

**SENATE STANDING COMMITTEE ON ECONOMICS QUESTION**  
**(Supplementary Budget Estimates 20 October – 21 October)**

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Question: SBT 24

Topic: Phoenix

Senator Williams asked:

1. How active is ASIC in investigating complaints in Phoenix operations and, in particular, where insolvency practitioners appear to be complicit in allowing Phoenix operations continue?
2. Is there any transfer of information inside ASIC between any group dealing with Phoenix operations and the group monitoring and controlling insolvency practitioners?
3. In relation to a complaint raised about the firm of Ngan & Co of Sydney and their long-term relationship with one Andrew Yiasemides, what did ASIC decide about further investigations?
4. As it appears Yiasemides has now 'cascaded' liquidated businesses through four Phoenix-type re-births, using Ngan & Co and associated firms, what is ASIC's view on investigating the actions of the various insolvency practitioners?

Answer:

1.

We understand that the reference to Phoenix operations can be described as a course of action whereby assets of value are transferred from one company (which will ultimately be liquidated) to another company for little or no consideration. This allows the second company to trade (often in the same industry as the first company). In doing so, the perpetrators leave the existing liabilities with the first company. This action has the affect of leaving little or no assets in the liquidated company to pay creditors monies owed.

ASIC takes a number of actions to curb illegal phoenix activity, including director bannings, criminal and civil proceedings, providing funding via the Assetless Administration Fund to liquidators to conduct investigations and submit reports to ASIC regarding the conduct of directors, and assisting liquidators through ASIC's Liquidator Assistance Program to obtain the books and records of failed companies through ASIC initiated court action.

ASIC has increased its consideration of the role of professional advisers in relation to facilitation of phoenix activity and may take action against such advisers where appropriate (e.g. *ASIC v Somerville & Ors* (No 2) [2009] NSWSC 998).

*Liquidator Assistance Program (LAP)*

When a company enters into external administration, the company's directors have an obligation to provide the external administrator with the company's books and records and a Report as to Affairs (RATA). This information is important for the identification of assets and creditors, and to assess a company's financial position.

If directors fail to comply with this obligation, an external administrator may apply to ASIC for action under the LAP to achieve compliance. ASIC's initial response is a warning letter to

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directors which achieves compliance in 55% of cases. If compliance is not achieved, ASIC initiates a prosecution.

Since July 2006 ASIC has prosecuted 1955 officers in respect of 2317 contraventions (information relevant as at March 2010).

#### *Director bannings*

In appropriate cases, ASIC undertakes disqualification of directors who have been officers of 2 or more failed companies where other statutory criteria for disqualification have been met (see section 206F of the Corporations Act). Directorship of multiple corporate failures may be indicative of potential phoenix activity.

Since July 2006 there have been a total of 265 directors bannings. Of these, 166 were funded by the Assetless Administration Fund. There are currently 34 briefs that have been referred to ASIC Delegates for banning action. There are 43 briefs that are currently being prepared which will be referred to ASIC Delegates (information relevant as at December 2010).

#### *Assetless Administration Fund (AA Fund)*

This fund was established by government to allow the financing of investigations and reports by liquidators in external administrations with minimal or no assets. Funding is provided for supplementary s533 reports by liquidators following receipt of an initial report identifying potential offences of interest to ASIC, and an application for AA funding.

Supplementary reports are for matters where substantive misconduct is suspected. Of the 243 director bannings undertaken since July 2006, 147 have been AA funded.

The fund also assists ASIC better to identify potential corporate misconduct in companies under external administration which require a supplementary statutory report to assist further assessment and investigation.

2.

Depending on the circumstances, there is transfer of information within ASIC, such as when a complaint of misconduct is referred from the Misconduct & Breach Reporting (M&BR) or Insolvency Practitioners & Liquidators (IPL) teams to a deterrence team for investigation.

3. To protect the integrity of its investigations and out of fairness to affected persons, ASIC does not generally comment on investigations it may or may not be conducting. ASIC is unfortunately not in a position to discuss any interest it might have in the firm Ngan & Co of Sydney and any relationship that firm might have with Mr Andrew Yiasemides.
4. To protect the integrity of its investigations and out of fairness to affected persons, ASIC does not generally comment on investigations it may or may not be conducting. ASIC is unfortunately not in a position to discuss any interest it might have in the firm Ngan & Co of Sydney and any relationship that firm might have with Mr Andrew Yiasemides.

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