

## PART III

### Reforming Australia's corporate insolvency system

This part of the report examines the options for reform of Australia's corporate insolvency system. Part II established that even if the highly publicised cases of insolvency practitioner misconduct are unrepresentative of the performance of the industry at large, there are sufficient concerns with the regulatory framework as to warrant significant recommendations for reform.

Chapter 9 deals with the **lack of adequate data** on corporate insolvency in Australia. It acknowledges that this has been a problem for a considerable time, and emphasises that better data collation and analysis will assist all stakeholders to understand better the nature and scale of misconduct and poor performance in the insolvency profession.

Chapter 10 revisits the problem areas identified in Part 2 and suggests **options to sharpen the incentives for the insolvency profession to improve its standards**, and for ASIC to become more responsive to complaints and more proactive in monitoring practitioners and communicating with stakeholders. Some of these options seek to develop existing practices through better disclosure, complaints handling and outreach programmes. Other options propose significant structural reform: adopting the 'chapter 11' bankruptcy process, creating a single insolvency regulator; establishing a 'flying squad' to monitor practitioners; and setting up an insolvency ombudsman to respond to complaints.

Chapter 11 concludes the report with the **committee's views** on these issues and makes several recommendations.



# Chapter 9

## The need for better data

*I suspect there is gold in the statistics.<sup>1</sup>*

9.1 One of the frustrations of this inquiry, and several others into Australia's insolvency industry, is the lack of adequate data to identify precisely the dimensions of the policy problem. Chapter 2 presented some basic data on the industry. Much of this information comes from the Australian Securities and Investments Commission's (ASIC) submission to this inquiry. There is also ASIC's June 2008 report *External administrators: Schedule B statistics 1 July 2004–30 June 2007*.<sup>2</sup> This aside, the committee is not aware of publicly available, properly collated insolvency industry data.

9.2 This lacuna of corporate insolvency industry data is a problem. Effective regulation, policy-making and public debate relies crucially on the collation and analysis of detailed and accurate statistics. This chapter canvasses the committee's evidence on the lack of data, ASIC's plans to improve the situation and some of the broader options for reform.

### A familiar theme

9.3 The lack of adequate, publicly available data on the state of the corporate insolvency industry in Australia has been a recurring theme in several past inquiries. In 1988, for example, the Harmer Report commented that statistics on corporate insolvency in Australia are not readily available in any 'comprehensive, identifiable or intelligent form'.<sup>3</sup> The Australian Law Reform Commission (ALRC) described the lack of relevant statistical information as 'one of the major handicaps' impeding its inquiry. Interestingly, the Commission contrasted the lacuna of corporate insolvency statistics with the collection and publication of detailed and relevant information on personal bankruptcies.

9.4 The Harmer Report recommended that statistical information on corporate insolvency should be published by the National Companies and Securities Commission on a quarterly basis with a yearly summary. Specifically, it proposed publishing data on:

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1 Dr Vivienne Brand, *Committee Hansard*, 9 April 2010, p. 14.

2 ASIC, *External administrators: Schedule B statistics 1 July 2004–30 June 2007*, June 2008 [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP\\_132.pdf/\\$file/REP\\_132.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_132.pdf/$file/REP_132.pdf) (accessed 20 June 2010).

3 Law Reform Commission, *General Insolvency Inquiry*, Report No. 45, 1988, p. 27.

- the number of companies subject to a formal insolvency administration;
- a breakdown of those numbers by category (compulsory, voluntary, etc.);
- a breakdown by these categories of the dates of incorporation, the reasons for failure and the principal business activity;
- estimates of the assets and liabilities of the companies; and
- a breakdown of payments made by the practitioner into remuneration, legal costs and dividend to unsecured creditors.<sup>4</sup>

9.5 The Commission envisaged that this information would be gathered from practitioners, who 'should be required to complete a form setting out details of each corporate insolvency administration'.<sup>5</sup> It noted strong stakeholder support for these proposals.<sup>6</sup>

9.6 The 2004 Parliamentary Joint Committee (PJC) on Corporations and Financial Services noted the lack of basic data on the operation of corporate insolvency laws. It quoted a submission from Dr Colin Anderson of the Queensland University of Technology which observed that there is virtually no data on the operation of the voluntary administration procedure beyond the number of commencements. The PJC recommended that ASIC:

...consider enhancing its capacity to provide more comprehensive, comparable analyses of statutory reports of liquidators for the assistance of journalists, academic researchers, the public and the Government and its own management requirements. Such information should be assessed in terms of maintaining public confidence in the administration and enforcement of corporate laws.<sup>7</sup>

9.7 The Insolvency Practitioners Association of Australia (IPAA) noted the PJC's recommendation in its submission to this inquiry. It also commented that, whether in response to this recommendation or not, in June 2008 ASIC issued a statistical report titled *External administrators: Schedule B statistics 1 July 2004–30 June 2007*.<sup>8</sup> The report was compiled from the estimates and opinions contained in statutory reports lodged with ASIC by practitioners.

