Chapter 7

Action against directors

7.1 The Corporations Act provides incentives for directors to take appropriate care. When directors fail to do so, in certain circumstances, ASIC can seek criminal or civil penalties. This chapter provides an overview of the current legislative and regulatory framework in which ASIC can take action against directors. Where the framework is not working as intended or as effectively as it could, it will suggest possible areas of reform. Evidence from many witnesses and submissions underscored the importance of taking action against directors in the fight against illegal phoenix operators and criminal misconduct related to insolvencies more generally.

Disqualification of directors

7.2 Chapters 3 and 4 illustrated how insolvencies, whether specifically connected to illegal phoenix activity or not, have considerable economic and social effects on individuals working within the industry as well as the broader community. Chapter 5 provided ASIC statistics that illustrated the scale of criminal and civil misconduct related to insolvencies in the construction industry. Where evidence indicates that insolvencies are connected to criminal or civil misconduct, ASIC has the power, under s 206F of the Corporations Act, to disqualify the individuals concerned from holding directorships.

7.3 This power is 'protective'.[1] Its primary purpose is to prevent individuals from continuing their anti-social activities and does not reverse their effect by returning monies lost through insolvency.

Legislative requirements

7.4 There are a number of conditions that ASIC must satisfy under s 206F. Before deciding to initiate proceedings against a person, that person must have been an officer of two or more companies that have been wound up (within seven years) and had liquidator reports lodged with ASIC under s 533(1) of the Corporations Act for both failures. This process limits the pool of directors ASIC can target. In addition to the two companies requirement, a liquidator only lodges a report under s 533(1) in certain circumstances; namely:

> (a) a past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or
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> (b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:
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> (i) may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or

1 *Proof Committee Hansard*, 28 September 2015, p. 35.

(ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company; or

(c) the company may be unable to pay its unsecured creditors more than 50 cents in the dollar;

7.5 Section 206F(1) sets out the minimum requirements to trigger ASIC's power. However, in order to exercise that power, ASIC must comply with the requirements under subsection (2). That is, ASIC:

(a) must have regard to whether any of the corporations…were related to one another; and

(b) may have regard to:

(i) the person's conduct in relation to the management, business or property of any corporation; and

(ii) whether the disqualification would be in the public interest; and

(iii) any other matters that ASIC considers appropriate.

7.6 Thus, before ASIC can make a decision under s 206F, it requires the liquidator to lodge a supplementary report with more substantive evidence that supports the allegations made in their initial report. Mr Brett Bassett, Senior Executive Small Business Compliance and Deterrence, ASIC, explained how the system operates:

> …in order for us to actually take a disqualification process further, there needs to be sufficient evidence for us to put a matter before an ASIC delegate and therefore for the delegate to actually make a decision, based on the evidence that is provided, that somebody should be disqualified. We do rely heavily on the 533 reports that come through from the liquidators for us to put that evidence before the ASIC delegates.[2]

Challenges in disqualifying directors

7.7 However, as ASIC explained, there are two problems that arise. First, the s 533 reports do not always meet the standard required for ASIC to initiate an application for disqualification; and second, there are often not enough assets available to fund a supplementary report to produce evidence of a sufficient standard.

7.8 On the first point, Mr John Price, ASIC, argued that in many cases, the initial external administrator reports do not meet appropriate evidentiary standards to launch an application for disqualification:

> It is with some regret that I say that many of those reports do not actually seem to have much, if any, evidence to back up some of the allegations made in them…It is clearly an undesirable situation that we have at the moment. From my point of view, I would like to see the quality of those reports improve—and quite markedly in some cases.[3]

2 *Proof Committee Hansard*, 28 September 2015, p. 35.

3 *Proof Committee Hansard*, 28 September 2015, p. 29.

