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# Research in Practice

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## Convictions for summary insolvency offences committed by company directors

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## Introduction

The Australian Securities and Investments Commission (ASIC) investigates and prosecutes certain strict liability criminal offences by directors before local and Magistrates' courts across Australia. Until December 2011, ASIC made public the details of each successful case by periodically releasing conviction reports on its website and through media releases. In this paper, an analysis of the raw information in ASIC conviction reports for the five calendar years 2006 to 2010 is presented to provide statistical data on convictions and fines obtained by ASIC under its court-based enforcement activities, with an emphasis on insolvency offences. The analysis reveals that under its summary prosecution program, ASIC's focus turned almost exclusively to insolvency crimes committed by directors of collapsed, insolvent companies, where they have failed to assist liquidators. The analysis reveals a trend toward fewer convictions (except in New South Wales) and smaller fines for these 'fail-to-assist' offences between 2006 and 2010.

This paper also provides background information about the traditional role played by insolvency practitioners in detecting corporate crime and assisting with prosecution, as well as the character and significance of summary insolvency offences. It suggests that prosecution of these summary insolvency offences may be important to the integrity of Australia's regime of corporate insolvency law.

By arrangement with the Commonwealth Director of Public Prosecutions, ASIC is permitted to conduct its own prosecutions of what the Commonwealth Director of Public Prosecutions describes as minor regulatory offences against the *Corporations Act 2001* (Cth) (the Act). Under this arrangement, ASIC commenced an expanded summary prosecutions program in 2002 and as part of this, received special funding for a Liquidator Assistance Program.

ASIC's first report on the outcomes of these initiatives showed that most of the convictions achieved between 2002 and 2005 were in respect of offences relating to failure by company officers to assist insolvency practitioners (ASIC 2005). Analysis of similar ASIC reports since 2005 reveals that convictions for such insolvency offences now predominate. Further, analysis of these reports shows a reduction in the average fine being imposed by the courts, a fall in the actual number of defendants convicted and offence rates varying between jurisdictions.

The purpose of this scoping study is to analyse and document changes in the number of convictions achieved by ASIC for failure to assist-type insolvency offences identified during the liquidation process, to examine changes in the penalties awarded by the

courts for such offences, to illuminate enforcement and prosecution action being taken in an area of white collar crime that is rarely discussed outside the insolvency industry and to point to the nature of the issues that should be examined through additional research.

## Scope of the present study

The statistics and issues discussed in this paper relate principally to directors of small proprietary limited companies—often referred to as *private companies*—that have become insolvent and collapsed. The businesses that they once operated are commonly referred to as *small and medium enterprises* (SMEs). According to ASIC (2010a: 5):

the majority of external administrations in Australia relate to small to medium proprietary limited companies. Statistics show that, in the majority of cases, minimal or no returns are being made to creditors.

This study concentrates on liquidations—that is, the process by which companies are wound-up and their assets and property redistributed. It will not examine other types of corporate external administrations (ie voluntary administrations, deed administrations, receiverships) because liquidations are the most common type of external administration. ASIC (2008a: 4) defines liquidations as:

the orderly winding up of a company's affairs. It involves realising the company's assets, cessation or sale of its operations, distributing the proceeds of realisation among its creditors and distributing any surplus among its shareholders.

In the financial year 2010–11, liquidations comprised approximately 67 percent of all 14,566 insolvency appointments (ASIC 2011). Approximately 34 percent of the 9,780 liquidator appointments in 2010–11 were 'compulsory liquidations' ordered by a court. Liquidators appointed in this way are often called *court-appointed liquidators* or *official liquidators*.

## Background

### Detecting offences

During the life of a small, private, unaudited Australian company, breaches of company law by its directors usually go unnoticed by the regulator because nobody other than the offenders (the directors) and perhaps one or two employees are aware that offences have occurred. Moreover, there are often no immediate victims, so there is not likely to be a complaint as long as the company continues to pay its suppliers, employees and taxes.

