



**Small Business
Development Corporation**

Our ref: D23/1824

Committee Secretary
Senate Standing Committee on Economics
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Dear Committee Secretary

***AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION INVESTIGATION
AND ENFORCEMENT INQUIRY***

The Small Business Development Corporation (**SBDC**) welcomes the opportunity to provide a submission to the Senate Economics References Committee's Inquiry into the capacity and capability of the Australian Securities and Investments Commission (**ASIC**) to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct (**the Inquiry**).

About the SBDC

The SBDC is an independent statutory authority of the Government of Western Australia (**WA**) established to support and facilitate the growth and development of small businesses in the State¹. The Small Business Commissioner (**SBC**) is also the Chief Executive Officer of the SBDC.

Along with providing information, advice and advocacy to the small business sector in WA, the SBDC offers a dispute resolution service to help small business operators resolve their commercial disputes. The SBDC also monitors the marketplace for key trends, issues and concerns affecting small businesses.

Small businesses play a crucial role in the WA community and contribute in significant and varied ways to the economy, including as an employer and income generator. Among its key strategic objectives, the SBDC advocates for a fair operating environment and improved access to justice for small businesses.

From this background, the SBDC submits the following comments in line with the Inquiry Terms of Reference.

¹ This submission outlines the views of the SBDC and does not necessarily represent the views of the Western Australian Government.

Point b: The balance in policy settings that deliver an efficient market but also effectively deter poor behaviour

The SBDC considers that the primary purpose of regulatory agencies in Australia is to play a key role in enabling economic growth by nurturing the development of the vast majority of business owners who operate legally and contribute to the growth of our economy whilst pursuing and prosecuting the very small number of business operators that are recalcitrant or not acting ethically.

In some regards, the SBDC considers that ASIC's current policy settings are insufficient to effectively deter poor behaviour, whilst in other areas the financial penalties that apply for minor administrative errors are excessive and harmful for small business operators. It is the SBDC's belief that the present enforcement priorities of the regulator do not strike the right balance, with ASIC insufficiently focused or resourced to pursuing more reports of alleged misconduct (see below).

Unlawful phoenixing

The SBDC has for many years advocated for laws associated with illegal phoenixing activity to be strengthened.

Unlawful phoenixing activity has a devastating impact on the small businesses and subcontractors that are affected. According to a report commissioned by the Phoenix Taskforce – which includes representation from ASIC, the Australian Taxation Office (ATO) and Fair Work Ombudsman – in 2018, phoenix activities are estimated to cost the economy between \$2.85 billion and \$5.13 billion per year².

Despite the introduction of the 2019 phoenixing reforms, this unlawful activity is continuing with countless reports of suspected phoenixing across the country. Commentators have estimated that up to 10 per cent of recent company collapses across Australia are the result of illegal phoenix operators³.

It is noted that during a 2014 public inquiry into the performance of ASIC, the then chairman claimed that Australia was hailed as a white-collar crime “paradise”; since then, it appears that enforcement actions have gone down, not up.

The ATO received more than 2,115 referrals of suspected illegal phoenix activity through the Tax Integrity Centre in 2021-22⁴. However, according to the ATO, since the Phoenix Taskforce was established in 2014, only five criminal convictions have been recorded and eight directors banned or disqualified from managing a corporation⁵.

² Source: <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/The-economic-impact-of-potential-illegal-phoenix-activity/>

³ Source: <https://www.news.com.au/finance/small-business/senators-launch-inquiry-into-asic-as-5b-problem-set-to-explode/news-story/d3942b22b3a0148903ad83c0f4e6e009>

⁴ Source: <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/#PhoenixTaskforceresults>

⁵ *ibid*

The SBDC is of the view that more needs to be done to stamp out this illegal activity, particularly with the increase in company collapses that are now occurring after pandemic-related government stimulus initiatives have been wound down.

According to ASIC records up until June 2022, 4,912 Australian companies have failed and been wound up, with the Executive Director of insolvency firm SV Partners estimating that one in ten current company collapses are due to illegal phoenixing activity. This number is likely to increase further due to the current market conditions⁶.

