
Illegal phoenix activity: Quantifying its incidence and cost

Helen Anderson, Ian Ramsay and Michelle Welsh*

Illegal phoenix activity has become a matter of increasing concern in recent years. Many parties are interested in understanding the size of the problem, how much it costs the economy, and how well current enforcement mechanisms work. These are important questions because they influence the allocation of government resources and the process of law reform. To answer the quantification questions, we undertook to gather together all the available data on the incidence and cost of illegal phoenix activity, as well as the enforcement of the various laws that can be utilised to combat it. However, despite the large amounts of information we obtained, we cannot provide a definitive answer to the quantification questions. Moreover, we believe that accurate quantification is highly problematic. This article, which is based on a much longer research report, presents a sample of our findings and explores the difficulties with quantification.

INTRODUCTION

Illegal phoenix activity has become a matter of increasing concern in recent years. Regulators such as the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO) have made a number of public statements about the prevalence of this activity and the detection and enforcement strategies they are implementing in response.¹ In 2015, bodies such as the Productivity Commission² and the Senate Economic References Committee³ examined phoenix activity as part of their inquiries into broader matters. Two questions of interest to many parties are the size of the problem and how much it costs the economy. These are important questions because they influence the allocation of government resources, and the process and content of law reform.

Many references have been made to the estimates made by the 2012 PriceWaterhouseCoopers (PWC) report prepared for the Fair Work Ombudsman (FWO).⁴ This report calculated the cost of illegal phoenix activity to be between \$1.8 billion and \$3.2 billion per annum. While there is no reason to believe that PWC's figures are not a reasonable approximation of the cost of illegal phoenix activity, they should not be accepted without closely examining the data and the assumptions relied upon by PWC. To answer the quantification questions, we undertook to gather together all the

* Professor Helen Anderson, Melbourne Law School, University of Melbourne.

Professor Ian Ramsay, Melbourne Law School, University of Melbourne.

Associate Professor Michelle Welsh, Monash Business School, Monash University.

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¹ For example see Australian Securities and Investments Commission (ASIC), *Small Business – Illegal Phoenix Activity* (2 February 2015) <<http://asic.gov.au/for-business/your-business/small-business/compliance-for-small-business/small-business-illegal-phoenix-activity>>; Australian Taxation Office (ATO), *Fraudulent Phoenix Activities* <<https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Fraudulent-phoenix-activities>>.

² Australian Government, Productivity Commission, *Business Set-up, Transfer and Closure*, Productivity Commission Draft Report (May 2015) 379; Productivity Commission Inquiry Report (30 September 2015) Ch 15.

³ Senate Economic References Committee, *Insolvency in the Australian Construction Industry*, Terms of Reference, (d); Report (December 2015) Ch 5.

⁴ PriceWaterhouseCoopers and Fair Work Ombudsman, *Phoenix Activity – Sizing the Problem and Matching Solutions* (June 2012) (2012 PWC Report).

available data on the incidence and cost of illegal phoenix activity. In 2015 our research team released a report which collates all of this data, together with all of the publicly available data on enforcement.⁵

Part two of this article defines phoenix activity. Part three asks why the quantification exercise is important and reviews previous attempts to do so. Part four discusses our research methodology and sets out some of the data we located regarding the incidence and cost of illegal phoenix activity. Part five draws together the threads of the earlier parts, including the difficulties of quantification and the implications of those difficulties. Part six concludes that while illegal phoenix activity is undoubtedly a significant problem, its incidence and cost cannot be reliably ascertained.

WHAT IS PHOENIX ACTIVITY?

Phoenix activity centres on the idea of a new company arising from the ashes of its failed predecessor. Typically, the individuals in control of the failed company transfer the business to the new company while its debts remain the responsibility of the failed company. The failed company may be placed into liquidation or voluntary administration, or simply left dormant and subsequently deregistered.

Phoenix activity is not necessarily illegal,⁶ and as we show later in the article, this complicates the accurate quantification of the incidence and cost of illegal phoenix activity. Phoenix activity is legal when the intention of the company's controllers is to undertake a legitimate business rescue and a fair price is paid by the new company for any assets transferred to it by the old company. By giving shareholders limited liability and granting separate legal entity status to companies, corporate law encourages entrepreneurs to run businesses, and implicitly encourages them to start new businesses when previous attempts have ended in insolvency. If those seeking to quantify illegal phoenix activity simply identify the external manifestations of these behaviours – two companies controlled by the same people, and assets transferred from the failed company to the new one – they will not be able to differentiate legal phoenix activity from illegal phoenix activity. This is a major hurdle in seeking to quantify illegal phoenix activity and is discussed further in part five.

We have divided legal phoenix activity into two sub-categories – legal phoenix activity as a proper business rescue and legal but problematic phoenix activity. Company controllers engaging in both forms of legal phoenix activity do not breach their duties under the *Corporations Act 2001* (Cth)⁷ or any other laws. Despite not being illegal, legal phoenix activity is problematic if it involves a number of business failures by a person with poor business skills who fails to learn from the experience. If each of this person's businesses inevitably collapses, over time the number of creditors impacted by the harmful behaviour will increase. While there may not be any illegality involved, it may however be appropriate for the government to put in place measures to restrain such individuals from starting another business and exposing vulnerable creditors such as employees and the ATO to the near certainty of loss. Currently ASIC has the ability to disqualify individuals from being directors in situations where legal phoenix activity becomes problematic.⁸ In part four, we consider the statistics on ASIC director disqualifications to see whether they can shed any light on the incidence of problematic phoenix activity.

⁵ Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Hannah Withers, *Quantifying Phoenix Activity: Incidence, Cost, Enforcement* (University of Melbourne and Monash University, October 2015) <http://law.unimelb.edu.au/_data/assets/pdf_file/0010/1689427/Quantifying-Phoenix-Activity-Incidence,-cost,-enforcement-updated-26-nov-2015.pdf> (Quantification Report).

⁶ Our categorisation of phoenix activity is summarised in Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Hannah Withers, "Profiling Phoenix Activity: A New Taxonomy" (2015) 33(2) C&SLJ 133. The fuller version is contained in our first report: Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Hannah Withers, *Defining and Profiling Phoenix Activity* (December 2014) <http://law.unimelb.edu.au/_data/assets/pdf_file/0007/1709503/15-Definingandprofilingphoenixactivity-reportfinal2.pdf>.

⁷ *Corporations Act 2001* (Cth) ss 180–183.

