Executive Summary

The Parliamentary Joint Committee on Corporations and Financial Services ('**PJC**') has undertaken a public inquiry into corporate insolvency law since September 2022, and is due to hand down its final report by 30 May 2023. The inquiry has taken a broad approach to assessing corporate insolvency law and has heard from a wide range of stakeholders who have submitted detailed written submissions, responses to Questions on Notice ('**QoN**') and comments during five days of public hearings. This report has reviewed the submissions, answers to QoN and written transcripts of the public hearings and identified the following themes in that material:

- Trusts and insolvency
- MSMEs and insolvency
- The role and liability of company directors
- Pre-insolvency advisors
- The operation of company deregistration processes
- The role of ASIC, the ATO and FEG in insolvency
- The role and responsibilities of insolvency practitioners
- The potential for a single insolvency statute, a single regulator and perhaps a government liquidator's office
- Reform of voidable transactions
- The position of secured creditors and the role of the PPSR
- The position of employees and contractors
- Reform of voluntary administration and DOCAs
- The availability of data and statistics on insolvency
- The special position of the construction industry
- Wholesale reform (a root and branch review)
- Other miscellaneous issues

While there were submissions in favour or against most of the suggested law reforms, there was broad consensus of the need to address trusts and insolvency, for greater regulatory and enforcement action by ASIC and the ATO and for a simplification and streamlining of insolvency laws. There was also general consensus on the need for a wholesale insolvency law reform project that would cover both personal and corporate insolvency.

This report

This report has been prepared by Dr Jason Harris,[1] Professor of Corporate Law at Sydney Law School, The University of Sydney. Dr Harris made an individual submission (with Mr Murray, submission 18) and contributed to submissions by the Law Council of Australia (submission 30) and the Society of Corporate Law Academics (SCOLA, submission 37).

This report was commissioned by the Association of Independent Insolvency Practitioners (AIIP) www.aiip.org.au, which is a non-profit organisation established by insolvency practitioners to assist fellow insolvency practitioners to meet the challenges prevailing in the industry in Australia. AIIP was founded in 2016 and

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approximately one third of all insolvency practitioners in Australia are members. AIIP members are either Registered Liquidators and/or Registered Trustees who primarily practice in the SME market. The AIIP provided a research grant to engage LLB and JD insolvency students from Sydney Law School to work as research assistants to assist with evaluating and summarising the documentary material produced by the PJC inquiry. Those student researchers are Jessey Nikoletatos (JD), Jerry To (LLB), Julia Tran (LLB), Kim Nguyen (LLB) and Lisa Alim (JD).

The role of the PJC

The Parliamentary Joint Committee on Corporations and Financial Services is a committee of both houses of the Federal Parliament and is created by the Australian Securities and Investments Commission Act 2001 (Cth). The role of the Committee is to inquire into and report to both Houses of Parliament on matters relating to corporate law, including the activities of ASIC, the operation of the corporations legislation (which includes the Insolvency Practice Schedule (Corporations)) and to inquire into other laws (domestic and foreign) that may affect significantly the operation of the corporations legislation. It should be noted that the jurisdiction of the committee does not explicitly include personal bankruptcy (including bankruptcy of partnerships and individual trustees), but those matters may be said to be related to affect significantly the operation of the corporations legislation to the extent that insolvent businesses may involve a combination of companies, partnerships and trusts. This was a matter raised by several persons who made submissions to the current inquiry.

The Committee is Chaired by Senator Deborah O'Neill (Australian Labor Party, NSW) with the Hon Alex Hawke MP (Liberal Party of Australia, Mitchell NSW) as Deputy Chair. A full list of the Committee is provided in Appendix 1.

A predecessor of this committee undertook the inquiry 'Corporate Insolvency Laws: A Stocktake' in 2004. Prior to that inquiry, the last substantive wholesale inquiry into insolvency law was the Australian Law Reform Commission's General Insolvency Inquiry (Report no 45) in 1988, known as the Harmer Report.

The terms of reference

The PJC's inquiry into corporate insolvency law was established on 28 September 2022, with the following terms of reference.

Inquiry into the effectiveness of Australia's corporate insolvency laws in protecting and maximising value for the benefit of all interested parties and the economy, including:

1. *recent and emerging trends in the use of corporate insolvency and related practices in Australia, including in regard to:*

   a. temporary COVID-19 pandemic insolvency measures, and other policy measures introduced in response to the pandemic that may have had an effect on such trends and practices;

   b. recent changes in domestic and international economic conditions, increases in material and input costs for businesses and inflationary pressures more broadly, and supply shortages in certain industries; and

   c. any other contributory factors or events that have impacted insolvency patterns;

2. *the operation of the existing legislation, common law, and regulatory arrangements, including:*

   a. the small business restructuring reforms (2021);

b. the simplified liquidation reforms (2021);

c. the unlawful phoenixing reforms (2019); and

d. the operation of the Personal Property Securities Act 2009 in the context of corporate insolvency;

3. *other potential areas for reform, such as:*

   a. unfair preference claims;

   b. trusts with corporate trustees;

   c. insolvent trading safe harbours; and

   d. international approaches and developments;

4. *supporting business access to corporate turnaround capabilities to manage financial distress;*
5. *the role, remuneration, financial viability, and conduct of corporate insolvency practitioners (including receivers, liquidators, administrators, and small business restructuring practitioners);*
6. *the role of government agencies in the corporate insolvency system, including:*

   a. the role and effectiveness of ASIC as the corporate insolvency regulator;

   b. the ATO's role and enforcement approaches to corporate insolvency, and relevant changes to its approach over the course of the COVID-19 pandemic;

   c. the role, funding and operation of relevant bodies, including the Assetless Administration Fund and the Small Business Ombudsman; and

7. *any related corporate insolvency matters.*

Conduct of the inquiry

The PJC received 78 written submissions, which came from a broad spectrum of the community, including professional associations (such as AIIP, ARITA, TMA, AICM, AICD, IPA, CPA Australia and CAANZ), industry associations (ABA, ACF, HIA, MBA), unions, employer groups, creditors (suppliers and finance companies), law firms, insolvency firms, accounting and other professional services firms, government agencies, academics and interested individuals. The written materials are available from the PJC's website. A full list of the written submissions is provided in Appendix 2.

The PJC also conducted five days of public hearings in Canberra and in Sydney, which produced detailed transcripts through Hansard. The public hearings also generated numerous questions on notice ('QoN') for those appearing before the committee, which were numbered (with ASIC receiving the highest number of QoN at 28).

In summary, the PJC inquiry has produced hundreds of pages of written material opining on the operation of corporate insolvency law in Australia and sharing personal experiences with different insolvency procedures. Many of the submissions included discussion of foreign insolvency laws and most of the submissions covered issues relating to both large and MSME insolvencies.

A review of this written material has revealed several major themes, which are discussed in the next section. References to relevant submissions are provided, and where relevant references to responses to QoN and transcripts of evidence before the public Committee hearings is provided. The summary discussion below refers to relevant submissions, but does not purport to be a comprehensive reference to every point raised in submissions, with a focus on identifying consensus on issues as well as differing views on commonly discussed points. There were submissions from

several individuals that raised personal grievances about the conduct of particular practitioners or firms and these were not included in the analysis.

Summary of the submissions

Trusts and insolvency

The issue that appeared to have the broadest consensus in submissions was the need for insolvency law to better deal with insolvent trustees. Many submissions noted the widespread use of trading trusts and the challenges that trust relationships produced for insolvency practitioners. It was noted that in 2021 Treasury undertook a public consultation on the issue of trusts and insolvency that produced 25 submissions, some of which contained detailed recommendations, and many of those parties who submitted to both the PJC and Treasury attached their Treasury submission to constitute their position before the PJC.[2] Several submissions noted that the Harmer Report in the 1980s had made detailed recommendations on insolvency law and trading trusts and suggested those were still valuable.[3] It was clearly expressed in several submissions that the High Court's decision in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Cth* (2019) 268 CLR 524, while helpful in clarifying some priority payment issues, was not a sufficient and effective response to the range of issues arising in trusts and insolvency.[4] ASIC noted in its submission that the issues that drive the use of trusts with corporate trustees and the complexities and costs that they produce in insolvencies 'warranted further consideration',[5] while CA ANZ described the need for reform in this area as 'urgent'.[6]

The recommendations made in the submissions to the Committee covered a broad range of matters, from practical difficulties for insolvency practitioners to highly complex matters of trust law. Insolvency practitioners recommended changes to facilitate external administration, namely amendments to confirm that insolvency practitioners can exercise statutory powers to deal with and sell assets of the company that are held on trust.[7]

The ability to automatically remove a company from its position as a trustee on the appointment of an external administrator (known as 'ejection clauses') was pointed out by several submissions as causing practical problems in insolvency.[8] Although the ipso facto protections introduced in 2018 provide that such provisions are of no effect if the exercise of the termination right is based on the appointment of a liquidator or of an administrator (and in some cases on the appointment of a receiver or a scheme administrator), the ipso facto provisions do not generally apply to documents and rights created before the commencement of the ipso facto provisions.

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[2] For a summary of the Treasury submissions see Calderisi and Moore (PJC sub38).
[3] ARITA (sub36), p57; IPA (sub62), p5; Law Council (sub30), p39; Murray and Harris (sub18), p11; SCOLA (sub37), p4; TMA (sub38), p20.
[4] See in particular the submissions by D'Angelo (sub19), Barrett (sub72), Hamilton and Morrison (sub5) and Sillink (sub76).
[5] ASIC (sub29), p57; see also KWM (sub45), p10.
[6] CA ANZ (sub39), p8.
[7] AIIP (sub20), p9; ARITA (sub36), pp56-57; Bluerock (sub8), p4; Commercial Bar Association Victoria (sub43), p2; Condon Advisory Group (sub61), p4; CPA Australia (sub11), p3; KWM (sub45), p10-11; Murray and Harris (sub18), p11-12; TMA (sub38), p20.
[8] ABA (sub23), p5; Bluerock (sub8), p4; Commercial Bar Association Victoria (sub43), p2; CPA Australia (sub11), p3; Hannan (sub54), p2; Law Council (sub30), p36-38; McGrathNicol (sub67), p4; TMA (sub38), p20.

