3 August 2026

SUBMISSION TO THE PRODUCTIVITY COMMISSION

REDUCING BARRIERS TO BUSINESS DYNAMISM INQUIRY

Dear Madam

I am a registered liquidator and trustee in bankruptcy of 30 years' standing.

I have been invited or otherwise contributed to eight government inquiries into insolvency.

When Ansett Airlines collapsed in 2001, I was engaged by the AWU, at that time led by Mr Bill Shorten, to assist the Union lobby the Federal Government to introduce a safety net that would protect unpaid employee entitlements when their employer is insolvent. That framework is now known as FEG.

3 of the 13 corporate law reform recommendations from the 2015 Productivity Commission Inquiry into insolvency in 2015 were adopted from my submission to that Inquiry.

In 2017, Senator Williams and I successfully lobbied for an amendment of the Corporations Act and the introduction of IPS 90-35. We created this amendment in response to ASIC's delay in removing liquidator Stuart Ariff from office. Creditors now have the ability to remove a liquidator by ordinary resolution, without waiting for ASIC or making a Court Application.

I now invite the Productivity Commission to endorse another safety net, which I have called the ATO *Complex Debt Safety Net.*

My proposal should recover up to $1billion of the $15 billion of tax revenue that is stolen from the ATO each year via sophisticated fraud.

My proposal is self-funded and available to be implemented in the short term.

I also invite the Productivity Commission to endorse a reform to the conflict-of-interest obligations of liquidators.

There is an urgent need to make a distinction between the perception of a conflict of interest and an actual conflict of interest.

The current laws are archaic and encourage unregulated pre insolvency advisers to access SME owners when they are in financial distress, which is increasing illegal phoenix conduct.

OBJECTIVE OF THIS SUBMISSION

I will detail herein examples of failure by the ATO, ASIC and AFSA to discharge their obligations.

I am conscious that I am giving one side of a story; I am inherently biased, and I have chosen to present the facts selectively to make a point.

I do not at any time wish to criticise any person associated with the said regulator failures.

My objective is solely to highlight a problem that I experienced first-hand, that I suspect is systemic ongoing concern for all stakeholders. I thereafter offer a solution, which I hope will eliminate or improve the issue.

My father worked in the Prime Minister's Office and I worked, albeit briefly in the ATO. I know first-hand, there are wonderful people in Government who are far more capable than me, at all levels of the institutions, and they are constantly dealing with resource, structural and political issues that limit the ability to make reforms.

I hope the proposals herein encourage incremental improvement in each regulator's work.

EXAMPLE OF LEGISLATIVE FAILURE & NO DETERRENCE
$41M THEFT

I am the trustee of a bankrupt estate wherein the bankrupt defrauded creditors of at least $41 million through [redacted] companies and trusts across [redacted] fraudulent schemes.

After he was declared bankrupt, the bankrupt's wife was used as a nominee director of the group of companies until she was declared bankrupt owing $61M. The bankrupt thereafter used his 21-year-old daughter as the nominee director to continue to engage in fraud.

[redacted] of the [redacted] fraudulent schemes that realised $41M were undertaken during the period the debtor was an undischarged bankrupt.

SUMMARY OF $41M THEFT

- $[redacted] million misappropriation of construction profits,
- $[redacted] million GST refund fraud on the same project,
- $[redacted] million GST refund fraud via an entirely fictitious $[redacted] million construction project (see ATO 322-page deemed $[redacted]M assessment of November 2023),
- $5 million+ through repeated phoenix activity involving [redacted]+ corporate entities

The ATO, ASIC, AFSA declined to make any attempt to recover any of the $41M or to prosecute the bankrupt for any criminal conduct.

These decisions were made despite detailed evidence, including intercepted communications by the Crime Commission confirming $[redacted]M to $[redacted]M in hidden assets disclosed by the wife of the debtor to her lawyer as part of contemplated divorce proceedings.

The bankrupt continues to retain and enjoy the benefit of the entire $41 million he obtained through deliberate fraud.