⁸ *Corporations Act 2001* (Cth) s 206F allows ASIC to disqualify a person from managing companies for up to five years if, within the past seven years, the person has been an officer of two or more companies and the companies were wound up and the liquidator lodged a report under s 533(1) about the company's inability to pay its debts (ie, the companies were unable to pay their unsecured creditors more than 50 cents in the dollar).

There is no express prohibition of phoenix activity. Labelling it illegal, as ASIC does,⁹ or fraudulent, as the ATO does,¹⁰ is designed to capture the breach of laws of more general application that happen to occur in the context of phoenix activity. In other words, there is a breach of a law that is not aimed specifically at phoenix activity during the closure of a failed company and the resurrection of its business via a new debt-free entity. Quantification of the incidence and cost of illegal phoenix activity might seem to be easier here, since there is, at least, a breach that can be investigated. However, as part four will show, there are two difficulties in utilising enforcement data to quantify incidence and cost – first, the small number of enforcement actions brought by regulators, and second, the failure to identify whether these breaches occur in the context of phoenix activity.

THE IMPORTANCE OF QUANTIFICATION AND PREVIOUS ATTEMPTS TO QUANTIFY

The emphasis placed on the extent and cost of illegal phoenix activity by regulators, by the media and in scholarly work gives a general sense of the importance of quantification. Calls by politicians, regulators, trade unions, media commentators, professional bodies or scholars for reforms to existing laws, the introduction of new laws, greater enforcement, increased resourcing or better prevention mechanisms all base their validity on the fact that illegal phoenix activity is a significant problem costing the economy dearly. For example, in 2009 Treasury released a proposals paper considering options to address what it termed fraudulent phoenix behaviour that relied upon estimates of the cost and extent of the problem by the Australian Securities Commission (ASC), the predecessor of ASIC, and the Cole Royal Commission.¹¹ In a 2011 press release announcing the introduction of legislation designed to extend directors' liability under the director penalty notice regime the Hon Bill Shorten, the then Assistant Treasurer and Minister for Financial Services and Superannuation referred to an ATO estimate of approximately 6,000 phoenix companies in Australia.¹² In a 2012 *Sydney Morning Herald* article, journalist Adele Ferguson referred to the same ATO estimate of the extent of the problem in calling for further reforms.¹³

In addition, accurate quantification can provide valuable benchmarks against which future enforcement efforts are evaluated. For example, as an indicator of success, a regulator may wish to point to a reduction in the incidence and cost of illegal phoenix activity over a period of time in which it was engaged in increased enforcement activity. Equally, if no reduction in the incidence and/or cost of this activity occurs this might indicate that alternative enforcement strategies should be considered. In our opinion, such an exercise is fraught with difficulty because of the complexity of phoenix activity. We explore those difficulties further in part five.

Before discussing what we discovered about the incidence and cost of illegal phoenix activity, it is instructive to consider two previous examples of quantification: the 1996 ASC survey of phoenix activity¹⁴ and the 2012 report produced by PWC for the FWO.¹⁵

In 1996, the ASC released the results of its review of complaints received about phoenix activity and a telephone survey it conducted. It indicated that 43 complaints relating to phoenix activity were received by the ASC between 1 July 1995 and 31 January 1996.¹⁶ This represented only 1.06% of all

⁹ ASIC, *Small Business – Illegal Phoenix Activity*, n 1.

¹⁰ ATO, *Fraudulent Phoenix Activities*, n 1.

¹¹ Australian Government, Treasury, *Action against Fraudulent Phoenix Activity*, Proposals Paper (November 2009) 3-4.

¹² The Hon Bill Shorten, "Protecting Employee Super and Strengthening the Obligations of Company Directors" (Media Release, No 138, 13 October 2011).

¹³ Adele Ferguson, "Latest Attempt to Extinguish Wily Phoenixes Lacks Firepower", *Sydney Morning Herald* (3 January 2012) <<http://www.smh.com.au/business/latest-attempt-to-extinguish-wily-phoenixes-lacks-firepower-20120102-1pi6n.html#ixzz36wmJ5Imp>>.

¹⁴ Australian Securities Commission, *Project One: Phoenix Activity and Insolvent Trading Public Version* (Research Paper 95/01, released May 1996) (1996 ASC Phoenix Activity Research Paper).

¹⁵ PriceWaterhouseCoopers and Fair Work Ombudsman, 2012 PWC Report, n 4.

¹⁶ Australian Securities Commission, 1996 ASC Phoenix Activity Research Paper, n 14, 43.

complaints to the ASC nationally.¹⁷ However, this is unlikely to accurately reflect the incidence of illegal phoenix activity. Not all those affected by illegal phoenix activity would have made a complaint to the ASC. The telephone survey discussed in the following paragraph indicates that this is indeed the case. Of those whose complaints related to phoenix activity, it is not clear whether the complainant or ASC employee identified the circumstances as such activity. Most significantly, there is no means of identifying whether the complaints that were made related to legal or illegal phoenix activity. A company's failure to pay its creditors in the context of phoenix activity does not render the controllers' actions illegal but may nonetheless upset the creditors sufficiently to complain about it to ASIC. The ASC report conceded that the statistics "represent at best a very raw and crude figure for complaints".¹⁸

The ASC also conducted a nationwide telephone survey of 390 small-to-medium enterprise (SME) operators. The survey results indicated that 18% of the operators surveyed had been affected by this activity, some more than once. Despite this, 80% of respondents said they did not report their experience of phoenix activity to the authorities. The ASC Report stated that "a major reason for not reporting the Phoenix activity to the authorities was that the greater majority thought that not only were they unsure about who to report the activity to, but even if the activity was reported it would not result in action by the authorities".¹⁹ Again, the survey could not conclusively state that the phoenix activity experienced by the SME operators was legal or illegal, with the report noting that "[t]he legality of Phoenix activity was apparently less understood by respondents, a substantial number of whom were unsure as to the illegality of the activity".²⁰ Indeed, the scenario put to survey respondents described only the outwardly visible aspects of phoenix activity.²¹ As a result of their research, the ASC concluded that the annual loss to Australian businesses due to "Phoenix type activity" to be between \$670 million and \$1.3 billion.²²

In 2012, PWC took a different approach. Rather than gathering data on instances of phoenix activity and extrapolating from there, PWC sought to model the overall cost to business and the community as a whole by gathering data from a variety of outside sources. The PWC Report states:

To quantify the impact of phoenix activity on employees a "risk-based" model was constructed. Based on stakeholder feedback and literature review, a number of industries were identified as being at risk of phoenix activity. Each industry was then ascribed a "risk rating" (low risk, medium risk or high risk). This was used to extrapolate the number of employees affected by phoenix activity per annum.

