Law Council
OF AUSTRALIA
Business Law Section

Manager
Corporations and Schemes Unit
The Treasury
Langton Crescent
PARKES ACT 2600
Via email: insolvency@treasury.gov.au

11 November 2016

Dear Sir or Madam,

Insolvency Practice Rules 2016

I refer to the consultation on the Insolvency Practice Rules 2016 and other legislative instruments.

The Insolvency and Reconstruction Law Committee of the Business Law Section of the Law Council of Australia has considered the proposed Rules. The Committee thanks you for the extension of the time for provision of these submissions.

I **enclose** our submissions on the proposed:

1. Insolvency Practice Rules (Corporations) 2016; and
2. Insolvency Practice Rules (Bankruptcy) 2016.

If you have any queries, please contact Victoria Butler, the Chair of the Insolvency and Reconstruction Law Committee, on 08 9426 6694, or at vbutler@jacmac.com.au.

Yours faithfully,

Teresa Dyson, Chair
Business Law Section

Enc.

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BLS

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee submissions
Division 15, Section 15-1 Register of Liquidators	Register of liquidators Rule 15-1(2)(f) and Rule 15-1(2)(g) 15-1(2) sets out the information to be recorded ASIC has ability to include any other information that is relevant Info at 15-1(2) must be public ASIC extra info may be public	The Register should only include the information at Rule 15-1(2)(f) if the disciplinary action has resulted in the imposition of a condition on the liquidator's registration or a determination by the relevant disciplinary committee or ASIC as to the cancellation of the liquidator's registration. The IR Committee supports ARITA's view that matters in process must be removed, if the action is unsuccessful. Having regard to the spirit of the IPRs, the information proposed at Rule 15-1(2)(g) should provide the whole of the conditions imposed, not merely a summary.
Division 20, Subdivision B 20-35	Conditions on registration of liquidators Rule 20-5(3) contemplates a positive requirement for a suspended liquidator to maintain, during the period of suspension, "adequate and appropriate" professional indemnity insurance and fidelity insurance for work performed before the suspension takes effect.	The positive obligation to maintain and hold "adequate and appropriate" insurance should exist on registration as a liquidator. The need for such insurance already exists by ILRA sections 20-30(1)(b)(i) and (ii) and 25-1. Further, the obligation to hold such insurance under the IPR should not be enlivened only by reason of a liquidator's suspension.
When profit or advantage is not derived from the external administration (60-20)	Only excludes AA Fund and FEG (60-1)	The IR Committee supports ARITA's concern with the practical implications of section 60-20 as set out below: "*The EM to the ILRA makes it very clear that an EA will need to obtain the approval of the creditors to the use of their firm's employees as when it is reasonably practicable.* *With the requirement to send an initial notification in CVLs and court liquidations and the new ability to seek approval of a proposal without a meeting, it appears that it will be practicable to seek the consent of creditors with that first notice by way of a*

		proposal without a meeting. *Similarly, in a VA, it would be practicable to obtain creditors' consent at the first meeting in the VA – therefore a resolution will need to be put at this meeting.* *If creditors choose to not approve the use of the EA's firm's employees, the EA will have three options:* 1. *Undertake all the work on the appointment themselves - not practical and I am advised by some members that this may be problematic as they are employees of their firm and have no rights to the remuneration in relation to their appointments under their employment contract. The remuneration must be paid to their firm which may breach 60-20?* 2. *Go to court for approval under s60-20(3)(b) – on the vast majority of appointments in Australia, this would not be practical as they are too small to bear the cost. Furthermore, even on appointments that are large enough to bear the cost, how would the administration be effectively conducted during the period between the refusal and the court hearing when the EA is unable to utilise their staff?* 3. *Resign. This is likely to be the outcome taken by the EA.* *If an EA resigns, finding a replacement EA falls to the following parties:* • *Court liquidation – the Court or ASIC (s473A)* • *CVL – court, ASIC or creditors (s499(3)). Practically creditors are going to be unable to do so as there will not be anyone to convene a meeting.* • *VA – by the person who made the original appointment (s449C(1)) – usually this will be the directors which may well result in the same issue repeating.* *Many CVLs in Australia are only taken with the provision of an*

		upfront payment or indemnity to cover the cost of the liquidation. With the removal of the role of the official liquidator it is likely that there will be a shift to this model in court liquidations. There will be challenges in finding someone to take the replacement appointment without the provision of an upfront payment or indemnity. *A remuneration determination will not have been made, but the outgoing EA will be entitled to the statutory minimum of $5,000 for remuneration of him/her and his/her staff up to the time that the creditors refused the use of the firm's staff under 60-5 due to the exception under 60-20(4)(c)(iii).* *We see this as a significant potential problem for some administrations.* *Remuneration is a process that requires approval from either creditors, the COI or the Court. There should be no reason to have to have approval from creditors twice.* *Expenses being paid to related parties are different and we can see the benefits of a process for the approval of those amounts*."
When it is reasonable or not reasonable for an external administrator to comply with a request for information from: • creditors (70-40) • an individual creditor (70-45) • members in a members' voluntary liquidation (70-46) • an individual member in a members' voluntary liquidation (70-47) • COI (80-40)	5 business days to respond to requests or later period as agreed (70-1) EA can extend period to respond by notice in writing (70-1(3)) Creditors Unreasonable requests (70-5) a) Prejudice interests and prejudice outweighs benefits b) Legal privilege c) Breach confidentiality d) Not sufficient available property	The IR Committee supports ARITA's views set out below: *"We are concerned practically about this process if a lot of requests are received.* *Effect of s486 which limits access of the inspection of company books and records in a court liquidation (and s513 in a creditors' voluntary liquidation) – has to be ordered by the court and limited to creditors and contributories – should there be an out for requests that would otherwise not be allowed under law?* *It appears that 70-1(2)(b) – period to respond is such later period as agreed – and 70-1(3) – EA can extend time by providing notice in writing – may be in conflict. The preference would be for 70-1(3) to apply as agreement may be difficult to reach with a creditor that is looking for information quickly. Also need to minimise costs to the administration.* *Vexatious periods are not consistent between requests for information and requests for meetings – should be 20 business days for both.*