Director ID

The SBDC welcomes the implementation of the Director ID system, which should limit the use of fraudulent director identities. It is hoped that the introduction of this identifier, which stays with the individual director forever, will help to identify and eliminate director involvement in illegal phoenixing, which typically results in subcontractors and suppliers being left unpaid.

However, the SBDC has been advised that some small business operators have had difficulty dealing with the complexities of setting up the Director ID online, especially for those that are not digitally literate and/or come from a multicultural background, while others lack awareness of the new statutory requirement.

The SBDC strongly supports the implementation of a new 'three strikes and you're out' policy towards directors of multiple failed businesses, to reverse the onus to prove fitness. Under such a proposal, a director of three insolvent companies (where the financial damage was above a particular threshold) would be banned from being a director of a company. This would reduce the burden on ASIC to prove if a director is criminal or not fit, and instead put the onus on the director who has been associated with three insolvencies which resulted in significant harm to creditors.

Point c: Whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement

Any contention that ASIC's regulatory action and enforcement is currently meeting the expectations of government, business and the community is disputed by the SBDC.

The SBDC is aware of recent commentaries regarding the ineffectiveness of ASIC at investigating reports of alleged misconduct, citing the 6 October 2022 report by economist Mr John Adams which revealed that reports of misconduct had only a 0.7 per cent chance of being formally investigated in 2020-21⁷.

Mr Adams' report also exposed that an average of 81 per cent of initial statutory liquidator reports submitted to ASIC in the last decade alleged some form of misconduct yet only 1.7 per cent of these were referred for action by the regulator.

The SBDC is deeply concerned about these figures.

⁶ Source: <https://www.news.com.au/finance/small-business/senators-launch-inquiry-into-asic-as-5b-problem-set-to-explode/news-story/d3942b22b3a0148903ad83c0f4e6e009>

⁷ *ibid*

Point d: The range and use of various regulatory tools and their effectiveness in contributing to good market outcomes

The SBDC is of the view that a significantly larger number of investigations and prosecutions should be undertaken by ASIC to penalise effectively those who deliberately engage in misconduct. Making this enforcement activity more visible, including high profile prosecutions of white-collar crime, would then serve as a strong deterrent to others considering flouting the laws.

Point e: The offences from which penalties can be considered and the nature of liability in these offences

Whilst the number of investigations and prosecutions undertaken by ASIC appears low, stakeholders have stated that the vast number of provisions that small businesses must comply with under the *Corporations Act 2001 (Cth)* means that many inadvertently find themselves subject to heavy financial penalties for relatively minor indiscretions. These include non-notification of a change in director or change in address, or late payment of the levy charged to business entities for the 'company annual review fee'.

The SBDC is of the view that reforms need to be made to the Industry Funding Model, including reducing the impact of the levies charged to small businesses and the excessive late payment fees.

Point f: The resourcing allocated to ensure investigations and enforcement action progresses in a timely manner

The SBDC recognises the financial and resource limitations on ASIC to conduct additional investigations. Under the SBDC's enabling legislation, the SBC has specific powers to investigate and report on any matter that affects the commercial activities of small businesses in WA. In line with this, a dedicated Investigations and Inquiry Unit (IIU) has been established within the SBDC that could potentially assist ASIC in investigating complaints, thereby reducing the regulator's burden and cost.

The SBDC would be interested in establishing a process to facilitate enhanced collaboration with ASIC on investigations through the IIU and the sharing of information across the two organisations.

To improve outcomes from ASIC investigations/intelligence for small businesses in WA, the focus on 'enforcement activities' as a criterion for the disclosure of ASIC-held information⁸ is counter-productive for agencies such as the SBDC that have investigatory powers, but no enforcement or integrity function. This therefore limits the types of information available for the SBC to enable its investigation function to be fulfilled.

