

**Australian Government  
Treasury**

**ASIC INDUSTRY FUNDING MODEL AND REGISTRY SEARCH FEES**

**Submission by Professor Helen Anderson, Melbourne Law School.**

**31 January 2019**

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I thank Treasury for this opportunity to make a submission regarding ASIC Industry Funding Model And Registry Search Fees. I refer to my earlier submissions to Treasury on ASIC's Industry Funding Model and Cost Recovery Model. These explain the Australian Research Council project I led that examined ways to regulate illegal phoenix activity. This submission is confined to comments on exempting journalists from paying certain registry search fees, and reducing the cost of various search fees.

**I applaud Treasury's move in exempting journalists from certain registry search fees, and reducing the cost of certain searches.** Journalists are a vital source of investigation, in addition to the investigatory work of ASIC. The work of journalists helps to shed light on some examples of improper dealings that have escaped ASIC's attention. This puts pressure, appropriately, on ASIC to follow up and to bring legal action where necessary.

In addition, journalists play a vital role in disseminating ASIC's message and in achieving general deterrence. This is a social good that justifies their free access to ASIC data. The public is very unlikely to know of ASIC's work in relation to rogues if the news media did not report it.

In this same vein, I suggest that a similar exemption be granted to academics. In my own case, my work on illegal phoenix activity has led to significant public awareness of the problem, as well as proposed law reform, including a director identification number. Other measures I have recommended over the past decade, including expanding the power to disqualify directors to regulators other than ASIC, reforms to *Corporations Act* s 596AB, and broader recovery powers against third parties, are also the subject of current draft legislation.

Academics are not using information obtained from ASIC for commercial gain. They struggle to obtain research funding. The cost of ASIC searches significantly inhibits their ability to delve into specific instances of wrongdoing. My own funding for the illegal phoenix activity research came from the Australian Research Council. This means money spent on ASIC searches both came from the government and returned to the government. An exemption could therefore be justified on the same basis as that allowed to the ABC, SBS and the ABS, as explained in the Exposure Draft.

However, as you will see from my comments below, **I believe Treasury should go much further. I have long advocated for the removal of all search fees.** In 2017, our phoenix activity research team produced a final report entitled [Phoenix Activity Recommendations on Detection Disruption and Enforcement](#).

In relation to search fees, we said:

#### Assist creditors and employees to detect harmful phoenix activity

Information about companies and directors should be readily available to the public so that creditors and employees can vet companies and their managers to protect themselves against harmful phoenix activity. We recommend making detailed information about companies available to the public free-of-charge and establishing a searchable register (see [**Error! Reference source not found.**]) of disqualified and ‘restricted’ directors. Director restriction is a new protective mechanism that we recommend introducing in relation to directors who have been involved in five or more corporate failures within the previous ten years (see [**Error! Reference source not found.**] for further discussion). We believe these proposals would play a significant role in reducing the incidence of harmful phoenix activity.

#### Public availability of data

An ounce of prevention is worth a pound of cure, so the saying goes. Potential victims of harmful phoenix activity can avoid being hurt by equipping themselves with information. This has the capacity to reduce the demand for later enforcement action by regulators. The abuse of the corporate form through phoenix activity is able to exist partly because of its ability to masquerade as a legitimate business rescue. The more information that is in the hands of creditors and employees before the event, the more likely it is that harmful phoenix activity will lose its appeal.<sup>1</sup>

Currently, harmful phoenix activity is simply too easy and too profitable for many offenders to resist, since it is unlikely that anyone will ‘join the dots’. Creditors have little chance of detecting directors’ history of repeated phoenix activity from publicly available records about the company they are presently dealing with. There is limited information available without charge on ASIC’s databases. Even if company documents are bought, a search of its documents does not reveal the past corporate history of its directors or other company officers.

We are not the only ones calling for ASIC information to be widely available. The Senate Economics References Committee looking at ASIC’s performance in 2014 recommended that ASIC ‘promote “informed participation” in the market by making information more accessible and presented in an informative way.’<sup>2</sup> The lack of easily locatable information about directors’ prior corporate history cannot be justified as ‘red-tape reduction’. The information is already there. It simply needs to be collated from existing document lodgements and made available by ASIC. Nor is the information confidential. It is already in the public domain, and with enough searching and paying for documents, a creditor would be able to locate it. Indeed, credit reporting agencies can piece the information together if creditors are prepared to pay for it, and larger suppliers commonly use their services for this purpose.

