

Appendix 4

PJC report recommendations and Government Response

This appendix lists recommendations from the committee's report, *Corporate Insolvency Laws: a Stocktake* (2004), which the Government rejected, supported in principle or argued were matters for ASIC.

<p>Recommendation 3 (p.40)</p> <p>The Committee recommends that an administrator should be prohibited from using a casting vote in a resolution concerning his or her replacement.</p>	<p>The Government rejects this recommendation.</p> <p>The exercise of the casting vote is sufficiently regulated by the requirement that it must be exercised in what the administrator perceives to be the overall best interests of the company, and the right of creditors to challenge the exercise of the vote in court. The Government will require administrators to publish reasons for the way they exercise a casting vote. This will inform creditors (and the courts) considering a challenge to a casting vote.</p>
<p>Recommendation 7 (p.47)</p> <p>The Committee recommends that the Government consider establishing an advisory council comprising representatives of professional organisations including the Insolvency Practitioners Association of Australia, CPA Australia, the Institute of Chartered Accountants in Australia, and the Law Council to assist ASIC in relation to the regulation, appointment, registration and removal of registered and official liquidators as well as on issues relating to the maintenance of professional standards of insolvency practitioners.</p>	<p>The Government rejects this recommendation.</p> <p>The proposed advisory council would largely duplicate existing mechanisms to allow for consultation with relevant professional organisations.</p>

<p>Recommendation 8 (p.54)</p> <p>The Committee recommends that, in its enforcement programs for the lodgement of reports as to the affairs of a company (RATAs), ASIC take greater account of the quality of reports provided.</p>	<p>This recommendation is a matter for ASIC.</p>
<p>Recommendation 10 (p.55)</p> <p>The Committee recommends that the Government consider amending the law to permit an administrator or a liquidator to recover from directors who have failed to ensure that company records are complete and up-to-date, the costs and expense of reconstructing the company's financial records in order to prepare a full and complete report on the affairs of the company. Directors would be held jointly and severally liable.</p>	<p>The Government rejects this recommendation.</p> <p>A provision along the lines proposed would be subject to uncertainty both as to the liability of individual, non-culpable directors and the quantum of any potential liability.</p>
<p>Recommendation 12 (p.61)</p> <p>The Committee recommends that reg. 5.3A.02 - administrator to specify voidable transactions in statement - be amended to include rights of recovery against the company's directors for insolvent trading.</p>	<p>The Government supports this recommendation in principle.</p> <p>A principles-based approach is preferred to the prescription of a detailed checklist of matters to be included in the report.</p> <p>Accordingly, the Government will introduce a requirement that the administrator's statement to creditors include 'any other matter material to the creditors' decision' (see response to recommendation 17 below). Adoption of this recommendation will permit an administrator to address the question of insolvent trading in their statement to creditors.</p>

<p>Recommendation 13 (p.63)</p> <p>The Committee recommends that insolvency be removed as a prerequisite for the avoidance of uncommercial transactions which may be challenged by a liquidator. Such transactions are to have taken place during the two year period preceding formal insolvency.</p>	<p>The Government rejects this recommendation.</p> <p>The current provision strikes a balance between promoting certainty for business and preventing the dissipation of company assets in the lead-up to insolvency.</p> <p>Removing the insolvency requirement for uncommercial transactions has the potential to cast doubt on many company transactions and disrupt business. The requirement of insolvency provides an important link with company transactions that are most likely to disadvantage creditors as a whole.</p>
<p>Recommendation 14 (p.84)</p> <p>The Committee recommends that the threshold test permitting directors to make the initial appointment of an administrator under the voluntary administration procedure be revised in order to alleviate perceptions that the VA procedure is only available to insolvent companies. The Committee notes the suggestion that the test be reworded to read ‘the company is insolvent or may become insolvent’.</p>	<p>The Government rejects this recommendation.</p> <p>The current test allowing directors to make the initial appointment of an administrator is not restrictive and strikes an appropriate balance between facilitating corporate rescue and protecting the rights of creditors.</p> <p>The current test does not limit use of the procedure to circumstances of actual or present insolvency. Any misconception about the current test would be best handled through education and compliance programmes. ASIC is preparing a comprehensive suite of information sheets in this area, and also operates an insolvent trading programme that adopts a proactive strategy whereby companies at risk of insolvency are visited by ASIC and directors encouraged to seek professional advice on turnaround strategies.</p>