Repeated requests for assistance from the ATO, ASIC, AFSA & the Victorian and Federal Police for more than 7 years delivered no assistance to me as the trustee of the bankrupt estate as detailed below.

ATO

The ATO declined all my requests for funding.

The ATO required a subpoena from me to access its records. The ATO cited the bankrupt's privacy rights as prevailing over my statutory powers to demand documents.

AFSA

Trustees in bankruptcy can obtain a subpoena via section 77C of the Bankruptcy Act from AFSA (the bankruptcy regulator). AFSA must be paid by the trustee for this service and AFSA may refuse to assist the bankruptcy trustee.

After undertaking about $300K in unfunded investigations, I sought funding from AFSA to finalise my investigations. AFSA twice refused my section 305 funding requests. AFSA's inaction delayed my investigation by 18 months in the first instance and then AFSA took another 12 months to consider and then reject my 2nd request.

To obtain funding from AFSA, I was required to demonstrate where the $41M of stolen funds was hidden within the web of [redacted] companies and discretionary trusts.

In circumstances where I needed in the first instance 55, and in due course likely 100 subpoenas from AFSA to obtain bank statements, to follow the money trail, the artificial barrier imposed upon me by the regulator resulted in the termination of any further investigations.

ASIC

All bankrupts are subject to an automatic director banning order for the period of their bankruptcy (s206B of Corporations Act). In this instance the bankrupt had failed to respond to 200 written questions from me, his trustee in bankruptcy, and the period of his bankruptcy was extended from 3 to 8 years.

The automatic director banning order, was therefore extended to 8 years.

When the bankrupt stole $[redacted] million via GST fraud arising from an entirely fictitious $[redacted] development of a vacant block of land in 2023, he was subject to this 8-year automatic director banning order.

The bankrupts $[redacted]M theft is unambiguous proof that director banning orders are a virtually useless "punishment" and they do not deter sophisticated fraud.

ASIC's enforcement team determined it would act on the $[redacted] GST fraud by the bankrupt.

ASIC determined the appropriate punishment for $[redacted] of GST fraud was to give the bankrupt a 5-year director banning order.

Most of ASIC's 5-year director banning order overlapped the pre-existing automatic 8 year statutory director ban the director was already subject to through being an undischarged bankrupt.

ASIC promoted its "successful banning order prosecution" in a media release.

ASIC's media release omitted to disclose:

- the existence of the 1st automatic and overlapping 8 year director banning order when it promoted its "successful" 5-year director banning order;
- The existing 8 year director banning order had failed to stop the $11M GST fraud, ASIC prosecuted.
- the bankrupt had retained all the $11M he stole from the ATO as both ASIC and the ATO declined to make any effort to recover the theft.

ASIC refused to release any information to me, in my capacity as bankruptcy trustee investigating a $41M of fraud. ASIC required me to obtain a subpoena before they would assist my investigations.

ASIC advised that my statutory duty to investigate fraud was subordinate to the bankrupt's right to privacy.

This bankrupt estate demonstrates that a trustee in bankruptcy (and the various liquidators of the associated [redacted] companies) do not have effective powers to compel companies, individuals, or government bodies to deliver relevant books and records including but not limited to bank records to assist in investigations of complex fraud matters.

The bankrupt estate was cited (identity supressed) in Senator Andrew Bragg's 2024 Senate Economics References Committee inquiry into ASIC's conduct as an example of regulatory failure.

The 2024 Senate Inquiry wrote to ASIC inviting it to reopen its investigation into the $41M fraud.

ASIC took no further action.

Recommendation 1 of Senator Bragg's 2024 Senate Inquiry into ASIC states:

"The committee recommends that the Australian Government should recognise that the Australian Securities and Investments Commission has comprehensively failed to fulfil its regulatory remit."

It was unfortunate that the conduct of AFSA and ATO was outside of the Senate Inquiry terms of reference as its clear, the need reform of their conduct is also compelling. I wish to reiterate; I make this assessment soley to encourage reforms and not merely list failures.

ASIC, ATO and AFSA possess the powers insolvency practitioners need to undertake statutory investigations. In theory trustees in bankruptcy and liquidators have access to statutory powers through these government agencies.