One of the most frequently discussed aspects of trusts law was the lack of transparency of when a company is acting as trustee. At present there is no public register of trusts and no positive legal obligation for a company to disclose in dealings that it holds property on trust, although a search for an ABN of a trust is possible and financial documents and tax returns may reveal a trustee capacity. Multiple submissions (including from insolvency practitioners, industry groups and creditors) suggested to the Committee that a public register for trusts should be established,[9] although some submissions narrowed this recommendation to cover commercial trusts.[10] Linking trustee company ACN's with trust ABN's via the Australian Business Registry was also recommended[11] as was requiring trustees to set out the name and ABN of the trust on all public documents and negotiable instruments.[12]

The trustee's right of indemnity against the trust assets was said to generate practical and policy problems as noted in several submissions. The lawyers Calderisi and Moore[13] noted that trust law allows for the limit or even exclusion of the right of indemnity (in some cases based on contract between the trustee and third parties and in some cases based on the wording of the trust instrument), and this could be particularly problematic where a third party creditor dealt with a trustee and could not have been aware that the trustee's right of indemnity was unavailable due to the prior conduct of the trustee requiring them to compensate the trust estate (the so-called 'clear accounts rule').[14] Several submissions requested reform to provide clarification of the priority of insolvency practitioners' expenses and remuneration against trust assets.[15]

Multiple submissions advocated reform to allow for greater certainty when a trustee executes documents by expanding Corporations Act 2001 (Cth) ss128-9 to include corporate trustees.[16] A further issue relating to the right of indemnity and insolvency involves corporate trustees acting in multiple capacities (such as being trustee over multiple trusts and acting in both trustee and non-trustee roles), which then requires a method of apportionment between the respective estates.[17] Extending statutory oppression remedies (Corporations Act 2001 (Cth) ss232, 233) to trusts was also recommended.[18] Submissions by the ACTU[19] and McGrathNicol[20] both supported treating beneficiaries of trading trusts in a similar manner to shareholders in a company. ARITA advocated treating insolvent trust funds as stand-alone economic entities.[21]

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[9] ACF (sub22), p6; ARITA (sub36), p58; D'Angelo (sub19), p9; FCA and SBDH (sub58), p5; Murray and Harris, public hearing 13.12.22, p48; Southern Steel Group (sub27), p3.
[10] See for example, D'Angelo (sub19).
[11] ASBFEO (sub31), p10.
[12] Law Council (sub30), p37 and CA ANZ (sub39), p8.
[13] Submission 24.
[14] See also the submission by Sillink (sub76).
[15] KWM (sub45), pp13-4; McGrathNicol (sub67), p4.
[16] Law Council (sub30), pp38-9.
[17] Barrett (sub72); Law Council (sub30), p38.
[18] Commercial Bar Association Victoria (sub43), p3.
[19] Submission 75, p10.
[20] Submission 67, p4.
[21] Submission 36, p56. See further D'Angelo (sub19).

Hamilton and Morrison[22] suggest detailed amendments to the Corporations Act 2001 (Cth) to accommodate insolvent corporate trustees involving a single trustee capacity as well as provisions to address multiple trustee capacities, changes to employee entitlement priorities when trusts are involved and a new administration regime for corporate trustees.

D'Angelo's submission[23] draws in his prior submission to the Treasury review and explains how the commercial use of trusts and the rights of beneficiaries has highlighted an inconsistency with corporate law's treatment of shareholders. In his response to Questions on Notice, Dr D'Angelo set out a proposal for a new Chapter 5AA of the Corporations Act 2001 (Cth) to deal with insolvent commercial trusts. Barrett's submission[24] also suggested a specific statutory regime for insolvent corporate trustees.

Although there was widespread support for reviewing the interaction between insolvency and trusts, there was also recognition that this is a complex issue with a mix of state and federal law that may produce constitutional issues that need to be addressed. Whatever reform may arise from this process will need to consider how the law will interact with trusts law generally. For example, should any insolvency law changes be limited (as Dr D'Angelo suggests in his submission)[25] to the commercial use of trusts? Is there a need to register family trusts that are simply holding assets and not likely to engage in commercial activities? These are issues that would benefit from a detailed and comprehensive law reform commission inquiry so that both insolvency and non-insolvency stakeholders can provide input.

MSMEs (micro, small and medium corporate enterprises)

The position of MSMEs in insolvency was a major theme across most of the submissions. It was consistently noted that MSMEs often have lower asset positions and frequently have little or no assets when they finally enter external administration. In many cases, assets and liabilities are intertwined between the company and the directors personally. The lack of assets was noted as a challenge for insolvency practitioners (usually liquidators) as there may be insufficient assets to provide an effective indemnity for an insolvency practitioner or indeed to provide for their fees. Organisations representing small business owners proposed several reforms to protect small businesses against debt recovery including a debt hibernation and tax deferrals.[26]

One prevalent theme was the challenge that MSMEs owners face with the complexity of insolvency legislation (and the complexity of corporate law overall).[27]

The need for early intervention was mentioned by several submissions.[28] The common refrain was made that directors failed to act early enough and might only take action once formal enforcement commenced (such as a winding up application)[29] and noted that if simplified liquidation and small business restructuring

[22] Submission 5. Their submission was adopted by the submission by SV Partners (sub50).
[23] Submission 19.
[24] Submission 72.
[25] Submission 19.
[26] ASBFEO (sub31), p3.
[27] Bluerock (sub8), p2; Westpac Bank, public hearing 28.2.23, p2.
[28] Westpac Bank, public hearing 28.2.23, p4.
[29] Narrow Road Capital (sub15), p8 and CPA Australia (sub11, p3).

were unavailable due to the company not satisfying the eligibility requirements then this could drive small business owners to seek out improper phoenix advisors.

In 2021 the Federal Government introduced small business restructuring in Part 5.3B of the Corporations Act and the simplified liquidation procedure.

The simplified liquidation procedure was consistently criticised in submissions and in the public hearings, with the complexity and expense of the procedure noted as limitations[30] explained that simplified liquidation was actually more complex and expensive than a standard liquidation.[31] The $1 million liability cap was noted as being of concern about whether this was the appropriate level for a simple, streamlined liquidation.[32]

The small business restructuring procedure in Part 5.3B was the subject of extensive discussion and debate in submissions and in public hearings. While several submissions noted that the new procedure had promise as a tool to assist MSMEs, many also considered that the procedure could be improved by making it simpler and more streamlined. The AIIP stated that what was intended to be simple and effective regime for MSMEs was in fact 'complex and expensive to implement'.[33] Bluerock also had concerns about the cost of SBR for MSMEs.[34] As the CA ANZ noted in their public hearing appearance,[35] 'there are at least 19 steps in this simplified process; yet only 13 in a voluntary administration'. However, lawyer Ben Sewell (who is also a registered liquidator for SBR appointments), noted that the SBR regime seemed to be easier to get a compromise offer to restructure the debts of a small company than in voluntary administration.[36]

Lifting the $1 million liabilities cap was the most common suggestion.[37] The ATO noted that their stakeholders had been discussing this.[38] Several submissions noted that the figure of $1 million was not necessarily indicative of how large or complex a company's financial affairs would be, so a complex insolvency of less than $1 million might not be appropriate for Part 5.3B or simplified liquidation. The ABA noted that the Banking Industry Code uses $3 million for the definition of a small business.[39] Some submissions also suggested that the requirement to pay all outstanding employee entitlements could be varied to make the procedure available to more small businesses.[40] Several submissions noted that the SBR procedure could be made more flexible across a range of matters, including eligibility criteria, setting remuneration for restructuring practitioners and the terms that can be included in a

[30] AIIP (sub20), p6; Bluerock (sub8), p2; FCA and SBDH (sub58) pp2-3; SCOLA (sub37), p3). ARITA (sub36, p46).
[31] See also Bluerock (sub8), p2.
[32] ATO, QoN 2, p2-3.
[33] Submission 20, pp3, 5.
[34] Submission 8, p1.
[35] Public hearing, 28.2.23, p39.
[36] Public hearing, 28.2.23, p60.
[37] ABA (sub23), p4; ASBFEO (sub31), p7; Ashurst (sub26), p4; CPA Australia, public hearing 28.2.23, p41; Deloitte (sub32), p5; Law Council (sub30), p25; SCOLA (sub37), p3; Sewell (sub12), p4; Symes (sub25), p2.
[38] QoN 2 pp2-3.
[39] ABA, public hearing 28.2.23, p4.
[40] CA ANZ (sub39), p2; Law Council (sub30), p25; Morgan (sub2), pp4-5; SBDH, public hearing 28.2.23, pp34-35; Murray and Harris, QoN 4, pp3-5.

restructuring plan.[41] Chartered Accountants Australia & New Zealand noted that ASIC's register records companies under restructuring as being under external administration, which is misleading.[42]

The fact that the numbers of appointments of SBR have been relatively low since it was introduced (noting that the numbers have increased in recent months) was explained by some as being attributable to a lack of understanding of the new laws within the business advisory community. Greater education for stakeholders would clarify the appropriate scope of work to be undertaken and this could make more insolvency practitioners and advisors in recommending it.[43]

There were some concerns expressed about Part 5.3B being used to prop up unviable zombie companies, with several submissions noting the ATO was taking a more active stance in evaluating restructuring proposals. The AIIP noted that more guidance from the ATO on what their expectations of the SBR procedure would be helpful.[44] A small number of submissions (mostly from the trade creditor community) argued against the idea of debt restructuring entirely suggesting that there should be tighter control of credit (particularly by the ATO) and stronger punishment for directors who allowed companies to not pay their debts. The AICM suggested that there be additional requirements for use of the procedure, including a requirement to have accurate books and records and a requirement to include more detailed information about the company's financial position in relation to the restructuring plan.[45] Murray and Harris suggested that creditor confidence could be improved if there was the possibility of a creditors' meeting if required by creditors and if there were greater safeguards for the voting process.[46] Chartered Accountants Australia & New Zealand also suggested that further guidance be provided as to reporting obligations of restructuring practitioners.[47]

The majority of submissions that discussed this issue acknowledged the potential value in saving businesses from liquidation but argued for a more efficient process to either restructure or liquidate.[48] The Australian Credit Forum noted that while their members had limited experience with the procedure, their members had stated that they would be unlikely to continue trading with the business on an unsecured basis once it did emerge from restructuring.[49] The ACF also suggested that more needed to be done to promote public awareness of the procedure,[50] and argued that upon rejection of a restructuring plan the company should transition into simplified liquidation.[51] There was clear frustration at the actions of the ATO in allowing large debts to accumulate and in not publicising these debts for the benefit of creditors.

