

## CRIME STATISTICS ON COMMON INSOLVENCY OFFENCES BY COMPANY OFFICERS

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Are insolvency offences committed by company officers on the decline; or are fewer cases being brought before the courts? And why are sentences handed out by courts for insolvency offences becoming smaller (by about 40% on average)?

These are just a few of the questions raised as a result of my analysis of figures issued in recent years by the Australian Securities and Investments Commission (ASIC) for summary offences it has prosecuted before Local and Magistrates Courts across Australia. (A summary criminal prosecution is a non-jury court proceeding.)

Other puzzling statistics thrown up by my analysis (and depicted in my charts and tables) include:

- the considerable differences in the apparent crime rates in NSW (rising) and Victoria (falling), and
- significant variances in the typical fine imposed in different States.

The analysis reveals the average amounts of fines imposed for offences, such as:

- section 475 - failure to provide a Report as to Affairs to the liquidator (average is \$639.88), (maximum fine available is \$2,750); and
- section 530A – failure to provide books and records to the liquidator (average is \$670.35), (maximum fine available is \$5,500).

This paper also looks at the number of insolvency offences that are being referred by liquidators to ASIC, raises concerns about under reporting of these alleged offences, and advocates a more comprehensive official system for capturing, tracking and publishing information about referrals.

### Convictions 2006 to 2009

Looking at reported summary convictions of company officers for the four calendar years 2006 to 2009, **Table 1** shows that the number of successful prosecutions has declined, both in number of defendants convicted and number of convictions.

In 2009 ASIC obtained convictions against 422 defendants, down by 76 (15.3%) on 2006; and down by 105 (19.9%) on 2007.

**Table 1**  
**ASIC – Successful Summary Prosecutions**  
**of Company Officers**  
**Corporations Act 2001**  
**NUMBER OF DEFENDANTS CONVICTED**  
**AND NUMBER OF CONVICTIONS**

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<b>Result</b>	<b>Calendar year 2006</b>	<b>Calendar year 2007</b>	<b>Calendar year 2008</b>	<b>Calendar year 2009</b>
Defendants convicted	498	527	447	422
Fines	906	952	849	759
Good Behaviour Bonds	42	54	0	4
Community Service Orders	0	68	0	4
Imprisonment	0	0	0	2
Number of convictions	948	1,074	849	769

NOTES:

(a) "Defendants" comprise individuals (human beings) and companies. The vast majority are individuals.

(b) In 2007 one company officer from South Australia was convicted of 68 offences for which he was ordered to do 320 hours community service.

(c) In 2009 two company officers from New South Wales were imprisoned for one offence each.

Over the same 4 year period the "population" – the annual number of company insolvencies -- has increased by more than 20%. According to ASIC's insolvency statistics, 9,437 companies entered external administration in 2009, up by 1,700 (21.9%) on 2006.

To an optimist the fall in convictions will suggest that fewer breaches of insolvency laws are being committed, or that compliance with the law is being achieved without resort to prosecution.

But further analysis of the figures throws this reckoning into serious doubt. It shows that summary convictions obtained by ASIC in NSW have increased rather than fallen.

**Table 2** shows that the number of NSW defendants convicted has increased since 2006. In 2009 ASIC obtained convictions against 327 NSW defendants. This is an increase of 21 (6.9%) on 2006, and a decrease of only 1 (0.3%) on the strange high in 2007.

**Table 2**  
**ASIC – Successful Summary Prosecutions**  
**Of Company Officers**  
**Corporations Act 2001**

NUMBER OF DEFENDANTS CONVICTED:

INTERSTATE COMPARISON

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	Population 2009 '000	Calendar year 2006	Calendar year 2007	Calendar year 2008	Calendar year 2009
NSW	7,165.4	306	328	318	327
VIC	5,473.3	66	92	54	32
QLD	4,450.4	74	81	56	50
WA	2,259.5	19	6	8	1
SA	1,629.5	28	18	8	11
TAS, NT & ACT	1,085.0	5	2	3	1
	22,063.1	498	527	447	422