This bankrupt estate demonstrates the divergence between theory and practice.

The statutory frameworks available to pursue complex fraud are being rendered ineffective by the processes adopted by ATO/ASIC/AFSA.

PROPOSAL 1
EXTEND POWERS OF INSOLVENCY PRACTITIONERS

The powers of investigation of liquidators and bankruptcy trustees require reform.

When considering harmonisation between corporate and personal insolvency frameworks, the powers held by AFSA to investigate the examinable affairs of a bankrupt under section 77C of the Bankruptcy Act should be replicated into the Corporations Act and amended to empower insolvency practitioners to unilaterally, without ASIC or AFSA approval, require relevant parties to:

- Attend before the liquidator/trustee in bankruptcy (without requiring court intervention) to give evidence.

- Produce documents, including bank records relevant to the insolvency practitioner's investigations into examinable affairs.

JUST 1 OF 57,000 GST FRAUDS NOT PROSECUTED

In July 2025, ABC's Four Corners program reported the ATO had been defrauded circa $2 billion in GST refunds paid to around 57,000 entities/companies/people.

The bankrupt estate referred to above, is just 1 of the 57,000 cases of deliberate GST Fraud.

The ATO advised Four Corners it had recovered only $96 million (less than 5%) after three years of work into this $2B fraud.

That's a KPI of 1.5% of the total number of claims investigated each year.

In the 2025 Annual Report the Tax Commissioner highlights at Page 2, the ATO's "recovery the GST fraud". 122 investigations into GST fraud were reported as finalised in 2025.

Whereas that's a large number, unfortunately, that is only 0.21 of 1% of the 57,000 matters.

Operation Protego, which focuses on this GST fraud, promotes its successful prosecutions on the ATO web page. Almost all of the prosecutions are for debts of less than $100K.

The context of reported data is important. 20,000 successful prosecutions are required to recover $2B. 122 were successful in 2025.

There is a material resources issue that needs to be addressed.

It is my experience, and the Royal Commission into Banking suggested the regulators are attracted to the "low hanging fruit", the easy investigations and prosecutions. Complex sophisticated fraud, is avoided. An additional resource allocation should change that perception and/or reality.

See next page

THE ATO DEBTOR BOOK AND ANNUAL WRITE-OFFS

The ATO 2024 Annual Report, at Appendix 7, Table 7.12 details the following:

Total tax collections:		$531 billion
Accrued tax obligations:		
Collectable	$53 billion	
Disputed debts	$16 billion	
Insolvency debts	$14 billion	
Not pursued/uneconomical	$6 billion	
Total Accrued debts		$89 billion
Total 2023 “Tax Gap”		$58 billion

$14B OF INSOLVENCY DEBT

The ATO Annual Report for 2024 indicates the ATO fails to collect approximately $14 billion of “insolvency debts” each year.

The 2018 report produced for the ATO & ASIC, *Economic Impacts of Potential Illegal Phoenix Activity* estimated the cost of illegal phoenix activities was $2.85B to $5.13B per annum. $1.6 billion (33%) of this $5.13 billon of annual losses is ATO fraud.

The $1.6 billion stolen from the ATO each year from illegal phoenix conduct, is part of the $14 billion of solvency debts written off by the ATO each year.

It follows that at approximately 11% of the $14 billion of insolvency debts written off by the ATO each year are likely to relate to complex fraudulent conduct.

As a liquidator of 30 years standing, I am certain that a large proportion of the 11% of this $14 billion write off could have been collected by the ATO if it applied adequate resources.

Unfortunately, for over 30 years, the ATO has ceased investigations and recovery actions at the point a company goes into liquidation, a person is declared bankrupt or incarcerated.

The ATO’s longstanding practice of effectively doing nothing to recover the proceeds of fraud in matters that involve insolvency. This leaves the proceeds of fraud, the stolen cash, in the hands of those parties who engage in deliberate fraud.

This is a systemic and enduring mistake that I have witnessed for over 30 years.