The limited protection given to directors for personal guarantees during the SBR was noted as being a hindrance on its take up, because directors may feel that it may

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[41] ABA, public hearing 28.2.23, p4; ARITA (sub36), p43; CA ANZ (sub39), p2; KPMG (sub55), p21; Murray and Harris (sub18), p9; Murray and Harris, QoN 4, pp3-5; Symes (sub25), p2.
[42] CA ANZ (sub39), p2.
[43] AIIP, QoN, p6.
[44] Submission 20, pp5-6.
[45] Submission 9, p3. Similar comments were made by Southern Steel Group, public hearing 21.2.23, p68 and by Murray and Harris, QoN 4, p4.
[46] Murray and Harris, QoN 4, pp4-5.
[47] Submission 39, p7.
[48] See for example ASBFEO (sub31), p7.
[49] ACF, public hearing 28.2.23, p11.
[50] Submission 22, pp2-3. See also AIIP, QoN, p6; ARA (sub63), p2.
[51] ACF (sub22), p3.

assist the company but leave them with remaining personal liabilities that could make them bankrupt and see them banned from being a director of the company.[52] ASIC noted that it had received stakeholder feedback about the SBR that it may have adverse effects on insurance as it could void a business's insurance but a registered liquidator's insurance (and restructuring practitioners are required to be registered liquidators) may not cover the directors as the procedure is debtor-in-possession.[53] CPA Australia noted that merchant facilities may also be cut off.[54]

Murray and Harris noted in their response to questions on notice that ASIC's Report 756, which reported the results of a study of 82 SBRs, showed that the ATO is the majority creditor (in value) in almost 80% of SBRs and in a majority of cases the ATO controls 90% or more of the relevant debts. Murray and Harris suggested that law reform to better facilitate ATO compromises may be preferable to using the SBR as effectively a tool to negotiate with the ATO.[55]

One constant theme in the submissions was the need for MSMEs to have in place adequate finance and accounting systems so that they monitor the financial position of the business and take action to seek assistance and advice before the company entered terminal insolvency. The CA ANZ described their small business accountant members as being like GPs in the health system, who were there to guide their business clients to support financial health and then refer them to a specialist insolvency advisor if things worsened.[56] Several submissions noted that small businesses often stop engaging with their accountant when the financial position deteriorates.[57] Some noted that many small businesses are not aware of what appropriate help is available to them and this leads them into worse financial problems.[58] Several submissions advocated for the ASBFEO's proposal from its Insolvency Practices Inquiry (2020) for a business viability voucher to be provided by government to assist MSMEs with seeking advice.[59] Others noted that many small business people do not want to access the help and advice that is there.[60] The submissions present a picture that many MSMEs only seek help once there is a significant external action such as the service of a DPN by the ATO, but by this time the business may have deteriorated so much that there is little that can be done in a restructuring.

The blurring of the lines between personal and corporate finances was a common theme, with director guarantees for corporate debts frequently mentioned in submissions.[61] The Australian Banking Association was asked about this in questions on notice from the Committee and stated that banks rarely rely on enforcing director personal guarantees if that will put the director into personal bankruptcy because the directors may have few assets following the collapse of their

[52] SBDH, public hearing 28.2.23, pp34-35; Murray and Harris, QoN 4, p3; SCOLA (sub37), pp1-2.
[53] Submission 29, p46.
[54] Submission 11, p2.
[55] Murray and Harris, QoN 4, p3.
[56] Public hearing, 28.2.23, p44.
[57] Small Business Debt Helpline, public hearing 28.2.23, p29.
[58] ABA, public hearing 28.2.23, p2; McGrathNicol (sub67), p5.
[59] Bluerock (sub8), p5; Brennan (sub73), Issue 5; Murray and Harris, QoN 4, p3; SCOLA (sub37), p4; Symes (25), p3.
[60] IPA, public hearing 28.2.23, p45.
[61] Law Council (sub30), pp59-60.

company.[62] AFSA provided statistics in response to its questions on notice by pointing out that only 24.4% of personal insolvencies were business related.[63] The Small Business Debt Helpline put things in starker terms, personal and corporate finances are 'completely intertwined…we see it literally in your day-to-day living: 'do I pay my rent? Do I pay my supplier? If I don't pay my supplier, I'm not going to be able to do the work. If I can't do my work, I can't pay my rent.'[64] The Law Council's submission raised the prospect of having a single procedure for personal and corporate insolvencies where there is substantial overlap between the financial affairs of the business and the individual directors.[65] Sewell suggested moving regulatory responsibility for MSMEs to AFSA.[66]

The role and liability of company directors

The discussion of the position of directors in the submissions was mixed. The AICD and major advisory firms extolled the virtues of the safe harbour reforms, with many other submissions requesting the Committee to recommend the implementation of the recommendations from the Safe Harbour Report conducted by Treasury. The AICD went further and suggested a review be undertaken into director liability laws in general and reforms should be introduced to harmonise safe harbour and the business judgment rule.[67]

There were strong and consistent complaints in submissions (particularly from creditor groups) that directors often left it too long to seek professional advice to assist with the financial problems of their business.[68]

The ability of many directors to effectively manage a restructuring and turnaround was questioned by several submissions, which led to consistent calls for more training for directors in financial literacy and insolvency.[69] Narrow Road Capital suggested a regular exam for directors to remind them of their duties.[70]

Although the balance of submissions pointed to an inability of many directors to address and resolve the problems that many businesses have, there were several submissions that suggested there was a more deliberate strategy by some directors to avoid paying debts and to engage in phoenix activity. The lack of legal clarity about what is an improper phoenix and what is legitimate restructuring was mentioned several times, with some calling for a formal legislative definition for a phoenix offence.[71] Greater cooperation between government agencies to better address phoenix activity was also recommended.[72] The ETU argued for stronger criminal sanctions against the use of straw directors.[73] The AICM[74] and Southern

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[62] See also their hearing on 28.2.23, p7, which questioned the costs involved in maintaining separate personal and corporate insolvency appointments involving the same director.
[63] Submission 7, p15.
[64] Public hearing, 28.2.23, p29.
[65] Submission 30, p60.
[66] Submission 12, p4.
[67] Submission 44, pp2-5.
[68] See for example the detailed discussion in Brennan (sub73) and Eskdale (sub60).
[69] ABA, public hearing 28.2.23, p7; ARITA (sub36), p70; ASBFEO (sub31), p4; CPA Australia (sub11), p5.
[70] Public appearance 28.2.23, p25.
[71] ARITA (sub36), p47; AICM, public hearing 28.2.23, p12.
[72] SCOLA (sub37), p7.
[73] Submission 49, p6.
[74] Submission 9, p7.

Steel Group[75] both argued for a requirement to appoint a registered professional as part of the safe harbour.

Several submissions called for stronger disqualification provisions for directors who were involved with failed companies,[76] or at least where those companies failed to pay a minimum proportion of the company's debts. Wellard suggested that directors be personally liable for such a minimum proportion.[77] The Australian Credit Forum suggested that stronger powers and more enforcement was needed to force directors to comply with their obligation to assist liquidators.[78] Murray and Mason pointed to the inconsistent approach given to penalties imposed on directors for non-compliance with insolvency requirement compared with the severe criminal liability for personal bankrupts.[79]

Insolvent trading and the safe harbour were discussed in numerous submissions, with most being supportive of the safe harbour reforms and urging the Committee to recommend the implementation of the Treasury Safe Harbour Report recommendations. It was noted in several submissions that potential insolvent trading allegations are frequently made by insolvency practitioners when preparing reports on potential misconduct for ASIC. The failure to take enforcement action in respect of seemingly rampant insolvent trading was explained by both a lack of funding available for liquidators and a lack of enforcement activity by ASIC.[80]

There were some submissions (mostly from unions and some creditor groups) that were highly critical of the safe harbour and argued for its abolition.[81] Narrow Road Capital stated that safe harbour advice was very expensive and offered little more by way of benefits than what voluntary administration could provide.[82] These submissions tended to argue that the safe harbour involved deceiving creditors or at least actively concealing the true financial position from creditors. This position does not acknowledge the fact that few insolvent trading cases are successfully brought each year and those that are do not always produce significant returns to creditors due to the cost and vagaries of complex commercial litigation. The AICD suggested that any wholesale review of insolvency law should consider the framework for director liability in Australia.[83] Wellard went further and advocated making directors personally liable if a minimum proportion of the company's debts were not paid on external administration.[84] KWM suggested that clarification of the potential for unfair preferences and voidable transactions during the safe harbour was needed.[85]

Several submissions noted that insolvent trading and safe harbour are not areas of primary focus for MSME directors, despite many smaller businesses trading insolvent for prolonged periods, due to directors often having limited assets and being personally liable for the company's debts anyway through personal

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[75] Submission 27, p4.
[76] ATO (sub35), p4; SBDC (sub28, p3); ACF (sub22), p4; Wellard (sub51), pp3-4.
[77] Submission 51.
[78] QoN, pp8-9.
[79] Submission 17.
[80] Eskdale (sub60) p6; Narrow Road Capital (sub15), p8 'insolvent trading prosecutions are almost unheard of'.
[81] AMWU (sub69), p7; Narrow Road Capital (sub15), p12 'safe harbour provisions are unnecessary and dangerous'.
[82] Submission 15, p12.
[83] Submission 44.
[84] Submission 51, pp5-6.
[85] Submission 45, p9. See also Subcontractors Alliance and Subbies United (sub56), p18.

guarantees.[86] ARITA noted that ASIC's former insolvent trading program could be a useful initiative to assist directors.[87] Financier Allan Eskdale noted that caution should be exercised when designing laws to encourage entrepreneurship by facilitating directors of failed companies to start a new business 'because every failed business owner is not an entrepreneur…nobody benefits from them immediately starting a new business that will also likely fail.'[88]

The Economic Abuse Reference Group recommended reforms to assist with victims of domestic violence and economic abuse in relation to the available defences for insolvent trading.[89]

Pre-insolvency advisors

The need for company directors and managers to seek professional advice earlier rather than later as their business declines was noted across multiple submissions. As the Group Head of Credit Restructuring at Westpac Bank said during his public appearance, the 'engagement of suitably qualified people to help the business is the best possible route to turnaround'.[90] The AIIP[91] and Murray and Harris[92] both noted that pre-insolvency advisors had become a pejorative term and that this was unfortunate because seeking advice before terminal insolvency was a critical step in obtaining a better commercial outcome for the company and its stakeholders. The lack of awareness and access for small business owners to obtain quality advice was also pointed out by financial counselling services, who noted that business owners in financial distress may have insufficient funds to pay for good advice.[93]

The lack of effective regulation of pre-insolvency advisors was a consistent complaint across multiple submissions, with ARITA noting a survey of its members showed that evidence of an increase in the influence of illegitimate pre-insolvency advice.[94] ARITA argued that addressing inappropriate pre-insolvency advice is critical in tackling the improper phoenix issue. This is a debate that crosses a spectrum of views from those advocating for restrictions on who may provide safe harbour advice to directors in respect of insolvent trading, with some such as ARITA arguing that only registered liquidators should fulfil that role, to others arguing for more targeted training for safe harbour advisors. Several submissions (from creditor groups and in particular from those involved in the construction industry such as CFMMEU) were highly critical of the skillset of insolvency practitioners in turnaround and restructuring as opposed to liquidation actions.

