



<b>Committee</b>	Parliamentary Joint Committee on Corporations and Financial Services
<b>Inquiry</b>	Inquiry into Corporate Insolvency in Australia
<b>Question No.</b>	004
<b>Topic</b>	Recommendation 28 from ARITA's submission to demonstrate that its decision to terminate the National Insolvency Trading Program was consistent with regulatory good practice
<b>Reference</b>	Spoken, 14 December 2022, Hansard page 70
<b>Committee member</b>	Senator Paul Scarr

## Question

**Senator SCARR:** Okay. Recommendation 28 calls upon you, Mr Day, to make a demonstration.

**Mr Day: Me?**

**Senator SCARR: Yes.**

**Mr Day: Or do you mean ASIC?**

**Senator SCARR:** ASIC. Recommendation 28 says:

The Committee should ask ASIC to demonstrate that its decision to terminate the National Insolvency Trading Program was consistent with regulatory good practice.

**Mr Day:** Thank you for that. I was made aware of this, and I know it was raised. I think that program finished in 2010. I think that was the footnote.

**Senator SCARR:** It sounds like it's dearly missed.

**Mr Day:** It sounds like it. At that stage, I think there were a couple of things that were starting to come about. My seniority and knowledge of what was the actual motivation of those decisions at the time means I'm not in a position to say, and I don't think either of my colleagues are in a position to say. We could take it on notice and have a look at that.

**Senator SCARR:** Could you take that on notice?

**Mr Day:** Absolutely. There are a couple of things I might suggest—I won't say 'guess', but 'suggest'. It wasn't long after that time that ASIC went through a form of restructure, and our focus probably changed a little bit more towards our regulated populations, necessarily, on certain conduct—not exclusively, but I'm saying that occurred. Not long after that, I think as Senator O'Neill might recall, a former senator, Senator Williams, was very focused on the conduct of registered liquidators. We had a number of inquiries at the time devoted to that space. Again, because of the choices we have to make about where we're focusing, I suspect—again I'm only speculating about that—that might be it. We'll take that on notice, go away and get you an answer.

**Senator SCARR:** Yes, if you could take that on notice. Perhaps also, in terms of coming back to us with an answer, consider whether there's anything that's been put in its place or resources made available in its place.

## Answer

During the period 2006 to 2010, as part of its national insolvent trading program, ASIC visited over 1,530 companies that we identified as displaying solvency concerns. A number of sources were used to identify and select companies for review, including, but not limited to:

- complaints received from the public, such as complaints from employees, unpaid creditors or other stakeholders;
- credit agency reporting;
- auditor notifications under s311 of the *Corporations Act 2001* (the Act) relating to insolvency concerns;
- financial accounts lodged with ASIC;
- referrals from other stakeholder teams within ASIC; and
- other publicly available sources (e.g. media, insolvency practitioners, credit managers, accountants, lawyers and court lists).

A key objective of this program was to encourage directors to seek professional advice at an early stage to address their company's solvency issues, or increase the likelihood of a return to creditors should the company enter into external administration.

This program was resource intensive to operate, and ASIC was only able to visit a very small proportion of companies displaying solvency concerns. During the same period, the Global Financial Crisis commenced and total companies entering into external administration or having a controller appointed rose from 7,818 in 2005-2006 to 9,281 in 2009-2010, peaking at 10,005 in 2008-2009.

Before ceasing this program in late 2009, ASIC released a consultation paper on proposed guidance to help directors understand and comply with their duty to prevent insolvent trading. ASIC finalised its consultation and published [Regulatory Guide 217 Duty to prevent insolvent trading: Guide for directors](#) in July 2010. This guidance reflected the key messages for directors from ASIC's national insolvent trading program, that, if followed, would reduce the likelihood the director would breach their duties under the Corporations Act 2001.

ASIC also published [Report 213 National insolvent trading program report](#) in October 2010 setting out the key messages and outcomes identified by ASIC's national insolvent trading program.

At the time this report was released ASIC's forward plan was to expand its work commenced in 2006 on the conduct of registered liquidators and insolvency practices, particularly in relation to independence, remuneration and competency.

[Senate Economics References Committee inquiry into Liquidators and Administrators](#) announced on 25 November 2009 looked into the role of liquidators and administrators, their fees and their practices, and the involvement and activities of ASIC, prior to and following the collapse of a business.

The Phoenix Surveillance Campaign was first implemented by ASIC in the 2013-14 financial year, with the ATO joining in the 2019-20 financial year. As part of the campaign, ASIC and the ATO share intelligence and undertake surveillance on directors that may be at risk of engaging in illegal phoenix activity. In 2013-14 200 directors were targeted. The criteria for the targeting has been refined over time. ASIC and the ATO now engages with around 40 companies a year. In 2022 ASIC and the ATO conducted 21 joint engagement consultations with directors of selected companies [MR21-295](#) and a further 20 were conducted by ASIC solely.