



<b>Committee</b>	Parliamentary Joint Committee on Corporations and Financial Services
<b>Inquiry</b>	Inquiry into Corporate Insolvency in Australia
<b>Question No.</b>	027
<b>Date</b>	1 March 2023
<b>Topic</b>	Pre-insolvency advisors
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<b>Committee member</b>	Senator Deborah O'Neill

## Question

**CHAIR:** Maybe, on notice, just in relation to the timing—the time people are advised. I'm trying to understand this from a small business point of view. You've given a really clear indication of how carefully you're attempting to engage with people. My question is : once that hits, how long is the response period of time, and what could happen then? We're running out of time, so I'll ask you to give that on notice so the committee is clear on it. I also ask you to look at evidence that we received yesterday from the financial counselling support services who made a point in particular about coercive practices with regard to directors in domestic violence or elder abuse situations, where directors might be receiving these notices from you in a sociological reality that is very different from what might happen if it's a business where things are functioning but the business is failing because of financial reasons, rather than power and abuse reasons. So I just seek your comfort and information on how you respond to that.

Finally, you talk about how important it is that there is ethics involved in the action of registered liquidators, and then you make a comment about pre-insolvency advisers. Critically, the accounting bodies CPA, CA ANZ and, I expect, the tax practitioner board are involved in that. Given the level of concern about very dodgy—to use a very technical term—practice by pre-insolvency practitioners, I would be interested in getting the ATO's view about what you're seeing with regard to that and seeking your comfort—and comfort from ASIC as well, because you interact with those bodies—that there is sufficient notice being taken of a burgeoning business of pre-insolvency practitioners—

**Mr Day:** I don't think it's fair to say it's burgeoning. It has been something that, through Phoenix Taskforce and others, we've been looking at for a number of years. I won't say the market is mature, Senator, but we're happy to take it on notice and give you a look at what the activities separately and together have been in relation to pre-insolvency advisers and what the difficulties have been but also what the successes have been.

**CHAIR:** Of the whole scheme?

**Mr Day:** Yes.

## Answer

ASIC is committed to using its regulatory tools of engagement, surveillance, compliance and enforcement to identify, disrupt and take action against those engaging in or facilitating illegal phoenix activity including pre-insolvency advisors (**PIAs**).

PIAs are generally professionals who provide business restructuring, rescue, turnaround or winding-up advice prior to a company entering formal external administration. PIAs may be business advisory/turnaround specialists or general professionals, such as accountants, lawyers, or registered liquidators, that provide pre-insolvency advice.

PIA is not a formal role regulated by ASIC. However, PIAs may hold roles regulated by ASIC such as registered liquidators, ASIC Registered Agents or Australian credit licence with a debt management authorisation. PIAs may also hold roles as tax agents regulated by the Tax Practitioners Board (**TPB**) and may have memberships in professional bodies such as law societies, Chartered Accountants

Australia & New Zealand, CPA Australia and the Australian Restructuring Insolvency and Turnaround Association.

Most PIAs are likely to comply with regulatory, legal and ethical requirements when providing their advice. A small number may suggest directors take actions amounting to illegal phoenix activity or other criminal conduct. Where a PIA provides advice facilitating illegal phoenix activity, they may:

- be complicit in the conduct and be equally liable for breaching their director duties obligations along with the director they advise (ss 180 to 184 of the *Corporations Act 2001* (Cth) (**Corporations Act**));
- have made or authorised the making of false or misleading statements in documents lodged with ASIC (s 1308 of the Corporations Act);
- breached the duty to prevent creditor-defeating dispositions (s 588GAB of the Corporations Act).

There are significant challenges in establishing a PIA aided, abetted, counselled or procured a director to engage in conduct breaching their directors' duties or creditor-defeating dispositions.

- ASIC must establish that a person engaged in illegal phoenix activity as a consequence of the advice provided by the PIA and link the person's conduct to the advice provided. ASIC's experience is that it is difficult to obtain evidence about the advice because there is a strong incentive for advice recipients to conceal or refuse to admit the existence of the offending advice as it incriminates the recipient.
- The advice and assistance provided by PIAs is often suspected to be oral and potentially contradictory to initial generic written advice, affecting any prosecution's ability to establish the fact of the offending advice to the requisite burden of proof.
- Misconduct tends to arise with respect to entities already keeping inadequate books and records, diminishing the ability to properly establish required elements.

ASIC has investigated and taken enforcement action against PIAs facilitating illegal phoenix activity and other criminal conduct.

- In 2016 PIA Stephen Charles Hall, a director of Eagle Business Solutions Pty Ltd was convicted and fined for aiding and abetting a director to breach their director duties.
- In 2019 and 2020 former PIAs John Narramore and Stephen O'Neill of SME's R Us Pty Ltd were imprisoned on charges of dealing in proceeds of crime arising from advising Richard Ludwig, a former director of Cap Coast Telecoms Pty Ltd, to engage in activity that would involve the illegal removal of company assets ([20-050MR Pre-insolvency adviser imprisoned for money laundering | ASIC](#)).

ASIC is also involved in joint-agency operations, conducted through the Serious Financial Crime Taskforce (**SFCT**), targeting PIAs. Two investigations involving suspected systemic misconduct by PIAs are currently active.

ASIC uses engagement and communication tools to inform and educate stakeholders about illegal phoenix activity including potential involvement by PIAs.

- ASIC has published information alerting directors of companies experiencing financial difficulty to the potential for dishonest PIAs to suggest they take actions that could be illegal ([Insolvency for directors | ASIC](#) and [Illegal phoenix activity | ASIC](#)).
- ASIC has published its expectations of registered liquidators in relation to external administrations involving PIAs which include engaging directly with company directors and scrutinising the role of PIAs by undertaking adequate investigations ([ASIC Corporate Insolvency Update - Issue 24 | ASIC](#)).

ASIC's general illegal phoenix activity engagement work also includes sharing information with partner agencies, the SFCT and the Phoenix Taskforce, and sharing information and intelligence with the ATO as part of the Data Fusion Project. In 2020-21 ASIC led a SFCT intelligence project targeting PIAs. Intelligence from this project was shared with partner agencies to assist them in detecting, deterring, and disrupting illegal phoenix activity and has informed SFCT priorities.