Due to the uncertainty surrounding the data, a range of sensitivity tests were conducted such as increasing and decreasing the loss per employee and using different estimates of the number of phoenix companies. An estimate of the impact on employees was also modelled using publicly available Dun & Bradstreet (D&B) data to sense-check the risk based approach.

The estimate of the impact of phoenix activity is for the 2009/10 financial year. This is because data was not available for many items for the 2010/11 financial year. There are a range of impacts of phoenix activity that may be significant but that could not be quantified with existing data.²³

It estimated that the cost to business generally from illegal phoenix activity fell somewhere between the \$1,784,338,743 and \$3,191,142,300 range annually.²⁴ It also estimated that illegal phoenix activity resulted in lost employee entitlements between \$191,253,476 and \$655,202,019

¹⁷ Australian Securities Commission, 1996 ASC Phoenix Activity Research Paper, n 14, 43.

¹⁸ Australian Securities Commission, 1996 ASC Phoenix Activity Research Paper, n 14, 43.

¹⁹ Australian Securities Commission, 1996 ASC Phoenix Activity Research Paper, n 14, 59.

²⁰ Australian Securities Commission, 1996 ASC Phoenix Activity Research Paper, n 14, 50.

²¹ "Now I'd like to discuss 'Phoenix' activities. An example of this is if Company A closes, leaving debts behind. The following week Company B starts up in the same premises, is run by the same people, but claims they aren't responsible for Company A's debts". Australian Securities Commission, 1996 ASC Phoenix Activity Research Paper, n 14, 51.

²² Australian Securities Commission, 1996 ASC Phoenix Activity Research Paper, n 14, 50.

²³ PriceWaterhouseCoopers and Fair Work Ombudsman, 2012 PWC Report, n 4, 14.

²⁴ PriceWaterhouseCoopers and Fair Work Ombudsman, 2012 PWC Report, n 4, 15.

annually.²⁵ This wide margin of error reflects the lack of reliable data available to PWC and its necessary reliance on feedback from stakeholders.²⁶

Amongst other things, data from the Federal Government's safety-net scheme, the General Employee Entitlements and Redundancy Scheme (GEERS) was used by PWC as a basis for modelling lost employee entitlements. However, the use of that data is problematic in estimating the cost to employees of illegal phoenix activity for a number of reasons. There is no direct or necessary correlation between unpaid employees seeking help from GEERS and illegal phoenix activity. The fact that employees have been paid (and therefore do not rely on a government scheme) does not mean that illegal phoenix activity has not taken place. Conversely, employees affected by legitimate liquidations or legal phoenix activity in the form of business rescues are compensated by GEERS. While companies whose employees relied on GEERS may have few or no assets, that is not the same thing as saying these companies were phoenixed. GEERS also covers the employees of insolvent unincorporated employers. On the other hand, GEERS data fails to capture the significant losses to employees from illegal phoenix activity that occurs through dormant companies or voluntary administrations, because employees of these companies are not eligible to claim on GEERS.²⁷

Additionally, none of the following were included in the GEERS calculations: the non-remittance of employee superannuation contributions, the non-payment of workers' compensation premiums, and unremitted PAYG(W) deductions. This is because these sums are not covered by GEERS advances. Potentially, therefore, the GEERS data could understate or overstate the cost of illegal phoenix activity to employees. While the total paid by these schemes since 2000 exceeds \$1.5 billion, the employees of only about 16,000 insolvent businesses received advances.

OUR METHODOLOGY AND FINDINGS

Methodology

The shortcomings of both the 1996 ASC survey and the 2012 PWC Report were borne in mind when we planned our research into the incidence and cost of illegal phoenix activity. We decided that we would not undertake estimates; rather, we would obtain and present as much publicly available data relating to phoenix activity as we could find. Others could make estimates based on this data if they chose to but providing data for that purpose was not our primary objective. We sought data from reports published by ASIC, the ATO, the FWO and the Commonwealth Director of Public Prosecutions, as well as information from their websites, media releases and evidence they had given to oversight bodies. We also examined the 2003 Cole Royal Commission into the Building and Construction Industry, as well as the ASC and PWC reports discussed in part three of this article. Our 2015 report²⁸ either reproduces this information or collates it into a manageable form. To fill the gaps in publicly available information, we then sought and obtained some data directly from the regulators and other agencies.

The data was scrutinised for the purpose of identifying those activities that clearly arose in the phoenix context. However, what was most striking, given that phoenix activity has been a significant issue for almost two decades, is the lack of data gathered or generated by regulators about phoenix activity, particularly where it involves illegality.

Incidence of illegal phoenix activity

It is not uncommon to find confident statements about the incidence of illegal phoenix activity. For example, in 2011, the Hon Bill Shorten, then Assistant Treasurer and Minister for Financial Services

²⁵ PriceWaterhouseCoopers and Fair Work Ombudsman, 2012 PWC Report, n 4, 15.

²⁶ PriceWaterhouseCoopers and Fair Work Ombudsman, 2012 PWC Report, n 4, 2.

²⁷ Only prescribed insolvency events are covered. In the case of companies, from November 2005, this has only been the appointment of a liquidator: GEERS Operational Arrangements (OAs) (1 November 2005-31 October 2006) cl 8(g)(vii), 16(f)(i). The same restriction applies in later versions of the OAs, although the paragraph numbers differ: GEERS OA (1 November 2006) cl 16(g)(i); GEERS OA (15 December 2008) cl 16(g)(i); and GEERS OA (1 January 2011) cl 16(f)(i).

²⁸ Anderson et al, Quantification Report, n 5.

and Superannuation, estimated that there were 6,000 phoenix companies in Australia in a media release relating to employee entitlements.²⁹ However, we were unable to arrive at a definitive figure about the incidence of illegal phoenix activity. The following four sources are the closest we could come to obtaining some indication of the size of this problem.

The first is external administrators' data. Given that illegal phoenix activity occurs around the time of the failed company's insolvency, we expected that the reports provided to ASIC by external administrators – liquidators, voluntary administrators and receivers – would provide a rich source of data. This was not the case. While external administrators do report their suspicions of misconduct to ASIC, the form that they complete does not ask them whether the misconduct occurred in the context of phoenix activity.³⁰ Table 1 shows the numbers of reports in which external administrators alleged misconduct, as well as the number of alleged breaches contained in those reports, between 1 July 2011 and 30 June 2015. Possible misconduct was reported in nearly three-quarters of these reports.