ASIC gave a response to questions on notice[95] about pre-insolvency advisors and noted that it uses a range of technologies and stakeholder engagement and liaison with other agencies to take action against those involved in phoenix activity, including pre-insolvency advisors, although it also noted that it was often difficult to obtain evidence of inappropriate advice being given because it was frequently destroyed. ASIC also noted that it was not the only regulatory agency with

[86] Brennan, public hearing 21.2.23, p44.
[87] Submission 36, p75.
[88] Submission 60, p6.
[89] Submission 3. This was endorsed by the FCA and SBDC (sub58, pp6-7).
[90] Public hearing 28.2.23, p4.
[91] QoN, p6.
[92] QoN 1, pp22-3.
[93] SBDH, public hearing 28.2.23, p29.
[94] Supplementary submission, p42.
[95] QoN 2.

responsibility in the area. The ATO's response to questions on notice[96] simply explained that it refers suspected phoenix activity advisors to the Phoenix Taskforce and Series Financial Crime Taskforce. The ACF suggested that creditors of insolvent companies that had been phoenixed should be offered equity in the new companies.[97]

The overarching theme from submissions on pre-insolvency advisors was that government agencies, and ASIC in particular, should be 'doing more' to discourage inappropriate advice and facilitate access to better and earlier advice for directors of companies in distress. Some submissions pointed to the Treasury Safe Harbour report's recommendation that ASIC develop guidelines on who can be classified as an appropriately qualified entity for the purposes of the safe harbour.[98] The ASBFEO's business viability review voucher proposal was also revised as a potential mechanism to regulate inappropriate pre-insolvency advisors.[99] Chartered Accountants Australia & New Zealand noted in response to their questions on notice suggested that an Insolvency Practitioners Board could be established to register and regulate all those who provide advice in relation to insolvency, including pre-insolvency advisors.[100]

Company deregistrations

This topic was raised in several submissions that the number of companies deregistered each year is far larger than the number of companies that enter external administration. Deregistration may occur on a voluntary basis by the company's directors submitting a form to ASIC and paying a fee, but there are restrictions on this such as the company having no outstanding litigation, no debts and less than $1,000 in assets. A deregistration can also occur following a completed liquidation. Lastly, ASIC can deregister a company where it has failed to comply with minimum regulatory requirements (such as paying its annual fees and failing to respond to ASIC correspondence). Some have suggested that this could involve company directors seeking to avoid the formal insolvency system by simply having the company deregistered rather than appointing a liquidator or administrator.[101] This may be because of the cost of seeking professional assistance, a lack of knowledge or perhaps a deliberate attempt to avoid the scrutiny of liquidation by simply abandoning the company and waiting for ASIC to deregister it. Ashurst during their public appearance noted that a lack of available assets in insolvent companies could discourage creditors from initiating insolvency proceedings and that this could then lead to involuntary deregistrations from ASIC.[102]

The Committee proceeded to ask several parties appearing in public hearings why '13 out of 14' insolvent companies were bypassing the system.[103] Insolvency practitioner (and lawyer) Michael Brennan raised concerns with this question as lacking any evidence to support its accuracy and suggested it was simply an 'unproven academic hypothesis' that the Committee should be cautious of adopting it

[96] QoN 17, p2.
[97] Submission 22, p4.
[98] Murray and Harris (sub18), pp6-7.
[99] Murray and Harris, public hearing 13.12.23, p45; Symes (sub25), p3.
[100] CA ANZ, QoN 4, p3.
[101] Murray and Harris (sub18), pp3-4; Morgan (sub2).
[102] Public hearing 14.12.22, p25.
[103] This phrase was also used by ARITA in its public appearance on 14.12.22, pp10-11.

as fact.'[104] Brennan suggested that the figure came from Murray and Harris' submission[105] and their interpretation of an article in the ARITA Journal by ASIC executive Thea Eszenyi from 2022 that provided data on deregistration. The figures cited in the Murray and Harris submission[106] were derived from the total deregistration notices posted on the public insolvency notices website. Brennan argued that evidence was needed as to why directors allow their companies to be deregistered before drawing any conclusions about companies avoiding formal insolvency processes. Brennan's submission gives a detailed explanation as to why directors of insolvent company might not want to simply abandon their company through deregistration, namely the potential for ongoing tax liabilities.

ASIC was asked several questions about deregistration during its appearance before the Committee and produced a detailed explanation of deregistration processes in its response to several Questions on Notice as well as statistical information on the numbers of deregistrations, which is not regularly published. That information made it clear that ASIC does not have the resources or processes to investigate every deregistration, and it relies on complaints from creditors and other stakeholders to object to a proposed deregistration to take action.

Several submissions made calls on ASIC to investigate deregistrations further,[107] although ARITA noted that ASIC appeared to have increased its enforcement against directors who give false declarations for voluntary deregistrations.[108] AIIP noted that the lack of transparency about deregistered companies limits accountability and proper education of directors.[109] DyeCo noted that the publication of pending deregistrations was often not effective in reaching stakeholders.[110]

ARITA suggested reforms to the members' voluntary liquidation process to better facilitate liquidation of companies that don't qualify for voluntary deregistration, which it said could reduce the numbers of ASIC involuntary deregistrations each year and would allow some scrutiny of such companies.[111]

ASIC's role

ASIC's performance and accountability have been subject to numerous inquiries in the past (including by the recently established Financial Regulator Assessment Authority) and are at present subject to two separate Commonwealth parliamentary committee inquiries by the PJC and the Senate Economics References Committee.

ASIC's role in corporate insolvency received extensive criticism from the submissions to the PJC inquiry. The most consistent criticism concerned ASIC's enforcement track record arising from reports of potential misconduct by insolvency practitioners. Several submissions complained that ASIC would regularly respond to offence reports by declining to pursue further within a very short timeframe (sometimes less than 1 minute).[112] When ARITA appeared before the Committee it

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[104] Submission 73, Key point 2.
[105] Submission 18, p3.
[106] See submission 18 at p4.
[107] CPA Australia (sub11), p5; Law Council (sub30), pp28-9; Morgan (sub2); SV Partners (sub50), pp4-5.
[108] Submission 36, p48.
[109] Submission 20, p15.
[110] Submission 13, p7.
[111] Submission 36, pp59-60.
[112] ARITA, Supplementary submission, pp52-3.

was noted that where ASIC declines to take further action it is difficult to discuss the matter with the relevant staff because the process is managed through the Liquidator Portal, while in contrast AFSA encourages bankruptcy trustees to speak to them on the phone to discuss potential offence referrals.[113] ARITA also suggested that ASIC's enforcement track record against small companies (for example with phoenix activity) was inadequate compared with its activity against big companies.[114]

ASIC was asked probing questions by the Committee during public hearings about their approach to enforcement and they responded with several questions on notice, some of which provided detailed information and statistics that had not previously been released. The general concern expressed about ASIC's enforcement approach in corporate insolvency was that there appeared to be widespread potential breaches of the law that are not being prosecuted, or indeed not even being investigated given the lack of funding available to liquidators to conduct full investigations. Murray and Harris noted that ASIC had not been active in exercising its notice powers in relation to creditor defeating dispositions and phoenix activity.[115] The ABA suggested that ASIC was under-resourced and was being given too much information to handle through reports from liquidators.[116] The Small Business Development Corporation of WA offered to provide investigation resources from its own organisation to assist ASIC to properly investigate MSMEs in WA.[117] CPA Australia suggested that there were areas of concern (such as cybersecurity) that insolvency practitioners could report on to ASIC.[118]

ASIC's response essentially was that it has limited resources and can't bring all potential enforcement actions. ASIC did note that it had increasingly been using artificial intelligence systems to review insolvency practitioner reports and declined the Committee's request to provide further details on exactly how such processes worked.

ARITA argued in its supplementary submission that ASIC's performance in corporate insolvency had gotten materially worse since 2015 (when the Productivity Commission conducted its inquiry into business set up transfer and closure).[119]

ASIC was also extensively criticised about the operation of the Assetless Administration Fund (AAF). Several submissions from insolvency practitioners explained that the time and cost of making applications to the fund was inefficient and ineffective noting that it could cost almost as much in time to make an application as was being requested for funding. Several submissions recognised that the AAF was not providing insolvency practitioners with sufficient funds to properly perform their role.[120] Furthermore, it was pointed out that some categories of funding were fixed and submissions noted that the amounts provided were insufficient to perform the task. Several submissions argued that the fund should be completely redesigned so that it could provide sufficient funding for the liquidation and investigation of assetless and low asset companies.[121] Greater transparency and

[113] ARITA, public hearing 14.12.22, pp8-9.
[114] Public hearing 14.12.22, p9.
[115] Submission 18, pp9-10.
[116] Submission 23, p7.
[117] Submission 28, p5.
[118] Submission 11, p4.
[119] ARITA, Supplementary submission, pp6-7.
[120] ACF (sub22), QoN 1, pp9-10; AIIP (sub20); McGrathNicol (sub67), p7.
[121] AIIP, QoN 1, p3; Ashurst (sub26), p7; SCOLA (sub37), p8.

data concerning AAF grants and their outcomes was suggested by Symes.[122] KPMG argued for increased funding for the AAF.[123]

Several submissions argued to remove insolvency from ASIC's responsibility and to establish a new insolvency regulatory agency.[124] Some advocated for a new single insolvency statute, which is discussed further below. The Law Council[125] and Deloitte[126] also questioned why corporate insolvency had so many regulatory agencies with responsibility (ASIC, ATO, AFSA for PPSR and several federal agencies for the FEG program). Robinson[127] suggested that greater harmonisation between the regulatory responsibilities for corporate insolvency with ASIC and personal insolvency with AFSA were needed, while Brennan[128] suggested that in his experience many practitioners have noted potential distrust between the 2 agencies. Robinson noted that ASIC now provides less information about its regulatory role with insolvency practitioners than previously.[129] ARITA explained during its public appearance before the Committee that AFSA takes a far more cooperative approach to bankruptcy trustee's work than ASIC appeared to take with liquidator tasks.[130] It should be noted that ASIC's insolvency team is not a team to address offences by directors (or others) involving insolvent companies, but rather a team to regulate insolvency practitioners. It is possible that this team does not appropriately balance between roles in advising IPs and regulating and enforcing the law against them. Indeed, the ASIC insolvency team may well respond to such a statement that their role simply isn't to advise IPs in respect of how to best comply with the law. The Robinson submission contains a detailed discussion of strengths based regulatory approaches in contrast to ASIC's apparent regulatory approach towards IPs.[131]

The funding of ASIC's insolvency team through the Industry Funding Model and the prices that ASIC charges (everyone, including liquidators) to access data were also widely criticised in submissions.[132] Several submissions suggested a new funding model based on a percentage charge on asset realisations (as is used by AFSA under personal insolvency).[133]

ATO's role

The role of the ATO in corporate insolvency was widely criticised in submissions. These criticisms were based on the role of the ATO as a major unsecured creditor in most corporate insolvencies and the role and powers of the ATO in relation to companies prior to the commencement of formal insolvency proceedings. The submission by Michael Brennan (insolvency practitioner and lawyer) provided detailed information about the ATO's role in liquidations in Queensland.[134]

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[122] Submission 25, p4.
[123] Submission 55, p26.
[124] ACTU (sub75), pp16-17; AICM (sub9), p7; IPA (sub62), p10; Murray and Harris (sub18), pp4-5; SV Partners (sub50), p6.
[125] Submission 30, p52.
[126] Submission 32, p12.
[127] Submission 41, p3.
[128] Submission 73, Issue 6.
[129] Submission 41, p3.
[130] ARITA, public hearing 14.12.22, pp8-9.
[131] Submission 41.
[132] See for example SV Partners (sub50), pp6-7, describing these as an 'insolvency tax'.
[133] AIIP (sub20), p12; AIIP, QoN, p3. See also ARITA (sub36), pp65-6, who suggest a percentage of dividends paid to creditors.
[134] Submission 73.