$58B “TAX GAP”

The ATO defines the “Tax Gap”, as their estimated value of tax that should be paid by taxpayers if they were compliant with the relevant tax law; and what is the actual value of tax paid each year.

The ATO estimates the annual “Tax Gap” is approximately 9% of total revenue.

In 2023, $58 billion of revenue was not collected by the ATO.

The ATO Annual Report states that small businesses, individuals and GST together make up more than 80% of the total “Tax Gap”.

The tax gap includes not only deliberate fraud, but it also includes honest mistakes, carelessness, non-lodgements.

The ATO Annual report refers to the following categories of “Tax Gap” including:

- taxpayers who create legal avoidance structures;
- engage in intentional evasion;
- The proceeds of the “shadow/cash economy”;
- under-reporting of income/sales;
- illicit activity;

I was unable to find a reliable source that quantifies the value of each of these classes of sophisticated tax evasion practices but using the ATO’s 2018 illegal Phoenix report as a guide, I shall assume about 11% or about $6 billion of the $58 billion “Tax Gap” relates to sophisticated tax evasion.

For convenience I will adopt the same logic and suggest that about 11% or $9 billion of the $89 billion in accrued tax obligations detailed in the 2024 ATO Annual Report also relates to sophisticated tax evasion.

It follows that approximately $15B ($9B accrued tax and $6B from the Tax Gap) is written off by the ATO because of sophisticated tax evasion practices each year.

The ATO Annual Report does not provide any guidance on how effective the ATO is at recovering the cash that was stolen because of sophisticated tax evasion.

To assist the Productivity Commission, I will refer to the conduct of AFSA, (the bankruptcy regulator) and ASIC (the corporate regulator) Annual Reports.

AFSA ANNUAL REPORTS

The bankruptcy regulator, AFSA 2025 Annual Report states the following:

“As of 30 June 2025, there were 39,851 active personal insolvencies, involving $19.3 billion in liabilities owed to 33,992 creditors.”

The ATO is the largest single creditor: $3.2 billion (16.5%) of the $19.3 billion in losses

See link https://www.afsa.gov.au/about-us/statistics-and-insights/system-insights/state-personal-insolvency-system [see the Section “Systems Trends and Regulatory Insights” \creditors\and the text in blue box with heading ATO collections has the data (sorry no page numbers on this report)]

ASIC ANNUAL REPORT

ASIC Annual Reports disclose about 13,000 complaints of misconduct are lodged with ASIC each year.

The ASIC Annual Reports state, normally in an appendix at the back of their circa 270-page reports, that ASIC investigates less than 2% of the 13,000 complaints of misconduct.

ASIC does not publish quantify the value of losses the stakeholders suffer from the 13,000 allegations of misconduct.

To assist the Productivity Commission, I will suggest that, if the data from AFSA Annual Report is applied to the ASIC data, the value of creditor losses arising from the 13,000 complaints of misconduct lodged at ASIC each year is likely to be $30 billion pa.

The ATO do not provide an equivalent KPI on the number of investigations it undertakes as a percentage of all matters that require investigation.

ABC'TV 4 Corners disclosed that the ATO investigated only 1.5% of total $2B of GST fraud each year. Whereas, the ATO Commissioners' remarks in the Annual Report suggests this fell to 0.21%, I will assume the KPI of investigations by the ATO of fraud is 1.5% to 2% of the all matters.

My Conclusions follow:

- ASIC do not investigate 98% of the $30B of annual trade creditor losses.
- ATO do not investigate 98% of the $15B in annual revenue that is written off due to complex tax evasion practices.

NEW RECOVERY OPTIONS

Since 2022 the ATO has used a private debt collection company, Recoveriescorp, to assist the ATO collect accrued and relatively simple small debt recovery matters.

See https://www.theguardian.com/australia-news/2025/oct/27/ato-tax-repayments-debt-collector.

In 2022, staff from the private debt collection company worked inside the ATO offices as an extension of the ATO debt collection teams.

In 2024 the relationship expanded to include offsite services, whereby the private debt collector started chasing ATO debts under its own name.

355,000 small debt recovery matters, including Centrelink debts, have been outsourced to the private equity-backed Recoveriescorp since January 2024.

