

List of recommendations

Recommendation 1

2.62 The committee recommends that ASIC conduct a review of administrators' and liquidators' reporting requirements and the range and extent of information it requires to be reported and, where necessary, make changes that will ensure the regulator is able to fully inform itself, the Parliament and the public with complete, relevant and up-to-date data on insolvencies.

Recommendation 2

2.63 The committee recommends that the government provide an additional budget appropriation to ASIC in the 2016–17 budget and over the forward estimates, if required, which is sufficient to ensure that ASIC has the capacity to conduct analysis and provide a wide range of relevant, up-to-date insolvency data.

Recommendation 3

2.64 The committee recommends that ASIC require all external administrators' reports to be lodged electronically in the Schedule B format.

Recommendation 4

2.65 The committee recommends that ASIC make better use of external administrators' reports and other intelligence in order to improve the standard of publicly available information, provide early warning to industry participants about repeat and concerning insolvent practices and lead to a more effective market.

Recommendation 5

3.72 The committee recommends that the ATO and ASIC increase their formal cooperation with superannuation funds to coordinate measures around early detection of non-payment of superannuation guarantee.

Recommendation 6

3.73 The committee recommends that privacy provisions which may inhibit information flows between the ATO and APRA regulated superannuation funds be reviewed and that the ATO seek advice from the Office of the Australian Information Commissioner as to the extent to which protection of public revenue exemptions in the Australian Privacy Principles might facilitate improved information sharing.

Recommendation 7

3.74 The committee recommends that the ATO continue to actively monitor the tax liabilities of businesses in the construction industry in order to ensure that debts owed to the Commonwealth are paid.

Recommendation 8

3.75 The committee recommends that if necessary, the government make an additional budget appropriation to the ATO in the 2016–2017 budget for the purpose of enabling the ATO to recover the outstanding tax liabilities of construction industry businesses.

Recommendation 9

4.15 The committee recommends that construction industry participants, particularly those representing the interests of subcontractors, develop partnerships with mental health support organisations to provide ready access to support, counselling and treatment for people in the industry who may suffer from the adverse mental health effects of the financial distress caused by contractual disputes and insolvency in the construction industry.

Recommendation 10

4.33 The committee recommends that the government fund an independent analysis of the effects of the high rate of insolvency and related issues on productivity and innovation in the construction industry.

Recommendation 11

5.34 The committee recommends that ASIC, in consultation with ARITA, work out a method whereby external administrators can indicate clearly in their statutory reports whether they suspect phoenix activity has occurred. For example, to serve as a red flag to ASIC, include a box in the reporting form that external administrators would tick if they suspected phoenix activity.

Recommendation 12

5.84 The committee recommends that consideration be given to amending confidentiality requirements in statutory frameworks of agencies participating in the Phoenix Taskforce to permit dissemination of relevant information to the ATO.

Recommendation 13

5.85 The committee recommends that more resources, including specific purpose budget appropriations be directed to whole-of-government strategies aimed at preventing, detecting and prosecuting instances of illegal phoenix activity.

Recommendation 14

5.86 The committee recommends that regulators increase engagement efforts with industry participants aimed at increasing and enhancing information flows.

Recommendation 15

6.59 The committee recommends that licensing regulators should undertake random financial health spot-checks throughout the life of a licence-holder's licence. Where a business fails to meet the standards required, it should be

required to show cause as to why its licence should not be conditioned, downgraded, suspended or cancelled, depending on the extent to which the business has not met required standards.

Recommendation 16

7.37 The committee reiterates Recommendation 17 of the Economics References Committee's June 2014 report of its inquiry into the performance of ASIC in these terms: 'The committee recommends that ASIC, in collaboration with the Australian Restructuring Insolvency and Turnaround Association and accounting bodies, develop a self-rating system, or similar mechanism, for statutory reports lodged by insolvency practitioners and auditors under the Corporations Act to assist ASIC identify reports that require the most urgent attention and investigation'.¹

Recommendation 17

7.38 The committee recommends that ASIC look closely at its record on enforcement and identify if there is scope for improvement, and if legislative changes are required to advise government.

Recommendation 18

7.39 The committee recommends that the government ensure that ASIC is adequately resourced to carry out its investigation and enforcement functions effectively.

Recommendation 19

7.47 The committee recommends that the Legislative and Governance Forum for Corporations give consideration to recommending amendments to the Corporations Act to ensure that the Director Penalty Regime covers GST liabilities.

Recommendation 20

7.56 The committee recommends that section 596AB of the *Corporations Act 2001* be amended to:

- remove the requirement to prove subjective intention in relation to phoenixing offences;
- introduce a parallel civil penalty contravention in similar terms; and
- extend the application of the section to all forms of external administration, not merely liquidation.

1 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, p. 244.

Recommendation 21

9.16 The committee recommends that ASIC and the ATO continue to develop and implement programs designed to monitor the integrity of the payment system, with the aim of referring relevant matters to relevant law enforcement agencies.

