

ASIC's responsibility to provide better information

Supplementary submission by Jason Harris

INTRODUCTION

This supplementary submission is responding to a request made by Senator Fawcett requesting information regarding what statistics ASIC should provide to better inform research and policy debate concerning corporate and insolvency regulation.

Australian corporate law and insolvency academics have had numerous discussions with senior ASIC officials in the past 5 years requesting further statistical information, in ASIC's possession, be released for research purposes. During this time ASIC has made a number of changes to its publication of insolvency statistics, such as providing more regular and more detailed Schedule B Reports data (discussed below) and providing cumulative totals for insolvency appointments. However, there is a broad range of important information that will assist with research and policy debates that could be, but are currently not, released on a regular basis.

This supplementary submission has been developed in consultation with leading corporate law and insolvency law academics: Associate Professors David Brown and Christopher Symes from Adelaide Law School, Associate Professor Colin Anderson from the QUT Law School, Associate Professor Helen Anderson from Melbourne Law School, Associate Professor Timothy Fisher from The University Sydney School of Economics and Michael Murray, Visiting Fellow QUT Law School. However, I take full responsibility for this supplementary submission and all errors, omissions or misstatements are mine alone.

PART ONE: STATISTICS CURRENTLY PUBLISHED BY ASIC

1.1 Annual Reports

ASIC publishes a detailed annual report each year which contains information on the structure of ASIC and provides highlights of activities undertaken by ASIC in the previous financial year. The discussion of enforcement outcomes is not collated into one place (which was the prior practice), but rather is discussed by way of key matters/regulatory highlights for the past year. There are some statistics provided (for example, p 44 2012-2013 report) but these figures give only raw numbers (eg 57 directors disqualified) without providing information about what provisions of the Corporations Act were contravened. Non-compliance matters are similarly only summarised (eg p 44) where total numbers of non-compliance (in this case the failure to lodge annual reports) are not disclosed, only the number of orders are provided. Obtaining 26 civil orders and 46 criminal convictions is an unhelpful statistic without knowing how many cases of non-compliance were involved. For example, if 5,000 companies failed to lodge their reports (a conservative figure based on the more than 2 million registered companies), then 72 orders seems a low figure.

The numbers of deregistered companies is published in the annual report, but no breakdown is given for the numbers of voluntary and involuntary deregistrations, or for what reason the companies were deregistered. This is important information about non-compliance and dormant companies/phoenix company activity that should be released.

Recommendation 1: ASIC annual reports should provide detailed numbers of enforcement outcomes, including total non-compliance statistics (in numerical form, not merely as a percentage of matters, or as a percentage increase on prior years), breakdowns of what legislative provisions have been contravened and the numbers and reasons for involuntary and voluntary deregistrations.

1.2 Enforcement

ASIC provides a half yearly enforcement outcomes report. This is a very useful report for research purposes, however it could be improved. Appendix 1 contains a breakdown of enforcement statistics, but these are reported at a general level only using categories such as 'criminal', 'civil' and 'administrative remedies'. The specific provisions that have been contravened should be disclosed. For example, the category of 'insolvency' is almost meaningless given Ch 5 of the Corporations Act (which covers insolvency) comprises of several hundred provisions. Similarly the category of 'small business compliance and deterrence' is too vague. The report for July 2013-December 2013 includes 42 administrative remedies against directors and 181 criminal orders against directors, both for small business compliance and deterrence. No detail of what contraventions or what sanctions were imposed is included, neither is any information on how many matters were commenced/investigated/completed in this category. This is a very unhelpful statistic. The media releases provided in Appendix 2 do not include small business compliance and deterrence, which means the overwhelming majority of sanctions go unreported to the public. This is totally unsatisfactory. If there are privacy concerns then these can be addressed by removing personal information, but there is no reason why information concerning enforcement action is not made public.

Recommendation 2: Provide detailed breakdowns of numbers of proceedings investigated, commenced, concluded and provide detailed outcomes based on specific sanctions imposed and provisions contravened.

1.3 Insolvency

Statistics

ASIC provides monthly statistics on the numbers of companies entering external administration (Series 1) and such numbers by industry (Series 1A), the numbers of insolvency appointments (Series 2) and annual summaries of the Schedule B reports from insolvency practitioners (Series 3). These statistical reports are very helpful for research, and are a vast improvement on what was previously released (series 1 and 2 only). The Series 3 report has a lot of useful information. However, the reports could be improved by:

- Tracking how many companies move from one appointment to another, such as moving from voluntary administration into a creditors' voluntary liquidation. Currently, companies are only counted once.
- Tracking companies by size (micro, small, medium and large) and linking this to remuneration and outcomes for creditors. For example, for liquidations involving remuneration of less than \$50,000, what was the return to creditors? Does the remuneration increase with more assets/liabilities? What are the remuneration rates in companies with no secured creditor compared with companies where there is a secured creditor? The information is in the report but is currently not linked. Alternatively, ASIC could release a sample of reports for research purposes (with personal information taken out) to allow this data to be extracted and reported.
- The statistics provided in Series 1, 1A and 2 should go back further than 1998. Major insolvency reforms were introduced in 1993 and it would be useful to have the earlier information.