<p>Recommendation 18 (p.101)</p> <p>The Committee further recommends that ASIC publish a guidance note to assist administrators in ensuring that administrators include all matters material to the creditors' decision in their administrator's report.</p>	<p>This recommendation is a matter for ASIC.</p>
<p>Recommendation 24 (p.122)</p> <p>The Committee recommends that ASIC work with the professional bodies to encourage the promotion of best practice standards in remuneration charging and in particular the provision of adequate disclosure of the basis of fees charged by insolvency practitioners and on a more timely basis.</p>	<p>This recommendation is a matter for ASIC.</p>
<p>Recommendation 25 (p.122)</p> <p>The Committee recommends that an administrator should be prohibited from using a casting vote in a resolution concerning his or her remuneration (see also recommendation 3).</p>	<p>The Government rejects this recommendation.</p> <p>The exercise of the casting vote is sufficiently regulated by the requirement that it must be exercised in what the administrator perceives to be the overall best interests of the company, and the right of creditors to challenge the exercise of the vote in court.</p> <p>The Government will require administrators to publish reasons for the way they exercise a casting vote. This will inform creditors (and the courts) considering a challenge to a casting vote.</p>
<p>Recommendation 29 (p.129)</p> <p>The Committee recommends that, as a step towards a better understanding of the nature, effects and extent of insolvent assetless companies, the Government should commission an</p>	<p>The Government rejects this recommendation.</p> <p>The establishment of an assetless administration fund and enhanced enforcement activity in this area will</p>

<p>empirical study of assetless companies.</p>	<p>provide the opportunity to obtain improved information about assetless companies.</p>
<p>Recommendation 30 (p.129)</p> <p>The Committee further recommends that as a first and immediate step, ASIC begin to collate statistics on insolvent assetless companies and publish such figures on a triennial basis together with an analysis.</p>	<p>This recommendation is a matter for ASIC.</p>
<p>Recommendation 31 (pp.144-45)</p> <p>The Committee recommends that ss 206D and 206F should not be subject to a requirement to have managed two or more failed corporations. They should permit a court, or ASIC in its discretion, to disqualify a person from being a director where essentially two conditions are met: the person is or has been a director of a company which has failed (as defined in s 206D(2)) and the person, as a director of the company (either taken alone or taken together with his/her conduct as a director of any other company) makes him or her unfit to be concerned in the management of a company.</p>	<p>The Government rejects this recommendation.</p> <p>Unlawful phoenix activity typically involves two or more corporate failures.</p> <p>The Government recently amended the Corporations Act to extend the maximum disqualification periods from managing corporations, for insolvency and non-payment of debts, from 10 to 20 years. In addition, ASIC may now apply to a court to have an automatic five-year disqualification order extended by up to a further 15 years.</p> <p>The Government will amend the ASIC Act to restore the longstanding interpretation of disqualification and banning orders as being ‘protective’ rather than ‘penal’ in nature.</p>
<p>Recommendation 32 (p.147)</p> <p>The Committee recommends that the Government in association with the Council of Australian Governments review the adequacy of the arrangements for the checking of the business names of companies on State Business Names Registries against the ASCOT database of company names</p>	<p>The Government supports this recommendation in principle.</p> <p>The Government will raise the question of the adequacy of arrangements for the checking of the business names of companies on State Business Names Registries against the ASCOT database with an appropriate ministerial forum.</p>

and ACNs.	
<p>Recommendation 33 (p.149)</p> <p>The Committee recommends that the Government consider the proposal to create a statutory process analogous to a Mareva injunction to enable the courts to freeze assets of a director or manager which are prima facie assets on which the corporation has a just claim.</p>	<p>The Government rejects this recommendation.</p> <p>The Corporations Act already empowers the court to freeze assets of a director or manager where ASIC is investigating an act or omission by a person which may constitute a breach of the Act. ‘Proceeds of crime’ legislation contains similar powers.</p>
<p>Recommendation 34 (p.150)</p> <p>The Committee recommends that the Government review the processes in place for registering a company with a view to improving the measures for determining the bona fides of those applying to register a company.</p>	<p>The Government supports this recommendation in principle.</p> <p>Company registration requirements should balance the need to promote integrity in business dealings and avoidance of the imposition of unnecessary compliance costs or risks on business.</p>
<p>Recommendation 35 (p.150)</p> <p>The Committee recommends that ASIC consider establishing a hot-line and guidelines for its operation in conjunction with strategically located employees for the purpose of facilitating possible early detection of, and intervention to prevent the implementation of, illicit phoenix activities.</p>	<p>This recommendation is a matter for ASIC.</p>
<p>Recommendation 37 (p.158)</p> <p>The Committee recommends that in its enforcement programs for the lodgement of external administrators’ statutory reports, ASIC also take greater account of the quality of reports provided.</p>	<p>This recommendation is a matter for ASIC.</p>

<p>Recommendation 40 (p.164)</p> <p>The Committee recommends that ASIC consider enhancing its capacity to provide more comprehensive, comparable analyses of statutory reports of liquidators for the assistance of journalists, academic researchers, the public and the Government and its own management requirements. Such information should be assessed in terms of maintaining public confidence in the administration and enforcement of corporate laws.</p>	<p>This recommendation is a matter for ASIC.</p>
<p>Recommendation 41 (p.165)</p> <p>The Committee recommends that ASIC continuously evaluate the incidence of possible failures to keep books and records adequately as disclosed in external administrators' reports on an annual comparative basis. This measure would allow ASIC to assess the effectiveness of its annual programs for the enforcement of financial reporting requirements.</p>	<p>This recommendation is a matter for ASIC.</p>
<p>Recommendation 43 (p.185)</p> <p>The Committee recommends that the Minister for Finance request the Corporations and Markets Advisory Committee to review the operation of the <i>Corporations Law Amendment (Employee Entitlements) Act 2000</i> to determine its effectiveness in deterring companies from avoiding their obligations to employees. Furthermore, in light of the evidence suggesting that some corporations deliberately structure their business to avoid paying their full entitlements to employees and more generally unsecured creditors, the Committee recommends that the review look beyond the effectiveness of the Act</p>	<p>The Government rejects this recommendation.</p> <p>The measures introduced through the <i>Corporations Law Amendment (Employee Entitlements) Act 2000</i> are one part of a suite of measures intended to protect creditors.</p> <p>The Government has announced an integrated set of proposals to improve the operation of Australia's insolvency laws, including a range of initiatives intended to complement the general body of rules concerning the duties of company officers and to strengthen creditor protections.</p>

