



Australian Government

Australian Government response to the
Senate Economics References Committee Report:

Insolvency in the Australian Construction Industry

May 2017

Economics References Committee
Insolvency in the Construction Industry

Government Response

Recommendation 1

- The committee recommends that ASIC conduct a review of administrators' and liquidators' reporting requirements and the range and extent of information it requires to be reported and, where necessary, make changes that will ensure the regulator is able to fully inform itself, the Parliament and the public with complete, relevant and up-to-date data on insolvencies.
- The Australian Government notes this recommendation.
 - Since 2010-2011 the Australian Securities and Investments Commission (ASIC) has improved its publication of insolvency statistics through its annual overview of corporate insolvencies, which is based on statutory reports lodged by external administrators for each financial year.
 - ASIC has been actively pursuing improvements to the public reporting of insolvency statistics, including through:
 - the amendment of Form EX01 in December 2014, through which external administrators report to ASIC on potential insolvent trading; and
 - the promotion of the electronic lodgement of relevant information through providing functionality for external administrators to lodge receipts and payments information in 'structured data'.
 - The Government's *Insolvency Law Reform Act 2016* received Royal Assent on 26 February 2016. The Act requires liquidators to lodge annual administration returns for each administration. ASIC will consult further with industry participants on what information will be required to be provided as part of the annual administration return. The electronic lodgement of these returns as 'structured data' will facilitate the improved public reporting of insolvency statistics.

Recommendation 2

- The committee recommends that the government provide an additional budget appropriation to ASIC in the 2016–17 budget and over the forward estimates, if required, which is sufficient to ensure that ASIC has the capacity to conduct analysis and provide a wide range of relevant, up-to-date insolvency data.
- The Australian Government notes this recommendation.

- The Government will consider whether additional funding for ASIC is necessary following the bedding down of the insolvency law reforms.
- In the 2016-17 Budget, the Government allocated additional funding of \$121.3 million over four years to ASIC to combat misconduct in Australia's financial services industry and bolster consumer confidence in the sector. The funding for ASIC includes \$61.1 million to enhance ASIC's data analytics and surveillance capabilities as well as modernise ASIC's data management systems.

Recommendation 3

- The committee recommends that ASIC require all external administrators' reports to be lodged electronically in the Schedule B format.
- The Australian Government notes this recommendation.
 - ASIC encourages external administrators to lodge forms electronically through the Registered Liquidators portal, available on the ASIC website. Continued improvements to the ease of electronic lodgement have seen a substantial increase in the number of electronic lodgements to 99.8% of all reports in 2014–15. This can be compared with 36.8% of all lodgements in 2002–03 being electronic.

Recommendation 4

- The committee recommends that ASIC make better use of external administrators' reports and other intelligence in order to improve the standard of publicly available information, provide early warning to industry participants about repeat and concerning insolvent practices and lead to a more effective market.
- The Australian Government notes this recommendation.
 - ASIC has advised that it continuously reviews the information it receives and actively seeks opportunities to enhance the availability of information to the public.
 - However, ASIC further advises that referral reports contain confidential information used to determine matters in which further investigations should occur. Any public disclosure prior to investigation by ASIC on the merits of the allegations could lead to inequitable consequences for the entity and/or prejudice an ongoing investigation.

Recommendation 5

- The committee recommends that the ATO and ASIC increase their formal cooperation with superannuation funds to coordinate measures around early detection of non-payment of superannuation guarantee.

- The Australian Tax Office (ATO) and ASIC will continue to work closely with superannuation funds to improve identification of non-payment of superannuation guarantee.
- The Superannuation Guarantee Cross Agency Working Group, chaired by the ATO and also comprising Treasury, the Department of Employment, the Australian Prudential Regulation Authority (APRA) and ASIC, has recently provided a report to Government outlining options to improve compliance with superannuation guarantee.
- An outcome of that report is that the ATO, ASIC APRA and the Fair Work Ombudsman (FWO) will meet on a regular basis to exchange information:
 - about the operation and viability of participants in the superannuation guarantee system;
 - relevant to identifying and addressing superannuation guarantee non-compliance; and
 - to better target activities by government agencies to address superannuation guarantee non-compliance by employers.
- The ATO continues to work with the superannuation industry on an ongoing basis.