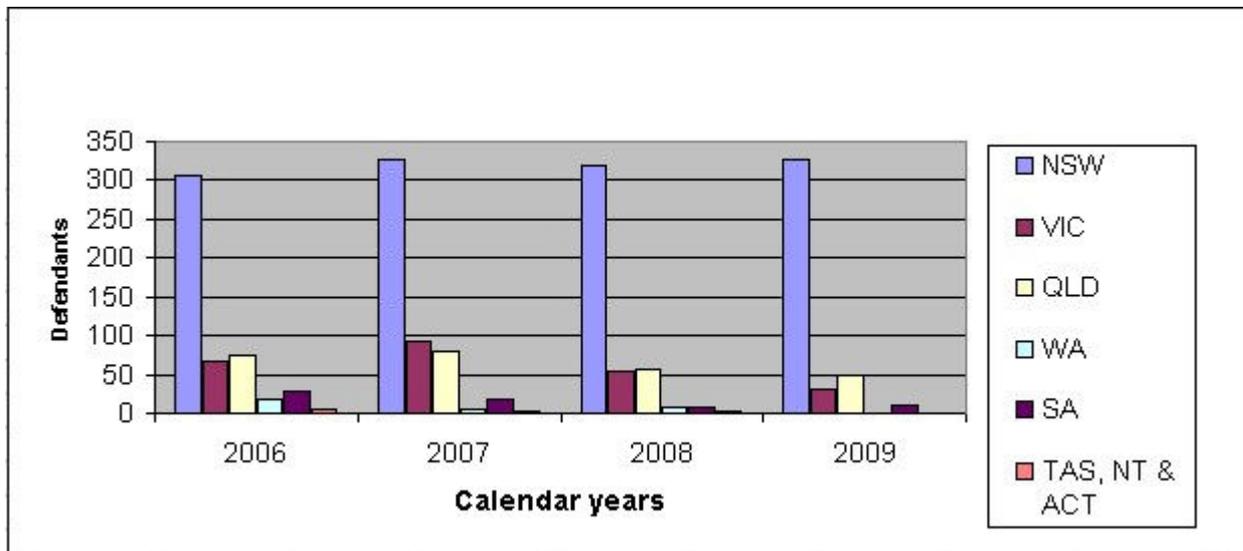
These numbers are shown again graphically in **Chart 1**.

**Chart 1**  
**ASIC – Successful Summary Prosecutions**  
**of Company Officers**  
**Corporations Act 2001**

NUMBER OF DEFENDANTS CONVICTED:

INTERSTATE COMPARISON

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The increase in NSW from 2006 and 2009 (6.9%) is roughly in line with the increase of 9.9% in the annual number of companies entering external administration in NSW from 2006 to 2009. ASIC’s insolvency statistics show that in NSW 4,124 companies entered external administration in 2009, up by 370 (9.9%) on 2006. In other words, convictions increased as the “population” increased.

What are we to make of the contrast in NSW?

One predictable conclusion – at least outside NSW - would be that company officers residing in NSW are not as law-abiding as those in other States. And, as implausible as this proposition is, other statistics drawn from **Table 2** could be used to support it. The table reveals that the number of NSW defendants convicted under these provisions in 2009 (327) is .0046% of the NSW populace (7.165 million). By comparison, the number of defendants convicted in 2009 in Victoria is far fewer (32), and only .00056% of Victoria's population (5.473 million).

So are NSW residents more unruly? Or do ASIC's enforcement officers in Victoria police the law less vigorously?

Provincial jibes aside, the more interesting question is why successful summary prosecutions have fallen generally. Is it, for example, that liquidator referrals to ASIC have decreased?

### **ASIC figures**

At the start of this paper I said that figures issued by ASIC for summary offences show that its convictions Australia-wide have fallen. Whilst this is true, it should be noted that ASIC does not issue its figures in the form in which I have presented them here.

What ASIC issues is a brief quarterly media release which announces, for example, that "ASIC successfully prosecuted 113 company officers in relation to 212 criminal contraventions of the Corporations Act 2001 (the Act). ASIC took these actions after receiving complaints from the public and insolvency practitioners ....".

Attached to these media releases is a Prosecution Report. It gives information about each successful case, such as the defendant's name and State of residence, the number and nature of each formal charge, and the sentence/fine imposed.

By analyzing the raw information in the Prosecution Report I have been able to extract and compile the statistics shown in this article.

ASIC's media release points out that most prosecutions follow offences relating to company officers failing to comply with their obligations to assist liquidators and administrators or provide them with access to a company's books. The release aims to publicize ASIC's achievements and deter other directors from breaching the Act.