TABLE 1 External Administrator Reports – Possible Misconduct Reported 1 July 2011-30 June 2015

		No misconduct reported	“Possible misconduct” reported	Total
2011–2012	No of reports	2,821	7,253	10,074
	% of reports	28%	72%	100%
	No of breaches	-	17,887	17,887
2012–2013	No of reports	2,493	6,761	9,254
	% of reports	26.9%	73.1%	100%
	No of breaches	-	16,652	16,652
2013–2014	No of reports	2,241	7,218	9,459
	% of reports	23.7%	76.3%	100%
	No of breaches	-	18,195	18,195
2014–2015	No of reports	1,793	6,561	8,354
	% of reports	21.5%	78.5%	100%
	No of breaches	-	16,279	16,279

Source: ASIC, as compiled by the researchers³¹

²⁹ The Hon Bill Shorten, n 12.

³⁰ ASIC, *EX01 Schedule B of Regulatory Guide 16 – Report to ASIC under s 422, s 438D or s 533 of the Corporations Act 2001 (Cth) or for statistical purposes*, <<http://asic.gov.au/regulatory-resources/forms/forms-folder/ex01-schedule-b-of-regulatory-guide-16-report-to-asic-under-s422-s438d-or-s533-of-the-corporations-act-2001-or-for-statistical-purposes/>>.

³¹ ASIC, *REP 456 Insolvency Statistics: External Administrators' Reports (July 2014 to June 2015)* (November 2015), Table 10 (ASIC REP 456); ASIC, *REP 412 Insolvency Statistics: External Administrators' Reports (July 2013 to June 2014)* (September 2014) Table 10 (ASIC REP 412); ASIC, *REP 372 Insolvency Statistics: External Administrators Reports (July 2012 to June 2013)* (October 2013) Table 10 (ASIC REP 372); ASIC, *REP 297 Insolvency Statistics: External Administrators Reports (1 July 2011 to 30 June 2012)* (September 2012) Table 17 (ASIC REP 297).

ASIC's published insolvency statistics break down these reports of possible misconduct further. For example, from July 2011 until June 2015, the civil obligations were alleged to have been breached more often than the criminal provisions (52,867 or 75% of all reported misconduct).³² Sixteen percent of the reports alleged post-appointment criminal misconduct by officers or employees (10,364 breaches), and 8% of the reports alleged pre-appointment criminal misconduct by officers and employees (4,874 breaches). The remaining 1% of reports alleged contraventions of other criminal offences and other possible misconduct.³³

To give a sense of possible current reporting of illegal phoenix activity, we examined the allegations of criminal and civil misconduct to isolate those that related to provisions that frequently arise in the context of phoenix activity. In relation to suspected criminal activity, these were breaches of the following *Corporations Act* sections: s 184 (duties to act in the best interests of the company and for a proper purpose, and not to misuse information or position), s 588G(3) (duty to prevent insolvent trading), s 596AB (agreements to avoid employee entitlements), and s 590 (offences by officers or employees), and other criminal offences under the *Corporations Act*. The alleged civil breaches of the *Corporations Act* we analysed are the directors' duties of s 180 (duty to exercise reasonable care and diligence), s 181 (duties to act in the best interests of the company and for a proper purpose), s 182 (duty not to misuse position), s 183 (duty not to misuse information) and s 588G(2) (duty to prevent insolvent trading).

Table 2 sets out the number of external administrator reports filed with ASIC for each financial year from 2008-2009 to 2014-2015 where the external administrator indicated that he or she suspected that criminal breaches of the criminal provisions occurred. Table 3 contains data relating to the number of external administrator reports filed with ASIC in the relevant years indicating that the external administrators suspected a breach of civil obligations occurred. The figures in Tables 2 and 3 that are not in parentheses represent the number of external administrator reports filed with ASIC in the relevant years indicating that the external administrators suspected a breach of the *Corporations Act's* criminal or civil provisions occurred. The figures within parentheses represent the number of external administrator reports filed in the given year in which the external administrators indicated that they held documentary evidence of the suspected breach. An examination of the data in these tables reveals that liquidators suspected that there were many more breaches of civil obligations than instances of suspected criminal activity. The total number of suspected instances of criminal activity declined over the period of time examined, whereas the number of suspected breaches of civil obligations rose substantially over the period that the data was collected. On average external administrators suspected that there were more criminal and civil breaches of the insolvent trading provisions than of any of the other provisions captured in the tables.

³² ASIC REP 456, n 31, Table 13; ASIC REP 412, n 31, Table 13; ASIC REP 372, n 31, Table 13; ASIC REP 297, n 31, Table 18.

³³ ASIC REP 456, n 31, Table 13; ASIC REP 412, n 31, Table 13; ASIC REP 372, n 31, Table 13; ASIC REP 297, n 31, Table 18.

TABLE 2 ASIC External Administrator Reports – Suspected Criminal Activity 1 July 2008-30 June 2015

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
S 184 Duties of good faith, use of position, and use of information	283 (214)	271 (186)	245 (187)	261 (200)	267 (164)	255 (206)	173 (128)
S 588G(3) Insolvent trading	678 (453)	651 (385)	604 (404)	536 (353)	408 (312)	381 (277)	166 (107)
S 596AB Agreements to avoid employee entitlements	13 (9)	14 (6)	9 (6)	8 (6)	13 (12)	5 (4)	9 (7)
S 590 Offences by officers or Employees	154 (120)	155 (108)	145 (110)	166 (137)	113 (90)	116 (92)	106 (85)
Other criminal offences under the <i>Corporations Act</i>	677 (424)	634 (343)	590 (336)	594 (361)	521 (377)	442 (283)	334 (205)
Total	1,805 (1,220)	1,725 (1,028)	1,593 (1,043)	1,565 (1,057)	1,322 (955)	1,199 (862)	788 (532)

Source: ASIC, as compiled by the researchers³⁴

TABLE 3 ASIC External Administrator Reports – Suspected Breaches of Civil Obligations 1 July 2008-30 June 2015

	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
S 180 Care and diligence	1,409 (830)	1,398 (867)	1,592 (951)	2,376 (1,434)	2,302 (1,508)	2,542 (1,817)	2,738 (1,908)
S 181 Good faith, best interests, proper purpose	790 (564)	839 (582)	789 (582)	1,114 (807)	1,204 (868)	1,302 (978)	1,286 (987)
S 182 Use of position	582 (443)	626 (491)	645 (481)	871 (683)	735 (601)	900 (713)	903 (727)
S 183 Use of information	216 (150)	257 (196)	257 (182)	296 (243)	217 (176)	295 (228)	236 (195)
S 588G(2) Insolvent trading	3,140 (2,097)	3,619 (2,332)	3,978 (2,551)	5,075 (3,339)	4,872 (3,508)	5,425 (4,023)	4,855 (3,631)
Total	6,137 (4,084)	6,739 (4,468)	7,261 (4,747)	9,732 (6,506)	9,330 (6,661)	10,464 (7,759)	10,018 (7,448)

³⁴ ASIC REP 456, n 31, Table 29; ASIC REP 412, n 31, Table 22; ASIC REP 372, n 31, Table 21; ASIC REP 297, n 31, Table 24; ASIC, *REP 263 Insolvency Statistics: External Administrators Reports (1 July 2010 to 30 June 2011)* (2 November 2011) Table 24 (ASIC REP 263); ASIC, *REP 225 Insolvency Statistics: External Administrators Reports (1 July 2007 to 30 June 2010)* (21 December 2010) Tables 18 and 45 (ASIC REP 225); ASIC, *Australian Insolvency Statistics: Series 3.3 – External Administrators' Reports Time Series for 1 July 2004-30 June 2014* (October 2014) Table 3.3.16.2.