Recommendation 6

- The committee recommends that privacy provisions which may inhibit information flows between the ATO and APRA regulated superannuation funds be reviewed and that the ATO seek advice from the Office of the Australian Information Commissioner as to the extent to which protection of public revenue exemptions in the Australian Privacy Principles might facilitate improved information sharing.

- The ATO continues to work with the superannuation industry on an ongoing basis.
- The ATO receives information on possible superannuation guarantee non-compliance from superannuation funds.
- The Government's SuperStream and Single Touch Payroll initiatives [will improve](#) information flows in relation to superannuation.

Recommendation 7

- The committee recommends that the ATO continue to actively monitor the tax liabilities of businesses in the construction industry in order to ensure that debts owed to the Commonwealth are paid.

- The ATO will continue to actively monitor the obligations of businesses in the construction industry.

- The ATO has a number of strategies in place for the construction industry and is working on bringing together a holistic view and approach to ensuring better engagement and correct registration, lodgement, reporting and payment of tax and superannuation obligations by industry participants.

Recommendation 8

- The committee recommends that if necessary, the government make an additional budget appropriation to the ATO in the 2016–2017 budget for the purpose of enabling the ATO to recover the outstanding tax liabilities of construction industry businesses.
- Any amendment to the allocation of funding to the ATO would be considered in the context of the Government’s ordinary Budget processes.
 - There are already several recent initiatives aimed to prevent tax liabilities or improve the collection of outstanding tax liabilities, including
 - Data and analytics (MYEFO 2015-16): this enables the ATO to use data more effectively, including data they receive as part of the reportable taxable payments measure.
 - : The Government will provide \$61.9 million over four years (including capital of \$12.2 million) to the ATO to upgrade its data analytics capability.
 - : This measure will enable the ATO to improve taxpayer compliance and reduce compliance burdens by pre-populating additional information in their returns.
 - : Improved data analysis capability will help the ATO in better detecting and deterring non-compliance. Compliance activities enabled by improved analytics are estimated to raise additional revenue of \$222 million over the forward estimates period.

Recommendation 9

- The committee recommends that construction industry participants, particularly those representing the interests of subcontractors, develop partnerships with mental health support organisations to provide ready access to support, counselling and treatment for people in the industry who may suffer from the adverse mental health effects of the financial distress caused by contractual disputes and insolvency in the construction industry.
- The Government encourages all private industries, including those related to building and construction, to develop partnerships with mental health support organisations to provide ready access to support, counselling and treatment for individuals within that industry.
 - Individuals that are experiencing distress or have been diagnosed with a mental illness are able to access a range of Australian Government funded mental health and suicide

services and supports. Information regarding these services and supports is available on the mindhealthconnect website or through accessing the Department of Health's website (www.health.gov.au).

- The Australian Government also provides funding for the following support services, which are targeted at mental health and suicide prevention in the building and construction industries:
 - The MATES in Construction (MIC) programme targets the male dominated building and construction industries using a community development model to create self-sustaining suicide prevention structures on site, and to de-stigmatise mental health and wellbeing issues, while encouraging workers in the industry to seek help for a range of issues. The MIC model focuses on making better and more useful connections between workers in the industry and external professionals; and
 - The OzHelp Foundation seeks to build the capacity of workers in the building, construction and mining industries to recognise warning signs of mental health issues and suicide, and to facilitate access to support services and improve referral pathways for mental health and suicide prevention services.

Recommendation 10

- The committee recommends that the government fund an independent analysis of the effects of the high rate of insolvency and related issues on productivity and innovation in the construction industry.

- The Australian Government notes this recommendation.
- The Government recognises the importance of funding research and innovation as a driver to increase productivity and to achieve long term economic growth for the Australian community.
- The Government has, through an Australian Research Council Discovery Grant, funded research by the University of Melbourne's Centre for Corporate Law & Securities Regulation into fraudulent phoenix activity. The Centre has now issued three reports: *Defining and Profiling Phoenix Activity (2014)*; *Quantifying Phoenix Activity: Incidence, Cost, Enforcement (2015)*; and *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement (2017)*.