	e) Information has already been provided f) Information will be provided under law within 20 business days g) Vexatious (15 bus days) Reasonable if not unreasonable Reasonable if creditors cover cost for providing in d, e and f above Individual creditors (70-10), Members (70-17) and Individual Member in MVL (70-21) are essentially the same, except for the exclusion of the grounds of insufficient funds.	*The ground for an unreasonable request of insufficient funds should be included for individual creditors (70-10) and individual members (70-21).”*
Requirements for reporting to creditors or members, including what reports, circumstances, manner and form, timeframes and who has to bear the cost. May also provide that the requirements under the IPRs can be modified by resolution of creditors or the COI (70-50)	All external administrations, in writing, within 7 business days of appointment, provide information on following (70-24): • Appointment • Rights to request information (collectively and individually) • Right to direct that a meeting be held • Right of creditors to give directions to the liquidator • Right of creditors to appoint a reviewing liquidator	The IR Committee supports ARITA’s comments as follows: *“Remuneration report (70-30 (6)) –* *a) Doesn’t seem to contemplate any method of remuneration other than hourly or commission – so no fixed fee or other basis?* *b) Commission basis is only on monies received – doesn’t contemplate a percentage on any other basis (eg on funds available for distribution).* *c) Parts (b) and(c) should only be required when time based remuneration is intended to be used. If commission or fixed fee is proposed then hours are not relevant.* *d) Very difficult to estimate with any reliability the total cost of an administration (f) – even more difficult with large administrations. Same issue with effect on dividend (g).* *e) better wording to ensure that costs have to be directly linked to major tasks.”*

	• Right of creditors to remove and replace the liquidator Timing: h) VA – with first meeting notice i) CVL – within 11 days j) Crt Liq – 20 bus days For liquidations only, within three months after commencement (70-27): • Likelihood of creditors receiving a dividend • Must be lodged with ASIC Report for remuneration in external administration (70-30): • Same reporting requirements as there currently is under the Act • Additional requirements to provide hourly rates or commission rate, estimate of total fees for the administration and the effect of remuneration on dividends (if any)	

	• Applies to COIs and creditors and members in an MVL • Now extended to Provisional Liquidators when seeking approval of COI or creditors (70-40)	
Requirements for reporting to creditors or members, including what reports, circumstances, manner and form, timeframes and who has to bear the cost. May also provide that the requirements under the IPRs can be modified by resolution of creditors or the COI (70-50)	Refers to provision of information and reports The liquidator must provide a report to the creditors of the company on the likelihood of creditors receiving a dividend before the affairs of the company are fully wound up and such report must be provided within 3 months after the commencement of the winding up (70-27(3))	There ought to be a general provision allowing the EA to provide the relevant information or report by email or other forms of electronic means. The 3-month period seems arbitrary. In some liquidations it will not be possible to determine the likelihood of a dividend within the first 3 months, particularly if litigation of claims is required. We suggest re-wording 70-27(3) to state, "*The report must be provided as soon as practicable after the liquidator has sufficient information to assess the likelihood of creditors receiving a dividend before the affairs of the company are fully wound up.*"
When the Commonwealth requests information, who is to bear the cost of providing it (70-55)	Commonwealth must bear the cost if insufficient funds in the administration to comply (70-45)	The IR Committee supports ARITA's comments as follows: "*question whether the Commonwealth should be entitled to s533 reports which are not ordinarily available for inspection (s1274). We have concerns about allowing access to what is a confidential report between the liquidator and the regulator – it is not a report meant for public consumption. The Department is entitled to ask for information which could include similar information to what is in a s533 report – this is fine, but no creditor should have access to the s533 report*".