7.9 Mr Bassett agreed. Mr Bassett noted that ASIC relies heavily on these reports but 'in a number of instances there is not sufficient evidence' to make a determination to seek disqualification.[4] Mr Price considered that ASIC should work closely with liquidators and ARITA in particular, 'to make it clear exactly what we are looking for to help us get a more effective system overall'.[5] The same suggestion was made by ARITA before in the committee's 2012 report into the *Performance of the Australian Securities and Investments Commission*.[6]

7.10 On the second point, ASIC noted in its submission:

> …companies that are wound up often have little or no assets in liquidation which may prevent liquidators from carrying out further investigations and lodging supplementary reports. This hinders ASIC's ability to justify banning directors from managing companies.[7]

7.11 The Assetless Administration Fund (AAF), established by the Australian Government in 2005, was intended to remedy this difficulty. The AAF funds liquidators to undertake further investigations and prepare and lodge supplementary reports to overcome such situations. ASIC noted that since commencement of the AAF:

> ASIC has paid grants totalling $7.9 million to prepare reports concerning potential breaches of the Act and to assist director disqualifications. There has also been an increase in the number of directors banned in the three year period (198 disqualifications) after the AA fund commenced, compared to the three years prior (99 disqualifications).[8]

7.12 The AAF caps funding at $7,500. Approval for funding over $7,500 may be given only where ASIC considers that the extent and nature of the work proposed to be undertaken is necessary and justifies the additional cost, and ASIC and the liquidator come to an agreement on the amount of funding.[9]

7.13 A complementary mechanism—the Liquidator Assistance Program (LAP)—provides assistance to external administrators by helping them obtain relevant books and records of a company. ASIC noted that LAP aims 'to ensure directors of companies in external administration comply with their obligations to provide information to the liquidator or ASIC about the companies they manage'. Failure to do so may result in court action.[10] Table 7.1 provides the details of LAP requests for the

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4 *Proof Committee Hansard*, 28 September 2015, p. 35.

5 *Proof Committee Hansard*, 28 September 2015, p. 43.

6 Economics References Committee, *Performance of the Australian Securities and Investments Commission* (2014), p. 244.

7 ASIC, *Submission 11*, p. 29.

8 ASIC, *Submission 11*, p. 32.

9 ASIC, *Regulatory Guide 109: Assetless Administration Fund: Funding Criteria and Guidelines* (November 2012), paragraphs RG109.41–42.

10 ASIC, *Submission 11*, p. 33.

financial years 2009–10 to 2013–14. It indicates an increase in the compliance rate and corresponding decrease in prosecutions.

Table 7.1: Summary of LAP Statistics (2009–10 to 2013–14)

Year	Liquidator Requests	Compliance Rate	Directors Prosecuted	Offences Prosecuted	Fines
2009–2010	1563	33%	554	1010	$813,768
2010–2011	1386	40%	425	761	$873,562
2011–2012	1410	44%	402	817	$1.05 mil
2012–2013	1484	45%	528	966	$1.15 mil
2013–2014	1559	39%	314	609	$768,000

7.14 It is clear that the disqualification provisions under s 206F set a high standard. However, as the CFMEU argued, it also appears that the disqualification provisions have 'hardly been over-utilised'.[11]

7.15 Chapter 5 documented that in 2013–14, initial external administrators' reports identified some 15,149 breaches of civil obligations and pre-appointment criminal provisions across all industries. Of these, 11,100 potential breaches concerned provisions related to insolvency (ss 180–184, s 588G), with 2,393 of these (21.5 per cent) specifically concerning the construction industry. And yet, ASIC has only disqualified an average of 69 directors (across all industries) per financial year since 2009–2010.[12]

7.16 It does not appear that the issue is simply one of inadequate administrator reports under s 533. ASIC acknowledged that a significant number of initial external administrators' reports confirm that the administrator has documentary evidence to support alleged pre-appointment misconduct. In 2013–14, this was the case in 47 per cent (4,446) of reports reflecting 10,945 alleged breaches. In 33 per cent of these cases (1,483 reports), the external administrator recommended further inquiry by ASIC.[13]

7.17 Noting the disparity between director disqualification and reports of alleged breaches of directors' duties, Professor Helen Anderson has argued that 'something should be done to match expectations with performance'. In particular, Professor Anderson has noted that:

> It is frustrating for insolvency practitioners to spend the time completing reports in the full expectation that ASIC will not investigate further or

11 CFMEU, *Submission 15*, p. 29.

12 ASIC, *Submission 11*, p. 32.

13 ASIC, *Report 412: Insolvency Statistics: External Administrators' Reports (July 2013 to June 2014)* (2014), p. 23.

> prosecute breaches for which the insolvency practitioners hold documentary evidence.[14]