Source: ASIC, as compiled by the researchers³⁵

Where illegal phoenix activity occurs one or more of the provisions contained in Tables 2 and 3 may be breached. However, it would be a mistake to equate the number of reported suspected breaches of these provisions with an accurate measure of the incidence of illegal phoenix activity. For many reasons, including the difficulty of precisely defining illegal phoenix activity, some incidences of this activity will not come to the attention of liquidators and therefore will not be included in these statistics. In addition, not all of the suspected breaches of these obligations reported by the liquidators will involve illegal phoenix activity.

The second source of data about the incidence of illegal phoenix activity was the suspected phoenix populations under the surveillance of the ATO or ASIC as a result of risk assessment exercises. The ATO has a “candidate” phoenix population of 334,292 “unique entities” of which 72% are micro businesses.³⁶ The ATO defines candidate operators as those that they suspect are engaging in illegal phoenix activity but have not yet been audited. In contrast, ASIC has 7,000 potential phoenix companies in its sights,³⁷ identified by an external data service provider. As a point of reference, we do know that in 2014-2015, 9,177 companies entered some form of external administration.³⁸ Because these companies are simply under surveillance by regulators, rather than their controllers being pursued for breaches of the law, it is possible that these risk assessments are picking up the external manifestations of phoenix activity – one company closed down, a new one started by the same people, and creditors were not paid in full. This may account for the different sizes of populations under surveillance. In any case, they do not provide reliable information about the incidence of illegal phoenix activity. The ATO has a “confirmed” phoenix population of 1,545 entities but it is unclear what laws, if any, have been breached and what action might follow.³⁹ The ATO defines confirmed phoenix operators as those that have been confirmed as engaging in such behaviour as a result of an audit.

The third source of information about illegal phoenix activity is a count of the disqualifications carried out by ASIC under s 206F, which appears to be ASIC’s main enforcement avenue for illegal phoenix activity. Section 206F of the *Corporations Act* allows ASIC to disqualify individuals from managing companies where a liquidator’s report about unpaid debts has been lodged in respect of two or more failed companies in the past seven years and ASIC is satisfied the disqualification is justified. We searched all ASIC media releases from 1 January 2004 to 30 June 2014 for reports of directors that were disqualified by ASIC pursuant to s 206F of the *Corporations Act* in circumstances involving phoenix activity. The search revealed that between 1 January 2004 and 30 June 2014, 32 media releases reported that 51 directors were disqualified in circumstances involving problematic or illegal phoenix activity. Relevant media releases specifically mentioned the term “phoenix activity” in relation to the disqualification of 22 directors, and implied illegal or problematic phoenix activity in relation to 29 directors. This is a small percentage of all directors disqualified pursuant to s 206F. There were 165 companies involved in these 51 disqualifications.

It appears that often ASIC uses this administrative power to disqualify where it believes there have been breaches of directors’ duty occurring during a series of liquidations, rather than bringing civil penalty actions against the alleged perpetrators. In some of the media releases ASIC speaks of

³⁵ ASIC REP 456, n 31, Table 32; ASIC, *Australian Insolvency Statistics: Series 3.3*, n 34, Table 3.3.16.3; ASIC REP 412, n 31, Table 23; ASIC REP 372, n 31, Table 22; ASIC REP 297, n 31, Table 25; ASIC REP 263, n 34, Table 24; ASIC REP 225, n 34, Tables 19 and 46.

³⁶ Anderson et al, Quantification Report, n 5, Table 15, based on directly supplied data.

³⁷ ASIC, *Senate Inquiry into Insolvency in the Construction Industry Submission by the Australian Securities and Investments Commission* (April 2015) 31.

³⁸ ASIC, *Insolvency Statistics – Series 1: Table 1.3 Companies Entering External Administration, January 1999-November 2014* (January 2015).

³⁹ Anderson et al, Quantification Report, n 5, Table 15, based on directly supplied data.

disqualifying directors under s 206F because of breaches of directors' duties in the context of phoenix activity.⁴⁰ However, this expression was used by ASIC informally, and it should be remembered that these are not proven directors' duties cases under the civil penalty or criminal provisions of the *Corporations Act*.

While it is useful to consider the amount of enforcement activity in the context of the available data on the incidence of illegal phoenix activity it is important to be clear that the number of disqualifications of those involved in two or more failed corporations within the past seven years does not allow the quantification of the incidence of illegal phoenix activity. The number of enforcement activities initiated by a regulator does not provide any indication of the incidence of activity being enforced.⁴¹ Some studies that have sought to draw conclusions based on this type of data have been the subject of criticism.⁴² Changes to enforcement statistics may be caused by a variety of factors not related to non-compliance including changes in the regulator's enforcement priorities, personnel, resources, and surveillance capabilities. ASIC is subject to resource constraints and an enforcement policy that takes into account the extent of harm or loss, the benefits of pursuing the misconduct, relative to the expense, the type and seriousness of the misconduct and the evidence available, and the availability of an alternative course of action.⁴³ As a result, these disqualifications do not reflect the total population of those who come within the scope of s 206F because of problematic or illegal phoenix activity. In other words, greater enforcement does not mean greater incidence of the behaviour, and vice versa.

The fourth source of data came from credit reporting agency Dun & Bradstreet in 2009, when it issued a press release noting a "dramatic spike" in the numbers of directors associated with multiple business failures and warning that a "disturbing trend" was emerging of directors "winding up companies only to become associated with others in a short period of time".⁴⁴ The Dun & Bradstreet research found the following for the 2009 financial year:

- the number of directors associated with multiple failures was six times greater than the number of directors for whom the failure was the first;
- when compared with the previous financial year, 25% more companies entered external administration with at least one director previously involved in the management of another defunct company;
- there was an 18% increase in the 2009 financial year in the number of directors associated with at least four failed ventures; and
- there were nearly 400 directors sitting on boards of operating entities at the time of the research who had been associated with 10 or more incidents of external administration; a "handful" who had been involved with 100 or more incidents; and "several instances" of directors with more than 200 incidents.