Recommendation 11

- The committee recommends that ASIC, in consultation with ARITA, work out a method whereby external administrators can indicate clearly in their statutory reports whether they suspect phoenix activity has occurred. For example, to serve as a red flag to ASIC, include a box in the reporting form that external administrators would tick if they suspected phoenix activity.

- ASIC has recently implemented changes to Form EX01 to improve ASIC's ability to identify those liquidator reports of misconduct that allege insolvent trading, and which may warrant further action. These changes seek information on the key indicators of phoenixing and were made in consultation with the Australian Restructuring Insolvency and Turnaround Association (ARITA).
- Where insolvent trading is alleged, external administrators are now asked to select one or more prescribed responses about:
 - the period over which the company traded while insolvent;
 - the extent of alleged insolvent trading;
 - the grounds upon which they believe the director suspected that the company was insolvent at the time debts were incurred; and
 - the evidence available to support the allegation of insolvent trading.
- ASIC also commenced a review of the Report as to Affairs (RATA), Form 507, in the second half of 2013. ASIC worked with stakeholders, including ARITA, in regard to changes to the RATA, such as the recording of information about phoenix activity.
- Phoenix Taskforce members are examining options for law reforms to deter, detect and deal with illegal phoenix activities.

Recommendation 12

- The committee recommends that consideration be given to amending confidentiality requirements in statutory frameworks of agencies participating in the Phoenix Taskforce to permit dissemination of relevant information to the ATO.

- The Australian Government notes this recommendation.
- The prescription of the Phoenix Taskforce under the *Taxation Administration Act 1953* allows the ATO to share information about phoenix activity with other taskforce agencies. There are also mechanisms in place that allow some (but not all) of the members of the taskforce to reciprocate information sharing with the ATO. In addition, action is being taken by the ATO through the Inter-Agency Phoenix Taskforce forum, to identify the remaining statutory impediments to other agencies sharing information with the ATO.
- The Government has amended the *Australian Securities and Investments Commission Act 2001* to streamline ASIC sharing of information with the ATO. The *Treasury Laws Amendment Bill (No. 1) 2017*, which contains the amendment, received Royal Assent on 4 April 2017.

- Work is also being undertaken to promote data sharing across the wider public service. In late 2015, the Department of Prime Minister and Cabinet (PM&C) completed an in-house study into Commonwealth public sector data, the Public Sector Data Management Report (the Report). The Department of Finance, the then Department of Communications, the Australian Bureau of Statistics and the ATO contributed to the Report, the findings of which have now been published (https://www.dpmc.gov.au/sites/default/files/publications/public_sector_data_mgt_project.pdf). Consultation on the Report, including proposed amendments to legislative regimes to enable greater data sharing between agencies, is continuing.
- A number of initiatives have been undertaken since the release of the Report to promote data sharing within the Australian Public Service. Firstly, on 7 December 2015, the Prime Minister released the Australian Government Public Data Policy Statement (Policy Statement) as part of the National Science and Innovation Agenda. The Policy Statement commits Australian Government entities to specific actions designed to optimise the use and reuse of public data, including the secure sharing of data between Australian Government entities, to improve efficiency and inform policy development and decision-making. The Policy Statement is available on the PM&C website (www.dpmc.gov.au/pmc/publication/australian-government-public-data-policy-statement).
- Second, the Secretaries Data Group has endorsed the ‘Guidance on Data Sharing for Australian Government Entities’, which encourages sharing data by default between Australian Government entities. Further, it seeks to streamline data sharing processes to enable greater efficiencies and improve decision making for policy and implementation processes. The guidance is available on the PM&C website at www.dpmc.gov.au/public-data/public-data-policy.
- In addition, on 21 March 2016, the Productivity Commission (the Commission) announced that it will undertake an inquiry into data availability and use (Inquiry). As part of its inquiry, the Commission is examining the benefits and costs of various options for increasing availability of public sector data to other public sector agencies (including between the different levels of government), the private sector, the research sector, academics and the community. The Inquiry will also suggest ways to improve data linking and availability, where there are clear benefits in doing so. A draft report was released on 3 November 2016. Further information about the Inquiry and its terms of reference is available on the Commission website (www.pc.gov.au/inquiries/current/data-access/terms-of-reference).
- Further, PM&C is working with the state and territory governments to assess and scope data sharing and/or integration projects between the Commonwealth and state and territory governments. Such cross-jurisdictional projects have the potential to provide governments with a holistic understanding of important policy issues for Australia, such as those in the education, health and welfare sectors.