### **Fines imposed**

Most of the successful summary prosecutions reported by ASIC result from referrals by external administrators (mainly liquidators). These insolvency offences occur where company directors fail to provide a Report as to Affairs of the company to the liquidator (sections 475 of the Act) and fail to provide books and records of the company to the liquidator, and/or fail to cooperate with and assist the liquidator (section 530A). Another offence – the continued failure to do an act (section 1314) – can be considered an insolvency offence as most prosecutions relate to continuing breaches of section 475.

**Table 3** shows that out of 759 fines imposed in 2009 as a result of successful summary prosecutions, 736 (97%) concerned these three sections.

**Table 3**  
**ASIC – Successful Summary Prosecutions**  
**of Company Officers**  
**Corporations Act 2001**

NUMBER OF FINES IMPOSED

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	<b>Calendar year</b>	
	<b>2009</b>	
	Number	%
Section 530A	330	
Section 475	325	
Sub-total	655	86.3
Section 1314	81	
Insolvency sections	736	97.0
Other sections	23	
All sections	759	100.0

At a time when the corporate population is increasing, and there are calls for better business ethics, more stringent regulation and a crackdown on fraud, it's surprising to see falls, nationally, in the number of convictions for insolvency offences.

But perhaps even more surprising is to see falls in the average fine imposed for insolvency offences. Inflation alone would suggest that the monetary amount should be increasing.

**Table 4** shows that over the four calendar years 2006 to 2009 the average fine for the main insolvency offences fell by about 40%.

In 2009 the average fine imposed, Australia-wide, for a section 530A offence was \$670.35, down by \$426.88 (38.9%) on 2006. Similarly, the average fine for a section 475 offence in 2009 was \$639.88, down by \$439.84 (40.7%) on 2006.

The maximum penalty provided by law for a section 530A offence is a fine of \$5,500 or imprisonment for 1 year, or both; for a section 475 offence it is a fine of \$2,750 or imprisonment for 6 months, or both. The fines are calculated by multiplying specified penalty units - 50 and 25 respectively - by the value of a penalty unit (\$110.00). Since 2002 both the value of a penalty unit and the specified number of units have remained the same.

In 2009 the average fine for a section 1314 offence was down by \$1,498.58, a fall of 61.3% on the 2006 average of \$2,444.75.

**Table 4**  
**ASIC – Successful Summary Prosecutions**  
**of Company Officers**  
**Corporations Act 2001**

AVERAGE AMOUNTS OF THE FINES IMPOSED  
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	Calendar year 2006 \$	Calendar year 2007 \$	Calendar year 2008 \$	Calendar year 2009 \$
Section 530A (Max. fine \$5,500)	1,097.23	941.11	732.82	670.35
Section 475 (Max. fine \$2,750)	1,079.72	1001.29	817.54	639.88
Section 1314	2,444.75	2006.02	1,246.02	956.17
Other sections	625.48	480.43	430.67	954.35
All fines	1,029.66	1,056.34	807.07	696.41