The press release also cited previous Dun & Bradstreet research which found that there was a 250% greater likelihood that directors on the boards of businesses that enter external administration

⁴⁰ See eg, ASIC MR 07-64 which provides details of ASIC's reasons for disqualifying Ms Sharon O'Neill, a childcare operator, for four years. ASIC found that three companies controlled by Ms O'Neill "collapsed owing substantial amounts to unsecured creditors and to the Australian Taxation Office and that Ms O'Neill personally neglected to ensure that these three companies maintained adequate books and records. ASIC further found that Ms O'Neill breached her duties as a director by engaging in phoenix activity relating to the sale of [two of the companies'] businesses". ASIC, *MR 07-64 ASIC Bans Eleven Directors* (14 March 2007) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2007-releases/07-64-asic-bans-eleven-directors>>.

⁴¹ See eg, Bridget M Hutter, "Regulation: Standard Setting and Enforcement" (1993) 27 *Law and Society Review* 233, 246.

⁴² See eg, Herbert M Kritzer, "Enforcing the Selective Service Act: Deterrence of Potential Violators" (1978) 30 *Stanford Law Review* 1149 in which the author criticised the methodology adopted in a study by Alfred Blumstein and Daniel Nagin: Alfred Blumstein and Daniel Nagin, "The Deterrent Effect of Legal Sanctions on Draft Evasion" (1977) 29 *Stanford Law Review* 241.

⁴³ ASIC, *Information Sheet 151 ASIC's Approach to Enforcement* (September 2013) Figure 1.

⁴⁴ Dun & Bradstreet, *Australia Experiences a Dramatic Spike in Directors Associated with Multiple Business Failures* (2009).

will be involved in another insolvent wind-up in the 12 months that follow. While a credit rating agency like Dun & Bradstreet is likely to have reliable data about directors who are forming new companies, their press release does not specify how many of the company controllers associated with these phoenix entities have engaged in illegal conduct. It also does not indicate whether the subsequent directorship was in the same type of business or whether assets were transferred between the defunct and new companies.

Cost of illegal phoenix activity

We were even less successful in obtaining meaningful information that would allow us to quantify the cost of illegal phoenix activity. While we could obtain approximate data about estimated deficiencies in liquidations or the amount of the ATO's insolvency debt, no data was available in relation to phoenix activity, whether legal or illegal. The most that the two tables contained in this section can do is provide an estimate of the upper limit on the amount of money that could have been lost by the 12 industries with the highest number of external administrators' reports lodged as a result of illegal phoenix activity in the specified time periods. However, given that we have no sense of what proportion of these losses was attributable to illegal phoenix activity, their usefulness is limited.

One piece of data collected by ASIC from external administrator reports is the size of the reported deficiency – the shortfall between the failed company's estimated assets and its estimated liabilities – of each liquidation. ASIC's insolvency statistics report for the 2014-2015 financial year contains data on the reported deficiency for the 12 industries with the highest number of external administrators' reports lodged.⁴⁵ Utilising this data we calculated an estimated lower and upper range for the top 12 industries for 2014-2015, and this is set out in Table 4. An examination of the data reveals that 46% of companies (4,371) in the top 12 industries failed with deficiencies at or below \$250,000. This group can be compared with the group of companies in the top 12 industries that failed with deficiencies in the \$1 million to less than \$5 million range. While this group only comprised 1,462 companies, Table 4 shows that it nevertheless accounted for the vast majority of estimated total deficiencies owed, at between \$1.46 billion to \$7.31 billion.

TABLE 4 Estimated Deficiencies for the top 12 industries – Shortfall between Estimated Assets and Estimated Liabilities 1 July 2014-30 June 2015

Deficiency categories	Total no. of companies	Estimated total range of deficiencies
\$0 - \$50,000	1,013	\$0 - \$50.65 million
\$50,001 - \$250,000	2,693	\$134.65 million - \$673.25 million
\$250,001 - < \$500,000	1,655	\$413.75 million - \$827.50 million
\$500,000 - < \$1 million	1,172	\$586.0 million - \$1.17 billion
\$1 million - < \$5 million	1,352	\$1.35 billion - \$6.76 billion
\$5 million - \$10 million	231	\$1.15 billion - \$2.31 billion
> \$10 million	238	> \$2.38 billion
Total	8,354	Total lower limit: \$6.01 billion Total upper limit: > \$14.17 billion

Source: ASIC, as compiled by the researchers⁴⁶

⁴⁵ This was based on data drawn from ASIC REP 456, n 31.

⁴⁶ ASIC REP 456, n 31, Table 34.

In 2009, the ATO estimated cost of illegal phoenix activity thus:

The cost to the Australian economy of phoenix and related practices has been estimated at between \$1 billion and \$2.4 billion a year. This cost includes competitors being unfairly priced out of business, trade creditors being left unpaid and employees missing out on vital superannuation payments. The Australian community also bears a significant part of this cost through reduced tax revenue.⁴⁷

We were not able to obtain any information explaining how this estimate was made. Somewhat more cautiously, in April 2015 the ATO reported in its submission to the Senate Standing Committee on Economics inquiry into insolvency in the Australian Construction Industry that potential phoenix groups it has identified, with links to around 360,000 entities, owed \$1.8 billion in debt collectively to the ATO, “although this is not all as a result of confirmed phoenix behaviour”.⁴⁸

There are more certain figures available in relation to ATO debt generally. The ATO classifies its debt as either “collectable debt” (ie those liabilities that are due and payable and not subject to dispute or the taxpayer is not subject to some form of insolvency administration) and “insolvency debt” (ie when liabilities are due and payable but the taxpayer is subject to some form of insolvency administration). These figures are contained in Table 5.

