

Australian Government  
Productivity Commission

**DATA AVAILABILITY AND USE**

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**Summary of recommendations**

1. Harmful phoenix activity may be more effectively deterred by the gathering of fuller information about company directors and their past corporate histories, and by the sharing of that information with the public and amongst government agencies.
2. Persons seeking to become directors of companies, whether newly incorporated or otherwise, must obtain a director identification number after establishing their identity through the customary '100 points of identification' process.
3. A director's DIN should be a public identifier of the director, both in dealing with the public, including employees and other creditors, as well as other regulators.
4. The company incorporation process should be online, with drop down boxes requiring, or displaying via an auto-populated form, the past corporate histories of prospective directors. Additional information should be asked depending on the number of companies involved and the extent to which they were unable to pay their debts.
5. The Report as to Affairs (RATA), prepared by directors upon a company's liquidation, should be revised to require directors to provide details of past corporate failures, as well as significant asset transfers within a specified period such as 12 months to other entities with which the director is associated.
6. The standard form external administrator reports prepared at the conclusion of liquidations, voluntary administrations and receiverships should be revised to include a tick-box indicating that phoenix activity is suspected. This report should also allow qualitative comments from external administrators, particularly to highlight especially egregious circumstances warranting an ASIC investigation.
7. To assist the public in its self-protection, data held by ASIC about companies and their directors should be available for no cost and be easily searchable.
8. The government should review the practical and legislative impediments to the sharing of data about companies and their directors amongst government agencies, to maximise the likelihood of appropriate enforcement action being taken.

9. The government should investigate ways in which information about corporate tax debts might be made available to credit ratings agencies so that the marketplace may form a proper opinion about the creditworthiness of persons associated with those companies and of any new entities with which they are associated.

## **Introduction**

We thank the Productivity Commission for this opportunity to make a submission to its inquiry into data availability and use. We are a group of academics in the final year of a three year Australian Research Council-funded project examining the regulation of illegal phoenix activity. Our aim is to devise ways in which this damaging behaviour can be most efficiently and effectively prevented, interrupted and/or deterred, without damaging legitimate business activities to the detriment of the economy. Our most recent output is a major report entitled *Quantifying Phoenix Activity: Incidence, Cost and Enforcement* (2015).

In simple terms, phoenix activity involves the closing down of one failed company and the transfer of its business, but not its debts, to another company. This is the consequence of the fact that the failed company, as a separate legal entity, is solely responsible for payment of those debts. Its controllers are free to start another company and to buy from the failed company assets that are useful to the new company. In some instances, the failure of the first company is either brought about deliberately or used as an opportunity to improperly benefit the new company through the transfer of assets at an undervalue. This breaches directors' duties or other fraud-related laws, and is commonly referred to as illegal or fraudulent phoenix activity. However, it is arguable that phoenix activity engaged in by what might be termed 'inept serial entrepreneurs' – those who repeatedly start and fail at business enterprise - is equally a problem.

The identification of phoenix activity as a significant issue for revenue authorities, employees, unsecured creditors, competitors and others is more than two decades old. Nonetheless, despite a range of measures that appear to deal with phoenix activity, the issue has not gone away. This suggests that different approaches should be considered.<sup>1</sup>

Phoenix activity, whether of the illegal or inept serial entrepreneur variety, might be said to thrive for the following reasons. First, it is largely invisible because there is little scrutiny of transactions surrounding insolvency and as a consequence, there is little or no public condemnation of company controllers for the failure of their business. Second, it is easy to do because the liquidation of the failed company and creation of a second or twenty-second company is straightforward. Third, it is profitable, because the cost of liquidating a company and starting another one are insignificant compared to the amounts of debts to employees, revenue authorities and unsecured trade creditors – sometimes in the hundreds of thousands of dollars – that can be shed by the process.

This submission tackles the phoenix issue by trying to undermine these incentives, while at the same time not interfering unduly with the legitimate and worthy rescue of a failed business. It maintains that transparency – comprehensive, readily available information about companies and their directors – reduces the invisibility of phoenix activity by inept serial

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<sup>1</sup> This paper is part of a much larger work: see <http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity>

entrepreneurs or illegal phoenix operators, so that appropriate action by regulators may be taken.