Provide the rules around meetings of creditors, including circumstances, notice, agenda, information to be given to creditors, who is to preside, quorum, proxies and attorneys, resolutions, voting, facilities including electronic communication, minutes	Attending by electronic means (75-35) – give info on how to access and advise if person wants to attend by electronic means they must give a written statement which includes a means of contacting them for the purposes of the meeting Person who wants to attend meeting by electronic means is responsible for connecting to meeting. Attendees by electronic means are present (75-75) Manner of voting (75-97) – creditor attending meeting in person or by telephone must	Under this proposal, a corporate creditor would first need to appoint a proxy or attorney, and then have that proxy send a statement of who is attending the meeting electronically, 2 business days prior to the meeting and also send a copy of the proxy. The proxy form should be amended to include a place for the requisite statement details required to comply with rules 75-35 (2) (b) and 75-75 (1) (b). Then only one form need be sent in, not a separate proxy and statement. The rules ought to be amended to require all proxies, the above statement and proofs to be delivered 1 business day prior to the meeting, so as not to discriminate unduly against those using technology and to align the voting and proof process (see further comments below). This timing prevents creditors turning up at the last minute, producing their proxies and proofs and potentially delaying the meeting, or creating a need for an adjournment if the proof is complex. It creates a more orderly meeting. Lodgements made after the above time, can be accepted and dealt with, but at the discretion of the external administrator or the person presiding at the meeting. This rule states: "A *creditor who participates in a meeting in person* ***or by telephone*** *must cast the creditor's vote personally and not otherwise".* *Note: The vote of a creditor who is not participating in a meeting in person or by telephone may be cast by a proxy (see section 75-150) or by the person's attorney (see section 75-165)."* This rule, on one reading of it, would prevent corporate proxy attendees on the telephone from voting at all, as a corporate cannot vote in person, only by a proxy. If a telephone is an electronic facility, rule 75-75(4) could mean that a proxy holder who has given a statement under rule 75-75 (1) (b) is deemed to

	cast their vote personally	be attending in "person" whilst on the telephone. This position needs to be clarified and is probably unintended. Large institutional creditors, like the ATO, often attend creditors meetings by telephone, via a proxy. They should not be denied a vote if they do. **Proofs of debt** **Timing of lodgement and adjournments** As mentioned above, it is submitted that all proofs of debt or particulars of debt (**Proof**) must be lodged by creditors at least 1 business day before a convened meeting. Too often creditors lodge a proof and proxy at the start of the meeting, thus requiring the presiding person to consider them live, or after a short adjournment of the meeting onerous. Other creditors should not have to suffer this interruption or delay if it is avoidable. The 1 day rule above would assist in this process. This issue is in part addressed by proposed rule (75-90(8). That rule allows an external administrator (who is not always the presiding person) who needs time to determine any question about whether a person can vote, to ask the meeting to resolve to adjourn the meeting for such time as they determine (not being more than 10 business days) to enable that administrator to determine the question. Query why creditors are better placed to determine the time needed to consider the proof. No resolution should be required for the adjournment. This specific adjournment rule seems unnecessary, even though it only allows a 10 day adjournment. Rule 75-135 allows an external administrator to adjourn any meeting otherwise, as they see fit, for up to 15 business days. It is submitted that this one rule 75-135

		ought to be sufficient for dealing with proof voting issues as well. The external administrator will be best placed to decide how long is required to determine a proof issue.
	Admission and rejection of proofs for voting purposes (75-94) Entitlement to vote (75-90)	**Reviewing proofs for voting purposes** We appreciate that the comments set out below deal with an important area of the rules and suggest some substantial changes. These changes may need consultation with other parties before their adoption given their importance. This part of the rules has always been difficult to apply. Giles JA commented in Kirwan v Cresvale Far East Pty Ltd [2002] NSWCA 395 at [244] that: "*The interaction between regulations 5.6.23 and 5.6.26(2)* ***is not clear*** *and has exercised judicial minds*" [now repeated in proposed rules 75 -90 and 75-94]. The complexity of these rules is manifestly obvious from a reading of the detailed analysis of them by Barrett J. in *Selim* v *McGrath* [2003] NSWSC 927 at [78] to [106].
	Entitlement to vote (75-90) – adjourn meeting to determine a right to vote	The proposed rules do not seek to clarify matters. They ought to in light of their obvious confusion. That will aid all stakeholders. A person determining a proof of debt is required to act: "*in a quasi judicial capacity and in the exercise of an adjudicatory function*". Per Barrett J. above.
	Entitlement to vote (75-90) Admission and rejection of proofs for voting purposes (75-94)	The confusion created by the just estimate and doubtful proof concepts in 75-90(4) and 75-94 and who can make them, should be deleted from the rules. Instead, the administrator or presiding person should just have the power to decide whether to admit or reject a Proof, in whole or part and in what sum. It is submitted that the external administrator or presiding person should judge claims "on the balance of probabilities" (**Balance**

		Test) at a prima facie level. It can then be rejected, admitted in whole or part, or more particulars or details can be called A disgruntled creditor can appeal that decision. Given the value of votes in Deed of Company Arrangement decisions, a doubtful claim should not be allowed to vote. It needs to pass the Balance Test threshold. The proposed and current rules can reward a weak claim, which does not pass the Balance Test and be allowed to vote. The suggested new rule 75-94 (2) in lieu of proposed rules 75-90(4) and 75-94 should read: "*In determining whether to admit or reject a claim or debt, in whole or part, for the purpose of voting, the presiding person or the external administrator must consider the liability and quantum of the claim and decide whether the claim is proven at a prima facie level, on the balance of probabilities."*
	Voting on resolutions (75-100) When a resolution is passed at a meeting of creditors (75-105)	**Polls and on the voices** Rule 75-105 has a misleading heading and wording. It might be suggesting that a poll is always required to pass a resolution. It would be clearer if that rule 75-105 was headed: "*When a resolution is passed by a poll at a meeting of creditors".*
Provide the rules around proposals without meetings (75-40)	When a resolution is passed without a meeting of creditors or contributories (75-120)	The IR Committee supports ARITA's comments in this area as follows: "*75-120(4) – Creditors need to prove their debt, but there must be an obligation for the EA to rule on the proof and admit it for voting purposes before counting the votes.* *75-120(4) – this subsection refers to subsections (2) and (3) but only (2) is correct as (3) is in relation to contributories.* *Must be a minimum period for the response period for proposals without*