TABLE 5 ATO Total Debt and Insolvency Debt 1 July 2009-30 June 2015

Year ending 30 June	Total collectable debt (\$ billion) ^a	Insolvency debt (\$ billion) ^b	Insolvency debt as a percentage of collectable debt
2004 ^c	Detail not provided	\$1.16	N/A
2005 ^d	\$17.5	\$1.27	7.26%
2006 ^e	Detail not provided	\$1.72	N/A
2007 ^f	\$19.57	\$1.86	9.50%
2008 ^g	\$22.11	\$2.27	10.27%
2009 ^h	\$24.57	\$2.88	11.72%
2010 ⁱ	\$27.48	\$3.0	10.92%
2011 ^j	\$27.5	\$5.3	19.27%
2012 ^k	\$31.7	\$6.2	19.59%
2013 ^l	\$33.2	\$5.4	16.26%
2014 ^m	\$34.2	\$6.2	18.13%
2015 ⁿ	\$35.1	\$6.3	17.95%

Notes:

^a Inspector General of Taxation, *Debt Collection* (July 2015) [1.30].

^b Inspector General of Taxation, *Debt Collection* (July 2015) [1.30].

^c ATO, *Annual Report 2003-04* (2004) 42.

^d ATO, *Annual Report 2004-05* (2005) 48.

^e ATO, *Annual Report 2005-06* (26 September 2006) 103.

⁴⁷ ATO, *Targeting Tax Crime: A Whole-of-government Approach – July 2009* (July 2009).

⁴⁸ ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015) 20.

^f ATO, *Annual Report 2006-07* (10 December 2007) 74.

^g ATO, *Annual Report 2007-08* (3 October 2008) 45.

^h ATO, *Annual Report 2008-09* (8 October 2009) 54.

ⁱ ATO, *Annual Report 2009-10* (7 October 2010) 55.

^j ATO, *Annual Report 2010-11* (30 September 2011) 51.

^k ATO, *Annual Report 2011-12* (4 October 2012) 58.

^l ATO, *Annual Report 2012-13* (3 October 2013) 39.

^m ATO, *Annual Report 2013-14* (10 October 2014) 50.

ⁿ ATO, *Annual Report 2014-15* (October 2015) 44.

Source: ATO, as compiled by the researchers.

Small businesses consistently account for the majority of all collectable debt with the ATO.⁴⁹ In 2014-2015, the ATO determined that \$1.4 billion of debts were uneconomical to pursue. According to the ATO, in 2014-15, “[t]he ratio of debts uneconomical to pursue to ATO net cash collections was 0.4%, which is similar to [2013-14]”.⁵⁰

ANALYSIS

Despite the large amounts of information we obtained, we cannot definitively quantify the incidence and cost of illegal phoenix activity. There are three main reasons for this. First, the lack of data is clearly intertwined with the lack of a clear definition of illegal phoenix activity. Because phoenix activity per se is not illegal, much of the data captured where phoenix activity is mentioned could relate to legitimate business rescues rather than breaches of laws. An example of this is the extensive ATO “candidate” phoenix population. Any enforcement activity relates to laws which also capture non-phoenix behaviour, and generally speaking, regulators have not kept data about which enforcement actions relate to illegal phoenix activity. What makes phoenix activity illegal, such as a breach of directors’ duty related to an undervalued transfer of assets, is not easily discernible.

The second issue with the quantification of the incidence of illegal phoenix activity is that data on enforcement actions, even if they were correctly categorised into phoenix and non-phoenix, is not a proxy for the frequency with which this behaviour occurs. When the external administrators’ reports of director misconduct and the Dun & Bradstreet figures about directors of multiple failed companies are compared to the ASIC s 206F disqualification statistics, it is clear that enforcement action is taken in a very small proportion of cases. It must also be remembered that none of these three sets of figures actually expressly capture illegal phoenix activity.

The lack of data about the incidence of illegal phoenix activity could be overcome to a certain extent by external administrators recording when they believe that particular breaches have occurred in the phoenix context. Unfortunately, there is no scope on the present Regulatory Guide 16 documentation for external administrators to expressly report their suspicions about illegal phoenix activity. Adding a tick-box to this effect, as well as scope for comments, would greatly assist the task of quantifying the incidence of illegal phoenix activity and estimating its cost. ASIC rightly points out that “[e]xternal administrators are the front-line investigators of insolvent corporations”.⁵¹ Their work contributes towards “(a) maintaining the integrity of the marketplace; and (b) promoting investor and consumer confidence”.⁵² Ensuring that insolvency practitioners have adequate funding for their investigations and free access to information held on ASIC’s databases would also significantly improve the quality and usefulness of this reporting.

⁴⁹ ATO, *Annual Report 2013-14* (10 October 2014) 49; ATO, *Annual Report 2012-13* (3 October 2013) 35.

⁵⁰ ATO, *Annual Report 2014-15* (October 2015) 45.

⁵¹ ASIC, *Regulatory Guide 16 – External Administrators: Reporting and Lodging* (July 2008) RG16.4.

⁵² ASIC, *Regulatory Guide 16*, n 51, RG16.5.

The third issue confounding the quantification of the incidence and cost of illegal phoenix activity is the paucity of information about dormant companies. It is possible that dormant companies are being utilised as havens for illegal phoenix activity since they escape the scrutiny of external administrators prior to being deregistered. The very act of “phoenixing” – stripping the assets out of the company and transferring them to another entity – makes the company a difficult engagement for liquidators who risk not being paid for their services. Creditors are then faced with the difficult choice of putting up additional funds to seek the company’s liquidation or letting the matter go. If no one chooses to fund the liquidation, the company remains dormant until ASIC eventually deregisters it for failure to return documents and pay fees.⁵³

We could not discover the number of dormant companies that are deregistered by ASIC each year. The last time that ASIC published this figure was in 2007-2008,⁵⁴ when 23,565 such companies were deregistered. No ASIC deregistration figures are available for the years 2008 to 2011. After that time, ASIC’s annual report lists a total deregistration figure, which will also include those companies deregistered voluntarily by their controllers, as well as companies which are deregistered following external administration. According to ASIC’s annual reports, the total numbers of companies deregistered in 2012-2013, 2013-2014 and 2014-2015 were 105,627,⁵⁵ 109,147⁵⁶ and 112,714⁵⁷ respectively. In those same three years, the total numbers of companies entering some form of external administration (but not necessarily deregistered that same year) were 10,746, 9,822⁵⁸ and 9,177⁵⁹ respectively. It is readily apparent that deregistered companies outnumber companies in external administration by roughly ten to one. However, because there are no available statistics to show the numbers of voluntary deregistrations of solvent companies, we could not calculate even an approximate number of dormant companies deregistered by ASIC.

