

**Attention:** Office of the National Data Commissioner  
PO Box 6500  
Canberra ACT 2600

## **Response to Discussion Paper and Privacy Impact Assessment about Data Sharing and Release reforms**

We are a group of legal academics with an interest in corporate and personal insolvency data.

We make this submission from our joint perspective as teachers, researchers and writers on corporate and insolvency law reform and policy.

### **Summary**

There is a serious lack of affordable corporate insolvency data available to assist with research projects that help inform and shape national public policy debates. The position in personal insolvency is better but could be improved. The need for access to affordable data has been the subject of comment for some decades. ASIC are the custodians for most of the relevant data regarding public and private companies in Australia, pursuant to its authority under the Corporations Act 2001. AFSA, and the Inspector-General in bankruptcy, holds much personal insolvency data, under the authority of the Bankruptcy Act 1966. Other agencies – ATO and the FEG recovery program, would also hold data relevant for research purposes.

Insolvency law reform and policy lacks empirical data on the most basic outcomes of the corporate regime – assets, realisations, recoveries, costs, returns to creditors, including employees – across liquidations and administrations. Personal insolvency reports some of these, across different types of administrations. Insolvency law reform, of its nature, should be based on empirical data. Insolvency law reform inquiries going back to 1988 have suffered from inadequate data and have made specific recommendations for data collection.

We support as a matter of principle making data more available for research, in particular corporate data, to promote informed policy debates. This may be either on a sharing or release basis.

### **Existing data**

Insolvency data is held by AFSA comprising information on the NPII and other information held in statistics and other databases maintained by AFSA. Corporate insolvency data is held by ASIC through various registers, most of which require payment of a fee in order to obtain information lodged with ASIC. University researchers find it difficult to obtain funding to pay for search and download fees to access information contained on public registers which severely limits the scope and significance of research that can be undertaken. As scholars employed by publicly funded higher education institutions with a statutory mandate to produce high quality and high impact research, we believe that it is imperative that the proposed data sharing and release legislation give university researchers a more effective, efficient and economical way to obtain access to important data for research purposes.

AFSA and ASIC have different approaches to the maintenance of and release of data for academic purposes.

### *AFSA*

AFSA has always extracted data on the operation of the bankruptcy system, and often published papers and outcomes. These usefully feed into bankruptcy law reform and policy. In addition, AFSA has a policy of inviting requests by academics for particular data sets which it will then try to meet. Academic research on such data sets can provide more useful policy information.

A recent example is a report on a 3 year research project funded by the Australian Research Council with scholars from the University of Melbourne<sup>1</sup> based on a long-term collaboration between Melbourne Law School and the Statistics team at AFSA.

It utilises a unique and significant dataset, provided by AFSA in line with its privacy policies and its commitment to facilitating independent bankruptcy research. The dataset contains the de-identified records of more than 28,000 individuals who declared bankruptcy between 2007 and 2016. The research also benefits from the expertise of several community organisation with specialist knowledge of debt problems and financial hardship. It draws upon three focus groups involving financial counsellors, consumer solicitors and social workers”.

There are other such examples.

### *ASIC*

ASIC produces statistics on numbers of insolvency and particular types, with some figures on returns to creditors. However, these are not of the level of detail produced by AFSA. Nor are we aware of ASIC having any similar approach to academic requests although it will try to meet them on payment of the statutory fees. Academics who have sought and obtained ASIC data have paid significant sums.

### **Background history**

By way of background to our submission, we give this review of the long history of our concerns. The significant ALRC Harmer Report, 1988, which was the last major review of our insolvency laws, said that

[36] It is important that there be readily available pertinent statistical information about insolvency. Insolvency is, for example, a valuable indicator of trends in the economic system; it is relevant to ascertaining the impact of credit practices on different sections of the community and can be a helpful guide to the possible need for regulation of forms of business organisation (such as the proprietary limited company). Further, on a broader scale, valuable studies on the origin and performance of small businesses would be greatly assisted by readily available information as to the insolvency of such businesses”.

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<sup>1</sup> See further, <https://law.unimelb.edu.au/centres/ccl/research/major-research-projects/personal-insolvency-project>

The report went on [37-38] to say that “one of the major handicaps that has impeded the Commission in this Reference has been the difficulty in obtaining pertinent statistical information about corporate insolvency in a readily available and intelligible form. Most, but not all, of the Corporate Affairs Commissions supply only very elementary information on an annual basis”.

In contrast, “the office of the Inspector-General in Bankruptcy has, for many years, collected and published detailed and relevant information relating to individual insolvency as part of an annual report on the operation of the Bankruptcy Act. Some of the statistical information is now being provided on a quarterly basis”.

That inherent difference between the two types of insolvency remains. The Report went on to make various recommendations about the need for better statistics.

### **PJC Report**

Sixteen years later, the 2004 report of the Parliamentary Joint Committee on Corporations and Financial Services - *Corporate Insolvency Laws: A Stocktake* commented that (at [1.19]):

“The Committee has not undertaken any empirical research itself and notes the lack of basic data on the operation of those laws. As one submission pointed out: There is little data on the operation of insolvency laws in Australia. We have only the bare minimum of information on the operation of our various corporate administrations. There is for example virtually no data on the operation of the voluntary administration procedure beyond the number of commencements. This is not a new observation. The Harmer Report expressed concern about the lack of pertinent statistical information on insolvency and put forward a number of proposals to improve information in relation to insolvent companies”.