7.18 Professor Anderson continued, noting that:

> If ASIC lacks the resources to pay proper attention to the multitude of reports of suspected director misconduct, where a liquidator claims to have documentary evidence in support, an alternative should be devised…If it is a matter of capacity and resources, ASIC needs to make the case for more funding.[15]

7.19 Echoing these complaints, the CFMEU commented:

> …the most recent enforcement reports give very little confidence that beyond a handful of high profile prosecutions, the general duties provisions of the *Corporations Act* are being utilised in any serious way against illegality, either in an insolvency context or otherwise.[16]

7.20 The committee heard from insolvency practitioners frustrated by ASIC's low rate of enforcement actions. Mr John Winter, ARITA, agreed with the position of Professor Anderson and the CFMEU. Mr Winter considered that ASIC could do a better job enforcing existing legislation as 'the law is already there and it can be enforced. It is up to ASIC to do it.'[17] Mr Winter continued:

> …in truth ASIC has a very limited success rate in trying to track down and stop these sorts of people…liquidators make 18,000 recommendations to ASIC a year around director misconduct. Our contention is obviously that that is the root cause issue. If directors were properly targeted and followed up for their inappropriate behaviour, there would not be any facilitation.[18]

7.21 Mr Glenn Franklin, Partner PKF Lawler, also indicated his frustration with ASIC, though laid blame at resourcing levels rather than desire. Mr Franklin noted that there are hundreds and thousands of administrator reports that provide evidence of alleged misconduct but it is 'only on really large matters…that ASIC seems to be able to have the resources to do much about it', and therefore in 'the vast majority of the liquidations—and I am talking about probably more like 90-plus per cent of the liquidations—ASIC is unable to provide further assistance'.[19]

7.22 Associate Professor Welsh, Mr Winter, Mr Franklin and Mr Peter Vrsecky, Partner PKF Lawler, further commented on the relationship between enforcement and culture. Mr Winter considered that as a result of the low level of enforcement 'a culture has developed that says to directors that the consequences of misconduct are

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14 Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (MUP, 2014), p. 70.

15 Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (MUP, 2014), p. 70.

16 CFMEU, *Submission 15*, p. 28.

17 *Proof Committee Hansard*, 28 September 2015, p. 11.

18 *Proof Committee Hansard*, 28 September 2015, p. 10.

19 *Official Committee Hansard*, 29 September 2015, p. 39.

mild if by some remote chance they are actually pursued for those actions by the regulator.'[20] Mr Winter explained:

> …in stark contrast, in New Zealand or in the UK, every day there are announcements of substantial actions against directors that send a market signal that says that the regulator will pursue people who undertake this illegal activity. We do not get that market signal here in Australia.[21]

7.23 Mr Franklin, Mr Vrsecky and Associate Professor Welsh, made similar comments—ASIC needs to send a market signal. Mr Franklin reiterated that there is generally no further action for small companies,[22] while Mr Vrsecky explained that smaller companies get 'swept under because of a lack of resources'.[23] Associate Professor Welsh agreed with the statement that, in consequence, people can establish several companies in order to illegally phoenix and be confident that nothing will happen.[24]

ASIC's high profile list

7.24 Notwithstanding these complaints, ASIC informed the committee that it has identified approximately 2,500 directors who meet the criteria for triggering the director disqualification provisions of the Corporations Act and whom against which credible allegations of illegal phoenix activity exist. Those 2,500 directors are currently operating over 7,000 registered companies.[25] Mr Bassett referred to this group as a 'high target list'.[26]

7.25 Mr Bassett explained further that ASIC does not investigate all 2,500 directors within this high target list. Rather, ASIC targets the highest-risk directors.

> In respect of the 2,500, we are not simply going through each of those. We are using the expertise of an external credit-scoring agency to help us risk-rate each one of those targets on a monthly basis. On a monthly basis we are getting the highest 20 or 40. That number keeps turning over, if that makes sense. So we are consistently targeting the high-risk ones.[27]

7.26 Mr Bassett continued, informing the committee of the outcome of this strategy:

> …we have identified seven live instances of what we call an illegal phoenix activity. Five of those matters have been referred for ASIC enforcement action and two of those matters have been proactively referred over to the ATO for action or consideration by them. [28]

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20 *Proof Committee Hansard*, 28 September 2015, p. 10.