PROPOSAL 2
ATO COMPLEX DEBT SAFETY NET

I invite the ATO to develop a new framework that focuses on the recovery of up to $15 billion of tax revenue that is written off due to the intentional complex tax evasion.

The worst of the worst taxpayers should not be permitted to retain the financial benefits of their fraud.

Registered liquidators and trustees in bankruptcy should be engaged by the ATO to act as external, yet independent agents of the ATO to recover complex fraud debts.

I call this proposal the ATO's "*Complex Debt Safety Net*".

Insolvency practitioners should be engaged on similar terms to the existing arrangement with private debt collection company Recoveriescorp.

Insolvency practitioners should be delegated the same powers of the ATO staff members and have access to information held by ATO.

Insolvency practitioners should be permitted to obtain funding for recovery actions with external litigation funders and engage external lawyers, as we currently do in all our insolvency appointment matters.

This proposal would be cost-neutral for the ATO as insolvency practitioners typically work on a “no win, no fee” basis.

Members of the *Complex Debt Safety Net* Team would be limited to Insolvency Practitioners who are already registered as either a liquidator or trustee in bankruptcy. They are all officers of the State and Federal Court experienced in fraud, forensic accounting, litigation and insolvency.

Insolvency practitioners are one the most heavily regulated professions in Australia, with an existing levy that self-funds ASIC/AFSA supervision of our profession.

Insolvency Practitioners are also subject to frequent scrutiny of the Courts, and creditors who have the right to demand information pertaining to our investigations and approve our remuneration and costs.

Debt collectors, such as Recoveriescorp, rely heavily upon call centre staff and repeated direct emails and texts to encourage debtor repayments. Debt collectors do not have staff with the technical skills required to tackle complex fraud.

The ATO should prioritise the matters run by the insolvency practitioners by value and public interest.

The $1.6B of annual ATO losses from phoenix type behaviour and $2B from GST fraud are an obvious target for a pilot program of this kind.

The $41M theft by the bankrupt estate detailed above is a prime example of a matter that should be outsourced to the “Complex Debt Safety Net” Team.

The $105M fraud by Adam Cranston, via Plutus Plus Payroll, where there was deliberate PAYG fraud is another matter that should be thoroughly investigated by the “Complex Debt Safety Net” Team.

Media reports suggest that to date $90M of the $105M stolen by the Deputy Tax Commissioner’s son remains in a “black hole” and is likely to be written off by the ATO.

LIMIT MEMBERSHIP OF THE COMPLEX DEBT SAFETY NET TEAM

The 2025 Annual Report (at table 5.5) stated the ATO had 2,171 senior managers aka Executive Level 2 staff within its total staff count of 21,493 members. That’s about 10% of the workforce.

I speculate between 50 to 100 of the 2,171 senior managers (Executive Level 2) have the equivalent skills as an insolvency practitioner.

Australia has around 660 registered liquidators and about 210 trustees in bankruptcy.

A 10X (1000%) increase in the capacity of the ATO to deploy senior managers (EL2 managers) and report to the 230 Senior Executive Service team members would make a profound change.

Insolvency services would obviously be limited to the investigation and recover the proceeds of complex fraud, as opposed to high volume tax assessment and compliance work.

In February 2024, the Commonwealth Fraud Prevention Centre reported that 470 staff were allocated to $2B GST fraud by the ATO detailed above which came to be called Operation Protego.

Given that senior managers (EL2) represent about 10% of the total ATO workforce, it follows that about 47 of the 470 staff members allocated to the $2B GST theft investigations were senior staff.

If 470 of the potentially available pool of 660 liquidators were allocated to this project, it would be a 1000% increase in expertise available to the ATO to recover $2B of deliberate complex fraud.

The ATO's Operation Protego, identified that 150 members from the ATO staff were actually engaged in GST fraud; and part of the 57,000 parties who had engaged in the $2B GST theft.

The recovery of all cash stolen by the 150 ATO staff members of GST fraud should be a priority for all stakeholders. Extra and impartial resources, i.e. the insolvency practitioners, would be highly beneficial to these investigations and act as a deterrence to future fraud by ATO staff.