		a meeting – at least 15 business days".
Provide the rules around meetings of creditors, including circumstances, notice, agenda, information to be given to creditors, who is to preside, quorum, proxies and attorneys, resolutions, voting, facilities including electronic communication, minutes and costs and security for costs (75-50)	Resolutions (75-105, 75-110, 75-120 and 75-190) Person to whom notice of meeting to be given (75-10) Notice of meeting (75-15) date, time place, purpose, entitlement to vote as creditors under 75-50, and be in the approved form Notice of meeting to be given not less than 10 business days, (75-15) – doesn't apply to meetings in a VA, COI, eligible employees Proxy form to be provided and can be lodged electronically (75-25). Must be in the approved form. Time and place of meeting must be convenient to majority of persons entitled to receive notice of meeting (75-30) – meetings can be held in multiple locations. Attending by electronic means (75-35) – give info on how to access and advise if person wants to attend by electronic means they must give a written statement which includes a means of contacting them for the purposes of the meeting. Lodgement of notice of meeting	IPR 75 – 15 - Can the notice be given by email or other forms of electronic means? The IR Committee also supports ARITA's comments in this area as follows: "*Regulation 5.6.33 has not been bought across – needs to be as it allows the use of special proxies as directed* *References to the term immediately should specify a time period* *IPR 75-20 - "give notice of meeting" – does this mean post or does this mean that creditors have to receive it? How does this fit with the extended postal delivery times?* *75-95 - Adjournment of meeting – Impossible to give notice for short adjournments – less than one week, due to postal restrictions – no guarantee that a creditor has provided an email contact* *75-95(8) – I think the reference is wrong – at the moment it is saying that a VA meeting will never lapse which cannot be right. I think it should be that 75-95(4) does not apply to a meeting under 436E (1st meeting in a VA). The first meeting in a VA should lapse if a quorum does not attend.* *75-100 – Chair should have the right to call a poll – this is the current law (reg 5.6.19)* *75-135(1)(b) – what if it is a nominee of the EA is chairing the meeting, not the EA – chair should have the right to adjourn, not just the EA* *75-135(5) - Adjournment of meeting – what if the adjournment is for only a short period and there is insufficient time to mail a notice? It is impossible to give notice for short adjournments – less than one week, due to postal restrictions – not all creditors will have email contact details.* 75-140 – what if the EA dies before the minutes have been prepared?

	with ASIC & publication on ASIC website (75-40) (a) VA 5 business days (b) Other 10 business days Rules around motions – can only be made by persons entitled to vote or EA; does not need to be seconded, must allow time for debate; then put motion, or amended motion, to a vote (75-70) Person who wants to attend meeting by electronic means is responsible for connecting to meeting. Attendees by electronic means are present (75-75) Entitlement to vote (75-90) – meeting can resolve to adjourn meeting to determine a right to vote Voting of secured creditors (75-93) –consistent with current legislation Admission and rejection of proofs for voting purposes (75-94) Quorum (75-95) Manner of voting (75-97) – creditor attending meeting in person or by telephone must cast their vote personally Voting on resolutions (75-100) When a resolution is passed at a meeting of creditors (75-105) – casting vote can't be used for	*75-140(3) only contemplates death before signed of the minutes".* *75-140 – attendance record should be lodged as part of the minutes* *75-150 - Shouldn't the proxy rules be together? 75-25 includes requirements about the notice of proxy"*

	resolutions about remuneration and can only be cast in favour of the removal of the EA. When a resolution is passed at a meeting of contributories (75-110) Resolution about remuneration must deal only with remuneration (75-115) When a resolution is passed without a meeting (75-120) Adjournment of meeting (75-123) – requirement to now give notification of adjournment and advertise if adjourned more than 6 bus days (5 bus days notice) Minutes of meeting (75-140) Appointment of proxies (75-150) Person may attend and vote by attorney (75-165)	
The Insolvency Practice Rules may provide for and in relation to meetings concerning companies under external administration. (75-50)	The IPR (Bankruptcy) provides for creditors with assigned debts to have their debts (for the purposes of voting only) equal the consideration paid for the assignment of the debt (s75-100(4)). The IPR (Corporations) do not provide this in s75-100.	We recommend harmonising these rules by including 75-100(4) from the IPR (bankruptcy) into s75-100 of the IPR (corporations) In short, the recommended approach is to allow creditors to vote only to the extent that they have paid for a debt - this avoids creditors buying distressed debt and artificially controlling voting at meetings. This would not apply for dividend purposes (they would receive dividends based on the debt itself as the entitlement to same has been acquired).

