Committee	Parliamentary Joint Committee on Corporations and Financial Services
Inquiry	Inquiry into Corporate Insolvency in Australia
Question No.	023
Date	1 March 2023
Topic	Threshold for reporting misconduct
Reference	Spoken, 1 March 2023, Page 35
Committee member	Senator Paul Scarr

Question

Senator SCARR: Absolutely. I'm a very complicated individual, Mr Day!
I want to turn to the issue with respect to reports of misconduct and the work practices that liquidators—because of their duties, because of their responsibilities under the Corporations Act—are required to undertake which, in many cases, are not remunerated and, in many cases, ASIC, when it's seeking to triage which cases to take forward or not to take forward, simply doesn't have the resources to progress. In paragraphs 228 to 230 of ASIC's submission you raise the issue of the relevant thresholds which apply. At the moment the threshold of misconduct which triggers a reporting obligation is a mere 'appearance of misconduct'. There's some commentary, some postulation as to whether or not that threshold should be increased. Just reflecting on this, I'm interested to know—and, again, you can take this on notice, Mr Day—whether or not there are any other analogous thresholds or benchmarks which apply in this space that could perhaps inform a decision as to how high the bar should be raised? Clearly, the appearance of misconduct is a very low benchmark, but I'm interested in any suggestions or even analysis of other benchmarks that apply in similar processes which could provide a guide to the committee in considering this. Would that be possible to take on notice?

Mr Day: It is, but I might assist in the first instance. Could you remind me what paragraphs of our submission you referred to, please?

Senator SCARR: Paragraphs 228 to 230, on page 58.

Mr Day: Thank you. I'll take on notice what you've asked because we might want to give some thought to the thresholds for misconduct to be reported to ASIC. The matters that are referred to in paragraph 228—'must lodge a report if there will be a dividend of less than 50 cents in the dollar'—I think we said on the last occasion that that's a very low bar. When you look at the statistics, it captures virtually the majority, if not all, companies in that way. I think there is some sense in that. They probably won't want to comment on this, but my friends at the ATO would think, 'We want as much data and information as we can get.' Certainly, when we look at it through a phoenix lens, anything that the independent person who is the registered liquidator looking at the activities and the conduct that went on in the company might share with us right across all companies when they go into liquidation is a useful data point for anything we might take into the future.

I will give you an example, and it's one of the things that I think is misunderstood about the matters we might not take on where we have a 533 report. If we get a 533 report in relation to a single director company, we might say thanks and we just record that, keep it and it's on file, so to speak. But two years afterwards, if the same thing happens with the same person being a director of a single person company, then the interest goes up. Even though the impact on the community or the debt might be low, what we have is starting to form a pattern of conduct by an individual that we want to know about. So, it might not be a big impact on, say, the tax base but it's certainly an impact on other small businesses that that person who is being a director of companies about is causing the community. We want to make sure that we know as much as we know so that we can take out bad actors. We know that's what the small business community wants us to do that.

It's not as straightforward as saying reduce the amount of workload by lowering the bar for these reports, because there actually is a public policy question about is it valuable for the regulators—not just ASIC, but the ATO and others who could benefit from our information—to know more about the people who are in control of a legal entity, being a company. It's got to be weighed up against that. We can give it some thought and take on notice where we think it might be better set, in terms of the bar that you refer to, but I just want to put forward that there's a broader public policy in some of these reports that sometimes is lost in the conversation.

Answer

The threshold for reporting misconduct may result in some offences not being reported and/or a loss of intelligence to ASIC, the ATO and other interested parties.

ASIC has not reviewed in detail the threshold for offence reporting in comparable jurisdictions but understands some alternative thresholds include:

- require reporting only when there are reasonable grounds to believe, rather than it appears, that an offence has been committed; or
- require the reporting only of offences for which the person may be criminally liable.

Whether or not the threshold should be changed is a matter for Government.

The initial reports of misconduct also contain statistical data that ASIC uses to publish statistics about companies that enter a formal insolvency appointment (e.g. information about estimated assets and liabilities, industry sector, number of employees (including the amount of outstanding employee entitlements) etc.). Unless this data was collected by some other means, the reliability and utility of ASIC's published statistics may be impacted as the number of initial reports lodged reduces.

ASIC must make decisions on how to best allocate its scarce resources. ASIC considers the factors set out in INFO 151 *ASIC's approach to enforcement* when assessing whether to take action with respect to alleged offences outlined in the initial reports lodged by registered liquidators. Where ASIC assesses further action may be warranted, it requests the registered liquidator prepare and lodge a supplementary report setting out further detail about the alleged misconduct. If the company is in liquidation, the liquidator can apply to ASIC for Assetless Administration Fund funding to help finance the cost of preparing the supplementary report.