21 *Proof Committee Hansard*, 28 September 2015, p. 10.

22 *Official Committee Hansard*, 29 September 2015, p. 39.

23 *Official Committee Hansard*, 29 September 2015, p. 39.

24 *Official Committee Hansard*, 29 September 2015, p. 8.

25 ASIC, *Submission 11*, p. 31.

26 *Proof Committee Hansard*, 28 September 2015, p. 36.

27 *Proof Committee Hansard*, 28 September 2015, p. 35.

28 *Proof Committee Hansard*, 28 September 2015, p. 35.

7.27 ASIC informed the committee that its proactive approach to preventing illegal phoenix activity extends to the high target list of 2,500 directors. Mr Bassett noted that between 2013–14 and 2014–15, ASIC spoke to over 250 of these directors. This education campaign has had positive results:

> Firstly, it raised awareness of what illegal phoenix activity was for a number of those directors who had previously said that they had no idea or no knowledge of what it was to engage in illegal phoenix activity.[29]

7.28 Secondly:

> in those instances where we have gone and spoken to directors, if the company has still gone into liquidation the allegations of misconduct in respect of mismanagement of the company, fraudulent transfer of assets et cetera have decreased, which is obviously a positive because they are not necessarily trying to defraud unsecured creditors.[30]

7.29 In light of ASIC's low rate in disqualifying directors, some witnesses suggested that the Corporations Act could be amended to provide for the automatic disqualification of directors who preside over a prescribed number of corporate failures that lead to very low returns to unsecured creditors after liquidation. Mr John Price, ASIC, informed the committee that such a proposal has previously been considered by Treasury, but there were 'a number of concerns raised'.[31] In addition to broader questions around procedural fairness, witnesses considered that setting the prescribed number of corporate failures and the level of 'very low returns' would be problematic.[32]

7.30 Another suggestion was proffered by Associate Professor Michelle Welsh. Associate Professor Welsh noted that legislation in Ireland prohibits an individual from holding more than 20 directorships at the same time. Similar legislation could be introduced in Australia in order to limit the ability of individuals to use the corporate form to disguise their illegal phoenix activity. As Associate Professor Welsh explained however, any such reform would also require greater transparency or oversight in identifying company directors: 'you would need to have that in place with something like the director identification number, because otherwise I could have 20 as Michelle Welsh and 20 as Michelle A Welsh'.[33]

7.31 In any case, simply disqualifying all 2,500 directors who meet the triggering conditions will not ameliorate this issue entirely. Mr Bruce Collins, Assistant Commissioner Risk and Strategy, Public Group and Internationals, ATO, explained that taking action against directors only deals with the 'demand side of the equation without looking at the supply side'. In Mr Collins' view, the focus should be on

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29 *Proof Committee Hansard*, 28 September 2015, p. 35.

30 *Proof Committee Hansard*, 28 September 2015, p. 35.

31 *Proof Committee Hansard*, 28 September 2015, pp. 35, 43–44.

32 Mr. Dave Kirner, Assistant Secretary, CFMEU South Australia, *Official Committee Hansard*, 21 September 2015, p. 32.

33 *Official Committee Hansard*, 29 September 2015, p. 8.

higher-risk entities—'the people involved in serial insolvencies, the people who advise them, the people who help set up those structures and actually implement them'.[34]

7.32 The CFMEU explained further why focusing on the demand side will not be entirely effective. The union noted that 'experience has shown that phoenix operators have little difficulty in arranging for family members, friends or business associates to take on the role of director of a company in which the phoenix operator, disqualified or not, remains the true guiding hand'.[35] Mr Dave Kirner, Assistant Secretary CFMEU SA, reiterated this concern at the Adelaide hearing on 21 September.[36]

7.33 Although the CFMEU referred specifically to unlawful phoenix operators, some submissions suggested that the problem of unlawful shadow directors is not confined to illegal phoenix operators. These submissions argued that greater information sharing between regulators and the creation of a beneficial owners register would significantly strengthen the ability of regulators to detect illegal phoenix behaviour. This will be addressed in chapter 12.