Rules for specific meetings (fits under s75-50)	Companies under administration (75-225) Court ordered and CVL – how [initial] meeting convened (75-230) – there is no precedent for this requirement as meetings are meant to no longer be mandatory. Costs of convening meetings (75-255) – costs to be met by person who requests a meeting Meetings to remove EA – right to speak, written consent required by incoming EA, DIRRI requirements for incoming EA (75-260)	The IR Committee supports ARITA's comments in this area as follows: *Where a meeting has been convened on the request of a creditor for the purpose of proposing a replacement EA (ILRA 75-15, 90-35), all documents required to be tabled at the meeting under IPR 75-260 should be required to be provided to the current EA to be circulated to creditors with the convening of the meeting. This would allow all creditors, not just those attending the meeting to make a fully informed decision (can affect how specific proxies are cast).*
Provide the rules in relation to procedures for COI, including eligibility to be appointed, convening and conduct of meeting, resignation and removal of members and vacancies (80-30)	80-5 – who is eligible to be on COI 80-10 – how resignations, removals and vacancies and dealt with	The IR Committee supports ARITA's comments in this area as follows: *80-5 - Should the Commonwealth be entitled to a separate role on the committee if they are not a creditor? Also role of a committee member is to represent all the creditors which the Commonwealth will not be doing. Also employees are already entitled to separately appoint a representative. EAs include VAs where FEG Scheme is not applicable*.
IPS Division 90 provides for reviewing liquidators	The IPR (Corporations) Division 90 has an irregular numbering that does not correspond with the IPS	Renumber the IPR Div 90 so that it either corresponds with the IPS Div 90 or runs in a standard numerical order (90-1, 90-5, 90-10 etc).
IPS 90-26 provides for a review by a reviewing liquidator	IPR (Corporations) 90-22 provides powers and duties of the reviewing liquidator	IPR (Corporations) 90-22(1)(b),(c) provide for the power to interview any of the parties and the power to director any of the parties. In our view a reviewing liquidator (as a liquidator of the company) may require officers to attend on them, attend meetings of the creditors and given certain information (s530A). Liquidators

		also have the power to seek a compulsory court examination of any person who has knowledge of the 'examinable affairs' of the company under s596B. As currently worded it is unclear whether s90-22 allows for a party to be compelled to be interviewed (including answering any questions, including answers that may be subject to privilege). The power to compel persons other than officers of the company to be interviewed and give information and documents is a power that should remain with the court and not be given to a reviewing liquidator.
Set rules around the reviewing liquidator, including giving notice, who may be appointed, DIRRI requirements, powers or duties of the reviewing liquidator, form and content of reports and preparation and provision of reports (90-29)	If the reviewing liquidator is appointed by ASIC then the report can't be provided to COI without ASIC approval (90-24)	There is no mention of creditors generally. (By omission, it would seem that the report can be provided to creditors without ASIC's approval but would need ASIC's approval for provision to the COI.) The IRC doesn't see the need or policy argument behind limiting provision of the report based on whether it is ASIC who appoints the reviewing liquidator. We suggest removing 90-24(3).

Law Council of Australia – Business Law Section Insolvency and Reconstruction Law Committee comments on Exposure Draft Insolvency Practice Rules (Personal Insolvency)

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
Definitions (5-15) (and linking to 50-40, duty to disclose interests)	A "material personal interest" that is required to be disclosed by a Part 2 committee member.	The relevant phrase refers to such an interest arising if the matter relates to a "related entity of the member". There appears to be no further elucidation of what is meant by the phrase.
Register of trustees – information to be recorded and parts to be publicly available (15-1)[1]	**15-1(2) sets out the information to be recorded** **AFSA has ability to include any other information that is relevant** **Info at 15-1(2) must be public** **AFSA extra info may be public**	**"action taken" as opposed to adversely determined (what happens to investigation underway and current position of AFSA not disclosing current matters)** **We disagree that there should be disclosure of matters in process, but if they are they have to be clearly marked as such** **Matters in process must be removed if the action is unsuccessful**

[1] Entries in bold are extracts from ARITA's submissions with which the Law Council agree. Any additional comments as to those submissions are in italics.

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
Registering trustees (20-1)	The applicant is required to have achieved at least 3 years full time study in law **and** accounting. The required qualifications of a trustee.	Is "and" meant to be or? Subject to the Applicant having completed a dual degree with an accounting major, a standard bachelor of business will not have necessary 3 years of Law study. We understand that the trend of most Australian Universities is to no longer to offer a Bachelor of Accounting but to offer Bachelor of Business with various majors. Some of those majors have very limited accounting subjects. If the intention is to have accounting skills then the requirement should be tightened up. CAANZ and CPA Australia have very specific education requirements before applicants can qualify for admission to their post graduate qualification program. The wording below is taken from CAANZ's website: "Completed an accredited Australian Bachelor or Master degree with passes in subjects covering the Required Competence Areas as listed on the Accredited Tertiary Course Lists by Chartered Accountants ANZ" Again if the intention is to ensure minimum accounting skills then it is suggested that a similar requirement be included. The Corporate Rules make specific reference to the ARITA post graduate course. It is submitted that a similar benchmark be set in this area. This does not however address the lack of specific training in commercial law for Applicants with an Accounting background. It is submitted that a background and understanding of the following subjects should be encouraged or incorporated into qualification requirements: • (possibly) Civil Procedure; • Company Law; • Contract Law; • Evidence. A knowledge and understanding of the above could be demonstrated via either direct course of study or including recognition of prior learning element in the applicant material. The applicant is required to engage in "at least 4000 hours of relevant employment at senior level". The phrase "relevant employment is defined. Arguably the reference to "senior level" is unnecessary. In any event, that phrase is not defined.