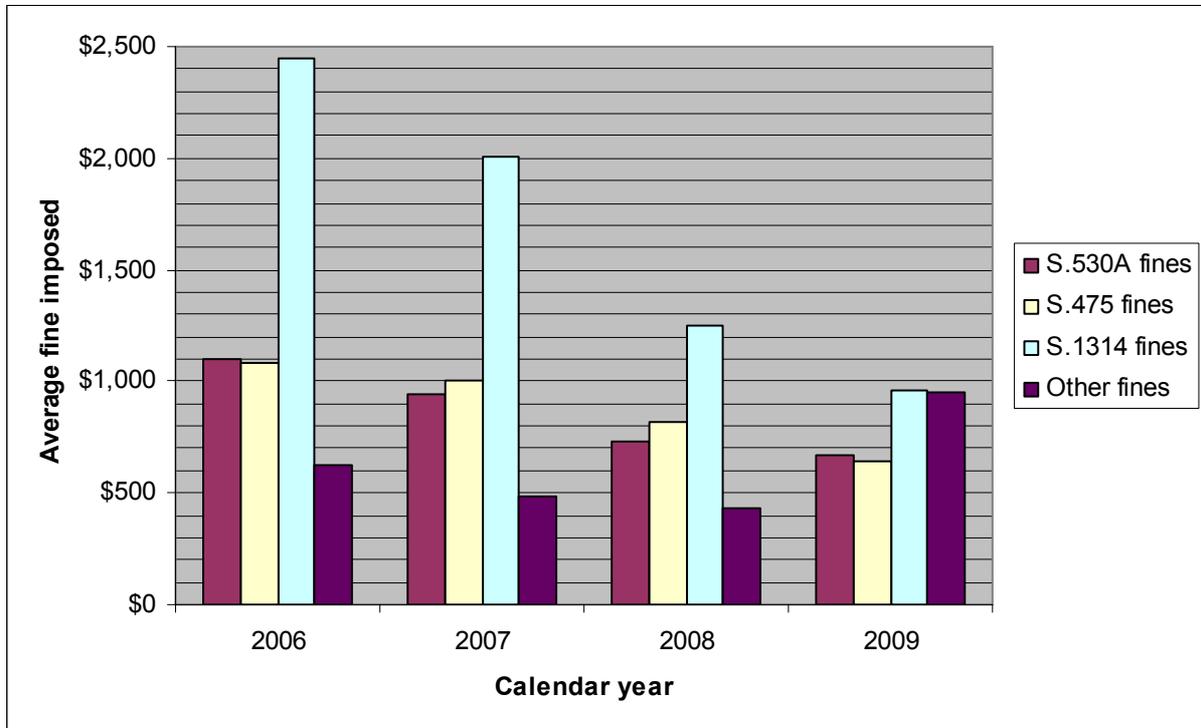
NOTE: In 2009 two substantial fines (\$5,000 and \$3,500) were imposed under Section 206A (Disqualified person managing a corporation). These caused the average of fines under the heading "other sections" to go against the downward trend.

These numbers are shown again graphically in **Chart 2**.

**Chart 2**  
**ASIC – Successful Summary Prosecutions**  
**of Company Officers**  
**Corporations Act 2001**

AVERAGE AMOUNTS OF FINES IMPOSED

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NOTE: In 2009 two substantial fines (\$5,000 and \$3,500) were imposed under Section 206A (Disqualified person managing a corporation). These caused the average of fines under the heading “other sections” to go against the downward trend.

In view of the differences discovered on making an interstate comparison of numbers of convictions, it would be interesting to make the same detailed comparison of average fines.

An analysis of the September 2009 and December 2009 quarters is presented in **Table 5**. It is of limited value because it reports on a comparatively small sample and doesn't distinguish between categories of offences. Nevertheless, it reveals that in NSW and Victoria during that period the average fine was considerably less than in other States. Queenslanders copped average fines of \$1,162.50 and \$1,240.00 compared with averages of \$501.21 and \$394.26 for New South Welshmen, and \$647.83 and \$562.50 for Victorians.

**Table 5**  
**ASIC – Successful Summary Prosecutions**  
**of Company Officers**  
**Corporations Act 2001**

AVERAGE AMOUNTS OF FINES IMPOSED:  
INTERSTATE COMPARISON

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	Quarter ended September 2009		Quarter ended December 2009	
	Number of counts	Avr. Fine \$	Number of counts	Avr. Fine \$
NSW	124	501.21	122	394.26
VIC	23	647.83	8	562.50
QLD	22	1,162.50	20	1,240.00
WA	1	2,750.00	0	0
SA	5	1,350.00	2	500.00
TAS, NT & ACT	1	1,000.00	0	0
All fines	176	642.76	152	515.79

### Liquidator's referrals

Liquidators refer insolvency offences under section 475 and section 530A to ASIC in one of two ways. One is through the statutory reports that external administrators must lodge with ASIC when they suspect an offence under any Australian law relating to the company to which they are appointed. The other process of referral is through the Liquidator's Assistance Program.

The first detailed analysis of the statutory reports that external administrators must lodge was released by ASIC in June 2008 through its Report 132. The report reveals that during the financial years 2003 to 2007 there were over 33,500 statutory reports lodged.

Given that the laws that mandate these statutory reports (e.g., section 533 of the Act) specifically require that offences and misdeeds be reported -- and that ASIC itself, through its own practice notes and regulatory guides for external administrators, emphasizes the importance and value of reporting alleged offences -- it is surprising that this official analysis doesn't address the subject at all.