External Administrators' Reports

ASIC provides an annual report based on information collected from insolvency practitioners' Schedule B reports. This is a very useful report that provides a range of statistics. However it could be improved by:

- Making their lodgement compulsory (they are currently optional in certain circumstances)
- Including company size as a variable for causes of failure and reported misconduct

National Insolvent Trading Program

ASIC provided a report (REP 213) on this Program in October 2010, which involved ASIC surveillance of companies trading whilst insolvent. However ASIC has since announced that it has ceased operating this program. A report on this program was published on a regular basis (every 2-3 years) although it would have been more helpful if it had disclosed the nature of companies that were involved (i.e. micro, small, medium, large). This program should be restarted and continued.

Recommendation 3: Provide more detailed statistical reports as outlined above for each type of report.

PART TWO: REQUESTED FURTHER STATISTICS

There are a number of further statistical reports that ASIC could and should release to assist with research and policy debate.

- **2.1 Form 524.** This form is the receipts and payments form completed by insolvency practitioners every 6 months. This provides essential information on the costs of insolvency procedures and on recoveries made during the procedures. A distinction should be drawn between periodic reports and the final reports which provide the final outcomes of the insolvency. This information should include a comparison between the projected and actual outcomes. The statistical report should include company size, asset level, liability levels as variables together with remuneration to demonstrate how these factors correlate with remuneration, fees and creditor returns.
- **2.2 Deregistration statistics.** As noted above, the ASIC annual report includes raw numbers of companies deregistered each year (more than 100,000). A separate statistical report on company deregistrations would assist with research on compliance issues, as well as illegal phoenix activity and employee entitlements. This report should include details regarding:
 - the age of the company when it is deregistered
 - the type of company – proprietary limited or public
 - the size of company as it was initially registered, displayed in bands – for example, one shareholder, one to five shareholders etc. This is the data disclosed on the company's initial application for registration in accordance with s 117(2)(k) of the Corporations Act.
 - whether the directors hold or held directorships in other companies, and whether those other companies are ongoing, dormant or deregistered.
 - any other available data.
- **2.3 Deeds of company arrangement.** Administrators are required to lodge deeds of company arrangements (DOCA) with ASIC, but little information is provided about them (aside from raw numbers of lodgements). ASIC should analyse these documents and provide a regular report on (even if only on a sample of DOCA submissions):
 - Estimated returns and duration, compared with final outcomes (where deed has been completed)
 - Details of DOCA terminations, and reasons for termination
 - Data from the Form 524 (remuneration, fees, realisations and dividends to creditors)
- **2.4 Make s439A reports (in voluntary administration) required to be lodged with ASIC (they currently are not required to be lodged).** This could form the basis of an ASIC report that could be correlated with the Form 524 report. It should include:
 - Details on the company in administration and who appointed the administrator
 - Length of the administration
 - Comparison between projected liquidation and DOCA outcomes
 - Administrator remuneration and fees

- Whether a receiver was appointed before or during the administration
- **2.5 Samples of lodged documents (such as Form 524, DOCAS, s439A reports if required to be lodged) should be made available on an anonymous basis for conducting empirical research.**

Recommendation 5: ASIC provide regular reports as outline above in 2.1-2.5.

Lastly, the ability to undertake statistical studies using information held by ASIC is extremely difficult because of the fees charged under the Corporations (Fees) Regulations 2001 (Cth). There is apparently no provision for waiver of these fees for research purposes. An amendment should be made to allow inspection and copies to be made without charge if for research purposes only, or at least to allow ASIC the discretion to waive the fees for research purposes or to charge an administrative fee on a cost recovery basis.

PART THREE-OUTSOURCING OF REGISTRY SERVICES

There has been considerable media speculation and numerous comments to the Senate inquiry concerning the potential sale of ASIC's registry services business. As academics we would like to raise with the committee the potential adverse effect this may have on the provision of information for research purposes and call on the committee to recommend that any such outsourcing be undertaken (if at all) with a requirement that information continue to be provided for research purposes and accountability purposes.

Please contact me if I can provide any further information or more specific recommendations.

Sincerely,

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