- Any suitable reforms identified as part of the wide-ranging consultation that is being undertaken by PM&C and the Commission will be progressed by Government.

Recommendation 13

- The committee recommends that more resources, including specific purpose budget appropriations be directed to whole-of-government strategies aimed at preventing, detecting and prosecuting instances of illegal phoenix activity.
- The Australian Government notes this recommendation and agrees that a whole-of-government approach to phoenixing is required.
 - In May 2015, the Government committed \$127.6 million over four years to fund a new Serious Financial Crime Taskforce (SFCT), comprised of agencies including ASIC, the ATO, the Australian Federal Police and the Attorney-General's Department. The SFCT will seek to disrupt and deter serious financial crime. Key operational priorities for the SFCT over the initial two year period will include investigations into serious international tax evasion and criminality in relation to trusts and phoenix activity.
 - The prescription of the Phoenix Taskforce under the *Taxation Administration Act 1953* allows the ATO to share information with member agencies. Phoenix Taskforce members meet on a regular basis as the Intra-Agency Phoenix Taskforce Forum and are increasingly sharing information, using sophisticated data matching tools and employing coordinated strategies to combat illegal phoenix activities.
 - Phoenix Taskforce members are examining options for law reforms to deter, detect and deal with illegal phoenix activity.

Recommendation 14

- The committee recommends that regulators increase engagement efforts with industry participants aimed at increasing and enhancing information flows.
- ASIC and the ATO regularly engage with participants in the building and construction industry.
 - An example of this engagement is an annual roundtable meeting, co-chaired by the ATO and the Fair Work Ombudsman, with the ten largest principal building contractors in Australia. ASIC and the ATO have also held meetings with the Construction, Forestry, Mining and Energy Union and industry associations such as the Master Builders Association, Housing Industry Association and Subcontractors Alliance.
 - In the 2013-2014 financial year, ASIC commenced a new initiative to increase director awareness of the risk of insolvency in the construction sector, including the risk of illegal phoenix activity. As a result of that program, which continues, over 300 directors with a history of involvement with failed companies have been informed of the

risks of insolvency and illegal phoenix activity and the tools and resources available to mitigate those risks.

- The ATO also has working engagements with several large construction contractors to discuss strategies to deter phoenix activity from occurring on major public infrastructure projects.

Recommendation 15

- The committee recommends that licensing regulators should undertake random financial health spot-checks throughout the life of a licence-holder's licence. Where a business fails to meet the standards required, it should be required to show cause as to why its licence should not be conditioned, downgraded, suspended or cancelled, depending on the extent to which the business has not met required standards.

- The Australian Government notes that this recommendation is a matter for state and territory governments.

Recommendation 16

- The committee reiterates Recommendation 17 of the Economics References Committee's June 2014 report of its inquiry into the performance of ASIC in these terms: 'The committee recommends that ASIC, in collaboration with the Australian Restructuring Insolvency and Turnaround Association and accounting bodies, develop a self-rating system, or similar mechanism, for statutory reports lodged by insolvency practitioners and auditors under the Corporations Act to assist ASIC identify reports that require the most urgent attention and investigation'.

- ASIC is currently consulting with the Australian Restructuring Insolvency and Turnaround Association to progress this recommendation.

Recommendation 17

- The committee recommends that ASIC look closely at its record on enforcement and identify if there is scope for improvement, and if legislative changes are required to advise government.

- The Australian Government notes this recommendation and notes that it is a matter for ASIC.
- On 19 October 2016, the Government announced a taskforce to review ASIC's enforcement regime to assess the suitability of the existing regulatory tools available to it to perform its functions adequately. Upon completion of the review, the taskforce will identify any gaps in ASIC's powers and make recommendations to the Government which it considers necessary to strengthen any of ASIC's regulatory tools and on any

other policy options available. The taskforce will produce its final report to the Government by the final quarter of 2017.