<p>and consider, and offer advice on, possible reforms that would deter this type of behaviour.</p>	<p>The proposed assetless administration fund, and additional funding for ASIC to investigate and prosecute misconduct in the area of corporate insolvency, should allow for more rigorous testing of this area of law.</p>
<p>Recommendation 44 (p.190)</p> <p>The Committee recommends that the Government explore the various measures proposed for safeguarding employee entitlements such as insurance schemes or trust funds giving particular attention to the costs and benefits involved in the schemes.</p>	<p>The Government supports this recommendation in principle.</p> <p>The Government is committed to the protection of employee entitlements through the GEERS scheme, but remains willing to examine and explore other measures which might enhance the operation of the scheme or provide employees with similar levels of protection.</p> <p>Further investigation would need to have regard to previous findings of consultations conducted by the Government (in August 1999 and January 2001), the need to maintain an environment in which Australian enterprises remain competitive and the experience of comparable international systems.</p>
<p>Recommendation 47 (p.197)</p> <p>The Committee recommends that the Government clarify the priority afforded superannuation contributions required to be made after the ‘relevant date’ of an external administration.</p>	<p>The Government rejects this recommendation.</p> <p>The law currently affords priority treatment to standard superannuation contributions payable after the ‘relevant date’ (the commencement of an external administration). The decision cited by the Parliamentary Joint Committee was subsequently the subject of a successful appeal.</p> <p>The Government will continue to examine and monitor court decisions that consider</p>

	<p>the operation of the relevant law in non-standard cases, with a view to clarifying the law where appropriate.</p>
<p>Recommendation 52 (p.206)</p> <p>The Committee recommends that the law be amended to clarify that a DCA which incorporates any form of promise of future performance should not be regarded as finalised until all such promises have been fulfilled.</p>	<p>The Government rejects this recommendation.</p> <p>The law imposes minimal restrictions on deeds of company arrangements (DCAs). It aims to allow creditors maximum flexibility in their formulation. Adoption of a provision in the terms proposed may impose unintended restrictions on the ability of creditors to formulate and accept DCAs.</p> <p>The law already includes many safeguards against abusive arrangements in DCAs. It requires information to be provided in the statutory report to creditors, prohibits unfairly discriminatory deeds, imposes liability on administrators for misleading and deceptive conduct and empowers a court to terminate a deed.</p> <p>The law should not unduly limit the discretion of creditors to approve a DCA, provided they are in a position to make an informed consent. ASIC has recently released guidance on information to be provided to creditors where the administrator proposes the establishment of a creditors trust.</p>
<p>Recommendation 54 (p.215)</p> <p>The Committee recommends that the creditors' voluntary liquidation procedure should be retained and entry to the procedure simplified to enable directors to place a company immediately into liquidation. Where an enterprise is not viable, the law should allow for its swift and efficient liquidation to maximise recoveries for</p>	<p>The Government rejects this recommendation.</p> <p>Adoption of this recommendation would confer an inappropriate power on the directors of companies. Creditors, not directors, should have the right to place a company in liquidation, or to apply to a court to have a company placed in</p>

<p>the benefit of creditors.</p>	<p>liquidation.</p> <p>A power in directors to place a company directly into voluntary liquidation is not comparable to the power of directors to place a company into voluntary administration. The voluntary administration procedure ensures that creditors ultimately determine the future of the company, including possible liquidation.</p>
<p>Recommendation 55 (p.217)</p> <p>The Committee recommends that the law be amended so as to permit administrators to apply to a court for an order that a party to a contract may not terminate the contract by virtue of entry by a company into voluntary administration. The court should be satisfied that the contracting party's interests will be adequately protected.</p>	<p>The Government rejects this recommendation.</p> <p>A prohibition on the enforceability of 'ipso facto' clauses would erode the freedom of contract, restricting the capacity of creditors to manage risk.</p> <p>The proposed amendment may introduce a high level of complexity to the law and increase the costs of voluntary administrations where an application is made to a court.</p>
<p>Recommendation 58 (p.225)</p> <p>The Committee recommends that the Government support a program of research into the impact of insolvency procedures, if necessary, by providing a specific allocation for the conduct of such research by ASIC, the professional associations and/or commissioned researchers.</p>	<p>The Government supports this recommendation in principle.</p> <p>The collection of statistical data by ASIC through forms approved by it pursuant to s 350 or prescribed forms is currently permitted by the law.</p>