Our recommendations are consistent with the government's Efficiency through Contestability policy<sup>2</sup> which states that

The purpose of the Contestability Programme is to encourage Commonwealth entities to adopt a more commercial mindset and to continually seek ways of improving the performance of existing or proposed government functions.

The notion of contestability suggests a reconsideration of whether government should deliver a specific function, programme or service. Instead, contestability shifts the emphasis from the function to be carried out to the desired outcome government seeks to achieve.

It is apparent to us that the government's desired outcome is to reduce harmful phoenix activity which impacts adversely on the marketplace and on government revenues. Our submission touches on aspects of Terms of Reference 1, 2, 4 and 5. While it strongly supports the sharing of corporate information, it argues that this information-sharing only becomes really useful if fuller and better data is gathered in the first place.

### **1. Collect meaningful data**

Obtaining and sharing information about companies and their directors is highly valuable in overcoming the problems caused by phoenix activity.<sup>3</sup> It facilitates estimating the size of the problem and knowing whether most losses are caused by illegal phoenix activity or inept serial entrepreneurs. This is vital for those seeking to design effective law reform.<sup>4</sup> It also assists ASIC in locating and monitoring those individuals against whom enforcement action might be taken.<sup>5</sup> Collecting significant and verified facts about prospective company directors and their previous corporate history at the time of incorporation is the start.

#### *(i) Director Identification Number*

The Productivity Commission has already endorsed the value that can be achieved through the use of a director identification number (DIN).<sup>6</sup> Requiring people to cite their DIN upon

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<sup>2</sup> <http://www.finance.gov.au/resource-management/governance/contestability/overview/>

<sup>3</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'. Australian Government, Senate Economics References Committee, *I just want to be paid' Insolvency in the Australian construction industry*, December 2015, (2015 SERC Construction Insolvency Report), [12.15].

<sup>4</sup> See here the comments made by the 2015 SERC Construction Insolvency Report, above n 3, [2.16] 'In order to ascertain and determine appropriate responses to insolvency in the construction industry, an accurate record documenting all incidents of insolvencies is required. Unfortunately, some submissions noted that corporate insolvency statistics are inadequate at present. This is an enduring complaint for many in the industry.' (footnotes omitted).

<sup>5</sup> Australian Government, Productivity Commission, *Business Set-up, Transfer and Closure Final Report*, September 2015 (2015 Productivity Commission Final Report), 425: 'The Commission considers that rather than crafting new offences, improvements in the detection and enforcement of existing laws are likely to be the best option for creating a genuine disincentive for directors contemplating phoenix action.'

<sup>6</sup> 2015 Productivity Commission Final Report, above n 5, recommendation 15.6. Note that the Productivity Commission also endorsed the DIN in its report, *Workplace Relations Framework Inquiry Report* (21 December 2015) <http://www.pc.gov.au/inquiries/completed/workplace-relations/report>, Vol 1, 48; Vol 2, 915 and 938. See our earlier submission: Helen Anderson, Ian Ramsay and Ann O'Connell and Michelle Welsh, Submission No 1, to Australian Government, Productivity Commission, *Business Set-up, Transfer and Closure Issues Paper*,

the incorporation of a company would assist ASIC in ‘joining the dots’ between multiple failed companies so that they might seek to have a person with a consistent history of insolvent companies banned from managing any further companies.<sup>7</sup>

The Productivity Commission recommended that the history of the DIN would be publicly available,<sup>8</sup> so that a person could see that a director whose company they were proposing to do business with – Wile E Coyote, DIN 123 456 789, director of Acme Explosives Pty Ltd – had in fact been associated with 20 previously failed companies. The usefulness of the DIN by the public therefore depends upon companies being required to state their directors’ names and DINs in their dealings with prospective clients, whether those dealings are conducted by the directors themselves or by the company’s employees. For example, quotes, contracts and invoices could display this information, or the company’s paperwork could clearly direct people towards a website that contained this information, required to be kept current. The latter suggestion would overcome any objection that each change of director would necessitate the production of new corporate stationery.