Committee's views

7.34 The committee is concerned that external administrators spend significant amounts of time preparing reports under s 533 of the Corporations Act documenting evidence of alleged breaches of directors' duties that appear to go nowhere. Whether the reports are not up to a sufficient standard to commence investigation, or the volume of reports overwhelms the resources of ASIC, this outcome is unhelpful. In particular, it contributes to a feeling among insolvency practitioners, academics and participants within the industry—including potentially unscrupulous directors—that ASIC fails to take enforcement seriously. The committee reiterates its view noted in its 2014 inquiry into the *Performance of the Australian Securities and Investments Commission* that ASIC should work closely with ARITA in order to make clear to external administrators what it requires in s 533 reports in order to launch an investigation.[37]

7.35 The committee is also concerned at the apparent low level of enforcement actions undertaken by ASIC. Data examined in this chapter and chapter 5 suggests that there are a considerable number of high-risk individuals breaching criminal and civil provisions of the Corporations Act. The committee appreciates that it is impossible to prosecute all breaches and that effective targeting and prosecutorial discretion is required. Nevertheless, the committee considers that in the absence of increased enforcement actions, a culture of compliance will be difficult to instil.

7.36 The committee understands that the low level of enforcement actions frustrates participants within the construction industry. However, proposals to limit the number of directorships an individual can hold concurrently, or to automatically

34 *Proof Committee Hansard*, 28 September 2015, pp. 18–19.

35 CFMEU, *Submission 15*, p. 29.

36 *Official Committee Hansard*, 21 September 2015, p. 23.

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

disqualify individuals involved in a prescribed number of insolvency events, are both unlikely to help reduce insolvencies and potentially infringe procedural fairness. The committee considers that greater regulatory oversight and transparency concerning the identity of company directors will have a similar outcome without infringing important rights protections. For this reason the committee prefers the introduction of a Director Identification Number as recommended by the Productivity Commission in its draft report into *Business Set-up, Transfer and Closure*, as a necessary transparency measure. This will be addressed further in chapter 12.

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'.[38]

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.

Director Penalty Regime

7.40 Disqualification is not the only response available. The Director Penalty Regime originally introduced as part of the *Insolvency (Tax Priorities) Legislation Amendment Act 1993*, but substantially amended in 2012, aims to ensure that directors cause their companies to comply with certain taxation and superannuation obligations. The ATO explained that:

> …the director penalty regime applies a legal responsibility to directors to ensure the company meets its pay as you go withholding and superannuation guarantee obligations. Once a director penalty notice is issued to them, directors may become personally liable to a penalty equal to unpaid PAYG withholding or superannuation guarantee amounts. The intention of the regime is to encourage directors to ensure the company is lodging and paying on time.[39]

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

39 ATO, *Submission 5*, p. 29.

7.41 Significantly, former directors remain liable under the regime for penalties equal to debts incurred up to the date of their resignation. The ATO informed the committee that in 2013–14, 'the ATO issued Director Penalty Notices in relation to just over 1,500 businesses in the construction industry'.[40]

7.42 Despite the apparent successes of this regime, the Australian National Audit Office notes that this number represents only 2.8 per cent of companies with superannuation guarantee charge liabilities.[41]

7.43 Ms Cheryl-Lea Field, ATO, acknowledged that the legislative amendments have not been an unqualified success. Ms Field noted that the ATO has 'seen an increase in disclosure of liabilities' but 'only a small increase in obligations actually being paid'.[42] Nevertheless, Ms Field argued that the regime enables the ATO to 'at least be aware of the liabilities and bring our actions at an earlier stage'.[43] The ATO did not provide a specific amount of superannuation that has been recovered through the penalty notice process.

