28 February 2020

Mr Terence Koutts
Senior Manager
Corporations
Australian Securities & Investment Commission
Level 5, 100 Market Street
Sydney NSW 2000

By email: 444GA.Submissions@asic.gov.au

Dear Mr Koutts

ASIC consultation on relief for share transfers using s 444GA

Thank you for the opportunity to consider and comment on ASIC's Consultation Paper 326 concerning "Chapter 6 relief for share transfers using s444GA of the Corporations Act" (Consultation Paper).

In general response to the matters covered in the Consultation Paper, ARITA considers that ASIC should ensure that s 444GA remains a viable tool in an insolvency practitioner's restructuring tool kit and not adopt strict, rigid and inflexible requirements around the need for independent expert reports (IER) which will serve to increase the time and costs associated with these restructuring applications.

However, the indication that the adoption of liquidation basis alone for the preparation valuation evidence to be provided to ASIC is a useful development welcomed by practitioners who engage in these restructures.

Use of s 444GA as restructuring tool

As noted in the Consultation Paper, s 444GA was introduced in 2007 with a view to providing for the transfer of shares by a deed administrator without shareholder consent to better give effect to the statutory object of Pt 5.3A.

Since its first use in 2010, and then an increasing use of the provision in and around 2014 to particularly respond to restructures in the mining sector, s 444GA has developed into an important tool for restructuring certain distressed companies. It provides an alternative for extracting value for creditors and stakeholders where a scheme of arrangement may be cost prohibitive, but a liquidation alone would yield little to no return to creditors.

Section 444GA is, therefore, a valid and useful part of the mechanics rightly available to insolvency practitioners to bring about the stated objectives of Pt 5.3A, being to maximise the chances of the company continuing to exist or, where that is not possible, to obtain a better return for stakeholders than a liquidation alone.

When considered against the broader objective of Chapter 5 of the Act, and noting that the Courts have taken a pragmatic approach to the use of s 444GA and the interpretation of its requirements, the adoption by ASIC of a policy which maintains a flexible and pragmatic approach to the operation of the provision, including applications for ASIC relief in support of such applications, should be favoured.

There is a risk that, should ASIC approach the grant of Chapter 6 relief in a manner which is too strict and rigid in its application, then the use of s 444GA as a restructuring tool may become prohibitively expensive. There is a concern that the approaches advocated in the Consultation Paper may fall on the side of being overly strict and rigid.

Comments on independence

In supporting its proposal that an independent expert report be prepared in all cases where Chapter 6 Relief is sought from ASIC, the Consultation Paper refers to the decision in *ASIC v Franklin (Liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85 (Walton).

As ASIC is aware, the context of the Walton decision involved an assessment of a referral relationship between the appointed liquidators and a commercial adviser to the company in liquidation. The adviser in that case had been involved in a series of transactions which it would fall to a liquidator to review and assess. The concerns in that case were focused on issues relating to the referrers' involvement in pre-appointment transactions; and whether they were involved in facilitating the appointment of a 'friendly' appointee.

Clearly registered liquidators are required to carefully consider their independence, and perceptions of their independence, at the commencement of, and throughout, an external administration appointment. It is also clear that where it is established that an appointee is independent at the commencement of an external administration they can, absent any change in circumstances, be considered to remain independent throughout the appointment to carry out the tasks which are required.

A registered liquidator acting on an appointment is regularly called upon to provide their expert views on the residual value of the company in a liquidation context, whether that be as an administrator, deed administrator or liquidator. In the event that a concern over the independence of an appointee arises then this can be considered in the context of the particular appointment and could result in replacement, a special purposes appointee or the use of an alternative expert for a specific role, such as the preparation of an IER. But this should be considered on a case by case basis.

It is not clear that an application for Chapter 6 relief from ASIC will, as a necessity in each and every case, require the appointment of an external expert, which is the position adopted by ASIC in the Consultation Paper.

ARITA contends that a strict approach which in all instances excludes an appointed deed administrator from providing an IER to ASIC in support of Chapter 6 relief is excessively conservative and restrictive.

The following matters:

(a) the existing obligations on registered liquidators to conduct their appointments and duties with the independence of their role at the forefront;
(b) the role of the Court in the s 444GA process; and
(c) the preference for an approach which maintains s 444GA as an effective and efficient mechanism for restructuring without it becoming cost prohibitive,

suggest an approach by ASIC to the provision of Chapter 6 relief which favours flexibility over rigidity.

Practitioners who have regularly been involved in cases where ASIC has maintained this strict approach have highlighted that obtaining an IER causes delays to the Court and DOCA timetables and increases the costs of the s 444GA application, which ultimately harms unsecured creditors. It is also noted that there are cases when the Courts and ASIC have accepted evidence from a deed administrator, or entity related to their firm, to satisfy it that there will be no unfair prejudice from a s 444GA transfer.[1] This suggests that there is scope for a flexible approach to be maintained rather than adopting a strict interpretation of the IER requirement which may, effectively, remove the utility of an application completely.

Additionally, the increases in costs and time delays which are likely to flow from the application of a rigid requirement for an IER could lead to unintended consequences, and detrimental impacts to the restructuring market in Australia, in terms of the viability of using s 444GA as a restructuring tool.

Misallocation of ASIC resources

Further, and importantly, ARITA notes that the technical issue covered in the Consultation Paper is narrow and specific. As acknowledged by ASIC in the Consultation Paper, it has only been called upon to grant the relief considered in the Consultation Paper on 11 occasions since 2014.

However, as recently covered in ARITA's response to ASIC as part of the 2018-19 Regulator Performance Framework, despite the *Insolvency Law Reform Act 2016* (Cth) (ILRA)

[1] *Tucker, in the matter of Black Oak Minerals Ltd (Subject to a Deed of Company Arrangement) (In Liq)* [2019] FCA 293

commencing over two years ago there remain a number of Regulatory Guides and ASIC Forms have not been updated to reflect the extensive changes made by ILRA.

For example, “RG81 Destruction of books” and the related Form 574 have not been updated to include consent for early destruction of books and records in Court Liquidations, yet this is an issue that insolvency practitioners are required to deal with much more regularly than s 444GA.

Ongoing delays to the updating of these materials have a more extensive impact on the day to day conduct of external administrations than the narrow technical issue covered in the Consultation Paper.

From this broader perspective, and given the matters in the Consultation Paper are likely to impact only a very small part of the insolvency profession, ARITA’s strong view is that the resources applied by ASIC to this consultation, and the proposed amendments to regulatory guides, could have been better applied to updating other ASIC materials which are utilised by the majority of insolvency practitioners far more regularly than s 444GA.

Please contact John Winter, CEO [redacted]) or Natasha McHattan, Legal Director [redacted]) if you would like any further information or assistance concerning this submission.

Yours sincerely,

John Winter
Chief Executive Officer

About ARITA

ARITA – Australian Restructuring Insolvency & Turnaround Association represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have more than 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

Some 82% of Registered Liquidators and 87% of 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 2018, ARITA delivered 183 professional development sessions to nearly 6,000 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' needs, knowledge and experience. We represented the profession at over 20 inquiries, hearings and public policy consultations during 2018.