The ATO was criticised as being inconsistent and uncommercial in its approach to the resolution of corporate insolvency matters. As some noted, the commercial outcome you could obtain in an insolvency could depend on which ATO officer was handling the matter. Complaints were made in multiple submissions about the ATO being disengaged as a creditor. In relation to small business restructuring, the ATO was criticised for supporting restructuring plans that were commercially unviable, although some also noted that the ATO appeared by getting tougher on restructuring plans.

Several submissions noted that it was difficult to interact with the ATO to address disputes about debts. The AIIP noted that some of its members had been forced to lodge formal complaints in order to engage in a discussion about insolvency matters, but that this process took over a month to proceed and such timeframes were inappropriate for procedures such as Pt 5.3B small business restructuring.[135] It was also noted that delays in resolving issues with the ATO lengthened insolvency procedures and could lead to increases in costs.[136] McGrathNicol also noted difficulties in dealing with the ATO to resolve disputes.[137]

Prior to insolvency, the ATO's use of its powers (such as garnishee notices and DPNs) was widely criticised as limiting corporate rescue and restructuring.[138] The Law Council noted several practical difficulties for directors of insolvent companies to comply with DPNs that had been issued.[139] The AICD complained that DPNs often appeared to be issued in an arbitrary and inconsistent manner.[140]

The ATO provided a detailed explanation of its internal DPN processes in responses to Questions on Notice.[141] The Economic Abuse Reference Group suggested that the ATO develop guidelines and processes to better support directors who were subject to domestic violence and economic abuse.[142] The Law Council suggested that s588FGA (which gives the ATO a right to pursue directors for tax payments that were claimed back by the liquidator as preferences) be repealed.[143] ARITA recommended that the ATO not be given priority over other unsecured creditors.[144]

The most frequently criticised aspect of the ATO's conduct was its track record on debt collection. Several submissions noted that the level of unpaid tax debts had reached historically high levels and that the ATO should be more active in recovering unpaid taxes and should not be extending multiple repayment arrangements with debtors of unviable businesses.[145] Deloitte did note that the ATO appeared to be getting more active in debt recovery,[146] although the Shopping Centre Council lamented that this could undo much of the financial support that its members provided to retailers during the pandemic by now putting businesses into formal insolvency.[147]

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[135] Submission 20, p4.
[136] AIIP (sub20), p5.
[137] Submission 67, p7.
[138] HIA (sub21), pp14-16.
[139] Submission 30, p56.
[140] Submission 44, p6.
[141] QoN-3, 4.
[142] Submission 3, p1. See also FCA and SBDH (sub58), p7.
[143] Submission 30, p12.
[144] Submission 36, p9.
[145] Law Council (sub30), p56; McGrathNicol (sub67), p7; Murray and Harris (sub18), p16.
[146] Submission 32, p12.
[147] Submission 40.

The AICM suggested that the threshold for reporting outstanding tax debts to credit reporting agencies should be lowered to $10,000,[148] but this was opposed by the response to Questions on Notice from CPA Australia, IPA and CA ANZ.[149] Distressed lender Allan Eskdale argued that the ATO should be more active in chasing up non-compliant corporate debtors (eg those that fail to make lodgements on time).[150]

One overarching concern expressed in submissions was that it appeared to be unclear what the ATO was seeking to achieve.[151] The Law Council described the ATO as being an 'unpredictable' creditor and suggested allowing ATO decisions on voting to be open to administrative review.[152] The ASBFEO went so far as to say that the views of some of its members was that the ATO was anti-business and often assumed small business taxpayers of deliberate non-compliance.[153] While the ATO stated in its submissions and responses to questions that it was simply a creditor and was seeking repayment of its tax debts, several submissions queried why the ATO seemed to adopt policy positions in relation to particular debtors that appeared to be aimed at punishment or broader public interest concerns rather than obtaining the best commercial outcome. Some submissions questioned whether the ATO should position itself as a regulatory agency in insolvency, but this was rejected by the ATO itself. The ATO's role in the Phoenix Taskforce was also criticised based on the relatively low numbers of successful prosecutions.[154]

Several submissions requested the Committee to recommend the ATO be subject to a model creditor policy in a similar manner to the Commonwealth's model litigant policy.[155] ARITA also suggested that ATO staff receive more training on insolvency because they are often looked at as a leading creditor in insolvency and others will look for guidance from the ATO.[156]

Fair Entitlements Guarantee (FEG)

The FEG program was widely criticised by both insolvency practitioners and employee groups. The concern of employee groups related to the failure of the FEG regime to cover unpaid superannuation entitlements, the capping of certain entitlements such as redundancy and other entitlements such as accrued time.[157] McGrathNicol also suggested that the small business redundancy rules needed amendment.[158] Suggestions were made about establishing trust funds to protect entitlements, which are discussed below.

The concerns of the insolvency profession related to the approach that FEG had been taking to the distinction between circulating and non-circulating assets and the priority given to employee entitlements under s 433 and s 561 (and therefore the priority that FEG would take following its payments to employees). The AIIP noted there was confusion about the operation of these provisions and this led to conflict

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[148] Submission 9, p9.
[149] QoN 1, p1.
[150] Submission 60, p1.
[151] See for example, AIIP (sub20), pp3-4.
[152] Submission 30, p56.
[153] Submission 31, p12.
[154] SBDC (sub28), p2.
[155] ARITA (sub36), p10; McGrathNicol (sub67), p7.
[156] Submission 36, p10.
[157] ACTU (sub75), AMWU (sub69), CFMMEU (sub68) and ETU (sub49).
[158] Submission 67, p10.

with the priority position of liquidators and their remuneration.[159] AIIP also noted that there was 'often disagreement between FEG and registered liquidators on the correct interpretation' of these provisions.[160] Insolvency practitioners discussed being pressured by FEG in relation to decisions to continue trading a business, including during voluntary administration despite FEG payments not being available in administration or under a DOCA.[161] KPMG noted that FEG action could result in an insolvency practitioner taking a conservative strategy by closing down a business immediately or sooner than necessary and this could have an adverse effect on employees.[162] McGrathNicol stated that in its experience FEG has sought to retrospectively second guess decisions by insolvency practitioners and had allocated significant resources for litigation although this was not always in the best interests of creditors as a whole.[163] ARITA suggested that FEG be required to work with the insolvency profession to develop guidelines concerning trade-ons in voluntary administration and should act as a model litigant.[164] Further guidance on the priority of employee entitlements, trade on decisions, circulating assets and insolvency practitioner remuneration and expenses was recommended by several submissions.[165] The submission from DEWR also sought further clarity on this issue.[166]

Several submissions noted that FEG could use its extraordinary information gathering powers to request large amounts of information and documents from insolvency practitioners, sometimes stretching back several years in relation to finalised matters. ARITA suggested that FEG provide funding for the work needed for such requests.[167] DEWR suggested the Committee consider broadening these powers.[168]

The submission from DEWR[169] gave further information on the operation of the FEG program and on its financial performance. It also recommended the Committee consider whether contribution order reforms were adequate to address misuse of the FEG program[170] and to consider whether the scope of the circulating asset concept was still appropriate and whether to codify the High Court's decision in *Carter Holt Harvey*.[171]

The role of insolvency practitioners

The bulk of the submissions to the inquiry noted the important public interest role that insolvency practitioners have in the economy. The submissions acknowledged that insolvency practitioners typically have insufficient funds to undertake full investigations and that many insolvency practitioners are regularly unable to recover their fees and expenses. The submissions from insolvency practitioners and

[159] Submission 20, p16. See also Deloitte (sub32), p10; DyeCo (sub13), p5.
[160] Submission 20, p17. See also Law Council (sub30), p57.
[161] AIIP (sub20), p17. See also ARITA (sub36) [7.3].
[162] Submission 55, p27.
[163] Submission 67, p8.
[164] Submission 36, p10.
[165] Deloitte (sub32), p10; KPMG (sub55), p7; Law Council (sub30), p14; McGrathNicol (sub67), p8; Murray and Harris (sub18), p17.
[166] Submission 52, p13.
[167] Submission 36, p10. See also McGrathNicol (sub67), p8.
[168] Submission 52, p13.
[169] Submission 52.
[170] Submission 52, p11.
[171] Submission 52, p13.

accounting bodies noted that insolvency practitioners are a heavily regulated profession, subject to stringent independence requirements and whose fees are governed by strict control by creditors and the courts. Owens suggested that insolvency practitioners should owe duties to the debtor,[172] although this ignores the fact that corporate insolvency practitioners are already officers of the company and do owe duties to the debtor company as well as its creditors, as well as coming under strict professional standards.

With respect to the level of fees charged by insolvency practitioners, several submissions noted that insolvency work generally charges less than audit, tax and consulting work within professional services firms and ARITA produced statistics that showed some senior insolvency practitioners are charging less in real terms than what was being charged at the turn of the millennium. It was noted in several submissions that other professional advisors and service providers are not subject to the same strict fee regulation as insolvency practitioners. Bluerock[173] and Deloitte[174] noted that the cost of compliance obligations reduced returns to creditors. The submissions by ARITA[175] and by Brennan,[176] give a detailed discussion of why practitioners may undertake unpaid work. The level of fee disclosure was subject to mixed responses, with some arguing that too much information is given to creditors who are unlikely to need it or read it, while others[177] argued for more detail in remuneration disclosures. Several submissions argued for higher minimum pre-approved remuneration (which is currently $5,000).[178]

The reporting and investigation work undertaken by insolvency practitioners was recognised by several submissions as being important work undertaken in the public interest.[179] However, multiple submissions also queried whether this work should be done without assistance from public funding. If work is being done not merely in the creditors' private interest, but rather in the public interest should the government and taxpayers contribute to that work being performed? The questions from the Committee during public hearings asked about whether some of this work should be performed at all.

One suggestion that was made in several submissions was whether a government liquidator's office (such as an Official Receiver as in the UK, or an Official Assignee as in Singapore and New Zealand), which is discussed further below. The ASBFEO suggested reducing the reporting obligations of IPs as well as digital reporting.[180] Deloitte noted that reporting obligations contributed to the costs of insolvency and this could reduce funds available to creditors.[181] ARITA noted that much work was undertaken by IPs in investigations and reporting without the benefit of discussions with ASIC as to whether any of that work would be acted upon because there is not an ongoing dialogue between practitioners and ASIC.[182]

[172] Submission 71, p9.
[173] Submission 8, p1.
[174] Submission 32, p9.
[175] Supplementary submission 1.
[176] Submission 73.
[177] Sewell (sub12), p4.
[178] CA ANZ (sub39), p2; SV Partners (sub50), p6.
[179] Murray and Harris (sub18).
[180] Submission 20, p6, p12. See also McGrathNicol (sub67), p10.
[181] Submission 32, p12. See also Bluerock (sub8), p1.
[182] Public appearance 14.12.22, pp8-9.

Diversity in the insolvency profession was a theme expressed in several submissions from industry groups and insolvency firms. It was noted that there is a gender imbalance in registered liquidators and several submissions explained how the current requirements to become registered as a liquidator (which require 4,000 hours of senior management experience in the past 5 years) disadvantaged practitioners who took parental leave. It was suggested that these requirements could be made more flexible to assist those taking extended leave prior to seeking registration as a liquidator. Many submissions urged greater action to increase diversity within the profession.