It is interesting to note that the inability to accurately quantify aspects of phoenix activity is not new. The 1996 ASC Phoenix Activity Research Paper contained the following comment:

The qualitative information gathered does not allow a definitive judgment to be made as to whether progression to careerist [phoenix offender] is assisted by professional advisers, either intentionally or unwittingly. Logic indicates that the involvement of professional advisers (like solicitors and accountants) is more likely to increase as the careerist becomes more professional. However, evidence neither supports or [sic] refutes this suggestion primarily because the information is simply not available.⁶⁰

The difficulties with obtaining reliable data about the size and cost of illegal phoenix activity prompt the question of how important that information is. Does it matter whether this is a \$1 billion or \$3 billion problem? In our opinion, it does matter and there is much to be gained from more accurate quantification. Accurate quantification is important for a number of reasons. It underpins calls for law reform; the need for greater enforcement and increased resources for regulators; and provides benchmarks for assessing the effectiveness of future enforcement efforts.

More accurate data on where the losses are actually occurring will allow for better assessment of our present laws to determine if they are properly targeted. It is generally accepted that the improper aspect of phoenix activity is the controller’s misuse of their position of power in the failed company to deliberately avoid the payment of debts. It is not illegal for a company to fail and for its controllers to start another business. These consequences of the separate legal entity of the company and the limited

⁵³ *Corporations Act 2001* (Cth) s 601AB.

⁵⁴ ASIC, *Annual Report 2007-08* (1 August 2008) 57.

⁵⁵ ASIC, *Annual Report 2012-2013* (10 October 2013) 47.

⁵⁶ ASIC, *Annual Report 2013-2014* (10 October 2014) 52.

⁵⁷ ASIC, *Annual Report 2014-2015* (15 October 2015) 66.

⁵⁸ ASIC, *Insolvency Statistics – Series 1: Companies Entering External Administration, January 1999-November 2014* (January 2015).

⁵⁹ ASIC, *Annual Report 2014-2015*, n 57, 66.

⁶⁰ Australian Securities Commission, 1996 ASC Phoenix Activity Research Paper, n 14, 47.

liability of its shareholders are usually considered, by company lawyers at least, to be sacrosanct. But what if it could be determined that the main losses to creditors were caused by legal but problematic phoenix activity? Would that make a difference to the government's approach to unfettered access to incorporation and the almost limitless right to become a director of any number of companies under the *Corporations Act*?

Section 206F already recognises that, even in the absence of proof of breach of directors' duties, ASIC may disqualify a director of multiple failed companies where it is satisfied that the disqualification is justified. A longer period of disqualification can be imposed by the court under s 206D. If statistics were available to show that, for example, the majority of resurrected businesses ended in failure, or that those who were incorporating their fourth or fifth phoenix company were almost certain to fail again, the government might change the requirements of s 206F. One way this could be done would be via automatic disqualification or restriction of directors involved in a specified number of failed companies unless they could prove before a court that they were a fit and proper person to manage companies in the future. Restriction provisions currently exist in the Republic of Ireland. Liquidators of Irish companies are required to apply to the High Court for a restriction order against the directors unless the Irish Regulator, the Office of the Director of Corporate Enforcement (ODCE), relieves them of the obligation.⁶¹ Where such an application is made directors of liquidated companies will be restricted for five years unless they satisfy the court that they "acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company"⁶² and that they cooperated with the liquidator.⁶³ Directors who are subject to a restriction order are prevented from being a director of a company unless it is adequately capitalised. The capital requirement for private companies is 100,000 in allotted paid up share capital, and in the case of a public company, 500,000.⁶⁴

It is interesting to note that tax law is not so reluctant to impose personal liability on directors for the defaults of their companies. The Commissioner of Taxation has the power to recover certain unpaid tax debts owing by the company from directors. Directors are under an obligation to "cause the company to comply with its obligation" to pay certain tax liabilities such as Pay-As-You-Go withholding (PAYG(W)) tax.⁶⁵ This obligation continues until the company has paid that tax or is wound up or placed into voluntary administration (VA). Directors become liable for a penalty through the issuance of a director penalty notice (DPN) if they do not cause the company to pay those liabilities by the due date. The DPN regime was amended in 2012 to extend its reach to unpaid superannuation guarantee charge (SGC) liabilities and to limit the circumstances in which directors can discharge a DPN by placing their company into VA or liquidation.⁶⁶

We requested information from the ATO about the use of the director penalty notice (DPN) provisions, and particularly the 2012 "lockdown" provisions that do not allow directors to escape personal liability via liquidation or VA if the company has not both reported and paid its PAYG(W) or SGC. This data had not been released publicly before. The ATO provided us with statistics relating to both standard and lockdown DPNs for the years 2010-2011 until 2014-2015, across four sectors – large, SME, micro and not-for-profit – and for both PAYG(W) and superannuation. For example, in 2014-2015, there were 1,474 lockdown DPNs and 2,004 standard DPNs relating to unremitted PAYG(W). Unfortunately, the data does not capture how many of the DPNs were issued to directors suspected of phoenix activity, whether legal or illegal. This is understandable given that the DPN mechanism is available to the ATO whether or not there has been any improper behaviour by directors. It is available simply because of the non-payment of those company obligations. Nonetheless, it is

⁶¹ *Companies Act 2014* (IE) s 683.

⁶² *Companies Act 2014* (IE) s 819.

⁶³ *Companies Act 2014* (IE) s 819.

⁶⁴ *Companies Act 2014* (IE) s 819.

⁶⁵ *Taxation Administration Act 1953* (Cth) Sch 1, Div 269-15.

⁶⁶ The *Taxation Administration Act 1953* (Cth) was amended by the *Tax Laws Amendment (2012 Measures No 2) Act 2012* (Cth) and the *Pay As You Go Withholding Non-compliance Tax Act 2012* (Cth), which came into effect on 29 June 2012.

useful in considering ways to tackle phoenix activity to know that nearly 3,500 directors were obliged to pay various unpaid company taxes in 2014-2015.

CONCLUSION

We do believe that quantification of the incidence and cost of illegal phoenix activity and of the enforcement of laws tackling illegal phoenix activity is important. So too is the quantification of legal but problematic phoenix activity. To improve the quality of the data, we urge regulators and liquidators to record their suspicions when they are receiving information, when investigating alleged phoenix operators, and when enforcing the laws under their control. It would also be useful for ASIC to repeat the 1996 ASC surveys into phoenix activity, this time with a greater understanding of the problem and the limitations of the 1995 research. The size of the sample surveyed should be expanded, given that there are now over two million proprietary limited companies in existence.

However, we do not believe that quantification should be an end in itself. The inability to quantify accurately should not be used as a reason to divert government attention and resources away from this problem. We should make sure that all interested parties continue to seek solutions even in the absence of accurate numerical benchmarks to assess their progress.

POSTSCRIPT

We have now learnt from ASIC that approximately 37,600 dormant companies were deregistered in 2014-2015.