7.44 As noted, the director penalty regime covers PAYG(W) and superannuation guarantees, not GST. The ATO explained that this means it 'cannot make directors personally liable for their special purpose vehicle's GST obligations—allowing phoenix property developers to intentionally plan to evade those obligations.'[44] The ATO noted that they 'remain open to improvements to the system that would make collection of GST liabilities from phoenix property developers easier'.[45]

7.45 There was additional support among some submissions to tighten the operation of the director penalty regime,[46] and extend it to cover other company debts.[47]

Committee's view

7.46 The committee considers that the Director Penalty Regime has been an important legislative reform in extending the ability of the ATO to ensure that directors comply with their obligations to pay employee entitlements. Nevertheless, the committee appreciates that the regime could be utilised more broadly, and has failed to recover a significant amount of outstanding liabilities. Of more concern, however, is the fact that the regime does not cover GST liabilities, allowing unscrupulous property developers to intentionally avoid their GST obligations. The committee believes that further consideration on this point could be conducted by the

40 ATO, *Submission 5*, p. 29.

41 Australian National Audit Office, *Audit Work Program* (July, 2015), p. 135.

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

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

44 ATO, *Submission 5*, p. 23. See further: *Proof Committee Hansard*, 28 September 2015, p. 16.

45 ATO, *Submission 5*, p. 24.

46 CFMEU, *Submission 15*, p. 22.

47 Name withheld, *Submission 17*, p. 3.

Legislative and Governance Forum for Corporations, the body with oversight of corporate and financial services regulation.

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.

Transactions entered into in order to avoid employee entitlements

7.48 Section 596AB of the Corporations Act prohibits transactions entered into with the intention of preventing the recovery of employee entitlements or depriving employees of their entitlements and imposes a criminal sanction for breach. The idea behind this provision is admirable—providing an incentive for directors to protect the property of employees.

7.49 However, despite being enacted in 2000, this provision has never been invoked. Further, in its submission ASIC did not include this provision as an offence that may be breached as part of illegal phoenix activity.[48] It is not clear whether this oversight is a cause or consequence of s 596AB's desuetude.

7.50 The committee notes further that a 2004 Report by the Parliamentary Joint Committee on Corporations and Financial Services recommended that a review of s 596AB be undertaken in order to determine its effectiveness in 'deterring companies from avoiding their obligations to employees'.[49] That review has never been undertaken.

7.51 The committee's attention was drawn to Professor Helen Anderson's *The Protection of Employee Entitlements in Insolvency: An Australian Perspective*. In chapter 2 of her book, Ms Anderson examines a series of clear instances of conduct where the facts fell within the reach of s 596AB but it was not invoked. Anderson notes that while 'it can never be fully ascertained to what extent the law has deterred employers from that conduct…in the absence of a single prosecution…its deterrence value is highly doubtful'.[50] Mr Michael Murray, ARITA, agreed, considering that s 596AB may not be 'as an effective provision as was originally anticipated', noting further that 'it is certainly a section that you do not see much in law reports'.[51]

7.52 Mr John Winter, CEO ARITA, agreed that s 596AB has been little used. Mr Winter informed the committee that in 2012–2013 insolvency practitioners reported 13 alleged criminal breaches of s 596AB and claimed to hold documentary

48 ASIC, *Submission 11*, p. 21.

49 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake* (June 2004), p. 185, Recommendation 43.

50 Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (MUP, 2014), p. 167.

51 *Proof Committee Hansard*, 28 September 2015, p. 11.

evidence in 12 of those cases. According to Mr Winter, 'it appears that ASIC took no action on those'.[52]

7.53 Professor Anderson proposed amending s 596AB in three important ways:

- remove the requirement to provide subjective intention;
- 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.[53]

7.54 The CFMEU supported Ms Anderson's proposed amendments, submitting that 'fifteen years is more than enough time for a statutory provision to prove its uselessness'.[54]

Committee's views

7.55 The committee supports the object of s 596AB of the Corporations Act but is concerned that it has failed to achieve its purpose. The absence of a single prosecution under s 596AB is telling. The committee supports Professor Helen Anderson's proposal to: remove the requirement to provide subjective intention; introduce a parallel civil penalty contravention in similar terms; and extend the application of s 596AB to all forms of external administration, not merely liquidation.

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.**

52 ARITA, *Submission 8.1*, p. 2.

53 Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (MUP, 2014), p. 168.

54 CFMEU, *Submission 15*, p. 28.