Many of the 33,500 statutory reports would contain one or more formal allegations of an offence under the corporations legislation. But, unfortunately for the insolvency practitioners who prepared the reports and other people who are interested in crime statistics, Report 132 contains nothing in its 74 pages about such offence referrals.

(Report 132 focuses instead on financial aspects of failed companies - causes of failure, number of employees, liabilities, deficiencies, estimated dividends, etc.)

The other process of formal referrals -- the Liquidator's Assistance Program (LAP) -- was introduced in 2002 and provides funds to ASIC so it can assist the insolvency profession by taking actions to ensure that directors of companies in external administration comply with their obligations, or are prosecuted for their failure to do so. To expedite prosecutions ASIC supplies liquidators with model statements and model affidavits for them to fill out and lodge with these special referrals.

It is this collaborative LAP process of referral which routinely results in a prosecution.

Some time after LAP began, ASIC modified the scope of the program by introducing a threshold. Since then liquidators have been told that: "If it is your intention to finalise the administration/liquidation without (the directors' Report as to Affairs or the books and records of the company) then the matter should only be reported in a 438D or 533 Report". The clear implication is that such cases don't warrant prosecution.

Unfortunately, particulars of the number of referrals under LAP are not published. So the questions of whether liquidator referrals under this program have fallen – and whether this may be due to the threshold - cannot be answered.

Likewise, there are no numbers published regarding offenders who have breached the law but have later been persuaded by ASIC into complying. The best clue about these numbers may have come in October 2005. Then Chairman of ASIC, Jeffrey Lucy, told a conference of insolvency practitioners that because of the LAP "around 74% of company officers contacted by ASIC now choose to comply with their legal obligations, compared to 57% at the end of the program's first year".

If 74% has remained a constant since 2005 – meaning, presumably, that the other 26% of offenders are prosecuted – then one could expect that in 2009 there were, under LAP alone, 1,620 referrals.

### **Tracking referrals**

But this is just guess work. To get the truth and to determine why insolvency crime rates fluctuate and produce anomalies such as shown here, much more information is required.

Enforcement of insolvency laws plays a big part in preserving the integrity of Australia's corporate insolvency system. ASIC recognizes this. It knows that without financial records and assistance by company directors it is difficult and often impossible for liquidators and administrators to uncover company assets, ascertain the company's liabilities and employee entitlements, look for voidable and suspect transactions, identify insolvent trading and find out the reasons for the company's failure. Unfortunately, shonky company directors know this too.

Insolvency practitioners, regulators, criminologists, and the public deserve better information on the level of corporate insolvency crime and what is happening to the hundreds, perhaps thousands, of formal allegations made each year.

ASIC should be required – and, if necessary, given extra funds - to capture, track and publish figures on referrals by external administrators. Similar reporting requirements are made of other law enforcement agencies, here and overseas.

With, say, a referrals tracking program, ASIC could report on the number of formal referrals received – through both statutory reports by external administrators and the Liquidator's Assistance Program – with referrals dissected into the type of allegation or provision allegedly breached. An outcomes report produced under this program would show how many referrals resulted in formal charges and, of those, how many resulted in convictions. And, for example, how many referrals were dismissed or declined (and why), and how many were being investigated or under review.

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**PS:** The statistics discussed and presented in this article have been derived from my detailed analysis of ASIC prosecution lists shown in **Table 6** (see next page).

**Table 6**

**ASIC – Successful Summary Prosecutions  
of Company Officers  
Corporations Act 2001**

SOURCE OF DATA USED IN ANALYSIS

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ASIC Media Release		Reporting Period
Number	Date	
06-116	12/04/06	Jan – Mar 2006
06-235	11/07/06	Apr – Jun 2006
06-359	10/10/06	Jul – Sep 2006
07-08	10/01/07	Oct – Dec 2006
07-99	16/04/07	Jan – Mar 2007
07-176	04/07/07	Apr – Jun 2007
07-265	08/10/07	Jul – Sep 2007
08-34	28/02/08	Oct – Dec 2007
08-77	16/04/08	Jan – Mar 2008
08-166	23/07/08	Apr – Jun 2008
09-14	13/02/09	Jul – Dec 2008
AD09-191	07/10/09	Jan – Jun 2009
09-228AD	17/11/09	Jul – Sep 2009
10-15AD	04/02/10	Oct – Dec 2009