However, when a company collapses and an external administrator is appointed, a supplementary branch of law enforcement comes into existence. The external administrator is required by the Act to make a formal report to ASIC about any alleged offences by a past or present director or other officer of the company that they detect. This requirement to report is not confined to offences under company law but relates to suspected violations under a law of the Commonwealth or a state or territory in relation to the company (ASIC 2008b). Where the suspected crime is not within ASIC's province—for example, restrictive trade practices or recklessly polluting the environment—the matter is referred to the appropriate regulatory authority.

External administrators, especially liquidators, are ideally positioned to uncover offences. They have the right to examine all the company's records, the right to question directors and employees, and the right to examine the directors and others under oath in court. They may also apply to a court for arrest warrants and for search and seizure warrants.

### Offences of failing to assist

Most post-appointment insolvency offences may be described as failure to assist-type offences, where directors do not comply with their obligations to assist the external administrator by providing information. For example, in court-ordered liquidations, it is an offence under s 475 of the Act if the directors of the collapsed company refuse or fail to make out, verify and submit to the liquidator a statement of affairs of the company, known officially as a Report as to Affairs (or RATA). The Report as to Affairs is designed to be both a financial statement (like a balance sheet) and a disclosure statement. In it, the director is supposed to disclose, describe and value the company's assets and liabilities.

In addition, under s 530A of the Act, each officer of the company in liquidation has a statutory duty to:

- deliver to the liquidator all books in the officer's possession that relate to the company;
- tell the liquidator where other books relating to the company are;
- attend on the liquidator as the liquidator reasonably requires;
- give the liquidator such information about the company's business, property, affairs and financial circumstances as the liquidator reasonably requires;
- attend such meetings of the company's creditors or members as the liquidator reasonably requires; and
- do whatever the liquidator reasonably requires the officer to do to help in the winding up.

### The reporting of offences

The requirement that an external administrator formally reports alleged offences to ASIC has existed for many years. In recent years, however, the reporting procedure has become far more efficient and sophisticated. Importantly, since 2002, the reporting of post-appointment, failure-to-assist offences has been supplemented by the Liquidator Assistance Program (LAP), which assists liquidators and ASIC to enforce these laws (ASIC 2012a).

Under LAP, ASIC takes action aimed at ensuring that directors of companies in external administration comply with their obligations to assist. Upon a director failing to comply, an external administrator may make a complaint to ASIC using model statements and model affidavits devised by ASIC. If compliance is not achieved after ASIC sends a warning letter to directors, it initiates a prosecution. It is this collaborative process, which is promoted and heavily relied upon by ASIC, that routinely results in a successful summary prosecution.

Because many of the companies that court-appointed liquidators are directed to wind up seem, *prima facie*, to have few or no valuable assets remaining, the support given to liquidators through LAP is important. So-called 'phoenix' companies, which are 'deliberately denuded of assets before going into liquidation' (Whelan & Zwier 2005: 14), have become of particular concern to ASIC in recent years, as well as to labour unions and the Australian Taxation Office (the main victim of insolvencies). As liquidators depend for their remuneration on being able to realise company assets (ie to convert assets into cash), a lack of assistance in getting information from directors is likely to result in reduced action on their part, which would defeat the liquidation scheme.

### The liquidator's role in law enforcement

ASIC (2008b: 6), in its Regulatory Guide for external administrators, states that external administrators 'are the front-line investigators of insolvent corporations'. However, in the world of law enforcement, the role of liquidators is far from clear. They are not agents of ASIC and are not investigating officials as defined under the *Crimes Act 1914* (Cth). Liquidators may apply to the court for arrest warrants (s 486B of the Act) and for search and seizure warrants (s 530C), but to formally execute warrants, they must seek the assistance of sworn police officers.

A court-appointed liquidator may, on behalf of the court, exercise or perform certain powers and duties conferred or imposed on the court. When performing these duties, the liquidator becomes an officer of the court. Further, they have duties to the court and are

subject to supervision by the court when carrying out his or her duties as a court-appointed liquidator (eg see *Davies & Nicol etc v Chicago Boot Co Pty Ltd* [2011] SASC 27). In criminal proceedings against directors, liquidators perform the role of witness.