Recommendation 22

9.17 The committee recommends that state and territory government departments and agencies responsible for administering their security of payment legislation closely scrutinise the practice of providing false statutory declarations and where necessary, launch prosecutions as a practical deterrent.

Recommendation 23

9.18 The committee recommends that each state and territory government department or agency responsible for the relevant security of payments act should follow the example in Queensland and publish publicly available, de-identified information concerning the outcome of payment disputes.

Recommendation 24

9.36 The committee recommends that it be made a statutory offence to intimidate, coerce or threaten a participant in the building industry in relation to the participant's access to remedies available to it under security of payments legislation.

Recommendation 25

9.61 The committee recommends that state government departments and agencies responsible for the relevant security of payments act provide education, awareness and support for industry participants who may wish to access remedies available to them under the relevant legislation.

Recommendation 26

9.62 The committee recommends that industry groups should also be proactive in educating and training members on the relevant payment systems. This should include streamlining complaints and dedicated help lines.

Recommendation 27

9.77 The committee recommends that adjudicators of payment disputes under the relevant security of payments act should be required by law to be independent and impartial.

Recommendation 28

9.108 The committee recommends that following completion of the steps recommended in chapter 10 in relation to Project Bank Accounts on construction projects where Commonwealth funding exceeds \$10 million, the Commonwealth enact national legislation providing for security of payment and access to adjudication processes in the commercial construction industry.

Recommendation 29

10.55 The committee recommends that commencing as soon as practicable, but no later than 1 July 2016, the Government undertake a two year trial of Project Bank Accounts (PBAs) on no less than twenty construction projects where the Commonwealth's funding for the project exceeds \$10 million.

Recommendation 30

10.56 The committee recommends that after the trial has concluded, a timely evaluation of the trial of PBAs on Commonwealth funded projects be conducted with a view to making the use of PBAs compulsory on all future Commonwealth funded projects and mandating extending the use of PBAs to private sector construction projects.

Recommendation 31

10.57 The committee recommends that, while the Commonwealth trial of Project Bank Accounts is underway, the Attorney-General refer to the Australian Law Reform Commission for inquiry and report a reference on statutory trusts for the construction industry. This inquiry should recommend what statutory model trust account should be adopted for the construction industry as a whole, including whether it should apply to both public and private sector construction work.

Recommendation 32

11.37 The committee recommends that the Council for the Australian Federation and state and territory regulators continue to develop external equivalence for licences in the building and construction industry.

Recommendation 33

11.38 The committee recommends that each state and territory licensing regime contain three key requirements:

- that licence holders demonstrate that they hold adequate financial backing for the scale of their intended project. This capital backing requirement should be graduated, with increased levels of proof required for more significant projects;
- that on registration, licence holders provide evidence they have completed an agreed level of financial and business training program(s), including principles of commercial contract law, developed in consultation with industry bodies; and
- that licence holders demonstrate that they are a fit and proper person to hold a licence.

Recommendation 34

11.39 The committee recommends that automated cross-agency data sharing should trigger an alert when an individual: declares bankruptcy; is convicted of

fraud; is disqualified as a director; or liquidates a company. This alert should require the relevant state or territory regulator to satisfy itself that the licence-holder remains a fit and proper person.

Recommendation 35

12.37 The committee recommends that the government, through the work of the Legislative and Governance Forum for Corporations establish a beneficial owners' register.

Recommendation 36

12.38 The committee recommends that section 117 of the *Corporations Act 2001* (Cth) be amended to require that, at the time of company registration, directors must also provide a Director Identification Number.

Recommendation 37

12.39 The committee recommends that a Director Identification Number should be obtained from ASIC after an individual proves their identity in line with the National Identity Proofing Guidelines.

Recommendation 38

12.40 The committee recommends that the *Australian Securities and Investment Commission Act 2001* (Cth) be amended to require ASIC to verify company information.

Recommendation 39

12.41 The committee recommends that ASIC and Australian Financial Security Authority company records be available online without payment of a fee.

Recommendation 40

12.52 The committee recommends that ASIC focus enforcement action on business advisors specialising in pre-insolvency advice who advise firms to restructure in order to avoid paying their debts and obligations.

Recommendation 41

12.53 The committee recommends that ASIC publish a regulatory guide in relation to the nature and scope of pre-appointment advice given or taken by companies.

Recommendation 42

12.61 The committee recommends that the *Corporations Act 2001* be amended to align with section 64ZB(8) of the *Bankruptcy Act 1966*.

Recommendation 43

12.62 The committee recommends that firms who provide business advice be prohibited by way of an amendment to the Corporations Act from buying into the companies they are advising via debt acquisitions.

Recommendation 44

12.68 The committee recommends that the government, through the work of the Legislative and Governance Forum for Corporations, give serious consideration to extending the jurisdiction of the Federal Circuit Court of Australia to include corporate insolvencies under the Corporations Act.