SMALL INSOLVENCY FIRMS OR LARGE INSOLVENCY FIRMS

Approximately 400 of the 660 liquidators in Australia are employed in 20 large insolvency firms. These large insolvency firms work on most of the 150 large scale insolvency matters that commence each year.

The remaining 260 of the 660 liquidators in Australia are employed in about 200 small practices. These sole practitioners and 2-3 person small partnerships work on the majority of the 8,000 to 10,000 small liquidations in the SME market that commence each year.

Small firms are represented by the AIIP and large firms represented by ARITA.

The Federal Government has historically only engaged large insolvency firms. This practice has typically resulted teams of very expensive professionals overservicing projects and delivering questionable outcomes. (see recent media reports on PWC and KPMG conflict issues).

If my "*Complex Debt Safety Net*" proposal is adopted, I strongly suggest the pilot program initial membership be limited to the pool of the 200 small firm insolvency practitioners who have not been given an opportunity to work with Government agencies in the past 30 years.

Self regulation of insolvency practitioners by insolvency practitioners to verify strategy and effectiveness of services rendered should be a key design feature of this proposal if adopted.

The large banks use the KPI of total average charge out rate per job when assessing the work of its insolvency practitioners. That is, what's the effective charge out rate (total hours from all staff). This is another obvious important KPI that should be used by the ATO to measure the effectiveness of each insolvency practitioner.

I suggest there should be a pilot program comprised of about 10 insolvency practitioners from small insolvency firms that collaborate and service each capital city.

I have approached 10 leading insolvency practitioners for this purpose, and they are willing to volunteer to participate in a pilot program to determine if the proposal is viable.

I suggest that every 2 years the number of insolvency practitioners serving on the *Complex Debt Safety Net* team should double in number.

This limitation would ensure each existing team members could mentor and assist a new *Complex Debt Safety Net* team member.

10 insolvency practitioners would grow to 20, then 40, 80 etc until all 660 insolvency practitioners are invited to work on this project.

This slow start up would enable KPI's/benchmarks for fees and service expectations to be built in a constructive and controlled manner via the pilot program. It also reflects the complexity of the work that is undertaken.

Each member of the *Complex Debt Safety Net* Team should work autonomously (all of Australia's 660 liquidators take personal appointments).

The pilot program should self-regulate via quarterly reviews by other Team members (who operate autonomously in different firms) to ensure the Team collaborate on a strategic level, as is the industry best practice model.

The ATO's oversight of Recoverscorp should be applied to this program and duplicate the pilot programs own supervision.

ASIC Annual Reports state the average duration of an ASIC investigation into fraud is about 3.5 years. I suggest this pilot program run for 4 years.

10% of all fraud recoveries from the Complex Debt Safety Net Team should be withheld from the ATO dividend to self-fund the pilot program and eliminate litigation funders who are expensive, but essential to current practice.

If this service is effective, consideration should be given to extending this service to the work performed by ASIC & AFSA.

PROPOSAL 3
SMALL FIRM LIQUIDATORS ENGAGED BY ATO AS INTERNAL CONSULTANTS FOR COMPLEX FRAUD & INSOLVENCY MATTERS.

If proposal 2 above is rejected, consideration should be given to using Insolvency Practitioners as high level advisors within the ATO for complex debt recovery matters.

There are many available variations of this proposal if stakeholders have a desire to implement change as suggested herein.

PROPOSAL 4
DESIGNATED REFERRAL (“SUPER COMPLAINT”) MECHANISM

Modelled on the ACCC’s super-complaint system, registered liquidators and trustees in bankruptcy should be allowed to make up to three designated referrals per year to ASIC/AFSA/ATO where serious misconduct (phoenix activity, insolvent trading, director breaches) is identified.

ASIC/AFSA/ATO should be required to investigate and respond to these ‘Super Complaints” in writing within 90 days.

PROPOSAL 5
REVERSE ONUS OF PROOF FOR RELATED-PARTY TRANSACTIONS

Fraudsters routinely destroy or withhold books and records.