## Methodology

### Sources of information

Between 2002 and 2011, ASIC released data on its summary prosecutions activities in the form of conviction reports, which contained the name and state of residence of each offender, the number and nature of each formal charge proved in respect of each offender and the penalty imposed by the court (ASIC called these reports *prosecution reports*, but as they only reported on successful prosecutions, the phrase *conviction reports* or *conviction lists* is used in this paper). A range of penalties for various summary offences were reported in this way. However, ASIC does not appear to have undertaken any comprehensive analysis of these data.

Due to a policy change by ASIC, the raw information that was analysed for this paper is no longer being published. In September 2012, ASIC (Danielle McInerney, Communications Manager, ASIC personal communication 24 September 2012) wrote:

[W]e no longer publish periodic summary prosecution reports. This data is now bundled up into both the Enforcement and Annual reports. These reports are made available on our website and to those who subscribe to our media releases.

At the time of writing, there have been two ASIC Enforcement Outcomes reports covering the periods July to December 2011 (ASIC 2012b) and January to June 2012 (Danielle McInerney, Communications Manager, ASIC personal communication 24 September 2012). Unlike the summary conviction reports they replaced, these new reports do not supply details of the state of residence of offenders, the sections under which enforcement action was

taken, or the fines that were imposed. Without that information, most of the statistical data shown in this paper could not have been produced.

For the purposes of this paper, conviction lists for the five calendar years 2006 to 2010 were selected for analysis. Unless otherwise stated, the source of the data in the Tables is ASIC official conviction lists. In addition, statistics released by ASIC on numbers of companies entering insolvency administration (ASIC 2011) have been used in order to examine any relationships present between prosecutions and the size of the regulated sector.

### Offences examined

Each ASIC conviction report disclosed convictions under several sections of the Act. The majority of offences prosecuted between 2006 and 2010 were the post-appointment insolvency offences under ss 475 and 530A. On average, 80 percent of successful prosecutions over the five year period were for breaches of ss 475 and 530A.

The next most prevalent offence that was successfully prosecuted was for breaches of s 1314. This provides a penalty where there is continued failure to do a specified act. While this is not specifically an insolvency provision, it can be viewed as one in this study because the data indicate that most prosecutions under s 1314 relate to continuing or ongoing breaches of s 475.

Convictions under ss 475, 530A and 1314 have been selected for analysis. Convictions for violations of the 13 other types of corporate laws reported on by ASIC have been classified and recorded in Table 5 as 'other breaches'. They include offences such as failure to notify a change of address or directors, false or misleading statements, acting as a director while suspended, failure to keep minutes, failure to maintain registers and other failure to assist-type insolvency offences where the external administrator was a controller or an administrator rather than a liquidator.

**Table 1** Successful summary prosecutions by ASIC of company officers (number of offenders)

	2006	2007	2008	2009	2010	Total
NSW	306	328	318	327	312	1,591
Vic	66	92	54	32	37	281
Qld	74	81	56	50	83	344
WA	19	6	8	1	6	40
SA	28	18	8	11	6	71
Tas, NT & ACT	5	2	3	1	5	16
Australia	498	527	447	422	449	2,343

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

# Prosecutions

## Number of offenders

In the five calendar years to and including 2010, ASIC successfully prosecuted 2,343 defendants Australia-wide (see Table 1). The actual number of defendants convicted in 2010 (n=449) was down by 10 percent on the number in 2006 (n=498) and down by 15 percent on the peak experienced in 2007 (n=527).

The majority of offenders (68%; n=1,591) resided in New South Wales; around 15 percent were from Queensland (n=344) and 12 percent (n=281) from Victoria. New South Wales appears to be overrepresented in these data, based on ASIC statistics on the domicile of companies that show that:

- at the end of December 2010, only 33 percent of all companies were domiciled in New South Wales;
- of all companies that entered external administration in the five financial years 2005–06 to 2009–10, only 46 percent were domiciled in New South Wales.
- of all companies that entered court-ordered liquidations in the five financial years 2005–06 to 2009–10, only 54 percent were domiciled in New South Wales.