That Committee then made suggestions for enhancing the collection of statistical information about the impact and experience of insolvency. There were for example, concerns then about “phoenix company activity”, with ASIC itself expressing concern “about allegations of phoenix company activity that relied heavily on anecdotal evidence without an appropriate level of underlying statistical support or analysis”; and about deregistered companies.

Both remain issues of concern today.

The Committee considered that there was “scope to enhance the quality of information collated and/or published in relation to companies that are the subject of statutory reports by external administrators, so as to improve its usefulness to management, journalists, academic researchers, the public, Parliament and the Government”.

It then went on to list useful data that could be obtained:

- estimates of the level (number) of strategic insolvencies (phoenix companies),
- the numbers or incidences of:
  - cases raising the possible application of director disqualification provisions,

- so-called assetless companies,
- strategic insolvencies involving the use of corporate groups,
- liquidations that returned less than 50c in the dollar to creditors,
- cases involving holding company liability for insolvent trading by a subsidiary; and
- cases involving a shortfall in the payment of employee entitlements and superannuation; and
- fraud matters.

The government response was simply that this was a matter for ASIC.

### **Senate Report 2010**

Six years later, a major Senate Report of 2010 recommended, in the context of a combining of the regulation role of ASIC with that of into one agency - the Australian Insolvency Practitioners Authority (AIPA) – the establishment of an agency to gather and report insolvency statistics.

The government rejected that proposal.

### **Other reports**

We could draw to your attention a number of other inquiries into insolvency over the years where the inadequacy of statistics has been the subject of comment.<sup>2</sup>

### **Discussion paper**

With reference to the discussion paper, we endorse several comments, for example that the data we seek, and its analysis, will “advance knowledge and create better public policy, by:

- Improving capability and the quality of research outcomes from Australia’s universities and research institutions.
- Providing trusted researchers with the opportunity to more accurately evaluate the effectiveness of government policies and programs.
- Strengthening cooperation between the Australian government and researchers, leading to more robust outputs tested by leading experts”

While academic and professional research and input into insolvency law reform is of high quality, it lacks empirical data both as to be able to assess the need for a particular law and as to the effectiveness of that law once introduced.

To some limited extent academics researchers have endeavoured to assess the operation of the Australian insolvency regime by way of manual extraction of data, with very useful results, but much more could be done, in particular in corporate insolvency.<sup>3</sup>

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<sup>2</sup> See further Murray, *‘The dark figures of insolvency’* (2009) 10(1) INSLB 7, which traces the largely failed efforts by government and regulator inquiries over the past two–three decades to collect and analyse statistics on corporate insolvencies in Australia.

<sup>3</sup> See for example, Routledge (1998) 16 *Company and Securities Law Journal* 4; Herzberg, Bender, and Gordon-Brown (2010) 18 *Insolvency Law Journal* 181; Wellard, “A Sample Review of Deeds of Company Arrangement under Part 5.3A of the Corporations Act” (ARITA 2014); Blazic, *Rehabilitation Regime or Corporate Graveyard: Practitioners’ Perspectives of the Australian Part 5.3A Voluntary-Administration Legislation* (DBA thesis, University of Wollongong 2014).

We also endorse these comments, that university researchers have explained:

“the opportunities for them to do more to improve policies and programs by having better access to government data. Researchers pointed to their ability to help fill government capability gaps, using their expertise to help solve intractable problems which will lead to better outcomes for all Australians. Researchers supported a data sharing system actively encouraging and enabling collaboration with researchers”.

The paper refers to the value of better data sharing between the Commonwealth and States and Territories, with research and policy problems spanning different levels of government and it refers to productive examples of sharing between States and the Commonwealth. That would assist given that while insolvency law is federally based, it is impacted much by state and territory laws, for example in building construction, transport, and small business. However, we would also add the need for better data sharing within the Commonwealth, between AFSA and ASIC, and FEG and ATO. For example, a corporate liquidation may often result in the bankruptcy of the directors, through personal indemnities or tax liabilities. The Melbourne University research, referred to earlier, gives much useful data about the extent of bankruptcies resulting from small business activity, which is very relevant to the current proposals to reduce the period of bankruptcy to one year. The intersection between family law and bankruptcy is another area where data would assist policy reform.

We also note the privacy assessment. As experienced academics, we are familiar with the need for privacy protection and the need for de-identification of data. We note that this was the case with the Melbourne University research into personal insolvency, where privacy issues are more direct.

We mention that there is a policy tension between insolvency law, which sees insolvency as necessarily a public process, and privacy of the individuals involved. These issues were raised by the ALRC 108 - <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/44-new-exemptions-or-exceptions/insolvency-practitioners/>

However, the views of the ALRC in favour of privacy protection do not contradict the points we make in this submission.

## **Conclusion**

We strongly support the data sharing and release initiative under the new Commonwealth Data Commissioner’s office. We recommend that the Commissioner’s office provide a facility through which scholarly researchers can access and utilise Commonwealth data to produce high quality and high impact scholarship to improve the policy analysis of existing law and proposed and potential law reform.

## **Signatories**

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