One area of insolvency practitioner conduct that attracted particular criticism was the conduct of recovery proceedings, specifically unfair preferences. This is discussed further below. Subcontractors' Alliance and Subbies United[183] were concerned about the independence of insolvency practitioners who were also members of bank panels (and the ABA subsequently in its response to QoN disclosed which firms were on bank panels). The CFMMEU suggested that related parties should not be permitted to take an assignment of a liquidator's right to sue.[184]

Government liquidator/Official Receiver and a single Insolvency Act

Several submissions argued for the introduction of a government insolvency agency,[185] such as an Official Receiver's office as is used in English insolvency law and is used in Australia in personal bankruptcy law. Some suggested that this could form part of a new insolvency regulator by removing corporate insolvency from ASIC and removing personal insolvency from AFSA and merging both into a new agency. However, there were also comments in some submissions that this could lead to poor outcomes because institutional agency synergies and knowledge could be lost and due to the cost of establishing the body.[186] It should be noted that one law reform proposal that is being discussed in the national media is to shift ASIC's enforcement responsibilities to a new federal civil enforcement agency.

The Committee asked multiple government agencies about their views on creating a single regulatory agency, but those agencies simply noted that there would be costs and complexities in such reforms and noted it was a policy matter for government. The Committee seemed very interested in the idea and sent questions on notice to multiple persons who appeared before them in person to ask about their views on such a proposal and how it might work. Several submissions noted that having insolvency law spread across multiple Acts, regulations, rules and legislative instruments contributed to its complexity and made it hard to access for businesspeople.

There was broad support for a single insolvency regulator (even if that regulatory agency did not perform work as a government liquidator) with a single insolvency statute.[187] A single insolvency statute is used in many common law countries around the world, including in Canada, Singapore and in England, although some corporate restructuring tools such as schemes of arrangement may be found in company law

[183] Submission 56, p17.
[184] Submission 68, p13.
[185] ACTU (sub75), pp16-17; AIIP (sub20), p15; ASBFEO (sub31), p11; CA ANZ (sub39), p11; FCA and SBDH (sub58), p3; Murray and Harris (sub18) and Symes (sub25).
[186] ARITA, supplementary submission 2; Brennan (sub73); McGrath Nicol (sub67), p6.
[187] ARITA (sub36); ASBFEO (sub31), p9; Deloitte (sub32), p12; DyeCo (sub13), pp9-10; MinterEllison (sub4), p2; SCOLA (sub37), p2.

statutes. There was strong advocacy for a single statute with a single set of rules, procedures and forms. It was clear that the harmonisation project of the ILRA had not been successful. A single insolvency statute does not necessarily require a single insolvency regulator, as it is possible to create a unified statute but keep ASIC and AFSA in their respective roles. However, that was not the preferred position of the majority of submissions that addressed this issue.

Several submissions suggested introducing alternative dispute resolution mechanisms, either through increased alternative dispute resolution in insolvency and/or with the introduction of specialist insolvency courts or tribunals which could handle both personal and corporate insolvency disputes.[188]

Voidable transactions

The powers of liquidators to recover previous payments and asset transfers for the benefit of creditors under Part 5.7B of the Corporations Act was the subject of detailed debate in submissions and in appearances before the Committee. While insolvency practitioners and accounting and insolvency industry groups noted the important role that voidable transaction proceedings played in promoting fairness and equality amongst unsecured creditors and in helping to support the work of liquidators who were often underfunded to perform their investigatory and reporting work, creditors were strongly opposed to the current regime. Simplification and clarification of unfair preferences was widely recommended.[189] The Law Council advocated caution in making changes to unfair preferences if this could encourage the disposal of assets prior to insolvency.[190] Deloitte also noted that limiting or removing unfair preferences would likely only benefit larger creditors with better credit management practices and leverage over debtors.[191]

Trade creditor groups and industry associations argued for restrictions on the timeframes in liquidators being permitted to bring voidable transaction proceedings, with many submissions complaining about being left in doubt about proceedings for years before receiving notice of proceedings shortly before the limitation period expired. Several submissions pushed for a new time limit of 1 or 2 years. Some submissions also complained about preference actions for relatively small amounts (under $30,000).[192] ARITA acknowledged that some liquidators took a scattergun approach by sending demand letters to all creditors who received payments within the prior 6 months, but also noted that such conduct was prohibited by its Code of Professional Practice.[193] The Subcontractors Alliance and Subbies United submission stated that unfair preference claims against subcontractors in construction liquidations commonly involved ambit claims by liquidators that were invariably settled for 30% of what was claimed.[194]

Several submissions advocated for reform to change the basis of unfair preferences to require an intention to obtain a preference, which is the law in some overseas

[188] Eskdale (sub60), p15; Kroll (sub47), p2; SV Partners (sub50), p6.
[189] ACF (sub22), p5; Commercial Bar Association of Victoria (sub43), pp3-4; Golledge (sub6); KWM (sub45), p8; KPMG (sub55), p7; McGrathNicol (sub67), p3; SCOLA, QoN, p5; TMA (sub38), Topic 7.
[190] Submission 30, p12.
[191] Submission 32, p6.
[192] ACF (sub22), p5; CPA Australia, IPA and CA ANZ, QoN, pp1-2; CPA Australia, public hearing 28.2.23, p45; FCA and SBDH (sub58), p4.
[193] Submission 36, p56.
[194] Submission 56, pp12-13.

jurisdictions (such as England). Several submissions, both from both insolvency practitioners and from creditors, advocated reform of the defences to clarify their scope. Creditor groups in particular were concerned about the attribution of knowledge of insolvency by simply seeking enforcement of the payment of debts.[195] The CPA Australia, IPA and CAANZ response to Questions on Notice stated that 'the current unfair preference regime penalises good credit management'.[196] Southern Steel Group also complained that unfair preference laws punished them for taking payments at a time when they were likely helping to support their debtor through a difficult time.[197] Some insolvency practitioners advocated for easier ways to pursue voidable transactions, for example through administrative notices such as is used in personal bankruptcy law in Australia. Another suggestion was to make payments to related parties deemed to be unfair preferences.[198] ARITA also recommended that a document on unfair preferences rights be approved for distribution by ASIC to help creditors better understand the process.[199] SCOLA suggested expanding ASIC's administrative notice recovery power for creditor defeating dispositions to cover all voidable transactions.[200] The Law Council recommended that the ATO's power to pursue directors for an indemnity against tax payments claimed back as preferences under s 588FGA be removed.[201]

Secured creditors and the PPSA

The PPSA was the subject of many submissions and while some believed that the PPSA had provided some benefits over the previous position for secured transactions, there were multiple complaints about the operation of the PPSA regime and the PPS Register. Small business and some accounting groups noted that there seemed to be a lack of understanding about the PPSR with small business owners and with many small business advisors. The ASBFEO noted that the PPSR is complicated, expensive and the application process is easy to get wrong.[202] The Law Council stated that the information provided on the PPSR website by AFSA was reasonably clear and helpful.[203] Winter and Peari suggested removing vesting where the secured party was an MSME and reinstating the *nemo dat* rule[204] and Bluerock[205] suggested those with retention of title claims should be subject to less stringent rules under the PPSA. Suggestions were made to verify the security interest at the point of registration to save insolvency practitioners time verifying registration after being appointed.[206] It was suggested that imposing time limits on the ability of secured parties to verify their security interests following notice from an insolvency practitioner would assist in insolvency proceedings.[207]

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[195] ACF (sub22), p5; AICM (sub9), pp1-2 and public hearing 28.2.23, p12; FCA and SBDH (sub58), pp2-5; CPA Australia, IPA and CA ANZ, QoN, p3; Southern Steel Group (sub27), p3; Subcontractors Alliance and Subbies United (sub56), p14.
[196] Page 1. See also ARITA (sub36), p54.
[197] Submission 27, p3.
[198] ARITA (sub36), p7; Golledge (sub6), pp1-3; CPA Australia, IPA and CA ANZ, QoN, p1; Southern Steel Group (sub27), p3; TMA (sub38), Topic 7.
[199] Submission 36, p7.
[200] Submission 37, p3.
[201] Submission 30, p34.
[202] Submission 31, p10.
[203] Submission 30, p30.
[204] Submission 1, p4.
[205] Submission 8, p3.
[206] ACF, QoN 1, p7.
[207] AIIP (sub20), p7; ARITA (sub36), p7; CA ANZ (sub39), p8; McGrathNicol (sub67), p2.

It was clear that there was frustration with the failure to respond to the Whittaker Review of the PPSA, which was completed more than 7 years before. The Committee quizzed several government agencies about this during public hearings on 13 December 2022 (particularly AFSA and Attorney-General's Department) but there was mostly just a discussion of minor amendments made to the PPSA and an ongoing project to improve and simply the system and engage with stakeholders to promote understanding of the regime.[208] The registration requirements relating to trustees, and particularly corporate trustees where there have been frequent mistakes by using the ACN of a trustee company rather than the ABN of the trust (as is required under the PPS Regulations), was a common topic for reform and simplification.[209] The process for amending and removing ineffective registrations on the PPSR was also a topic of several submissions and was said to be a regular impediment to asset sales during insolvency and restructuring and simplifying the PPSR was a common suggestion.[210]

The power of secured creditors to appoint receivers during restructuring efforts was a topic for several submissions, who noted that this ability had largely been removed in several other common law countries, however this was mostly raised by submissions from insolvency lawyers[211] and was not the subject to extensive discussion in other submissions. KPMG stated that security enforcement rules generally functioned well and were critically important in facilitating secured lending and reducing the cost of debt in Australia.[212] While there were no submissions from individual banks, the Australian Bankers Association was asked extensive questions about how banks address financial distress, particularly involving MSME borrowers. While prior inquiries (in particular the ASBFEO's Insolvency Practices Inquiry in 2020) had suggested restricting secured creditor and receiver powers, there were few recommendations from creditor groups about this in the PJC inquiry. Several submissions noted that banks had taken more flexible approaches to distressed borrowers in recent years.[213] However, Brennan noted that secured creditors often 'laid siege' to corporate borrowers which put them into a position where a formal insolvency was unavoidable, but security over proceeds meant that businesses would be unable to restructure due to a lack of cashflow.[214]

Some suppliers complained about what they perceived as unfair conduct by insolvency practitioners in relation to secured assets. Southern Steel Group suggested faster notification of appointment of an insolvency practitioner, the ability to conduct their own stocktake and a greater effort to keep their goods separate.[215]

Schemes of arrangement was a topic of discussion, particularly with insolvency lawyers and large professional services firms. It must be noted that the Treasury Department conducted a review of creditors' schemes of arrangement in 2021 with 22 submissions made (some of the submissions being in excess of 100 pages, for example the TMA submission). A general moratorium prior to the filing of a scheme