⁸ Excerpt: **The ASIC Privacy Policy (January 2022)**

We only disclose personal information for the purpose for which it was collected, or for another purpose, if one of the following applies:

- .. we reasonably believe the disclosure is necessary for our enforcement activities, or for the enforcement activities of other Commonwealth, state or territory agencies.

In its definition of a government entity, the *Small Business Development Corporation Act 1983 (WA)* makes provision for the SBC to provide reports on investigations and related activities to ASIC. The investigation functions of both agencies could be improved markedly if information was able to be shared both ways. This would require a change to the *Australian Securities and Investments Commission Act 2001 (Cth)* to broaden the ability for ASIC to disclose beyond enforcement and integrity to also include agencies that have an investigation function in their legislation, such as the SBDC.

Additionally, the SBDC notes the Federal Government's plans to establish a "super complaints" process at the Australian Competition and Consumer Commission (**ACCC**) which would enable trusted small business representative bodies to fast track recommendations for investigations or actions. The SBDC strongly supports this initiative and sees the benefit in a similar process also being established at ASIC.

If such a process were established at ASIC, the SBDC would be keen to be listed as a super complainant to enable the fast tracking of recommended actions based on patterns or emerging trends that become apparent through our dealings with small businesses and their representatives.

Point g: Opportunities to reduce duplicative regulation

Modernising Business Registers Program

The Federal Government established the Modernising Business Registers (**MBR**) program five years ago to replace the 30-year-old Australian Business Register (**ABR**) and 31 other ASIC registers and search services with a single platform operated by a new one-stop service, the Australian Business Registry Services (**ABRS**).

The MBR program aimed to streamline how businesses register, view and maintain business information with government, to make it easier for businesses to meet their registration obligations and improve the efficiency of registry service transactions as well as reduce opportunities for phoenixing. The initiative was keenly welcomed by the SBDC from a small business perspective.

However, the SBDC notes that following significant time delays and a \$1 billion cost overrun, the Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP, announced a review of the MBR program on 9 February 2023⁹.

The transfer of registry functions from ASIC to the new register was originally scheduled to occur on 22 June 2022, however had been delayed until 1 July 2026, prior to the announcement of the review. According to the announcement, the review would ensure investment in this critical infrastructure "is delivered within a reasonable timeframe and budget", without providing further details¹⁰.

⁹ Source: <https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/independent-review-mbr-announced>

¹⁰ *ibid*

The continued delays and cost blow-outs to the introduction of the new business registration system are disappointing.

It is understood that the new ABRS system will provide the capacity and capability for enhanced data sharing across federal and state governments, which the SBDC strongly hopes will be able to be utilised once it is finally in place.

The SBDC strongly supports better information sharing between ASIC and state and local government entities. This would have a range of benefits to our economy, including better protection of small businesses, preventing negative outcomes from government tenders, and reduced illegal phoenixing activity.

Point h: Any other related matters

Small Business Support Unit

The SBDC believes there should be more assistance provided by ASIC for small businesses through a dedicated and appropriately resourced Small Business Support Unit staffed with specialist small business officers. The SBDC contends that there is often insufficient support and assistance provided by the regulator for small business clients, including for those that are victims of circumstances beyond their control and face the loss of both business and personal assets as a result of insolvency.

Potentially ASIC could model the ATO's approach to SME engagement, information and service that it followed during the pandemic to help and assist businesses that were experiencing financial challenges. At its heart, the ATO's approach recognises that in most cases, small business operators do not have the specialist expertise or capacity to handle all their modern taxation complexities.

Concluding statement

The SBDC appreciates the opportunity to provide this submission to the Inquiry. In the SBDC's opinion, the current inquiry presents an opportunity to consider changes that will improve outcomes for small businesses, especially as the country emerges from the widespread economic impacts of the COVID-19 global pandemic.

If you would like to discuss this submission further, please contact [REDACTED] [REDACTED] (Senior Policy and Advocacy Officer) on [REDACTED] or email [REDACTED]

Yours sincerely

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SMALL BUSINESS COMMISSIONER

3 March 2023