

SENATE ECONOMICS REFERENCES COMMITTEE  
INSOLVENCY IN THE AUSTRALIAN CONSTRUCTION INDUSTRY

RESPONSE TO QUESTIONS ON NOTICE AND REQUESTS FOR INFORMATION  
RESULTING FROM THE HEARING ON TUESDAY, 29 SEPTEMBER 2015, AT  
MELBOURNE.

Response provided by Associate Professor Michelle Welsh, Monash Business School and Associate Professor Helen Anderson, Melbourne Law School.

**Question: Senator CAMERON: It was said yesterday in evidence that that was the problem. In fact the quality of the liquidators' responses to ASIC do not allow them to deal with things in time, so the phoenixed companies have time to shuffle all their assets out, and by the time ASIC is in a position where it can run a case there is no money left. It is in another company with another new name.**

**Senator CAMERON: Just have a look and see if you have come across that. That is the role of the liquidator. The quality of the liquidators and the timeliness of reports would be the two issues.**

The Corporations Act requires liquidators to report a number of matters to ASIC.<sup>1</sup> A central part of this reporting relates to misconduct before and during external administration by corporate controllers. Liquidators also notify ASIC whether they suspect the conduct breaches civil penalty or criminal laws, and whether they hold documentary evidence to support their claims. This is vital intelligence that ASIC uses to select cases to pursue further. ASIC rightly points out that '[e]xternal administrators are the front-line investigators of insolvent corporations.' Their work contributes towards '(a) maintaining the integrity of the marketplace; and (b) promoting investor and consumer confidence.'<sup>2</sup>

We believe that ASIC and the liquidators are committed to dealing with this complex issue and are doing their best given the resources they have available. In relation to the timeliness of the liquidators' reporting it is important to recognise that the conduct that constitutes phoenix activity takes place either before or during the external administration. This means that the filing of the liquidator's report occurs after the phoenixing has taken place and the assets have been stripped. In this context ASIC's enforcement options are usually limited to

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<sup>1</sup> This reporting is done in compliance with ASIC Regulatory Guide 16: External administrators - Reporting and Lodging. available at <http://asic.gov.au/for-finance-professionals/registered-liquidators/applying-for-and-managing-your-liquidator-registration/rg-16-external-administrators-reporting-and-lodging/>.

<sup>2</sup> ASIC, Regulatory Guide 16 External administrators: Reporting and lodging July 2008, RG16.5.

taking action against the directors and this may take the form of a civil penalty application alleging a breach of duty, or an administrative disqualification for multiple corporate failures.

While the 'timeliness' of the liquidators' reports is not a matter that can be resolved, we believe that there is scope to improve the usefulness of the information that is contained in them. Currently there is no ability on the present reporting documentation for external administrators to expressly report their suspicions that the suspected misconduct is illegal phoenix activity. Adding a tick-box to this effect, as well as scope for comments, could greatly improve ASIC's ability to enforce against directors in a timely manner. In addition, ensuring that insolvency practitioners have adequate funding for their investigations and free access to information held on ASIC's databases would also significantly improve the quality and usefulness of their reporting to ASIC.

**Question: Senator CAMERON: ASIC and the ATO indicated yesterday that there are now liquidators illegally advising companies. Have you heard of this?**

We have heard this allegation from ASIC but we have no evidence of liquidators illegally advising companies. ASIC, who regulates liquidators, would be in a better position than our research team to provide this evidence to the Committee. If this is occurring we believe that it is limited to several notorious individuals and is not a practice that is wide spread in the industry. ARITA is very concerned about phoenixing and has been very helpful in providing information to us for the purpose of our research.