[208] See AFSA, QoN 1.
[209] See for example, ABA (sub23), p4; Murray and Harris (sub18), p10.
[210] ABA, QoN 1, p7; ABSFEO (sub31), p10; Bluerock (sub8), p3; Deloitte (sub32), p6; KordaMentha (sub14),p3; McGrathNicol (sub67), p2; Murray and Harris (sub18), p10; SBDC (sub28), p7.
[211] Law Council (sub30), p42; TMA (sub38), Topic 11.
[212] Submission 55, p15.
[213] Eskdale (sub60), pp9-10; Law Council (sub30), p42.
[214] Submission 73, Issue 7.
[215] Submission 27, p2. See also AICM (sub9), p4.

application was suggested by several submitters.[216] Adjustment of voting thresholds,[217] cross-class cramdown[218] and super priority debtor-in-possession financing were also suggested,[219] although KWM suggested super priority financing reforms but not in relation to creditors' scheme.[220] KPMG suggested alternate adjudication procedures through expert determination rather than through court procedures.[221]

Employees and contractors

Employees were represented by several large union organisations who made submissions about the protection of employee entitlements, in particular superannuation. The ACTU recommended a rethinking of priority payments to promote employees and dependant contractors to first priority.[222] SCOLA recommended that the caps on employee entitlements that receive priority should be lifted.[223]

Phoenix activity and the safe harbour were also common topics in submissions by employee groups, with a perspective that directors were abusing safe harbour to restructure companies in a way that disadvantaged employees and the payment of employee entitlements. It should be noted that Pt 5.8A of the Corporations Act was amended in 2019 to rewrite the rules on personal liability for transactions that seek to avoid paying employee entitlements. These provisions impose personal liability (both civil and criminal) on company officers and their advisors for entering into transactions that seek to avoid or hinder the repayment of employee entitlements. In addition, the anti-phoenix reforms introduced the 'creditor defeating disposition' power for voidable transactions and gave ASIC the power to issue administrative notices to order payment in cases of creditor defeating dispositions. The submissions that addressed these provisions noted that they had not been used widely and there had been only 1 case of creditor defeating dispositions. Insolvency practitioners noted that the ability to bring such proceedings requires adequate funding, which was not typically available including through the Assetless Administration Fund.

Several submissions (mostly from unions) discussed trust and insurance arrangements within enterprise agreements to protect employee entitlements, with the Incolink scheme suggested as one example.[224] The CFMMEU gave more detail on the use of trusts to protect entitlements in its answers to Questions on Notice.

Contractors had a different perspective to employees, although they were also concerned about being paid. The contractor submissions mostly related to the construction industry and the particular operation of, and challenges involved in, that industry. The contractors argued that Security of Payment legislation was not entirely effective in ensuring that sub-contractors were being paid.[225] A particular concern

[216] ABA (sub23), p4; KPMG (sub55), pp19-20; Law Council (sub30), pp12, 41.
[217] ABA (sub23), p5, KWM (sub45), p4; Law Council (sub30), p41; McGrathNicol (sub67), p9.
[218] KWM (sub45), p4; Law Council (sub30), pp13, 43; TMA (sub38), Topic 7.4.
[219] KPMG (sub55), p20; Law Council (sub30), p42; TMA (sub38), Topic 7.4.
[220] Submission 45, p5.
[221] Submission 55, p19.
[222] Submission 75, p14.
[223] Submission 37, p8.
[224] ACTU (sub75), p8; Incolink (sub66); KPMG, QoN 1, p2.
[225] See also CFMMEU (sub68), p9.

related to the handling of retention monies on construction projects, with contractors alleging that owners would withhold money even for very minor defects.[226]

VA and DOCAs

The voluntary administration and DOCA regime in Part 5.3A were not specific terms of reference but several submissions made recommendations for improvement. It was generally noted that voluntary administration provides a flexible restructuring tool that can be used by a range of businesses, although it is probably not suitable to micro enterprises given the costs involved,[227] although lawyer Ben Sewell argued that voluntary administrations are largely unsuccessful for anything but large companies.[228] Ashurst advocated for a new debtor-in-possession regime apart from administration.[229]

Insolvency practitioners noted that the costs of administration relate to the reporting and investigations required and to the compressed timeframe involved. An administration that involves a trading business was likely to be more difficult and expensive than a non-trading asset-based business.[230] The TMA suggested a general review of voluntary administration.[231]

The facilitation of prepack transactions through an expedited administrations or perhaps simply voting on a DOCA towards the start of an administration was recommended by some submitters,[232] in conjunction with a suggestion to make independence requirements for insolvency practitioners more flexible to allow for more pre-appointment work to be undertaken prior to becoming administrator.[233] Several submissions suggested amendments to confirm the scope and acceptable uses of creditors' trusts.[234]

Removing the need for court approval for time extensions and for variations to administrator personal liability (which are often heard in the same application) were suggested as potential reform ideas to save costs in administration.[235] KWM advocated simply extending the period for the 2nd creditors meeting to a default of 3 months given this type of extension is routinely granted by the courts anyway.[236] Some suggested that an insolvency administrative panel be introduced to handle these types of issues rather than using the court.[237] Others suggested that s443A be reformed to better balance personal liability risk for the administrator.[238]

The potential automatic vesting of PPSA security interests granted by an administrator to facilitate rescue finance was noted as a problem by several submissions.[239]

[226] Subcontractors Alliance and Subbies United (sub56).
[227] Law Council (sub30), p22.
[228] Public hearing 28.2.23, pp60-1.
[229] Submission 26, pp1-4.
[230] Law Council (sub30), pp22-3.
[231] Submission 38, Topic 11.
[232] Submission 38, Topic 11.
[233] Law Council (sub30), p24 and McGrathNicol (sub67), p3.
[234] Deloitte (sub32), p4; KWM (sub45), p6; SCOLA (sub37), p5.
[235] Law Council (sub30), p24; McGrathNicol (sub67), p3 and Murray and Harris (sub18).
[236] Submission 45, p5.
[237] Deloitte (sub32), p4.
[238] McGrathNicol (sub67), p3; TMA (sub38), Topic 11.
[239] KWM (sub45), p5; Murray and Harris (sub18), p10; TMA (sub38), Topic 6.4.

Some submissions raised concerns about the independence of administrators who are appointed by directors and so suggested that a panel system could be used to appoint administrators once the board had decided to put the company into voluntary administration.[240] Submissions from unions noted that they routinely saw administrators who appeared to be advising directors prior to their appointment and this reduced confidence in the administration process within the creditors and employees.[241] Subcontractors Alliance and Subbies United suggested an independent authority to appoint administrators and liquidators.[242] There was a perception from some submissions that administrators were more motivated by their potential liability and recoverability of their fees than they were about achieving the best commercial outcome, in terms of deciding whether to continue trading the business or recommending creditors pursue liquidation.[243] It should be noted, however, that the original intention of administration (as expressed in the Harmer Report) was to impose personal liability on administrators for costs incurred during the administration to ensure that the administration was as short as it needed to be. It is also noted that personal liability is similarly imposed on receivers for their trading activity under ss419 and 419A.

Deeds of company arrangements were commented on by several submissions. One concern raised was the viability of DOCA proposals that depended on future trading profits. The ATO suggested that DOCAs be assessed by the number of DOCAs that were complied with rather than the number of those merely accepted by creditors.[244] The ATO went on to express concerns that creditors accept too many DOCAs that have low prospects of being fully effectuated and are simply being used to avoid paying creditors a reasonable dividend. The ATO suggested that some DOCAs involve issuing promissory notes to promote a faster termination, but argued against this allowing the DOCA to be finalised until the promissory note was discharged.[245]

The limitations imposed on DOCAs, particularly the inability to include 3rd party rights (such as personal guarantees given by the directors) and the inability to assign contracts were noted as hindering the use of DOCAs to produce optimal commercial outcomes.[246] On the other hand, the Shopping Centre Council of Australia argued that DOCAs operate unfairly on landlords because they compromise future and contingent claims, and their claims for future rent were limited too much by administrators in the proof of debt process.[247] KWM suggested that DOCAs receive protection against ipso facto clauses (such protection does apply to administration but not to the commencement of a DOCA).[248] SCOLA also recommended amendments to clarify the role and powers of directors during a DOCA.[249]

The lack of data

The lack of comprehensive data on the operation of the insolvency regime in Australia has been a long-standing issue, with recommendations on improving

[240] ATO (sub35), pp3-4.
[241] CFMMEU (sub68).
[242] Submission 56, p18.
[243] SBDC (sub28), pp3-4.
[244] Submission 35, pp6-7.
[245] Submission 35, p7.
[246] McGrathNicol (sub67), p3 and TMA (sub38), Topic 11.
[247] Submission 40, p7.
[248] Submission 45, p6.
[249] Submission 37, p6.

available data being made by several prior inquiries all the way back to the Harmer Report. Several written submissions pointed out the lack of detailed data about insolvency.[250] The Committee also asked for data during multiple in person hearings, including asking ASIC, ATO, DEWR and other industry groups for empirical evidence on matters that were being raised. Most of these questions from the committee were taken on notice by parties appearing before them and were then provided in responses to questions on notice. It is disappointing that much of this data is only provided during public inquiries.[251]

AIIP argued for more data concerning the role and performance of the ATO in insolvency.[252] ARITA provided a list of important questions about the operation of insolvency laws that would be better informed by improved data, including the nature of companies going into insolvency, dividends paid in insolvency, the cost of insolvent administrations and fees recovered and written off by insolvency practitioners.[253]

One particular topic that produced numerous comments on the lack of data concerned the safe harbour. Several submissions noted that there is generally no public disclosure that directors are seeking to rely on the protection of the safe harbour against insolvent trading.[254] One safe harbour matter that was raised in several submissions by unions and during the public hearings and in questions on notice was the restructuring of Ovato, a commercial printing company.[255] The submissions by unions noted that Ovato had negotiated employee concessions without disclosing that it was pursuing a restructuring strategy that would result in a reduction in redundancy entitlements. The director of the company then announced that he was operating under safe harbour protection and a creditors' scheme was implemented together with a variation of the enterprise agreement that significantly reduced redundancy entitlements, with the company being eventually being shut down and workers losing their jobs. The unions discussed this matter in terms of feeling deceived about restructuring efforts while directors were operating under safe harbour.[256] Multiple government agencies were asked about their knowledge and any involvement in the matter and this formed the basis of several responses to questions on notice. Submissions by law firms, insolvency and turnaround industry bodies and insolvency firms pointed out safe harbour is not subject to public disclosure and that such disclosure may in fact exacerbate a company's financial problems if creditors and stakeholders withheld or restricted their support for the company.

The cost of accessing data from ASIC's registers was an issue raised by several submissions, particularly from insolvency practitioners. It was noted that data access fees contribute to the cost of insolvency proceedings and therefore reduce the funds

[250] AIIP, QoN 1, p2; ARITA, supp 1 [3.6]; Barrett Walker Accountants (sub64), pp1-2; Kroll (sub47), pp2-3; Murray and Harris (sub18), Robinson, public hearing 1.3.23, p11; SCOLA, public hearing 1.3.23, p18; SCOLA (sub37), p8; TMA (sub38), p7; TMA QoN, p15.
[251] As was noted by Murray and Harris, public hearing 13.12.22, p38.
[252] QoN-001, p3.
[253] Supplementary submission 1, pp29-30.
[254] KPMG (sub55), p22.
[255] See AMWU (sub69).
[256] 'the safe harbour was used 'as a smoke screen', AMWU, public hearing 21.2.23, p28.

available for creditors. These submissions requested the committee to recommend that such data be available free of charge for insolvency practitioners.[257]

Several suggested that ASIC provide data for the purposes of research in the public interest.[258] Murray and Mason also suggested that professional associations and individual professional firms should be required to contribute more data.[259] The Law Council went one step further and recommended a broad review of publicly available information provided by government organisations relating to insolvency.[260] Any wholesale reform of insolvency law will no doubt need to fully integrate the effect use of data and new technologies (such as artificial intelligence).