Analysis of the number of offenders convicted annually per 1,000 court-ordered liquidations revealed that

between 2006 and 2010, there was an increase of 29 percent in New South Wales, compared with decreases in the other jurisdictions (see Table 2). For example, there was a 34 percent decrease in the number of offenders in Victoria and a 19 percent decrease in Queensland over the same five year period.

## Contraventions

A total of 4,429 contraventions of the *Act* were recorded against the 2,343 offenders (see Table 3). The number of contraventions decreased by 17 percent between 2006 (n=948) and 2010 (n=789), and by 27 percent from the peak in 2007.

Most of those convicted (more than 70%) were found to have committed two distinct criminal acts; one under s 475 and one under s 530A.

## Penalties

### Nature of penalties

Nearly all of the 4,429 contraventions resulted in fines (n=4,245; 96%; see Table 3); only two contraventions resulted in imprisonment. In 182 instances (4%), good behaviour bonds or community service orders were

**Table 2** Successful summary prosecutions by ASIC of company officers (number of offenders per 1,000 court ordered liquidations)

	2006	2007	2008	2009	2010	% change <sup>a</sup>
NSW	207.5	222.2	227.6	197.8	267.4	29
Vic	101.4	161.7	91.5	53.5	67.8	(34)
Qld	213.9	217.7	180.6	119.9	173.6	(19)
WA	152.0	60.0	133.3	9.4	48.8	(67)
SA	318.2	187.5	98.8	122.2	83.3	(74)
Tas, NT & ACT	119.0	50.0	88.2	19.6	83.3	(36)
Aust	182.6	198.6	180.8	144.8	183.6	0.6

a: Between 2010 and 2006. Figures in parentheses refer to a percentage decrease

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

**Table 3** Contraventions and fines imposed by ASIC following summary prosecutions of company officers

	All contraventions	All fines	Insolvency section fines	
	n	n	n	% of all fines
2006	948	906	661	73
2007	1,074	952	839	88
2008	849	849	774	91
2009	769	759	736	97
2010	789	779	760	98
Total	4,429	4,245	3,770	–

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

	Fines (n)	Total fines (\$)	Average fine (\$)
2006	906	932,873	1,029.66
2007	952	1,005,634	1,056.34
2008	849	685,201	807.07
2009	759	528,575	696.41
2010	779	744,010	955.08
Total	4,245	3,896,293	917.85

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

	2006	2007	2008	2009	2010
s 475	1,098.68	1,001.29	817.54	639.88	816.84
s 530A	1,097.23	941.11	732.82	670.35	876.89
s 1314	2,444.75	2,006.02	1,246.02	956.17	1,849.82
Insolvency breaches (above)	1,179.47	1,133.90	843.54	688.35	955.80
Other breaches	625.48	480.43	430.67	954.35a	926.32
All fines	1,029.66	1,056.34	807.07	696.41	955.08

a: In 2009, 2 unusually high fines were imposed for 'other' breaches. This had the effect of changing the downward trend that had been occurring in that category of offence to that point

Source: ASIC 2010c, 2010d, 2010e, 2009a, 2009b, 2009c, 2008c, 2008d, 2008e, 2007a, 2007b, 2007c, 2007d, 2006a, 2006b, 2006c

given; although in the last three years (2008, 2009 and 2010), there were just 18 such outcomes, representing less than one percent of the contraventions in that period.

## Amount of fines

The total amount of the 4,245 fines imposed between 2006 and 2010 was \$3,896,293. Added to this were costs that were, on average, approximately 21 percent of the fine. Over the five year period considered, the average fine imposed for a summary offence prosecuted by ASIC decreased from \$1,030 to \$955 (-7%; see Table 4).