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4 Law Reform Commission, *General Insolvency Inquiry*, Report No. 45, 1988, p. 21.

5 Law Reform Commission, *General Insolvency Inquiry*, Report No. 45, 1988, p. 3.

6 Law Reform Commission, *General Insolvency Inquiry*, Report No. 45, 1988, p. 21.

7 'Corporate Insolvency Laws: A stocktake', *Parliamentary Joint Committee on Corporations and Financial Services*, June 2004, p. 5.

8 ASIC,  
[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP\\_132.pdf/\\$file/REP\\_132.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_132.pdf/$file/REP_132.pdf)  
(accessed 20 June 2010).

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## The need for better data on insolvencies

9.8 Several groups have commented to the committee on the need to improve the collection and analysis of statistics on the insolvency industry. These comments underline the potential benefit for the regulator, industry associations, practitioners, creditors, academic researchers, the parliament and the public from a thorough and independent system of data collection on insolvency in Australia.

### *ASIC's forward program*

9.9 ASIC Commissioner Mr Michael Dwyer explained to the committee that the data that ASIC has relates to:

- information from liquidators' lodged section 533 reports, which is collated and made publicly available (see ASIC's June 2008 statistical report); and
- information from liquidators' ongoing receipts, payments and statements of position (Form 524), which is publicly available and open for academics to analyse but cannot currently be collated using ASIC's technology.<sup>9</sup>

9.10 Mr Stefan Dopking of ASIC told the committee that ASIC's ability to gather information through section 533 reports has improved in recent times. He noted the PJC report's recommendation that the data from these reports be published triennially and told the committee that the:

...first batch of triennial data has been published. The next batch of data is due to be published at the end of this financial year. Some have commented that it would be better to have that annually. That is something we are looking at.<sup>10</sup>

9.11 In addition ASIC has advised that as part of its forward program it will obtain data from practitioners to allow an assessment of the relationship between asset recoveries, remuneration charged and returns to creditors. The results will be made available to creditors and the market. ASIC will also improve data collection by redesigning Form 524 relating to receipts and payments.<sup>11</sup>

### *Technology*

9.12 The Chairman of ASIC, Mr Tony D'Aloisio, was asked his view of the IPAA's comment that the Commission must gather and publish more detailed information on insolvencies. He responded that while this task is on ASIC's agenda, it is contingent on an update of their technology:

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9 Mr Michael Dwyer, *Committee Hansard*, 23 June 2010, p. 33.

10 Mr Stefan Dopking, *Committee Hansard*, 23 June 2010, p. 37.

11 ASIC, *Submission 69*, pgs. 9 and 80. Mr Stefan Dopking, *Committee Hansard*, 23 June 2010, p. 37.

There is a lot of information which comes in through the various forms which are lodged. There are two parts to this. The first is: is all the information being collected what the industry would like? We think it probably is. The second is: how are all the reports prepared and disseminated? We would like to work further to improve those...

Our limitation in relation to the production of those reports at the moment is connected with our star program. ASIC is in the process of a complete rejig of its technology so that it is clearly more up to date. It is quite old, so our systems and our technology do not have the ready ability to convert data, aggregate, produce reports and publish electronically. A lot of our processes are still manual, including the lodgement of these forms. With our new technology platform, which will come in progressively over the next two or three years, we expect we will be in a much better position to provide aggregated reports and data on the information we collect, better than we are doing at the moment.<sup>12</sup>

9.13 The Chairman restated the point in his evidence at a subsequent public hearing. He told the committee:

At the moment part of where we are with ASIC is that we are upgrading our systems. We will have tremendously more flexibility with the new systems in place to be able to release data and statistics.<sup>13</sup>

### ***Criticism of ASIC's approach***

9.14 Mr Geoffrey Slater, a barrister, criticised the lack of system in the way ASIC identifies potential misconduct. As chapter 8 noted, he is particularly critical of the lack of systematic data collection on insolvency practitioners' fees and complaints on the level of charging. Mr Slater argued that the collection of basic statistics is elementary to monitoring and regulating the profession.<sup>14</sup>

### ***The IPAA's view***

9.15 The committee acknowledges that the IPAA is a strong supporter of improved insolvency statistics. In evidence to the committee, the IPAA's President, Mr Mark Robinson, commented on the high quality of ASIC's June 2008 statistical report:

This excellent report gave information such as the average dividend per matter, the industries the liquidations were in, whether they were SMEs or big companies involved, the average time taken to conduct the administration and the number of offences recorded against directors in terms of 533 reports. All of that sort of information is pretty key to understanding where the industry is currently at and where it is trending.<sup>15</sup>

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12 Mr Tony D'Aloisio, *Committee Hansard*, 12 March 2010, pp. 22–23.