Construction

The building and construction industry featured in many submissions, including from builders and developers,[261] from contractors and sub-contractors,[262] unions[263] and from professional services providers. These submissions tended to give detailed discussion of how the building and construction industry operates, including providing graphical explanations of the parties and processes commonly involved in projects. It could be said that these submissions were arguing that building and construction is an important industry for the economy and that the financial position of parties involved in this industry is very tight and is being challenged significantly by inflation and labour shortages in order to justify special rules or exceptions that account for the circumstances of the industry.

The submissions from builders and developers argued for a blanket exception from the operation of the ipso facto protections that were introduced in 2018 in large part on the basis that their industry has special characteristics that make such protections particularly problematic and that major firms frequently support their contractors and sub-contractors when they get into financial difficulty.[264] A somewhat different picture was presented by submissions from the contractors, sub-contractors and unions who argued that workers in the industry (including both formal employees and those engaged as contractors but who were working effectively as employees) were being regularly short-changed from their entitlements and outstanding debts. A consistent theme in both groups of submissions was the significant flow-on effects that insolvency could produce in the construction industry and the widespread scale of the financial difficulties in the industry. The effect of fixed price contracts was said to be particularly problematic in the current inflationary environment.

The appropriateness of retention monies was debated by both builders and developers (in favour) and contractors (against). The contractor submissions also explained why protecting their financial position on projects through PPSR registrations was practically very difficult.[265]

[257] ARITA, supp 1, p30; SV Partners (sub50), p7.
[258] Submissions (ARITA (sub36), p6; Kroll (sub47), p2; Murray and Harris (sub18), pp2-4; Murray and Harris, QoN 1 pp16-7; SCOLA (sub37), p8.
[259] Public hearing1.3.23, p24).
[260] Submission 30, p13.
[261] HIA (sub21); MBA (sub48).
[262] Subcontractors Alliance and Subbies United (sub56).
[263] ACTU (sub75), CFMMEU (sub68) and ETU (sub49).
[264] MBA (sub48), p4.
[265] Subcontractor Alliance and Subbies United (sub56).

Other issues

With 78 submissions from a diverse section of the community, there were many issues raised for consideration that only appeared in single submissions or a very small number of submissions. Some of those issues to note include the following.

Several submissions asked the PJC to consider how not for profits and charities are dealt with under insolvency law and requested clarification in any potential law reform.[266] Several of these submissions arose from individuals with personal experience of the insolvency of community groups, aged care facilities and other NFPs. SV Partners noted the need for insolvency law to accommodate new technologies, such as NFTs and DAOs.[267]

Industry groups representing retail and commercial landlords made detailed submissions about the effect of COVID support measures on their operations, particularly the national tenancy code and restrictions on exercising contractual rights against tenants who breached the terms of their leases. Submissions from small business groups raised the prospect of further support measures in the future to respond to sudden shocks and national disasters and emergencies, which were rejected by the landlord groups.[268]

Several submissions also argued for reform relating to the external administration of corporate groups, with a particular focus on rules relating to consolidated meetings, committees of inspection and approval of remuneration.[269] The ACTU suggested public disclosure of all related entities within business groups (including trusts, partnerships and joint ventures),[270] while the ETU[271] advocated for stronger powers to make related parties liable for unpaid debts. Barrister Stephen Golledge SC argued for simplification of the court ordered pooling process.[272] Professor Jenny Buchan argued for changes to insolvency law to better accommodate franchising arrangements.[273] Blanchett[274] and Wellard[275] both suggested that the test of insolvency under s95A should be reviewed.

Wholesale reform

The majority of submissions noted that it had been almost 40 years since the ALRC's Harmer Report was handed down and commented on the significant changes in the economy and in society since the 1980s. The nature and operation of business activity has changed fundamentally since the 1980s, with many businesses now reliant on the value of intangibles rather than fixed assets and with new forms of commercial finance and different community attitudes to debt, let alone the rise of the internet and more recently artificial intelligence. While several submissions commented that the corporate insolvency system was not fundamentally flawed, and in many cases worked well, the consensus was that a broad wholesale review of insolvency law (both personal and corporate) was warranted. Complexity of the legal

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[266] AICD (sub44); AGD (sub33); James (sub65).
[267] Submission 50, p5.
[268] ASBFEO (sub31), p3.
[269] KordaMentha (sub14), p4; McGrathNicol (sub67), pp9-10; TMA (sub38).
[270] Submission 75, p8.
[271] Submission 49, p6.
[272] Submission 6, p5.
[273] Submission 77.
[274] Submission 42.
[275] Submission 51.

framework was cited as one important reason for a wholesale review. Insolvency practitioners, lawyers, creditors, employees, small business owners and financiers all complained about the complexity of the law. The range of matters highlighted above demonstrates that there is much to review and consider through deep public consultation. This was commonly referred to as a 'root and branch review'.

The Committee asked several questions on notice for those who appeared before it about how a wholesale review might work, and which government agency would be best to conduct it. The Committee also asked about the experience of foreign insolvency law reform initiatives, with Canada, Singapore and the UK providing examples in several submissions. The change in international insolvency discourse in favour of promoting restructuring and business reduce?? was noted in several submissions and it was suggested by some that a policy preference for such approaches could inform wholesale law reform.

Conclusion

It remains to be seen what the PJC's final report will recommend. However, the review of submissions, answers to QoN and transcripts of public hearings demonstrates a desire for a broad review of insolvency law. Many submissions lamented the complexity and uncertainty of the existing insolvency law system and noted the costs that the system imposes on users and the broader economy. While many submissions noted that the system works reasonably well and produces some good outcomes, the breadth of complaints and suggestions for review show a strong case for a wholesale review. A review of the Committee's comments and questions during hearings and in questions on notice suggests that the Committee may recommend some form of broader review.

There are likely several reform ideas that may represent 'quick wins' or short-term solutions to address concerns raised in submissions. If one were to focus on the strength of concern (based on language used and the volume of material produced), then restricting unfair preferences, clarifying liquidator powers over insolvent trading trusts and recommending better disclosure and data from ASIC and the ATO would be areas to look for recommendations in the report. The PJC made numerous comments about ASIC's performance record, but it should be noted that the committee is undertaking 1 of 2 current inquiries into the performance of ASIC. The Committee also spoke at length about insolvency practitioner investigations and reporting obligations, but it's difficult to see any reforms that would be easy to implement on those issues and it would seem they are more suited to a holistic review of insolvency. Similarly, the creation of a single insolvency statute, single regulator and potentially a government liquidator would all have large resourcing implications and these lend themselves to a longer wholesale review process.

Whatever the final report recommends, the material produced by the PJC's inquiry into corporate insolvency law has provided a wealth of detailed information about the perspectives and experiences of a diverse cross section of stakeholders in insolvency.

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Appendix 1: Members of the PJC

Chair: Senator Deborah O'Neill, Australian Labor Party, NSW

Deputy Chair: Hon Alex Hawke MP, Liberal Party of Australia, Mitchell NSW

Members

Senator Andrew Bragg, Liberal Party of Australia, NSW

Mr Steve Georganas MP, Australian Labor Party, Adelaide SA

Ms Zaneta Mascarenhas MP, Australian Labor Party, Swan WA

Senator Nick McKim, Australian Greens, TAS

Dr Daniel Mulino MP, Australian Labor Party, Fraser VIC

Hon Keith Pitt MP, Liberal National Party of Queensland, Hinkler QLD

Senator Louise Pratt, Australian Labor Party, WA

Senator Paul Scarr, Liberal Party of Australia. OLD

Appendix 2: List of written submissions

1 Drs Richard Winter and Sagi Peari
2 Mr Russell Morgan
3 Economic Abuse Reference Group
4 MinterEllison
5 Drs Garry Hamilton and David Morrison
6 Mr Steven Golledge SC
7 Australian Financial Security Authority
8 BlueRock
9 Australian Institute of Credit Management
10 Vantage Performance
11 CPA Australia
12 Mr Ben Sewell
13 DyeCo Solvency & Turnaround
14 KordaMentha
15 Narrow Road Capital Pty Ltd
16 Ms Paulina Fishman
17 Mr Michael Murray and Dr Rosalind Mason
18 Prof Jason Harris and Mr Michael Murray
19 Dr Nuncio D'Angelo
20 Association of Independent Insolvency Practitioners Ltd
21 Housing Industry Association
22 Australian Credit Forum
23 Australian Banking Association
24 Mr. Daniel Calderisi and Jacob Moore
25 Prof Christopher Symes
26 Ashurst
27 Southern Steel Group
28 Small Business Development Corporation
29 Australian Securities & Investments Commission
30 Business Law Section, Law Council of Australia
31 Australian Small Business and Family Enterprise Ombudsman
32 Deloitte
33 Attorney-General's Department
34 Department of the Treasury
35 Australian Taxation Office
36 Australian Restructuring Insolvency & Turnaround Association
37 Society of Corporate Law Academics
38 Turnaround Management Association Australia
39 Chartered Accountants Australia and New Zealand
40 Shopping Centre Council of Australia
41 Ms Catherine Robinson
42 Mr David Blanchett
43 Commercial Bar Association of Victoria
44 Australian Institute of Company Directors
45 King & Wood Mallesons
46 Dr Sulette Lombard
47 Kroll
48 Master Builders Australia
49 The Electrical Trades Union
50 SV Partners
51 Associate Professor Mark Wellard
52 Department of Employment and Workplace Relations

(there is no 53)
54 Mr Neil Hannan
55 KPMG Australia
56 Subbies United and The Subcontractors Alliance
57 NSW Small Business Commission
58 Financial Counselling Australia and the Small Business Debt Helpline
59 Scanlan Carroll
60 Mr Allan Eskdale
61 Condon Advisory Group
62 Institute of Public Accountants
63 Australian Retailers Association
64 Barrett Walker Accountants
65 Mr Royden James
66 Incolink
67 McGrathNicol
68 CFMMEU (Construction and General Division)
69 Australian Manufacturing Workers' Union
70 Mr Nicholas Crouch
71 Ms. Suzann Owens
72 The Hon. Reginald Barrett AO
73 Mr Michael Brennan
74 Professor Lynne Taylor
75 Australian Council of Trade Unions
76 Dr Allison Silink
77 Professor Jenny Buchan
78 Badenoch Integrated Logging Pty Ltd
78A Response by Craig Crosbie and Daniel Bryant, Liquidators of the Gunns Group