Recommendation 18

- The committee recommends that the government ensure that ASIC is adequately resourced to carry out its investigation and enforcement functions effectively.

- The Australian Government notes this recommendation.
- In response to the Financial System Inquiry, the Government committed to introducing an industry funding model for ASIC by the end of 2017. This initiative is on track to be delivered by the end of the year.
- Funding for ASIC is considered in the context of the Government's ordinary Budget processes.

Recommendation 19

- The committee recommends that the Legislative and Governance Forum for Corporations give consideration to recommending amendments to the Corporations Act to ensure that the Director Penalty Regime covers GST liabilities.

- The Australian Government notes this recommendation.
- The Legislative and Governance Forum on Corporations (LGFC), established by the Council of Australian Governments, has responsibilities under intergovernmental agreements on corporations, business names and the national credit law. The LGFC is predominantly a vehicle for consultation by the Commonwealth with the States and Territories on Commonwealth legislation. The LGFC does not make recommendations to the Government regarding proposed legislative amendments.
- Phoenix Taskforce members are examining options for law reforms to deter, detect and deal with illegal phoenix activities.

Recommendation 20

- The committee recommends that section 596AB of the Corporations Act 2001 be amended to:
 - remove the requirement to prove subjective intention in relation to phoenixing offences;
 - introduce a parallel civil penalty contravention in similar terms; and
 - extend the application of the section to all forms of external administration, not merely liquidation.

- The Australian Government notes this recommendation.
- Phoenix Taskforce members are examining options for law reforms to deter, detect and deal with illegal phoenix activities.
- The FEG scheme administered by the Department of Employment provides financial assistance to give certain unpaid employee entitlements to eligible employees who lose their jobs due to the liquidation or bankruptcy of their employer. As part of administering this scheme, the Department of Employment examines ways to maintain the integrity of the scheme, including any relevant law reform.

Recommendation 21

- The committee recommends that ASIC and the ATO continue to develop and implement programs designed to monitor the integrity of the payment system, with the aim of referring relevant matters to relevant law enforcement agencies.

- During the 2014/15 financial year, ASIC implemented a surveillance campaign to monitor the integrity of payment systems in the building industry that uncovered false statutory declarations to claim payment for work undertaken on eight large commercial projects. The campaign uncovered a number of instances where subcontractors had provided false statutory declarations to principal contractors. ASIC is currently considering the most appropriate regulatory or enforcement remedy. ASIC will publish its findings and will encourage entities/persons affected by this type of conduct to report it to the regulator.
- Security of payments legislation exists in various state jurisdictions and programs to monitor those systems is a matter for the relevant state authorities.
- Integrity of payment and wider non-compliance issues are regularly addressed at ATO and ASIC forums, including the Intra-Agency Phoenix Taskforce Forum and its subordinate operational groups. Where there is evidence of false declarations and statements, these matters would ordinarily be referred to law enforcement agencies for

prosecution. Criminal treatments are an important aspect of Phoenix Taskforce strategies and the worst offenders are referred to the Serious Financial Crimes Taskforce.

- The Government has also made a number of recent initiatives relevant to this recommendation.
- On 2 December 2016 the *Code for the Tendering and Performance of Building Work 2016* (the Code) was made under the *Building and Construction Industry (Improving Productivity) Act 2016*. The Code applies to building industry participants that wish to undertake Commonwealth-funded building work. Section 11D provides that code covered entities are required, amongst other things, to:
 - comply with all applicable laws and other requirements relating to the security of payments;
 - ensure payments are made in a timely manner and are not unreasonably withheld;
 - have a documented dispute settlement process that details how disputes about payments to subcontractors will be resolved and must comply with that process; and
 - ensure that disputes are resolved in a reasonable, timely and cooperative way;
- The Code further prohibits a code covered entity from engaging in illegal or fraudulent phoenix activities for the purpose of avoiding any payment due to another building contractor or building industry participant or other creditor.
- Failure to comply with the Code may result in a building industry representative being precluded from tendering for future Commonwealth-funded building work.
- Section 32A of the *Building and Construction Industry (Improving Productivity) Act 2016* provides for the establishment of a Security of Payments Working Group. Membership of the Working Group includes the Australian Building and Construction Commissioner and representatives of employees, employers, and contractors.
- A key function of the Working Group is to monitor the impact the Australian Building and Construction Commission has on improving compliance with security of payments obligations. It will also make recommendations about policies, procedures or programs that could be implemented to improve compliance with security of payment laws.