(ii) *Improvements to company registration*

As an adjunct to the DIN, the company registration process could also be improved to provide significantly more information to ASIC. There are presently two ways to incorporate a company. The first is to purchase one already incorporated by a business service provider that has an online link to ASIC. Alternatively, a paper form can be completed and mailed to ASIC by the prospective director.<sup>9</sup> In either case, ASIC lacks the capacity to adapt the registration process to address any responses to the questions on the form. To overcome this without inhibiting legitimate business activity, it is suggested that the form should be completed online by the prospective director themselves. It is surely not unreasonable to expect a business person to possess the computing capabilities and intellectual ability to complete such a form upon incorporating a company. This requirement would have implications for the incorporation and purchase of shelf companies from business service providers. Where directorships change after the company is established, these questions could be asked on the ‘change of company details’ form.<sup>10</sup>

The online form would ask additional questions of the prospective director via drop-down menus. Having cited the director’s DIN, the form could ask whether the person has ever managed any other company. If the answer is no, then the rest of the form is simple and quick to complete. If yes, then a drop-down menu could require more information. Further questions could include whether the other companies are still in existence and if not, whether they paid their creditors in full or less than 50 cents in the dollar. Again, answers indicating a poor track record could prompt more questions. It is fair that a person who wants another opportunity to run a company should provide this level of detail. Ideally over time, much of this information would auto-populate the incorporation form once the director had entered their DIN.

In the meantime, asking directors to provide this information equips ASIC to take appropriate action which may include placing them on a watch list. If the director provides false

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December 2014. The suggestion of a DIN was also made in 2013: Helen Anderson, ‘An Ounce of Prevention: Practical Ways to Hinder Phoenix Activity’ (2013) 25(3) *Australian Insolvency Journal* 16.

<sup>7</sup> *Corporations Act 2001* (Cth) s 206F.

<sup>8</sup> 2015 Productivity Commission Final Report, above n 5, 427.

<sup>9</sup> <http://asic.gov.au/for-business/starting-a-company/how-to-start-a-company/>

<sup>10</sup> *Corporations Act 2001* (Cth) Form 484.

information, ASIC may prosecute them.<sup>11</sup> ASIC should be able to determine this relatively easily, as the DIN allows ASIC's own databases to compile corporate histories of the directors. The advantage of the incorporation form displaying director histories is that it reminds would-be directors of the fact that *ASIC knows this information*, thereby discouraging them from engaging in illegal phoenix activity by interfering with its invisibility.

As a related suggestion, ASIC should make directors' prior corporate histories available to other regulators. At present, if the Fair Work Ombudsman (FWO) receives a report that Honest Trolley Hire Pty Ltd has been underpaying its workers, it can conduct an ASIC search to discover that its sole director is Joe Bloggs and can bring an accessory action against him.<sup>12</sup> But it cannot discover that Joe has done a similar thing with the previous 15 entities that he has controlled because it cannot search for his name on anything other than the listing of banned directors. Access to Joe's previous corporate history would allow the FWO to decide how strongly to pursue the case and whether, for example, it should proceed to court or accept an enforceable undertaking. It could also use this information in a referral to ASIC that Joe may have breached his duty as a director by deliberately liquidating companies to avoid large fines against them.

(iii) *Information from RATA and external administrator reporting*

There are two other major sources of information that are not fully exploited by ASIC at present. The first is the Report As To Affairs (RATA)<sup>13</sup> that is completed by company directors at the time of the company's insolvency and given to the external administrator. At present, this form does not ask any questions about previous company failures with which this director has been associated. It also does not ask anything about the transfers of significant corporate assets prior to the company's insolvency to entities with which the directors are connected. This is a missed opportunity to require company directors to admit facts to the liquidator which might encourage further investigation and an application to the Assetless Administration Fund.<sup>14</sup>

The second is the information which external administrators are required to provide to ASIC at the conclusion of an administration.<sup>15</sup> Greater disclosure about the circumstances of the company's failure could be required in their reporting.<sup>16</sup> A central part of this reporting relates to misconduct by corporate controllers before and during external administrations. Liquidators notify ASIC whether they suspect the conduct breaches civil penalty or criminal laws, and whether they hold documentary evidence to support their claims. This is vital intelligence that ASIC uses to select cases to pursue further. At present, the return submitted

<sup>11</sup> *Corporations Act 2001* (Cth) s 1308(2).

