulator or another professional body;
   - Media articles; or
   - General feedback from external parties, including other members.

e) The penalties which may be imposed where a complaint is substantiated are governed by ARITA's Constitution and are detailed in the ARITA Complaints Investigation Procedures document publicly available on the ARITA website.

f) ARITA has expelled members as a result of breaches of professional conduct. Such expulsion may happen:

   - automatically under the ARITA Constitution (e.g. as a result of regulator action)
   - at the discretion of the ARITA Board, or
   - as a result of a conduct matter (complaint or concern).

Details of members who have been expelled are published on our website on an ongoing basis. Since 2014 ARITA has terminated the following members:

2017

Termination of ARITA membership - Mr Ray Sutcliffe

In accordance with clause 7.1(b)(ii) of the ARITA Constitution, Mr Sutcliffe's ARITA membership was automatically terminated effective from 28 June 2017. Termination was following his request that the Australian Securities and Investments Commission cancel his registration as a liquidator and his undertaking not to reapply for registration as a liquidator for a period of three years, in accordance with an enforceable undertaking accepted by Mr Sutcliffe.

Termination of ARITA Membership - Mr Ross McDermott
On 30 January 2017 ARITA's Professional Conduct Committee determined that the ARITA membership of Mr Ross McDermott be terminated on the basis that the statement of agreed facts in the decision of *Australian Securities and Investments Commission v McDermott, in the matter of Conalpin Pty Ltd (in liq) [*2016] FCA 1186 reflects multiple failures by Mr McDermott to comply with his statutory duties as a registered liquidator and the requirements of the ARITA Code of Professional Practice.

2016

Termination of ARITA Membership
On 29 February 2016 the ARITA Board unanimously passed a resolution in accordance with clause 7.2(a) of the ARITA Constitution that Mr Ian Hall and Mr Chris Giddens (KPMG) be expelled from membership of ARITA and their names be removed from the ARITA Register for their refusal to comply with the penalties applied as a result of ARITA Disciplinary Proceedings.

2015

Termination of membership - Mr Christopher McCroary
In accordance with clause 7.1(b) of the ARITA Constitution, Mr McCroary's ARITA membership was automatically terminated effective from 24 August 2015 following his request that the Australian Securities and Investments Commission cancel his registration as a liquidator and his undertaking not to reapply for registration as a liquidator.

Termination of membership - Mrs Tina Battye
In accordance with clause 7.1(a)(iv) of the ARITA Constitution, Mrs Battye's Graduate membership of ARITA was automatically terminated following the cancellation of her membership of Chartered Accountants ANZ for a period of three years.

Termination of Membership – Mr Andrew Wily
In accordance with clause 7.1(b)(ii) of the ARITA Constitution, Mr Wily's ARITA membership was automatically terminated effective from 24 March 2015. Mr Wily recently relinquished his status with the Australian Financial Security Authority as a Registered Trustee. Through its statutory role in supporting AFSA under section 155H of the Bankruptcy Act, ARITA became aware of actions being undertaken by AFSA that invoked consideration of Mr Wily's ongoing membership under clause 7.1(b)(ii) of the ARITA Constitution.

2014

Termination of membership – Mr Stephen Jay

Mr Jay's ARITA membership was automatically terminated effective from 16 June 2014 following his agreement with the Australian Securities and Investments Commission to the cancellation of his registration as a liquidator and his agreement not to re-apply for registration as a liquidator, pending the finalisation of all of his external administrations, including the lodgement of numerous statutory documents.

Termination of membership – Mr Pino Fiorentino

Mr Fiorentino's ARITA membership was automatically terminated effective from 8 July 2014 following a decision of CALDB.

Prior to the termination of Mr Fiorentino's membership, ARITA had made a decision suspending his membership, and his membership remained suspended up until the time of its termination.