

ASIC'S DEREGULATORY INITIATIVES  
RESPONSE TO REPORT 391  
16<sup>th</sup> May 2014

Submission by Associate Professor Helen Anderson, Professors Ian Ramsay and Ann O'Connell, Melbourne Law School, and Associate Professor Michelle Welsh, Department of Business Law and Taxation, Monash University.

---

We thank ASIC for this opportunity to respond to Report 391, 'ASIC's Deregulatory Initiatives'. We are a group of academics currently undertaking an Australian Research Council-funded project examining the regulation of fraudulent phoenix activity. Our aim is to devise ways in which this damaging behaviour can be most efficiently and effectively prevented and deterred.

We support the removal of so-called 'red tape' where it does not perform a useful regulatory function. While this response does not offer feedback specifically in relation to those initiatives and law reform proposals outlined in Report 391, we wish to take this opportunity to offer our recommendations as to how several ASIC forms might be improved. These improvements would better enable ASIC to achieve its strategic priorities of ensuring fair and efficient markets, as well as efficient registration and licensing. In addition, the implementation of our recommendations would address the serious issue of fraudulent phoenix activity, a phenomenon estimated in 2009 by Treasury to cost the government \$600 million in lost taxation revenue each year.

Form 201 – Registration of a Company

In our opinion, fraudulent phoenix activity would be significantly reduced if those seeking to register a new company were aware that ASIC could easily trace their prior company history. The registration of companies with fictitious directors should also be eliminated. To achieve these two objectives, we suggest that the regulations be amended so that would-be directors are required to provide details of any previous companies with which they have been associated and to prove their identity when they seek to register a new company.

At present, the only information requested from a proposed director is their name and address, and date and place of birth. There is no requirement to provide documentation to substantiate any of these details. We suggest that persons seeking to register a company be required to attend a Post Office and provide 100 points of identification in the same way that a person wanting a passport must establish their identity prior to the paperwork being forwarded to government for processing.

In addition, we suggest that Form 201 be amended to include questions about prior directorships or management of other companies. Where the applicant discloses prior experience as a director, a further question would be asked to ascertain whether the company in question is still in existence, whether it has been liquidated or deregistered, or whether the company is dormant. Where the applicant submits that the company was deregistered or liquidated, a further question would then be asked to establish whether creditors were paid more than 50 cents in the dollar. A requirement to disclose previous directorial experience when registering a new company would instil in applicants the awareness that ASIC can 'join the dots' between the present application and their previous corporate history. Failure to

answer truthfully can be penalised pursuant to s 1308(2). The form could also remind applicants of ASIC's ability to disqualify a director who has been associated with two or more failed companies (s 206D). Together, these steps would actively discourage the incorporation of further companies by serial phoenix operators, without unduly inhibiting genuine entrepreneurs from attempting new business ventures.

We recognise that this additional paperwork and procedure runs counter to the philosophy behind reducing 'red tape'. However, compliance procedures such as these are legitimate and essential to the protection of all corporate stakeholders. Only those regulations that serve no proper purpose should be characterised as 'red tape' and removed. Our suggestions make it easier and cheaper for ASIC to detect and act against those persons who seek to abuse the corporate form. Deterring potential phoenix operators may also lead to a decrease in the need for costly enforcement actions.

Form EX01 Schedule B of Regulatory Guide 16 Report to ASIC under s 422, s 438D or s 533 of the Corporations Act 2001 or for statistical purposes.

We recommend that two major changes be made to this form:

1. At paragraph 4.4, the form asks for 'other possible misconduct' that is not already captured in the preceding questions. This is the first time that the external administrator has the chance to describe the conduct in words, since earlier questions can only be answered by ticking boxes. However, we submit that external administrators might not be utilising paragraph 4.4 to raise any possible suspicion regarding fraudulent phoenix activity. This is because they are likely to classify fraudulent phoenix activity as a contravention of one of the directors' duties which have already been asked about previously in the form.

Therefore, we would like to see a specific question about fraudulent phoenix activity inserted at this point. Obtaining this data would facilitate the quantification of suspicions about this behaviour, both for ASIC's benefit and for the benefit of other regulators such as the Australian Taxation Office and Fair Work Ombudsman.

2. There should be scope for the external administrator to indicate the strength of the documentary evidence that they hold in relation to the suspected misconduct. At present, the form merely prompts the administrator to tick a box in order to indicate their belief that the case warrants ASIC inquiry. Insolvency practitioners have informed us on several occasions that they would like some means of letting ASIC know that the case at hand suggests blatant misconduct warranting investigation. If the tick-box approach is to be maintained to allow for electronic processing, perhaps the form could be amended to give the administrator the opportunity to indicate whether, for example, in their opinion the case is strong, very strong or extremely strong.

We are available for further consultation, either in person, on the phone or via email, should this assist ASIC with its valuable work in this area.