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
Standards applicable to the exercise of powers of registered trustees (40-40)	**Division 42 – same standards for trustees that are currently in the regulations**	**42-10 sometimes trustees will want to include a disclaimer regarding information that has been prepared based on the bankrupt's information where the trustee is unable to verify its correctness. This should not be prevented.** **42-45 – says "must" obtain independent advice – what if the asset is something that has a readily ascertainable market value (eg. Shares) – should use "should"** *[IR Committee comment – we do not consider that "should" necessarily fixes the problem. It is suggested that it is made explicit and words be added to the end: "except to the extent those matters are readily and objectively ascertainable". We appreciate this would also mean that the trustee doesn't need to obtain advice if the extent of the trustee's interest was also readily and objectively ascertainable – but we still maintain the suggestion].* **42-85 – the reference should be to 75-50 rather than 75-25, but this item is currently in conflict with 75-50. Our view is that 75-50 is wrong and should provide for the trustee to be able to appoint a nominee to attend in their stead – this is in line with corporate.** *[IR Committee comment – we agree that there should be an ability to appoint a nominee. And note that this will have flow on effects – eg. references to "trustee" in relation to meetings should be changed to "the person presiding at the meeting". This reference is in line with the Corporate Rules].*

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
Standards for registered trustees (Division 42)	Certain standards of conduct are prescribed for registered trustees. A trustee must preserve confidential information. A trustee must notify creditors, the appointor, a committee or the Court "as appropriate" of any conflict of interest and "take appropriate steps to avoid the conflict"	Are these rules intended to augment section 179 of the Bankruptcy Act http://www.austlii.edu.au/au/legis/cth/consol_act/ba1966142/s179.html or somehow alter or inform the relevant common law in relation to applications to remove a trustee? The term "confidential information" is not defined. Why is such a stipulation required? Would the bank account details of the bankrupt be confidential? Are these alternatives or not? How does one decide who to inform. How does one "take steps to avoid the conflict" and who is the arbiter in respect of that decision? Is it the entity with whom the conflict is raised?
Investigations by trustees (42-30)	A registered trustee "must consider the views of creditors" regarding the extent of investigations.	Should "related party creditors" be defined? Why should a trustee have to consider their views if, for example, those creditors themselves might be compromised? Should there be a "carve-out" in respect of the views of those creditors who might be a target for recovery proceedings?
Realisation of assets (42-35)	Assets should only be realised where there is, amongst other things, a cost-effective return. Costs incurred must be reasonable and necessary (42-55)	Assets, though not defined, are likely to include the potential recoveries to an estate by way of successful proceedings pursuant to section 120-122 of the Bankruptcy Act. Will a trustee fall foul of the Division 42 (standards) by pursuing litigation (on advice) if the proceedings are unsuccessful? Presumably there might be an overlaid reasonableness test?
Creditor's rights to be considered (42-145)	The rights of creditors should be considered in determining whether to use funds to fund further investigations.	Should "related party creditors" be defined? Why should a trustee have to consider their views if, for example, those creditors themselves might be compromised? Should there be a "carve-out" in respect of the views of those creditors who might be a target for recovery proceedings?

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
Part 2 committees (investigations into conduct) – interviews concerning proposed cancellation of registration (50-67)	The committee must interview the trustee as soon as possible.	Should the power be extended to a requirement to produce documents (timesheets, legal advice etc)? If so, and in respect of legal advice, what mechanisms might be required to protect privilege (after all, the trustee may, in defence of an investigation to cancel their registration, wish to refer to legal advice as a way of framing their conduct as reasonable).
Circumstances in which Inspector-General may determine remuneration (60-5)	The conjunction "and" is sued for (a), (b) and (c).	It is suggested that the term "or" should be used between (b) and (c) as (c) deals with a failure of a committee of creditors to determine remuneration. In some administrations there may not be a committee of creditors. Even if there is, the use of "and" suggests that remuneration must be put to all creditors and the committee before the Inspector General can consider.
List of prescribed matters for the I-G to have regard to when making a remuneration determination (60-11)	Circumstances where the IG may determine remuneration (60-5) Form of trustees application to the IG (60-10) Matters to which the IG must have regard when making a remuneration determination – similar to the court list of matters for corporate. (60-15)	**The wording in EM item 49 and 60-5(b)(i) does not line up. The EM refers to "the proposal was not agreed to", whereas the IPR says "no resolution has been passed". If creditors pass a resolution forcing the trustee to accept a much reduced amount for remuneration, the trustee would have the scope to go to the IG for a determination of remuneration under the EM but not under the wording in the IPR. We think the wording from the EM should be used. We note that there is different wording again in 60-5(c)(i) for the COI and it would appear to let the trustee go to the IG.**
When profit or advantage is not derived from the administration of an estate (60-20)	Only excludes FEG (60-25)	**Similar issues as for corporate in 60-1**

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
When it is reasonable or not reasonable for a trustee to comply with a request for information from: a) creditors (70-40) b) an individual creditor (70-45) c) regulated debtor (70-56) Committee of Inspection (COI) (80-40)	• 5 business days to respond to requests (70-1) – 5 business days for COI (80-20) Creditors • Unreasonable requests (70-5) a) Prejudice interests and prejudice outweighs benefits b) Legal privilege c) Breach confidentiality d) Not sufficient available property e) Information has already been provided f) Information will be provided under law within 20 business days g) Vexatious (10 bus days) • Reasonable if not unreasonable • Reasonable if creditors cover cost for providing in d, e and f above Right of regulated debtor to request information (70-15)	**We are concerned practically about this process if a lot of requests are received** **It appears that 70-1(2)(b) – period to respond is such later period as agreed – and 70-1(3) – trustee can extend time by providing notice in writing – may be in conflict. The preference would be for 70-1(3) to apply as agreement may be difficult to reach with a creditor that is looking for information quickly. Also need to minimise costs to the administration**