Recommendation 22

- The committee recommends that state and territory government departments and agencies responsible for administering their security of payment legislation closely scrutinise the practice of providing false statutory declarations and where necessary, launch prosecutions as a practical deterrent.

Recommendation 23

- The committee recommends that each state and territory government department or agency responsible for the relevant security of payments act should follow the example in Queensland and publish publicly available, identified information concerning the outcome of payment disputes.

Recommendation 24

- The committee recommends that it be made a statutory offence to intimidate, coerce or threaten a participant in the building industry in relation to the participant's access to remedies available to it under security of payments legislation.

Recommendation 25

- The committee recommends that state government departments and agencies responsible for the relevant security of payments act provide education, awareness and support for industry participants who may wish to access remedies available to them under the relevant legislation.

- Security of payments legislation already exists in various state jurisdictions and programs to monitor those systems is a matter for those state authorities.
- In addition, the *Code for the Tendering and Performance of Building Work 2016* prohibits code covered entities from taking action with the intent to coerce a building contractor to exercise, or not exercise, rights arising under state and territory security of payment laws (Section 11D).
- On 21 December 2016, the Minister for Employment announced a wide-ranging review of security of payments laws in the building and construction industry. The review will, among other things:
 - examine security of payment legislation of all jurisdictions to identify areas of best practice for the construction industry;
 - take into account any reviews and inquiries that have recently been conducted in relation to security of payments, including the December 2015 report by the Senate Economic References Committee on Insolvency in the Australian Construction Industry and the draft legislation developed by the 2003 Cole Royal Commission into the Building and Construction Industry; and

- consider how to prevent various types of contractual clauses that restrict contractors in the construction industry from obtaining payments for work that has been completed.
- The review will deliver a final report, with recommendations to be considered by Government, no later than 31 December 2017.

Recommendation 26

- The committee recommends that industry groups should also be proactive in educating and training members on the relevant payment systems. This should include streamlining complaints and dedicated help lines.
- The Australian Government notes this recommendation relates to matters under industry control.

Recommendation 27

- The committee recommends that adjudicators of payment disputes under the relevant security of payments act should be required by law to be independent and impartial.
- The Australian Government notes this recommendation is a matter which falls under the responsibility of state and territory governments.
 - The Australian Government has also announced a wide-ranging review of security of payments laws in the building and construction industry to identify best practice.

Recommendation 28

- The committee recommends that following completion of the steps recommended in chapter 10 in relation to Project Bank Accounts on construction projects where Commonwealth funding exceeds \$10 million, the Commonwealth enact national legislation providing for security of payment and access to adjudication processes in the commercial construction industry.

Recommendation 29

- The committee recommends that commencing as soon as practicable, but no later than 1 July 2016, the Government undertake a two year trial of Project Bank Accounts (PBAs) on no less than twenty construction projects where the Commonwealth's funding for the project exceed \$10 million.

Recommendation 30

- The committee recommends that after the trial has concluded, a timely evaluation of the trial of PBAs on Commonwealth funded projects be conducted with a view to making the use of PBAs compulsory on all future Commonwealth funded projects and mandating extending the use of PBAs to private sector construction projects.

Recommendation 31

- The committee recommends that, while the Commonwealth trial of Project Bank Accounts is underway, the Attorney-General refer to the Australian Law Reform Commission for inquiry and report a reference on statutory trusts for the construction industry. This inquiry should recommend what statutory model trust account should be adopted for the construction industry as a whole, including whether it should apply to both public and private sector construction work.