<sup>12</sup> *Fair Work Act 2009* (Cth) s 550.

<sup>13</sup> *Corporations Act 2001* (Cth) Form 507. See <http://asic.gov.au/regulatory-resources/forms/forms-folder/507-report-as-to-affairs/>

<sup>14</sup> The Assetless Administration Fund ('AAF') is administered by ASIC. With funds provided by the government, it finances insolvency practitioners in their work on behalf of companies with few or no assets. The aim of the fund is to overcome the inability of liquidators to make proper investigations due to financial constraints. 'A particular focus of the AAF is to curb fraudulent phoenix activity': ASIC, Regulatory Guide 109: Assetless Administration Fund: Funding Criteria and Guidelines (November 2012), RG109.1.

<sup>15</sup> Reports are required from external administrators pursuant to *Corporations Act* s 533 (by a liquidator); s 422 (by a receiver); and s 438D (by a voluntary administrator). The reporting format is governed by ASIC Regulatory Guide 16. The form is EX01 Schedule B of Regulatory Guide 16 - Report to ASIC under s 422, s 438D or s 533 of the *Corporations Act 2001* or for statistical purposes.

<sup>16</sup> In December 2014, EX01 was changed to ask for additional information where insolvent trading was alleged. No amendment was made with respect to phoenix activity.

to ASIC requires a tick-box to indicate that breaches of duty and other civil or criminal offences are suspected. In our opinion, a further tick-box should be inserted so that administrators could report that the breach occurred in a suspected phoenix context.

This suggestion was expressly endorsed by the 2015 SERC Construction Insolvency Report.<sup>17</sup> The Senate Economics References Committee, considering ASIC's performance in 2014, also recommended a system by which external administrators could indicate to ASIC which reports required 'the most urgent attention and investigation'<sup>18</sup> but this recommendation was simply 'noted' by the government, with the claim that ASIC 'has worked, and continues to work' on this.<sup>19</sup> The government gave this reply, despite the SERC's report outlining 10 pages of complaints about ASIC's response to reports of misconduct<sup>20</sup> following which the committee stated that it 'received many other complaints [about ASIC] that are too numerous to detail here.'<sup>21</sup>

The external administrator reports should also provide some space in which liquidators can advise ASIC of the specific details of phoenix activity and any other relevant information about the company and its controllers.<sup>22</sup> Clearly, this would necessitate a move away from the automated processing of the reports of misconduct that sees nine out of ten 'filed' and only one out of ten followed with an automated request for more information.<sup>23</sup>

In contrast, the United Kingdom has recently introduced online reporting of director misconduct by liquidators.<sup>24</sup> There is a series of drop-down boxes depending upon answers to questions relating to the director themselves, the adequacy of books and records, causes of failure, undervaluation of assets transferred, uncommercial transactions between the company and other parties, other corporate failures involving these directors, and a failure to properly deal with tax affairs. This method of reporting means that insolvency practitioners can complete the paperwork quickly and cheaply where nothing is amiss, yet have the scope to report misconduct where that has been discovered. The online report gives the Insolvency Service a detailed starting point for their own investigations.

## **2. Share data held by ASIC with other regulators, liquidators and the general public**

There are three aspects to sharing data that need to be considered. There are the cost implications of sharing data, practical impediments, and legislative impediments.

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<sup>17</sup> 2015 SERC Construction Insolvency Report, above n 3, [5.34], rec 11: The committee recommends that ASIC, in consultation with ARITA, work out a method whereby external administrators can indicate clearly in their statutory reports whether they suspect phoenix activity has occurred. For example, to serve as a red flag to ASIC, include a box in the reporting form that external administrators would tick if they suspected phoenix activity.