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<sup>1</sup> For example, the SERC noted that ‘information is critical in inhibiting illegal phoenix activity and in preventing small-scale insolvencies turning into larger collapses’: *SERC Construction Insolvency Report*, [12.15].

<sup>2</sup> *SERC Performance of ASIC Report*, recommendation 39, [22.28].

The parties who lack access to information but for whom information is crucial for self-protection are independent contractors and other small unsecured trade creditors for whom paid credit searching may not be economical. Because these parties are unable to enforce their debts directly once the company enters liquidation,<sup>3</sup> any recovery they receive is at the lowest rank of unsecured creditor. This typically is less than 11 cents in the dollar.<sup>4</sup> These parties need information *before* any contract is entered into<sup>5</sup> so that a decision can be made whether to do business with this company at all and if so, what price to charge. Once again, this lack of information was highlighted by the 2015 SERC Construction Insolvency Report, and their first recommendation was that

ASIC conduct a review of administrators' and liquidators' reporting requirements and the range and extent of information it requires to be reported and, where necessary, make changes that will ensure the regulator is able to fully inform itself, the Parliament and the public with complete, relevant and up-to-date data on insolvencies.<sup>6</sup>

This was followed up with recommendations about 'early warning to industry participants about repeat and concerning insolvent practices'<sup>7</sup> and 'that regulators increase engagement efforts with industry participants aimed at increasing and enhancing information flows.'<sup>8</sup> Of particular importance is their recommendation 'that ASIC and Australian Financial Security Authority company records be available online *without payment of a fee*.'<sup>9</sup>

The Australian Government has abandoned its plans to privatise the ASIC registry. However, it is important not to equate the decision to abandon the privatisation of the ASIC registry with a decision to make ASIC information free-of-charge. Indeed, the fact that the decision to abandon privatisation was made on financial grounds<sup>10</sup> raises a question about whether the government would be willing to forego the significant revenue generated from ASIC registry fees.<sup>11</sup> ASIC and the government need to take the next step of providing free-of-charge access to information in the ASIC registry, for the reasons set out below.

First, providing free-of-charge access to ASIC registry information appears to be required by the government's policy for 'Better and More Accessible Digital Services',<sup>12</sup> including its

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<sup>3</sup> *Corporations Act* s 471B.

<sup>4</sup> ASIC, *Report 507: Insolvency Statistics – External Administrators' Reports (July 2015 to June 2016)* (December 2016) ('*ASIC Report 507*'): '[i]n 97% of cases, the dividend estimate was less than 11 cents in the dollar': at 7. This was also the case in 2014–15 and 2013–14.

<sup>5</sup> ASIC does allow interested parties to register under their Company Alert system, which sends a message when a specified company lodges various documents, including those relating to changes of director and external administration: see ASIC, *Alerts* <<http://asic.gov.au/online-services/alerts/>>. However, the person seeking the information must still pay to obtain the document. In addition, the alert expires annually unless renewed.

<sup>6</sup> *SERC Construction Insolvency Report*, recommendation 1, [2.62].

<sup>7</sup> *Ibid* recommendation 4, [2.65].

<sup>8</sup> *Ibid* recommendation 14, [5.86].

<sup>9</sup> *Ibid* recommendation 39, [12.41] (emphasis added).

<sup>10</sup> See Lucy Battersby, 'Government Abandons Plans to Outsource ASIC Registry', *The Sydney Morning Herald* (Sydney), 19 December 2016.

<sup>11</sup> ASIC, 26: '[i]n 2015–16, ASIC raised \$876 million for the Commonwealth in fees and charges, an increase of 6.4% from 2014–15. The increase in revenue is driven by continued net company growth coupled with fee indexation.'

<sup>12</sup> The Liberal Party of Australia, *The Coalition's Policy for Better and More Accessible Digital Services* (June 2016).

Public Data Policy.<sup>13</sup> The government's *Public Data Policy Statement* provides that Australian Government entities will 'where possible, make data available with free, easy to use, high quality and reliable Application Programming Interfaces' and 'only charge for specialised data services and, where possible, publish the resulting data open by default.'<sup>14</sup> As CPA Australia CEO Alex Malley observed, privatisation of the ASIC registry 'has always been in conflict with the government's own open data policy which commits to release non-sensitive data as open by default.'<sup>15</sup>