- While the Commonwealth has responsibility for its own construction procurement, the Australian Government notes that the regulation of the building industry, including specialised payment arrangements (outside of insolvency), is a matter for the states and territories.
- The Australian Government operates a devolved procurement framework where Commonwealth entities are responsible for undertaking their own procurement processes in order to meet their business needs. The Commonwealth Procurement Rules (CPRs) provide the basic rule set that applies to entity procurement activities, and include provisions on encouraging competition, ethical behaviour and prescribing specifications. The CPRs are also not intended to target specific categories of goods or services, nor specific industries. They are the rule set for all Australian Government procurement and importantly, require all potential suppliers to government to be treated equitably.
- The Attorney-General's Department will consult with the appropriate Australian Government agencies on the Committee's report and recommendation 31. Decisions

regarding what matters may be referred to the Australian Law Reform Commission (ALRC), and the issuing of any terms of reference, are ultimately a decision for the Attorney General. The scope of any such terms of reference must be consistent with the ALRC's functions outlined under section 21 of the *Australian Law Reform Commission Act 1996*.

Recommendation 32

- The committee recommends that the Council for the Australian Federation and state and territory regulators continue to develop external equivalence for licences in the building and construction industry

Recommendation 33

The committee recommends that each state and territory licensing regime contain three key requirements:

1. that licence holders demonstrate that they hold adequate financial backing for the scale of their intended project. This capital backing requirement should be graduated, with increased levels of proof required for more significant projects;
2. that on registration, licence holders provide evidence they have completed an agreed level of financial and business training program(s), including principles of commercial contract law, developed in consultation with industry bodies; and
3. that licence holders demonstrate that they are a fit and proper person to hold a licence.

- The Australian Government notes these recommendations are matters which fall under the responsibility of state and territory governments.

Recommendation 34

- The committee recommends that automated cross-agency data sharing should trigger an alert when an individual: declares bankruptcy; is convicted of fraud; is disqualified as a director; or liquidates a company. This alert should require the relevant state or territory regulator to satisfy itself that the licence holder remains a fit and proper person.

- The Australian Government notes this recommendation.
- This proposal would require significant IT infrastructure changes to ASIC, the Australian Financial Security Authority and Commonwealth, state and territory regulators or agencies.
- Enabling such alert functionality is likely to be problematic, in terms of data integrity, and costly, and its ultimate effectiveness will depend on the quality and format of data

held by agencies. The efficacy of systems to accurately match individuals to those held in other registers is also an issue. This will be considered in the context of the Government's response to recommendations 36 and 37.

- Privacy issues are also likely to be raised by this proposal, noting that personal information is likely to be included. Where information is shared with state or territory authorities appropriate privacy arrangements will need to be put in place, including access, correction and complaint mechanisms, noting the potential significant consequences for an individual if errors were to occur.
- The Government is open to information brokers providing limited alert services in relation to the Australian Financial Security Authority and ASIC registers.

Recommendation 35

- The committee recommends that the government, through the work of the Legislative and Governance Forum for Corporations establish a beneficial owners' register.
- The Australian Government does not accept this recommendation.
 - The Government has committed to improve the transparency of information on beneficial ownership and control of companies that is made available to relevant authorities, as part of Australia's first Open Government Partnership - National Action Plan (the Plan), released on 7 December 2016.
 - On 13 February 2017 the Government released a public consultation paper entitled 'Increasing Transparency of the Beneficial Ownership of Companies'. The consultation paper seeks views on increasing the transparency of information on the beneficial ownership of companies for relevant authorities, to better assist these authorities to combat illicit activities.
 - The Legislative and Governance Forum on Corporations (LGFC), established by the Council of Australian Governments, has responsibilities under intergovernmental agreements on corporations, business names and the national credit law. The LGFC is predominantly a vehicle for consultation by the Commonwealth with the States and Territories on Commonwealth legislation. The LGFC does not make recommendations to the Government regarding proposed legislative amendments and is not the appropriate forum to address this recommendation.

Recommendation 36

- The committee recommends that section 117 of the Corporations Act 2001 (Cth) be amended to require that, at the time of company registration, directors must also provide a Director Identification Number.

Recommendation 37

- The committee recommends that a Director Identification Number should be obtained from ASIC after an individual proves their identity in line with the National Identity Proofing Guidelines.

- These recommendations align with recommendation 15.6 of the Productivity Commission's Report on Business Set-up, Transfer and Closure. The Government will give further consideration to Director Identification Numbers as part of its ongoing work to combat illegal phoenix activity in Australia.

Recommendation 38

- The committee recommends that the Australian Securities and Investment Commission Act 2001 (Cth) be amended to require ASIC to verify company information.