<sup>18</sup> Australian Government, Senate Economic References Committee Report, 'Performance of the Australian Securities and Investments Commission', October 2014, (SERC Performance of ASIC) [15.66].

<sup>19</sup> Australian Government, Australian Government Response to the Senate Economic References Committee Report, 'Performance of the Australian Securities and Investments Commission', October 2014, 9.

<sup>20</sup> SERC Performance of ASIC, above n 18, 227-236.

<sup>21</sup> Ibid [15.38].

<sup>22</sup> See RG 16, above n 16.

<sup>23</sup> Australian National Audit Office, *ASIC's Processes for Receiving and Referring for Investigation Statutory Reports of Suspected Breaches of the Corporations Act 2001*, Audit Report No 18 2006-2007, 2007, at [3.8]. It appears the situation has not changed since 2007. See SERC Performance of ASIC, above n 18, [15.60] – [15.63].

<sup>24</sup> See <https://www.gov.uk/government/publications/director-conduct-report-service>

(i) *The cost of data*

The abuse of the corporate form through illegal phoenix activity is able to exist because of its ability to masquerade as a legitimate business rescue. The more information that is in the hands of creditors before the event, and enforcement agencies after the event, the more likely it is that illegal phoenix activity will lose its appeal.<sup>25</sup>

There is limited information available for no cost on ASIC's databases. Indeed, liquidators winding up a phoenix company must pay ASIC to obtain documents about the company and its directors, in order to perform their statutory obligation to report to ASIC about director misconduct. This seems entirely the wrong way around. Liquidators should be provided by ASIC at no cost with as much information at ASIC's disposal as possible, at the commencement of the engagement, to ensure that the liquidators can perform their gatekeeper roles efficiently and effectively.

There is a strong justification for ASIC information being more freely available, not less. The 2015 SERC Construction Insolvency Report made recommendations about 'early warning to industry participants about repeat and concerning insolvent practices'<sup>26</sup> and 'that regulators increase engagement efforts with industry participants aimed at increasing and enhancing information flows.'<sup>27</sup> Of particular importance here is their recommendation 'that ASIC and Australian Financial Security Authority company records be available online without payment of a fee.'<sup>28</sup>

The Senate Economic 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>29</sup> Increased transparency in Australia would follow the trend set in European Union countries.<sup>30</sup> The government should accept the economic benefits of free information to assist creditor self-protection, as the UK government has done.<sup>31</sup> According to UK Business Secretary, the 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>32</sup>

<sup>25</sup> 2015 SERC Construction Insolvency Report, above n 3, [12.15].

<sup>26</sup> 2015 SERC Construction Insolvency Report, above n 3, recommendation 4.

<sup>27</sup> Ibid recommendation 14.

<sup>28</sup> Ibid recommendation 39.

<sup>29</sup> SERC Performance of ASIC, above n 18, [22.28].

<sup>30</sup> See [https://e-justice.europa.eu/content\\_insolvency\\_registers-110-en.do](https://e-justice.europa.eu/content_insolvency_registers-110-en.do): 'Insolvency registers are a very important source of information of a legal nature for facilitating daily tasks of citizens, legal professionals, state authorities, companies and other interested parties. They facilitate access to official and trusted insolvency-related information to banks, creditors, business partners and consumers. This information enhances transparency and legal certainty in European Union markets. ... the core services provided by all registers are to register, examine and store insolvency information and to make this information available to the public.'

<sup>31</sup> The United Kingdom recently announced that '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' held by the UK register of companies would be searchable, free of charge. See <https://www.gov.uk/government/news/launch-of-the-new-companies-house-public-beta-service>, 22 June 2015.

<sup>32</sup> <https://www.gov.uk/government/news/free-companies-house-data-to-boost-uk-economy>, 15 July 2014.