An analysis of all fines imposed in 2010 showed that:

- 40 percent were for less than \$500;
- 28 percent were between \$501 and \$1,000;
- 20 percent were between \$1,001 and \$1,500; and
- 12 percent were greater than \$1,500.

The largest single fine in 2010 was \$6,000 (imposed twice in Queensland). The average Queensland fine in 2010 was \$1,271, compared with \$901 in New South Wales and \$903 in Victoria.

## Fines for insolvency offences

Most of the fines imposed (and almost all fines imposed in recent years) were for breaches of the three insolvency offence sections—namely, ss 475, 530A and 1314. The maximum penalty, or statutory cap, provided by law for a s 475 offence is a fine of

\$2,750 or imprisonment for six months, or both; for a s 530A offence, it is a fine of \$5,500 or imprisonment for one year, or both. A continuing offence (s 1314) can attract a fine of up to \$55 per day until the relevant obligation is complied with. In 2006, the number of fines for insolvency offences represented 73 percent of the total fines imposed; by 2010, this had risen to 98 percent of all fines (see Table 3).

Over the five years, the average fine imposed for a summary insolvency offence fell by 19 percent (from \$1,179.47 to \$955.80; see Table 5).

For each of the three insolvency offence sections considered, decreases in the average fine imposed were as follows:

- 26 percent for a s 475 offence (from \$1,098.68 to \$816.84);
- 20 percent for a s 530A offence (from \$1,097.23 to \$876.89); and
- 24 percent for a s 1314 offence (from \$2,444.75 to \$1,849.82).

To determine why this decline is occurring would require additional research into other sources, such as analysis of court records and interviews with offenders, liquidators and prosecutors.

These data (presented above) on the average fines for specific insolvency offences should be treated with some caution for two reasons. First, Bird et al. (2003) identified a source of error in ASIC's conviction reports regarding the allocation of fine information to the proper section of the Act, especially under ss 475

and 530A. Although they reported that in 2001 ASIC installed a new system capable of producing more refined enforcement data, further research would be needed to determine if errors of this nature continued to exist after 2001. Second, fines recorded in ASIC conviction reports are, at times, shown as a combined single fine for two convictions under two different sections. This seldom occurs, but where it does, it is mostly in reports of Queensland convictions. In such cases, both convictions have been counted, with the amount of the fine divided between the two offence types.

## Conclusion

This paper presents descriptive statistical information on the number and outcomes of prosecutions undertaken by ASIC for insolvency offences against ss 475, 530 and 1314 of the Act between 2006 and 2010. It was found that during this period, fewer convictions have, on average, been recorded each year and smaller fines imposed.

Further research would be required to reach a definitive view on why there has been an overall decrease in the number of defendants convicted of summary insolvency offences and why New South Wales and Queensland have gone against this trend. Of particular interest would be data on activities within ASIC's Liquidator Assistance Program. Specific research questions would include—does the program focus more on some states than on others? Have there been fewer complaints by liquidators? Have prosecution success rates fallen? Do success rates vary from state to state? Are directors becoming more compliant? Research interviews with officers in the LAP would help to answer these questions.

The average fine imposed for a summary insolvency offence decreased by 19 percent during the years 2006 to 2010. The reasons for this decline could be increased leniency by the courts, or due to the individual circumstances of the offence or the offender changing over time. Further analysis of court records and interviews with offenders would be required to reach a definitive view on which of these factors had the greatest influence.

There are many potential recovery actions, lawsuits and prosecutions that may be brought to bear against the directors of a failed company by its liquidator, its creditors, ASIC and other regulatory authorities. These include taking civil or criminal action for insolvent trading, as described in ASIC's regulatory guide *Duty to Prevent Insolvent Trading: Guide to Directors* (ASIC

2010b).

But if company records are not available and information is withheld by directors, the chances of lawsuits and prosecutions being brought or succeeding are greatly diminished. It is therefore possible that this benefit for directors of SMEs is a significant reason why breaches of failure-to-assist insolvency offences are committed. However, further research is needed into this issue and into whether increased penalties would reduce the number of these offences.

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