- For company information lodged with ASIC, basic data quality checks are carried out on manually processed forms and upfront business rules are used for online lodgements, to prevent inaccurate data (e.g. ensuring fields are complete and address validation against Australia Post files).
- Under the *Corporations Act 2001* and the *Criminal Code Act 1995*, penalties apply for providing false or inaccurate information.
- Currently there are over two million registered companies in Australia. A balance must be met between ensuring the accuracy of the information and minimising the regulatory burden for applicants through ensuring the process is as efficient and accessible as possible.

Recommendation 39

- The committee recommends that ASIC and Australian Financial Security Authority company records be available online without payment of a fee.

- The Australian Government will consider this recommendation as part of the Government's consideration of future approaches and improvements to Government registry functions.

- The Government announced its commitment to open data through the release of a Public Data Policy Statement in December 2015. The Government committed in its Policy Statement to optimise the use and reuse of public data, to release non-sensitive data as open by default, and to collaborate with the private and research sectors to extend the value of public data for the benefit of the Australian public.
- Agencies are required to assess arrangements under the Public Data Policy Statement and explore options to increase access to data.

Recommendation 40

- The committee recommends that ASIC focus enforcement action on business advisors specialising in pre-insolvency advice who advise firms to restructure in order to avoid paying their debts and obligations.

Recommendation 41

- The committee recommends that ASIC publish a regulatory guide in relation to the nature and scope of pre-appointment advice given or taken by companies.

- The Australian Government notes these recommendations and notes that they are matters for ASIC.
- ASIC provided testimony to the Senate inquiry that this is an area of concern and is an existing priority, with work underway to identify, disrupt and prosecute relevant advisors.
- In liaison with the ATO, ASIC has identified a number of "high risk" pre-insolvency advisers and is currently conducting further inquiries and undertaking surveillance activities to identify potential breaches. To date, the ATO, together with ASIC officers, have conducted access visits without notice as part of investigations into the activities of a firm of pre-insolvency advisors and their alleged involvement in facilitating illegal phoenix activity.
- ASIC has also referred one matter involving a pre-insolvency adviser to the Office of the Commonwealth Director of Public Prosecutions (CDPP). The CDPP successfully prosecuted the matter and the Court convicted the advisor and ordered payment of a fine of \$6,600 for dishonestly aiding, abetting, counselling or procuring another director to breach their director duties.

Recommendation 42

- The committee recommends that the Corporations Act 2001 be amended to align with section 64ZB(8) of the Bankruptcy Act 1966.

Recommendation 43

- The committee recommends that firms who provide business advice be prohibited by way of an amendment to the Corporations Act from buying into the companies they are advising via debt acquisitions.

- Distressed debt may be purchased for a range of legitimate purposes. Secondary markets allow creditors to manage risk and to support arrangements to fund recovery actions in insolvencies.
- Arbitrary reallocation of voting rights for persons purchasing distressed debt would impact debt legitimately purchased through secondary markets.
- A framework is already in place under the *Corporations Act 2001* to address abusive practices. Under section 445D, a court may make an order to terminate a deed of company arrangement for a range of reasons, including false or misleading information given to creditors, material omission or contravention, injustice or undue delay, oppression, unfair prejudice and unfair discrimination.

Recommendation 44

- The committee recommends that the government, through the work of the Legislative and Governance Forum for Corporations, give serious consideration to extending the jurisdiction of the Federal Circuit Court of Australia to include corporate insolvencies under the Corporations Act.

- The Legislative and Governance Forum on Corporations (LGFC), established by the Council of Australian Governments, has responsibilities under intergovernmental agreements on corporations, business names and the national credit law. The LGFC is predominantly a vehicle for consultation by the Commonwealth with the States and Territories on Commonwealth legislation. The LGFC does not make recommendations to the Government regarding proposed legislative amendments and is not an appropriate forum this recommendation.
- The Federal Court is a specialist court for adjudicating disputes involving the Corporations Act. Careful consideration, including consultation with the courts and other key stakeholders, would need to be given to any proposal to amend the existing jurisdiction of the Federal Court.
- The Government is not currently considering extending the jurisdiction of the Federal Circuit Court to include corporate insolvencies.