Transparency could be enhanced at relatively little cost if the external administrator reports lodged with ASIC were both more comprehensive and more widely available to other regulators<sup>33</sup> particularly to the ATO, where it is highly likely that taxes will remain unpaid. The Department of Employment would also benefit in knowing whether they should fund a liquidator to recover from errant directors FEG payments made to their companies. Rather than referring suspected phoenix operators to ASIC for action, which may not happen due to ASIC's resourcing and enforcement priorities, organisations such as FWO and ATO should be encouraged to utilise their own regulatory tools. A more sound judgment about what action to take can be made if better intelligence is available.

There are two related issues dealing with cost that should be noted at this point. The first is the government's move towards the privatisation of the corporate registry function.<sup>34</sup> A private registry operator, while committed by the tender terms to 'open and equal access',<sup>35</sup> will necessarily charge for the majority of the information it provides, as ASIC does with the majority of its information at present. It appears that the drive towards registry privatisation is based on a need to upgrade ASIC's computing capabilities without the cost of that process being borne by the government.

The second related issue dealing with cost concerns ASIC's own funding. While not directly touching on the free availability of information for liquidators or others, it should be noted here that the government's tendency appears to be towards 'user pays', rather than away from it. Federal Treasurer Scott Morrison has announced that industry sectors regulated by ASIC will bear the costs of its operation.<sup>36</sup>

#### (ii) *Practical impediments*

The spread of functions between regulators and outside parties sometimes results in information not being in the hands of a party with both the incentive and legislative power to bring enforcement action and to seek redress for a victim. This is most clearly illustrated by the enforcement of superannuation payments. When a company enters liquidation, employees with unpaid entitlements are entitled to claim on the taxpayer-funded Fair Entitlements Guarantee (FEG),<sup>37</sup> which covers specified amounts of wages, leave and redundancy entitlements. However, superannuation is not covered by FEG.<sup>38</sup>

Superannuation recovery is subject to a peculiar mechanism. The employer is obliged to pay at least the statutory mandated amount<sup>39</sup> to the employee's chosen fund<sup>40</sup> but the fund is not,

<sup>33</sup> This would necessitate privacy safeguards and protection for the external administrators against defamation. External administrators enjoy qualified privilege in providing reports of misconduct to ASIC. This protects them from actions for defamation in the absence of malice: *Corporations Act* s 89. This is also noted in RG 16, above n 16, [16.59].

<sup>34</sup> Australian Government, Department of Finance: 'The Government announced in the 2014-15 Budget that it would commission a scoping study into future ownership options for the operation and ownership of the registry functions of the Australian Securities and Investments Commission (ASIC) Registry.' See <http://www.finance.gov.au/procurement/scoping-studies/asic-faqs/>. Expressions of interest closed on 19 October, 2015. Indicative bids closed on 23 February 2016.

<sup>35</sup> <http://www.finance.gov.au/procurement/scoping-studies/asic-faqs/>

<sup>36</sup> <http://sjm.ministers.treasury.gov.au/media-release/042-2016/>. This is likely to include liquidators, based on Treasury's proposal paper released in 2015: Australian Government, Treasury, 'Proposed industry funding model for the Australian Securities and Investments Commission', August 2015, Attachment D.

<sup>37</sup> <https://www.employment.gov.au/fair-entitlements-guarantee-feg>.

<sup>38</sup> Under the *Fair Entitlements Guarantee Act 2012* (Cth) s 5, an employment entitlement under the Act means annual leave, long service leave, payment in lieu of notice, redundancy and wages.

<sup>39</sup> This amount is currently 9.5% of eligible wages.

strictly speaking, a creditor in the winding up.<sup>41</sup> In practice, the fund might chase the employer for the payment but is obliged to be satisfied with the employer's answer. The employer might reply that the employee has changed funds or is no longer employed there. The enforcement of superannuation comes through the superannuation guarantee charge which is administered by the ATO,<sup>42</sup> but the ATO relies on the employer to self-declare their failure to pay.<sup>43</sup> An ATO investigation may be prompted by employee complaints<sup>44</sup> that superannuation has not been paid but for a variety of reasons, the ATO may not initiate recovery action or may be unable to recover the outstanding amount.<sup>45</sup> The employee may be unaware of the non-payment until the employer company becomes insolvent.<sup>46</sup>