Second, making corporate registry information available free-of-charge is consistent with the approach being taken to this issue overseas. Mr Malley remarked in response to the government's decision to abandon its plans to privatise the ASIC Registry, '[t]he challenge ahead is that registry information that is free in other comparable jurisdictions like the USA, UK and New Zealand is expensive and difficult to access here. That's something that needs to be addressed.'<sup>16</sup> Increased transparency in Australia would follow the trend set in European Union countries<sup>17</sup> and the UK.<sup>18</sup> According to UK Secretary of State for Business, Innovation and Skills, the Rt Hon Dr Vince Cable,

[t]he government firmly believes that the best way to maximise the value to the UK economy of the information which Companies House holds, is for it to be available as open data. By making its data freely available and free of charge, Companies House is making the UK a more transparent, efficient and effective place to do business.<sup>19</sup>

UK Companies House still charges small fees to access certain more detailed documents about companies, such as £1 for a 'company record' or 'mortgage statement'.<sup>20</sup> However, a large amount of basic information is now free-of-charge via a user friendly-search engine,<sup>21</sup> including: an overview of the company and its status; its filing history with hyperlinks to the corresponding PDF documents; a list of active and resigned officeholders; and insolvency information, among other details. It is possible to search for either a company or an officer and then click into the company or officer to determine which officers are associated with which companies and vice versa. Importantly, the register indicates whether officers are disqualified and provides basic details of the disqualification. As discussed further at [**Error! Reference source not found.**], detailed information about disqualifications, including a

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<sup>13</sup> Department of the Prime Minister and Cabinet (Cth), *Public Data Policy* <<https://www.dpmc.gov.au/public-data/public-data-policy>>.

<sup>14</sup> Australian Government, *Australian Government Public Data Policy Statement* (7 December 2015).

<sup>15</sup> Battersby, above n 10.

<sup>16</sup> Ibid.

<sup>17</sup> See European Union, *Insolvency Registers* <[https://e-justice.europa.eu/content\\_insolvency\\_registers-110-en.do](https://e-justice.europa.eu/content_insolvency_registers-110-en.do)>: 'The information and documents you can find in these registers [national insolvency registers] should be *available for free*.'

<sup>18</sup> See UK Companies House, 'Launch of the New Companies House Public Beta Service' (News Story, 22 June 2015): '[i]n line with the government's commitment to free data, Companies House is pleased to announce that all public digital data held on the UK register of companies is now accessible free of charge, on its new public beta search service. This provides access to over 170 million digital records on companies and directors including financial accounts, company filings and details on directors and secretaries throughout the life of the company.'

<sup>19</sup> UK Department for Business, Innovation & Skills, 'Free Companies House Data to Boost UK Economy' (Press Release, 15 July 2014).

<sup>20</sup> For information on UK Companies House's services and fees, see: UK Companies House, *About Our Services* <<https://www.gov.uk/government/organisations/companies-house/about/about-our-services>>.

<sup>21</sup> See UK Companies House, *Search the Register* <<https://beta.companieshouse.gov.uk/>>.

summary of the misconduct that gave rise to the disqualification, is made available by the UK Insolvency Service for three months following the disqualification.<sup>22</sup>

France has recently announced the introduction of an online, publicly accessible, register of trusts containing information about the trust and its trustees, settlors and beneficiaries.<sup>23</sup> Providing transparency about trusts is intended to end ‘use of shell companies for tax evasion, money laundering and financing illicit activities.’<sup>24</sup>

Third, there is now a mounting body of evidence indicating that open data adds significant value to the economy. Lateral Economics estimates the potential value of open data (including government, research, private and business data) to the Australian economy at up to \$64 billion per annum,<sup>25</sup> while PwC estimates that data-driven innovation added an estimated \$67 billion in new value to the Australian economy in 2013, leaving another \$48 billion in unrealised potential value.<sup>26</sup> PwC concludes that ‘[g]overnment should prioritise the provision of open data as a key input for the Australian economy and provide senior political leadership to “get on with it” in order to support wider innovation by other players.’<sup>27</sup> The World Bank notes that ‘[w]hile sources differ in their precise estimates of the economic potential of Open Data, all are agreed that it is potentially very large’ and ‘governments should consider how to use their Open Data to enhance economic growth, and should put in place strategies to promote and support the use of data in this way.’<sup>28</sup>

A report by the Australian Bureau of Communications Research in February 2016, which estimates the value of Open Government Data to the Australian economy at up to \$25 billion per year, concluded that ‘[w]hile there is little consensus on the magnitude of the economic benefits of open government data sets, it is apparent that they provide substantial current and potential net benefits to the economy and society.’<sup>29</sup> The Bureau consulted with the Securities Industry Research Centre of Asia-Pacific (‘SIRCA’) in the process of preparing the report, which made the following comment in regard to ASIC’s data provision practices:

SIRCA believes ASIC’s current model of data provision is limiting innovation; information is only provided on the title of a document with a pay-per-view model for access. There is a significant information asymmetry here—only the holders of data know what is there, while the users don’t have the full picture. With limited information, the opportunities for innovation are not fully understood, and hence the potential business case for opening the data is limited. Fully readable and searchable data would be preferred, noting that similar institutions overseas do provide this service for free to encourage financial system innovation.<sup>30</sup>

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<sup>22</sup> See UK Insolvency Service, *Director Disqualification Outcomes: Summary of Results* <<https://www.insolvencydirect.bis.gov.uk/IESdatabase/viewdirectorsummary-new.asp>>.

<sup>23</sup> Decree No 2016-567 of 10 May 2016 (France) JO, 11 May 2016, 0109.

<sup>24</sup> Press release of the Finance and Public Accounts Ministry of 11 May 2016, cited in Kramer Levin Naftalis & Frankel LLP, *Creation in France of a Public Register of Trusts* (20 May 2016).

<sup>25</sup> See Lateral Economics, *Open for Business: How Open Data Can Help Achieve the G20 Growth Target* (June 2014) 32.

<sup>26</sup> See PricewaterhouseCoopers, *Deciding with Data: How Data-Driven Innovation is Fuelling Australia’s Economic Growth* (September 2014) 1.

<sup>27</sup> *Ibid.*

<sup>28</sup> The World Bank, *Open Data for Economic Growth* (25 June 2014) [45].

<sup>29</sup> Bureau of Communications Research, Department of Communications and the Arts (Cth), *Open Government Data and Why It Matters Now* (February 2016) 33.

<sup>30</sup> *Ibid.*

While there are many good reasons for providing better access to corporate registry information, confidentiality restrictions may prevent the disclosure of some information. ASIC's Regulatory Guide 103 'Confidentiality and Release of Information'<sup>31</sup> outlines the practices it has adopted in relation to disclosure of information based on its reading of the High Court's decision in *Johns v Australian Securities Commission*.<sup>32</sup> However, we note that Regulatory Guide 103 has not been updated for over 20 years. As a preliminary step towards wider availability of free information, we recommend that ASIC review and clarify its ability to disclose information about companies and their directors and update its regulatory guidance accordingly.

Any initiatives to publicise information about company directors must also comply with the provisions of the *Privacy Act 1988* (Cth) which was amended in 2012.<sup>33</sup> The Act only covers the information of individuals, not companies, and as far as the individuals are concerned, identity verification is not covered by the *Privacy Act*.<sup>34</sup> The Australian Privacy Principles, which form part of the Act,<sup>35</sup> do allow an organisation to adopt a government related identifier of an individual as its own identifier if to do so is authorised by an Australian law or a court or tribunal order.<sup>36</sup> Information about prior corporate histories of directors would be covered by the *Privacy Act* and must comply with both Australian Privacy Principles, as well as the credit reporting provisions<sup>37</sup> of the Act where that information is publicly disseminated by credit reporting agencies.

However, exemptions from provisions of the *Privacy Act* can be obtained, and there should be further exploration of what might be possible here in relation to corporate history information.

**Recommendation 8: Make information about companies public and free-of-charge**

- Australia should follow the lead set in the United Kingdom and some European countries by allowing free searches of lodged company and director information.
- ASIC should review and clarify its ability to disclose information about companies and their directors and update its regulatory guidance accordingly.
- Where necessary, exemptions should be made to the *Privacy Act* to allow easy searching and location of directors' corporate histories.

<sup>31</sup> ASIC, *Regulatory Guide 103: Confidentiality and Release of Information* (issued 27 November 1995, updated 26 February 1996) 2.

<sup>32</sup> (1993) 178 CLR 408. This case concerned the disclosure to a Royal Commission of information obtained via a private examination by an ASIC officer, which was later revealed in the Royal Commission's publicly available transcripts.

<sup>33</sup> *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

<sup>34</sup> See David Francis, 'Summary of the Impact of the Amendments to the Privacy Act' (2014) 21(5) *Credit Management in Australia* 8, 8.

<sup>35</sup> *Privacy Act 1988* (Cth) sch 1.

<sup>36</sup> *Ibid* s 20L(2), sch 1, Australian Privacy Principle 9.

<sup>37</sup> *Ibid* pt IIIA.