13 Mr Tony D'Aloisio, *Committee Hansard*, 23 June 2010, p. 32.

14 Mr Geoffrey Slater, *Committee Hansard*, 13 April 2010, p. 50.

15 Mr Mark Robinson, *Committee Hansard*, 12 March 2010, p. 45.

9.16 The IPAA stated in its submission that while it welcomed ASIC's 2008 report: ...we consider it is essential that more detailed and current information on insolvencies should be gathered by ASIC and published. For the purpose of this submission, the IPA conducted its own limited member surveys but we were constrained by the fact that much basic and current information about corporate insolvencies is not readily available.<sup>16</sup>

### *Academics' perspectives*

9.17 The committee received evidence from several legal academics based in Brisbane and Adelaide who were critical of the lack of public data on insolvency.

9.18 Dr Anderson and Dr David Morrison from the Queensland of University have argued for some time about the need for better insolvency statistics. As noted earlier, Dr Anderson put this case in a submission to the 2004 PJC inquiry. In his submission to this inquiry, he cited the PJC's recommendation on better insolvency data (see paragraph 9.6) and urged the committee to take action.<sup>17</sup>

9.19 Indeed, Dr Anderson and Dr Morrison identified the independent collection of data associated with business failure and the operation of the insolvency regime as the one positive outcome—above all others—that this inquiry could achieve. They reasoned that in the absence of this data, it is very hard to tell how many 'Ariff type' problems exist.<sup>18</sup> They argued that:

It is possible to argue that the level of wrongdoing by insolvency practitioners is small relative to the matters that they deal with. This is no doubt the basis of some submissions to the enquiry. On the other hand it could be widespread, necessitating changes to the law and practice. The bottom line is that we simply do not know.<sup>19</sup>

9.20 The same argument was made by Associate Professor David Brown from the University of Adelaide Law School. He argued that without better data on the industry, it is difficult to know the size of the misconduct problem:

We see a few cases coming to court, we see a few enforceable undertakings being accepted by ASIC and we think that that must be, if not the tip of the iceberg, surely not the extent of the problem. Therefore, it would be good if the statistics reflected that.<sup>20</sup>

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16 IPAA, *Submission 36*, p. v. See also Mark Robinson, *Committee Hansard*, 12 March 2010, p. 45.

17 Dr Colin Anderson, *Committee Hansard*, 23 June 2010, p. 17.

18 Dr Colin Anderson, *Committee Hansard*, 23 June 2010, p. 16

19 Dr Colin Anderson, *Submission 79*, p. 2.

20 Associate Professor David Brown, *Committee Hansard*, 9 April 2010, p. 22.

### *Comparisons*

9.21 Associate Professor Brown also commented that the UK and New Zealand governments have far more developed data gathering mechanisms than Australia. He explained to the committee that:

The way the World Bank, the IMF and others conduct these types of inquiries is that they normally send a questionnaire to the government and get someone to provide information. But it is fair to say that in the UK there are a panoply of regulators and self regulators in the insolvency industry and there is no shortage of statistics kept by the government insolvency service and by the separate regulatory professional bodies. So I would not think that it is a problem in the UK. In New Zealand there is not any regulation, really. Again, it would be the government supplying the statistics.<sup>21</sup>

9.22 In the context of international comparisons, Dr Anderson told the committee that one of the important matters in all jurisdictions is the issue of how much liquidators are being paid as opposed to how much they are returning to creditors. On this score:

...we have no information in Australia about how we rate...[T]here has been a large study in the US so we have started there about how much the costs are. You could make those sorts of international comparisons if you had that data here. As I understand it, liquidators have to put in an account or report at the end of each administration and within that is included things like fees and costs. It would appear to us that at least a start could be made on collating some of that information if it were used.<sup>22</sup>

### *Academic research*

9.23 From a professional viewpoint, Associate Professor Brown expressed his frustration at the lack of adequate insolvency statistics. He told the committee that it is difficult to inform students of even basic data, such as the number of administrations in 2009. Further, the data that is available is not presented in a user-friendly manner.<sup>23</sup>

9.24 Dr Morrison noted that the purpose for which ASIC wants insolvency data and the academic community's interest in this data often does not intersect. He told the committee that:

...if you want data from ASIC, if you are an academic and you would like to look at something independently, unless it is a priority area that is presumably flagged between the government and ASIC, ASIC cannot provide it to you. If you want to pay to get data at ASIC, even if you can afford to pay for it—and most of us cannot, of course, because we are

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21 Associate Professor David Brown, *Committee Hansard*, 9 April 2010, p. 22.

