

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Inquiry into Corporate Insolvency in Australia

Division: The Australian Small Business and Family Enterprise Ombudsman
Topic: Small Business Insolvency
Reference: Written
Senator: **Questions Submitted By**
1. Senator O'Neill

Question to ASBFEO:

1. Does the lack of clarity regarding the treatment of trusts under Australia's insolvency regime have any relevance to the low uptake of the small business restructuring provisions since their introduction in early 2021?

General questions:

6. Data and research: Submitters to this inquiry and many previous inquiries and reviews have recommended that better data, statistics, and research is needed on corporate insolvency (questions b, c: which data is needed and sources of data)
12. Recommendations in submissions and timing of reforms (question b: areas of reform)

Answer:

1. We have no specific evidence regarding the correlation between the treatment of trusts and the low uptake of the small business restructuring provisions. However, ensuring greater transparency of trusts and their treatment under insolvency law would help improve the overall financial acumen of creditors and directors. With 487,000 operating trusts in the 2021-22 FY, the use of trust structures to trade or as part of the ownership structure for small business represents a reasonable proportion of Australian companies.¹
6. Policymakers and academics would benefit from greater data to develop more targeted recommendations for Australia's insolvency system reform. At present, the Australian Securities and Investments Commission (ASIC) provides insolvency data in its insolvency statistics series. While helpful, these data are high-level and limited to the number of insolvencies by the type of appointment. We recommend that ASIC's insolvency data series include the estimated size of the business, the extent of phoenixing activity, outcomes of liquidations (such as returns to creditors), insolvency-related fees per liquidation and restructure, and financial positions of deregistered companies (including the cause of company failure). We note that insolvency practitioners are already obligated to provide ASIC with a lot of this extensive information, and we recommend making this information publicly available where possible.

¹ Australian Bureau of Statistics, Data Cube 1: Table 10, in *Counts of Australian Businesses, including Entries and Exits*, July 2018-June 2022

We further recommend ASIC considers how to make this data easier to interpret and locate for users with limited expertise in data interpretation or understanding of technical terminology. This could include a data portal with search and filter functions, which would assist users to quickly locate the information they need. A data inventory or data dictionary would be further useful in assisting ASIC's internal staff and external users to better understand their data holdings. The Office of National Data Commission's *Foundational Four* provides practical guidance for agencies on how they can start improving their data practices.

12. We would like to see a more effective solution to dealing with reports of alleged misconduct and company deregistrations as part of the root and branch review. We are concerned by the number of initial statutory reports that do not get investigated for potential corporate misconduct or see enforcement action. At the Parliamentary Joint Committee public hearing on 14 December 2022, we heard from ASIC that only between 16% and 19% of initial statutory reports progress to the supplementary reports stage, with the majority receiving a 'no further action' automated response within 40 seconds. Additionally, there have been 147,000 deregistered companies since 2012 that were not investigated for potential misconduct or credit owed to creditors. We recommend the root and branch review considers:
 - a) Ensuring greater transparency into ASIC's decision-making and automated algorithm when filtering insolvency practitioners' reports of corporate misconduct.
 - b) Ensuring adequate legislative flexibility for regulators to adopt a tailored approach to responding to disputes from insolvency practitioners, other agencies and small businesses.
 - c) Reducing reporting requirements for insolvency practitioners in the *Corporations Act 2001* to ensure their reporting focuses on cases that warrant investigation by the regulator.

More information about these recommendations can be found in the ASBFEO's submission to the Senate Economics References Committee's inquiry into the capacity and capability of ASIC to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct (6 February 2023).