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Changes to the ARITA Code in effect from Monday, 18 August 2014

The Australian Restructuring Insolvency and Turnaround Association (**ARITA**) has revised its Code of Professional Practice (**Code**) to reflect findings made by the Federal Court of Appeal in *ASIC v Franklin; in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85 (**Walton**).

Compliance with the new amendments to the Code is mandatory for ARITA members from Monday, 18 August 2014.

Background

The Full Federal Court found that the administrators of Walton Construction Pty Ltd and Walton Construction (Qld) Pty Ltd were in a position of apprehended or perceived lack of independence or impartiality in accepting an appointment that was referred to them by a regular referrer of work.

For further information on the decision, please see our Case Update here.

Amendments to the Code

Section 6.6.1 of the Code has been amended, requiring members to disclose in the DIRRI (Declarations of Relevant Relationships) the name of the referring entity. In doing so, practitioners should bear in mind the provisions of the *Privacy Act 1988* (Cth) (**Act**) prohibiting the use or disclosure of personal information, except where expressly authorised by the person or where required or permitted by law. ARITA takes the view that in circumstances where the Act requires a practitioner to provide a DIRRI, such disclosure may be permitted by law. Query however whether the provisions of the Act actually extend to requiring the disclosure of this information. In all other circumstances, consent of the referring entity should be obtained.

The Code also requires an insolvency practitioner to give a meaningful explanation for why the referral relationship does not result in a lack of independence. It is not sufficient to merely state

that the relationship does not result in a conflict or that the relationship is permitted under the Code.

Comment

The amendments have been made despite the court finding that it was not necessary for an insolvency practitioner to give reasons why a referral relationship does not give rise to a perception of a lack of independence. His Honour Justice White considered that, in large and complex administrations, it may not be practical for liquidators to deal with all matters in the DIRRI in great detail.

While ARITA members must adhere to the Code, the Code is unlikely to be relevant in determining whether a perception of bias exists. In *Walton*, Robertson J expressly stated that the Code should not be used in order to construe the provisions of the Act, because it was not referred to in the Explanatory Memorandum to the Act and it was not extraneous material of a type to which the court could have referred.

This view is in line with the earlier decision in *Re Monarch Gold Mining Co Ltd; Ex parte Hughes* [2008] WASC 201, where Master Sanderson considered that the Code had no legal status and could not be used to determine whether an insolvency practitioner had breached his or her obligations under the Act. Sanderson M did, however, note that insolvency practitioners should still pay close attention to their obligations under the Code in order to 'assuage the concerns' of the parties involved.

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