

PART II

Assessing the legislative framework

Overview of Part II

Part II addresses the adequacy of the current legislative and regulatory framework to reduce the level of insolvency in the construction industry and to curb illegal phoenix activity. At the outset it is important to note that this framework must balance two competing goals: promoting investment and protecting participants from unscrupulous operators.

It is also important to note that regulation cannot prevent all insolvencies and the regulators cannot stop every instance of illegal phoenix activity. As Associate Professor Michelle Welsh explained, illegal phoenixing 'is easy, cheap and not transparent'. As such, '[e]ven if the regulators' funding were increased by multiples, they are never going to be able to catch and take enforcement action against everyone who engages in this type of activity'.¹ Rather, regulators—and regulation—need to be smart.

Time and time again the committee was informed that the key element in combating illegal phoenix activity and insolvencies more generally is information in the form of 'real time data'. Information is critical for both regulators, who need to stay informed,² and participants in the industry, who need to be made aware of their rights and obligations under existing legislation.³

At the same time, witnesses before the committee largely considered that legislative reform is necessary.⁴ For example, Mr John Chapman, the South Australian Small Business Commissioner, noted that despite the current legislative framework, small businesses are continuing to suffer the brunt of the insolvencies in the industry. As Mr Chapman noted further, these small businesses are, generally speaking, not the cause of the insolvency but collateral damage.⁵ In light of this assessment, the committee accepts the need for additional legislation and regulation to protect small businesses, employees and subcontractors. The critical question is: 'What should that regulation look like?'

1 *Official Committee Hansard*, 29 September 2015, p. 7.

2 *Proof Committee Hansard*, 28 September 2015, p. 17.

3 *Official Committee Hansard*, 21 September 2015, p. 3.

4 A notable exception is Master Builders Australia. Mr Wilhelm Harnisch considered that existing institutional regulatory arrangements are both capable and adequate to deal with insolvencies and phoenixing: *Proof Committee Hansard*, 4 November 2015, p. 1.

5 *Official Committee Hansard*, 21 September 2015, p. 3.