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
Requirements for reporting to creditors or the regulated debtor, including what reports, circumstances, manner and form, timeframes and who has to bear the cost. May also provide that the requirements under the IPRs can be modified by resolution of creditors or the COI (70-50)	• Initial information and DIRRI required to be given to creditors (70-20) • Requirements for the initial remuneration notice – largely the same as the Code's initial advice to creditors on remuneration (70-25) • Remuneration reporting requirements are set out at 70-30 – largely mirrors requirements for reporting for remuneration approval for corporate administrations • Requirements for the Remuneration claim notice – sent to creditors and the regulated debtors that makes a request to do so within 28 days of receiving their remuneration report (under 70-30) (70-35) DIRRI must be kept up to date (70-40)	**The requirement to provide initial information to creditors is very complicated. S19(1)(a) sets the requirement to report, the timeframe for reporting is in regulation 4.14, the information to be provided is set out in IPRs 42-125 and 70-20 (which seem to have an element of duplication). This should be much easier for trustees to be able to comply with. IPR 42-125 and 70-20 should be combined into 70-20. Regulation 4.14 should be repealed and the timing put into 70-20. This is how it is done in the corporate IPRs.** **Why the inconsistency between personal and corporate in respect of remuneration reporting (still requiring an IRN and RCN in personal insolvency). Opportunity should have been taken to bring the requirements into complete alignment – add IRNs to corporate and remove RCNs entirely. RCNs give scope to request a review by the IG but this could be linked to something else other than the RCN.** **70-25(5) requires certain information to be provided - trustees of PIAs who were not the controlling trustee are in (a), then in any other case (b) but this doesn't apply to PIAs where the trustee of the PIA was the controlling trustee. There is no guidance for PIAs where the trustee of the PIA was the controlling trustee but the section applies to them as a trustee of a regulated debtor's estate.** **IRN should not have to provide an estimate of the remuneration –this is too difficult to assess at the commencement of the administration.** **Remuneration report –** **a) Doesn't contemplate any method of remuneration other than hourly or commission – so no fixed fee?** **b) Commission basis is only on monies received – doesn't contemplate a percentage on any other basis;** d) **Very difficult to estimate with any reliability the total cost of an administration (f) – even more difficult with large administrations. Same issue with effect on dividend (g).** a.

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
When a trustee cannot appoint a representative to attend a meeting on their behalf (75-25)	**No specifically mentioned meeting** **Only the trustee can chair the meeting (75-50).**	**75-25 - A nominee of the trustee should be able to chair the meeting – we agree with removing the rights of creditors to appoint one of their own as chair, but the trustee should maintain the right to appoint a nominee as is the current law (s63B which has been repealed)** **Note that regulation 4.15 has been repealed – this regulation currently provides for the nominee of the trustee to be able to exercise proxies granted to the trustee – this should be reinstated or a IPR written in conjunction with the trustee being able to nominate a representative to chair the meeting** **Also note that all meeting requirements in relation to the chair specify the trustee and these will need to be changed.** *[IR Committee comment – this would be changed to "the person presiding at the meeting" – in line with the Corporate Rules..*
When a trustee cannot appoint a representative to attend a meeting on their behalf (75-25)	When a resolution is passed without a meeting of creditors or contributories (75-110) When a special resolution is passed without a meeting (75-120)	**75-120 - Changes have been made to the corporate IPRs to provide for "responding creditors" to prove their debt when a proposal without a meeting is used. This has not been taken up in the bankruptcy IPRs and it should. We have also recommended that the proof or claim should be admitted for voting purposes before counting of the votes.** **This should be the same for special resolutions passed by a proposal without a meeting**