22 Dr Anderson, *Committee Hansard*, 23 June 2010, p. 19.

23 Associate Professor David Brown, *Committee Hansard*, 9 April 2010, p. 22.

employees of the government and therefore paid small amounts of money—the records they have are based on paper and microfiche, so you have to pay a search fee every time you want something and you have to go into quite an archaic set of files. So, even if ASIC wanted to help people with independent information, they actually do not have the technology to do it, and that is a very stark contrast to ITSA, the bankruptcy regulator.<sup>24</sup>

9.25 In response to this comment, Mr Warren Day of ASIC told the committee that historical data on insolvencies predating the creation of ASIC is available on microfiche. He noted that ASIC is in the middle of a project to scan the microfiche information 'so that it is all more accessible by academics and other parties'. Mr Day acknowledged Dr Anderson and Dr Morrison's concerns about the cost of accessing this data, but explained that the payments are required by law.<sup>25</sup>

### Options for reform

9.26 Dr Anderson and Dr Morrison proposed that an information gathering agency should be established that is independent from the regulator and focussed in its task of researching and analysing the data. They suggested that this agency could be structured 'along the lines of the Australian Institute of Criminology'.<sup>26</sup>

9.27 The academics emphasised the importance of the new agency's independence from the regulator. Their argument was based on probity and resource considerations. On ensuring probity, Dr Anderson told the committee:

Our point of view is that if you rely upon data which is coming from the regulator then it always raises the question of whether you are being told only what you want to hear. I am not saying that either ASIC or ITSA are doing that, but it raises that potential problem. It seems to us that in an important area like the regulation of the economy through corporations and through insolvency there is room for some way of funding information in an independent way.<sup>27</sup>

9.28 On the issue of adequate resources, Dr Anderson and Dr Morrison explained that ASIC currently uses the data it gathers only in a supervisory sense. They saw this as 'not surprising' given the competing demands upon ASIC's resources and the lack of any incentive to provide researchers with the access they require to undertake meaningful independent research.<sup>28</sup>

9.29 Dr Morrison contrasted ASIC's publication of data with that of the Insolvency and Trustee Service Australia (ITSA). He told the committee that the contrast between

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24 Dr David Morrison, *Committee Hansard*, 23 June 2010, p. 17.

25 Mr Warren Day, *Committee Hansard*, 23 June 2010, p. 33.

26 Dr Anderson, *Submission 79*, p. 3.

27 Dr Colin Anderson, *Committee Hansard*, 23 June 2010, p. 16.

28 Dr Colin Anderson, *Submission 79*, p. 3.

the paucity of insolvency data on ASIC's website and the detailed data on ITSA's website is 'quite remarkable'. The Australian Taxation Office also has 'quite a remarkably well set up and resourced website' which shows that it is possible for a large government agency to provide 'relevant, accurate and timely information'.<sup>29</sup>

9.30 Mr Jeffrey Fitzpatrick from Flinders University also argued that ASIC is not well placed to gather the requisite statistics on insolvency matters. He was asked whether the Productivity Commission might be the appropriate body for this task and responded:

It could be the Productivity Commission but if you think of other examples, there is the National Institute of Labour Studies at Flinders which looks at labour statistics, there is the Australian Institute of Criminology that looks at criminology statistics, there might be the need for an insolvency unit that looks at insolvency statistics so that they can be processed in a meaningful way. ASIC is stretched to the limit and to expect them to do everything for everybody is an impossible task.<sup>30</sup>

### **Committee view**

9.31 The committee strongly agrees with the view that there needs to be a better system for collating and analysing corporate insolvency data in Australia. It agrees with Dr Anderson and Dr Morrison that the lack of data is an issue that needs to be addressed in a comprehensive way to ensure confidence in information about the perceived problems and the policy that results. Chapter 11 makes a recommendation to this end.

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29 Dr David Morrison, *Committee Hansard*, 23 June 2010, p. 17.

30 Mr Jeffrey Fitzpatrick, *Committee Hansard*, 9 April 2010, p. 15.