Because of the multiple parties involved in superannuation – employee, employer, trade union, superannuation fund, ATO - information is vital to ensure that unremitted payments are followed up as soon as possible. This was recognised by the 2015 SERC Construction Insolvency Report which recommended better liaison between the ATO, ASIC and superannuation funds to assist early detection.<sup>47</sup>

### (iii) *Legislative impediments*

The 2015 SERC Construction Insolvency Report also recommended that privacy provisions be reviewed to facilitate improved information sharing.<sup>48</sup> In the phoenix context, these issues are illustrated by the Interagency Phoenix Forum (IAPF).<sup>49</sup> While there is much goodwill between these regulatory agencies and a genuine commitment to the disruption of illegal phoenix activity, information does not flow freely. For example, the ATO is the host of the Australian Business Register's Phoenix Watchlist. The ATO provides data about suspected phoenix operators to the list but it is difficult to discover whether the other IAPF members are providing similar information.<sup>50</sup>

<sup>40</sup> *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth) which inserted *Superannuation Guarantee (Administration) Act 1992* Part 3A.

<sup>41</sup> Employees are priority creditors under a liquidation – *Corporations Act 2001* (Cth) s 556(1)(e) – (h) and superannuation is one of the entitlements which are subject to this priority.

<sup>42</sup> *Superannuation Guarantee Charge Act 1992* (Cth); and *Superannuation Guarantee (Administration) Act 1992* (Cth) s 64A.

<sup>43</sup> *Superannuation Guarantee (Administration) Act 1992* (Cth) s 46.

<sup>44</sup> <https://www.ato.gov.au/Individuals/Super/In-detail/Growing/Unpaid-super/?page=4>

<sup>45</sup> See <https://www.ato.gov.au/Individuals/Super/In-detail/Growing/Unpaid-super/>.

<sup>46</sup> See further Helen Anderson and Tess Hardy, 'Who Should be the Super Police? Recovery of Unremitted Superannuation in Insolvency', (2014) 37(1) *University of New South Wales Law Journal* 162.

<sup>47</sup> 2015 SERC Construction Insolvency Report, above n 4, [3.72], recommendation 5: 'The committee recommends that the ATO and ASIC increase their formal cooperation with superannuation funds to coordinate measures around early detection of non-payment of superannuation guarantee.'

<sup>48</sup> 2015 SERC Construction Insolvency Report, above n 4, [3.73], recommendation 6: 'The committee recommends that privacy provisions which may inhibit information flows between the ATO and APRA regulated superannuation funds be reviewed and that the ATO seek advice from the Office of the Australian Information Commissioner as to the extent to which protection of public revenue exemptions in the Australian Privacy Principles might facilitate improved information sharing.'

<sup>49</sup> A full list of member agencies is available at <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Fraudulent-phoenix-activities/>

<sup>50</sup> In its April 2015 submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry, the ATO noted that it had 'provided information regarding 154 confirmed Phoenix operator groups with 2,184 linked entities through the Phoenix Watchlist' and that it was working to provide further data in the future: ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015), 20. No other submissions by regulators indicated that any intelligence had been provided to the watchlist, nor is there any other publicly available information to that effect.

The IAPF is now a prescribed task force,<sup>51</sup> which allows the exchange of tax information within the forum.<sup>52</sup> However, according to the ATO, it does not permit that information to be passed on by recipient agencies to others within the forum, or for the ATO to receive information from other agencies.<sup>53</sup> This apparent lack of co-operation led the 2015 SERC Construction Insolvency Report to make a formal recommendation that ‘consideration be given to amending confidentiality requirements in statutory frameworks of agencies participating in the Phoenix Taskforce to permit dissemination of relevant information to the ATO.’<sup>54</sup> The Coalition Senators’ Additional Comments at the end of that report also noted that:

As these agencies are characterised by a diversity of aims, powers and responsibilities, any changes to the operation of the Taskforce, including the changes to confidentiality requirements outlined in Recommendation 12, would need to be considered by all the relevant agencies and would take time to resolve.<sup>55</sup>

Any initiatives to publicise information about company directors must also comply with, or be exempted from, the provisions of the *Privacy Act 1988* (Cth) which was amended in 2012.<sup>56</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>57</sup> The Australian Privacy Principles, which form part of the Act,<sup>58</sup> do allow an outside organisation to adopt a government related identifier of an individual as its own identifier if it is authorised by law or regulations.<sup>59</sup>

Information about prior corporate histories of directors would be covered by the *Privacy Act* and must comply with both Australian Privacy Principles and the credit reporting provisions<sup>60</sup> of the Act if that information were publicly disseminated by credit rating agencies. Credit managers in particular would like to see information about prior tax defaults by companies who are seeking credit.<sup>61</sup> At present, the ATO cannot register tax defaults with credit rating agencies, as a bank or trade creditor might, but there are tentative signs that the ATO would like that information made public. ATO Second Commissioner Geoff Leeper said in 2014,

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<sup>51</sup> *Taxation Administration Act 1953* (Cth) sch 1, 355-70(12): ‘The regulations [Taxation Administration Regulations 1976] may prescribe a taskforce for the purposes of item 4 of the table in subsection (1). A major purpose of the taskforce must be protecting the public finances of Australia.’ Regulation 48 of the *Taxation Administration Regulations 1976* has the current list of prescribed taskforces:

[http://www5.austlii.edu.au/au/legis/cth/consol\\_reg/tar1976378/s48.html](http://www5.austlii.edu.au/au/legis/cth/consol_reg/tar1976378/s48.html)

<sup>52</sup> *Taxation Administration Act 1953* (Cth) sch 1, 355-70, table headed ‘Records or disclosures for law enforcement and related purposes’ item 4, inserted by the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* (Cth).

<sup>53</sup> 2015 SERC Construction Insolvency Report, above n 4, [5.64].

<sup>54</sup> 2015 SERC Construction Insolvency Report, above n 4, [5.84], recommendation 12.

<sup>55</sup> *Ibid* 197.

<sup>56</sup> *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

<sup>57</sup> David Francis, ‘Summary of the Impact of the Amendments to the Privacy Act’ (2014) *Credit Management in Australia* 8, 8.

<sup>58</sup> *Privacy Act 1988* (Cth), Sch 1.

<sup>59</sup> *Privacy Act 1988* (Cth), s 20L(2) and sch 1, Australian Privacy Principle 9.

<sup>60</sup> *Privacy Act 1988* (Cth), Part IIIA.

<sup>61</sup> According to a survey we administered of credit managers who were members of the Australian Institute of Credit Management, February 2016, 96.19% of credit managers agree or strongly agree that ‘[h]aving the ATO list all unpaid tax by commercial entities would significantly enhance my credit approval/declining decision making.’ Survey on file with authors

the fact ... a debt to the tax office cannot be disclosed to the markets because of secrecy provisions [means that] there are no credit reference consequences from being in debt to the tax office. ... This is a matter for government to consider at some point. The only way around it that we can think of is to propose that the Commonwealth as an entity have the ability to advise a credit market, 'Geoff owes \$41,000,' without disclosing the nature of that debt.<sup>62</sup>

The significance of publicly available tax default information is that unpaid taxes are often an early sign of the precariousness of a company and its likelihood of defaulting on other debts. If credit rating agencies could include this sort of information in its advice to prospective lenders and trade creditors, one significant incentive towards phoenix activity – its invisibility – might be undermined.

### **Conclusion**

Harmful phoenix activity is difficult to tackle by regulators because of its ability to disguise itself as a genuine business rescue. That disguise can be penetrated where there is extensive, verified, publicly available information about failed companies and the people associated with them.

We welcome the opportunity to discuss these ideas further with the Productivity Commission.

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<sup>62</sup> Australian Government, House of Representatives, Official Committee Hansard, Standing Committee on Tax and Revenue, 28 February 2014, 24.