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
Provide the rules around meetings of creditors, including circumstances, notice, agenda, information to be given to creditors, who is to preside, quorum, proxies and attorneys, resolutions, voting, facilities including electronic communication, minutes and costs and security for costs (75-50)	Resolutions (75-105, 75-110, 75-115 and 75-120) Person to whom notice of meeting to be given (75-10) Notice of meeting (75-15) a) date, time place, purpose, entitlement to vote as creditors under 75-50, and be in the approved form b) IG can approve different forms for different meetings c) Can be emailed Notice of meeting to be given not less than 10 business days, (75-20) Proxy form to be provided and can be lodged electronically (75-25) Time and place of meeting must be convenient to majority of persons entitled to receive notice of meeting (75-30) – meetings can be held in multiple locations • Attending by electronic means (75-35) – give info on how to access and advise if person wants to attend by electronic means they must give a written statement which includes a means of contacting them for the purposes of the meeting • Lodgement of notice of meeting with AFSA & IG to publish on website for PIA's and s73 compositions only (75-40) • Agenda must deal with a list of prescribed items (75-55)	**IPR 75-20 - "give notice of meeting" – does this mean post or does this mean that creditors have to receive it? How does this fit with the extended postal delivery times?** *[IR Committee comment - 75-15 - there should be provision to allow notice to be given by electronic means?]* **75-35(2)(b)(iii) and 75-75 – under 75-35 the person wanting to attend a meeting using electronic means must provide contact details but under 75-75 they are responsible to access the meeting themselves. Are the contact details just in case the RT needs to contact them?** *[IR Committee comment – the submission in relation to the Corporate Rules is here adopted].* **Under this proposal, a corporate creditor would first need to appoint a proxy or attorney, and then have that proxy send a statement of who is attending the meeting electronically, 2 business days prior to the meeting and also send a copy of the proxy.** **The proxy form should be amended to include a place for the requisite statement details required to comply with rules 75-35 (2) (b) and 75-75 (1) (b). Then only one form need be sent in, not a separate proxy and statement.** **The rules ought to be amended to require all proxies, the above statement and proofs to be delivered 1 business day prior to the meeting, so as not to discriminate unduly against those using technology and to align the voting and proof process (see further comments below). This timing prevents creditors turning up at the last minute, producing their proxies and proofs and potentially delaying the meeting, or creating a need for an adjournment if the proof is complex. It creates a more orderly meeting** **75-90 – trustee should have right to adjourn meeting to determine right to vote as trustee has power to adjourn a meeting under 75-135.** *[IR Committee comment – we disagree on this point – in our submission on Corporate Rules, we say that the right to adjourn a meeting to determine the right to vote is unnecessary because the EA has the power to adjourn the meeting for any reason. So we would hold the same view here.]* 75-90 – There is no guidance on notice requirements if the meeting is adjourned.

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
	Tabling on SOA (75-60) How the meeting is to be conducted (75-65) Rules around motions – can only be made by persons entitled to vote or RT; does not need to be seconded, must allow time for debate; then put motion, or amended motion, to a vote (75-70) The convenor must call into the meeting any person who has given a statement that they want to attend by phone. Attendees by phone are present (75-75) Statement by a creditor as to amount of debt – creditors must be advised to provide a written statement before the meeting (75-80) Debtor's SOA to be tabled (75-85) Entitlement to vote (75-90) Quorum (75-95) Voting on resolutions (75-100) When a resolution is passed at a meeting of creditors (75-105) When a special resolution is passed at a meeting (75-125) When a special resolution is passed without a meeting (75-130) Adjournment of meeting (75-135) – requirement to now give notification of adjournment and advertise if adjourned more than 8 days (7 days' notice) Minutes of meeting & attendance record in the approved form (75-140)	**75-95 – why are the quorum requirements different between personal and corporate? If creditors have provided a proxy to the trustee, they are in attendance and there should not have to be a creditor actually present (physically or by electronic means). Should be same as corporate.** **75-95 - Adjournment of meeting – Impossible to give notice for short adjournments – less than one week, due to postal restrictions – no guarantee that a creditor has provided an email contact** **75-100 – 75-100(4) from the Corporate IPRs should be included. This provision provides that a declaration about the outcome of a resolution on the voices is conclusive evidence unless a poll is called.** **75-100 – Chair must have the right to call a poll.** [*IR Committee comment re 75-105 – we make the same commentary as we make for the equivalent Corporate rule.]* **75-125 and 75-130 – Why have the requirements for a special resolution changed from those existing in the Bankruptcy Act at the moment? Should remain at majority in number and 75% in value (s 5 definition). Increasing the thresholds as proposed under the IPRs will make it very difficult to pass such resolutions. We disagree with this change.** **75-135(4) – notice of adjournment is still required to be given immediately – should be by next business day (as per 75-95) but notice should only be required if adjournment is over a certain number of days, otherwise due to postal restrictions the notice is not likely to be received**

ILRA Reference	IPR Content	BLS Insolvency and Reconstruction Law Committee Submissions
	Appointment of proxies (75-150) Person may attend and vote by attorney (75-160).	**75-150 – there is no longer a restriction on the regulated debtor being appointed a proxy which is a requirement of the current law (s64ZC(6)).** **75-260 – should have a requirement to disclose relationship with nominating creditor(s)** **75-260(4)(a)(ii) and (iii) – should they specify incoming trustee like 75-260(4)(a)(i) does – otherwise incoming trustee is required to disclose relationships of the current trustee.** **75-260 – the incoming trustee should be required to provide information on the proposed basis that fees will be charged and if time based, the applicable hourly rates (essentially an IRN).** **Where a meeting has been convened on the request of a creditor for the purpose of proposing n replacement trustee (ILRA 75-15, 90-35), all documents required to be tabled at the meeting under IPR 75-260 should be required to be provided to the current trustee to be circulated to creditors with the convening of the meeting. This would allow all creditors, not just those attending the meeting to make a fully informed decision (can affect how specific proxies are cast).**
Provide the rules in relation to procedures for Committees of Inspection (COI), including eligibility to be appointed, convening and conduct of meeting, resignation and removal of members and vacancies (80-30)	80-10 how COI deals with resignations, removal and vacancy 80-10 – how resignations, removals and vacancies in the COI are dealt with	**Why is there no eligibility criteria like in Corporate at IPR80-5 and is currently required under the bankruptcy act at 70(3)** **Why are the replacement provisions different between corporate and personal IPRs – refer to bankruptcy IPR 80-10(6) where the committee must request the trustee to convene a meeting, versus corporate IPR 80-10(6) where the meeting that removes a member of the COI appoint a new member and (7) the COI can appoint a new member.**