Insolvency practitioners bear the onus of proof to when litigating voidable transactions. The statutory framework has an inherent defect.

The onus of proof for all related-party voidable transactions of the Corporations Act and the Bankruptcy Act should be reversed.

PROPOSAL 6
LARGE COMPANIES REQUIREMENT TO KEEP ACCOUNTING RECORDS

I detailed above a bankrupt estate that used 77 companies to defraud creditors of 41M, including a fictious $92M development (that was just a vacant block of land).

No material books and records from any of the 77 companies were ever provided to any insolvency practitioner. Following the money trail was therefore very difficult for insolvency practitioners, who pursuant to section 545 of the Corporations Act, are entitled to cease investigations, where there is no money.

The bankrupt, who engaged in intentional fraud, did not suffer any consequences for the breaching the obligations prescribed by section 286 of the Corporations Act.

This is systemic problem for all complex fraud matters.

I suggest Section 286 of the Corporations Act requires reform.

A new criminal offence should be created for failing to maintain books and records of a company that is or may be insolvent.

The offence should be limited to the directors of large companies.

The threshold to quantify for a Small Business Restructure (1M in creditors) should be adopted to separate SME’s from large companies.

SME’s should be exempt from more compliance obligations.

The director’s of large insolvent companies, who exceeded the SBR threshold, should be required to maintain books and records, that explain all cash transactions and banking receipts and payments from the date of insolvency.

The level of punishment, the jail term, should be incremental.

The onus of proof of avoiding jail, ie establishing a bona fide reason for not keeping records (and/or a backup of records) should fall on the director, not the insolvency practitioner.

The focus of this provision is to deter systemic complex fraud, that has adopted "bottom of the harbour" practices for decades, without any adverse consequences.

The Bankruptcy Act should adopt an identical amendment.

PROPOSAL 7
UNEXPLAINED WEALTH & INCOME

New offences for complex fraud matters are urgently required reforms for both the Corporations Act and the Bankruptcy Act.

If a Trustee suspects a bankrupt, has engaged in complex fraud the period of the income contributions assessment framework should be extended for at least 5 years after discharge from bankruptcy. Longer periods should apply for larger frauds.

The period for vesting of asset in a trustee in bankruptcy should also be extended.

Where a bankrupt has assets that are not from his taxable income or other legitimate source, the bankrupt should be required to detail the source of assets and income. Where the bankrupt fails to reconcile assets held to legitimate income and/or ownership sources the assets should be available as divisible property of the bankrupt estate.

The reversal of the onus of proof should apply where creditors losses exceed $1M. Director's and bankrupts should bear the onus of proof.

The SBR threshold of $1M in creditors is a good reference point to distinguish between the SME market and the large matters market.

The legislative frameworks should recognise the industry has a few hundred large matters each year, and 1000's of small matters each year.

The obligations to attend to both segments of the market should be different.

The offence framework should be drafted to reflect current practice.

Where bankrupts & director's, who engage in complex fraud:

- Fail to respond to a reasonable questions;
- Fail to account for missing assets;
- Fail to accurately disclose their income and/assets;

Jail terms and significant financial fines should be available.

These new offences should also apply to accessories of bankrupts who engaged in complex fraud where more than $1M of creditors suffer a loss.

This includes professional advisors.

In the $41M bankrupt estate, that I disclosed in this submission, the accountant used in all 4 schemes, failed to hold any material records, that would normally be held by an accountant.

Parties who help, lend assets, provide gifts, homes, cars and income or act as a “nominee director” for a bankrupt that is not commercial, should have a duty to detail why such benefits are not fraudulent.

PROPOSAL 8
REGULATION OF PRE INSOLVENCY ADVISERS.

The pre insolvency market is awash with unregulated operators who prey on desperate directors.

For example, today, companies with advertised winding up applications will receive around 20 phone calls from pre insolvency advisors offering legitimate and illegitimate solutions.

ASIC should work with ARITA and AIIP to develop a schedule of fees to serve as a voluntary benchmark for pre insolvency advice.

Court rules should require that options for insolvent directors to get assistance, should be given to each respondent when a winding up application or bankruptcy notice is filed/served.

The 10,000 small business owners who face insolvency each year and the 13,000 people declared bankrupt should be educated about their options and warned about predatory practice of pre insolvency advisors.

Directors should have a statutory right to challenge excessive pre insolvency fees paid, under duress, that exceed industry benchmarks.

ASIC should also be empowered to prosecute excessive pre insolvency fees.

Pre Insolvency advisors should be registered and regulated by ASIC.

PROPOSAL 9
CONFLICTS OF INTEREST

Insolvency practitioners should be encouraged to share the results of their investigations and their views on the applicable law with all stakeholders.

Insolvency practitioners should be also encouraged to educate all stakeholders, encourage settlements, and avoid unnecessary litigation, without the threat of being accused of creating a perception of a conflict of interest.

This is particularly vital for the approximately 10,000 directors who face insolvency each year in the SME market.

The vast majority of small business owners who face an insolvency event are generally unskilled in insolvency law & practice, exhausted, and without adequate financial resources when they first engage an insolvency practitioner for assistance.

Insolvency practitioners should not be required to direct the small business owners to obtain advice from multiple professional advisers to understand their conflicting personal and business interests where there is less than $250K in assets.

The conflict-of-interest rules are archaic and impractical in the context of modern SME insolvencies.

The standards of conduct that apply to large scale fully funded insolvencies should not be forced upon no fund small SME insolvencies. Regulation must adapt to economic reality.

The current rules ignore the findings of the 2020 ASBFEO Insolvency Practices Inquiry, which reported that 58% of all liquidations had assets of less than $10,000.

93% of liquidations do not pay a dividend.

It follows that about 80% of the SME insolvent companies, cannot afford the various professional fees to comply with the archaic conflict of interest obligations.

The inflexibility of the current law creates a void that is filled by the unregulated pre-insolvency industry.

The unregulated pre industry practitioners frequently encourage conduct that may be illegal or detrimental, at great expense to all stakeholders.

Legislative reform of the archaic obligations will reduce illegal phoenix conduct.

Immediate action on this issue merely requires an update to ASIC's Regulatory Guidelines and enforcement practices.

PROPOSAL
COMPULSORY EXPERT MEDIATION FOR RECOVERY ACTIONS

The cost of litigation is, in my view the single biggest obstacle to compliance.

In the SME market, virtually, all voidable transactions from about 80% of the liquidations can not be prosecuted by a liquidator due to the costs of litigation. Professional Fees consume the proceeds of successful actions.

In an environment where ASIC does 2% of the compliance work that is available, the public relies upon insolvency practitioners to fill the void when offences and fraud is suspected.

The cost of litigation makes this role all but impossible for 80% of insolvency administrations.

A mini insolvency court, with strict limits on time, submissions and judgement length is essential to restore confidence in the integrity of the legislation. Self-representation should be standard in matters where the claim that is less than a reasonable limit, which I suggest might be $250K.

Most insolvency practitioner recovery actions would also benefit from compulsory expert mediation.

This should take the form of an inquisitorial Court with an industry expert and lawyer jointly deal with each matter. Strict time limits for submissions, evidence and judgments would benefit all parties. I suggest the French system is a good pro forma to adopt.

Justice Lee from Federal Court broke with tradition and called for this type of reform at the AIIP annual conference, about 3 years ago.

Justice Lee stated this reform would reduce the Court workload and costs of parties while encouraging sensible outcomes, that would be available to appeal to the Court.

CONCLUSION

I hope these proposals assist the Productivity Commissioner develop reforms that assist the ATO, ASIC & AFSA discharge their very important roles within our community.

I sincerely hope the content of this submission is read with a view to start of process of improving insolvency offering a solution to the resourcing issues impacted the ability of AFSA, ASIC, and ATO to recover debt and deter fraudulent behaviour for the benefit of public interest.

I would be delighted to discuss the contents of this submission if that assists any stakeholder.

Yours faithfully

NICHOLAS CROUCH
PARTNER
CROUCH AMIRBEAGGI