

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

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Associate Professor Helen Anderson
Professor Ann O'Connell
Professor Ian Ramsay
Associate Professor Michelle Welsh
Hannah Withers



Melbourne Law School



**MONASH
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GLOSSARY OF COMMON ABBREVIATIONS

AAF – Assetless Administration Fund

AAT – Administrative Appeals Tribunal

ABR – Australian Business Register

ABS – Australian Bureau of Statistics

ACC – Australian Crime Commission

AFP – Australian Federal Police

ASC – Australian Securities Commission

ANAO – Australian National Audit Office

ASIC – Australian Securities and Investments Commission

ATO – Australian Taxation Office

CALDB – Companies Auditors and Liquidators Disciplinary Board

CDPP – Commonwealth Director of Public Prosecutions

DCT – Deputy Commissioner of Taxation

DEEWR – Department of Education, Employment and Workplace Relations (now the Department of Employment)

DOCA – Deed of Company Arrangement

DPN – Director Penalty Notice

EESS – Employee Entitlements Support Scheme

EXAD – External Administration

FEG – Fair Entitlements Guarantee

FWA – *Fair Work Act 2009* (Cth)

FWBC – Fair Work Building and Construction

FWO – Fair Work Ombudsman

GEERS – General Employee Entitlements and Redundancy Scheme

GST – Goods and Services Tax

IAPF – Interagency Phoenix Forum

IGT – Inspector-General of Taxation

JCPAA – Joint Committee of Public Accounts and Audit

LAP – Liquidator Assistance Program

MOU – Memorandum of Understanding

NITP - National Insolvent Trading Program

PAYG(W) – Pay As You Go (Withholding)

PEIS – Phoenix Early Intervention Strategy

PWC – PriceWaterhouseCoopers

RATA – Report As To Affairs

SGC – Superannuation Guarantee Charge

SGE – Superannuation Guarantee Estimate

SME – Small to Medium Enterprises

SRO – State Revenue Office

TAA – *Taxation Administration Act 1953* (Cth)

VA – Voluntary Administration

VLRC – Victorian Law Reform Committee

EXECUTIVE SUMMARY

PART 1: INTRODUCTION

- 1) This report was prepared by the Phoenix Research Team, which is made up of academics from Melbourne Law School and Monash Business School.
- 2) This report reproduces estimates by both government and non-government bodies of the incidence, cost, and enforcement of laws that address illegal phoenix activity. The Phoenix Research Team neither endorses nor dismisses these estimates.
- 3) Note that the main body of this report contains all the referencing for the comments made in this Executive Summary, and the reader is directed there to obtain further information.
- 4) The data contained in this report falls into two broad categories: first, data that was obtained from publicly-available sources, and second, data that was supplied by the regulators following a request by the Phoenix Research Team. The date range which was examined for each data source is noted within each entry in the main body of this report. The ranges cover different periods, depending on what the Phoenix Research Team was able to obtain. As such, each data set should be considered exclusively and not compared with data from other sources without taking the date differential into account.
- 5) Not all information relating to illegal phoenix activity obtained by regulators and other agencies is available to the public or to us, and therefore will not be represented in this report.
- 6) There is no specific offence of 'illegal phoenix activity'. For this reason, there is not, nor can there be, any accurate quantification of the incidence, cost or enforcement of illegal phoenix activity in Australia. The lack of an illegal phoenix activity offence means that the enforcement statistics in this report only capture actions under *other legislative provisions*, in circumstances where phoenix activity might be present.
- 7) The data contained in this report is therefore designed to provide context for others to make estimates of this behaviour. For example, it provides the numbers of liquidations, amounts paid by government employee entitlement schemes, and tables of enforcement actions taken by regulators that *could* relate to illegal phoenix activity. For example, 9,822 companies entered some form of external administration in financial year 2013-14; as such it is possible to state that no more than 9,822 companies in that year could have been placed into liquidation for the purpose of illegal phoenix activity. The Phoenix Research Team makes no estimate of how many of those 9,822 companies were the targets of such behaviour.
- 8) There are multiple parties with an interest in the eradication or minimisation of illegal phoenix activity. The key agencies that come into contact with illegal phoenix activity through their spheres of operation and administer laws or undertake enforcement activities to regulate it in some way are the Australian Securities and Investments Commission (ASIC), the Australian Taxation Office (ATO), the Fair Work Ombudsman (FWO), the Commonwealth Director of Public Prosecutions (CDPP), the Department of Employment, and the State and Territory Revenue Offices (SROs). These agencies are the key sources of the Phoenix Research Team's data.

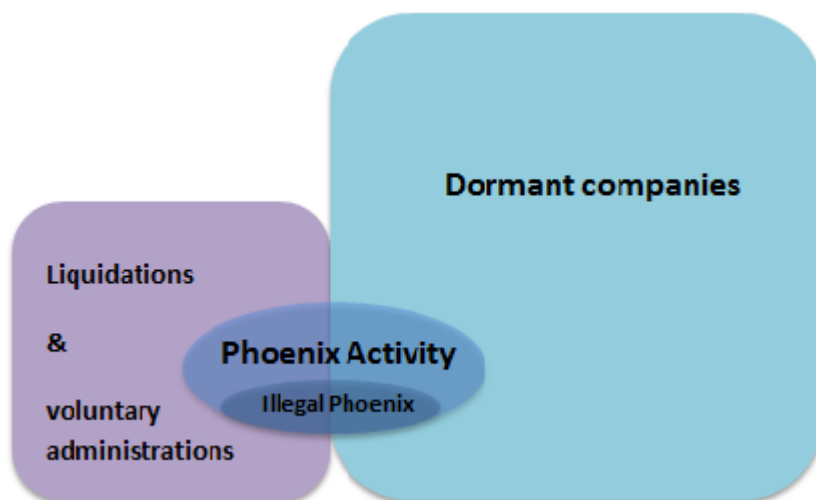
Statistics from different agencies do not always reconcile. Small amounts of data were also obtained from trade unions and credit ratings agencies.

- 9) Key relationships and partnerships exist between government agencies, regulated through various Memoranda of Understanding (MOUs). Additionally, there are two key inter-agency initiatives: the Australian Business Register (ABR) Phoenix Watchlist and the Inter Agency Phoenix Forum (IAPF). However, the dissemination of information held by regulators and other government agencies is subject to specific limitations contained in their governing legislation, as well as general limitations in privacy laws. These limitations must be borne in mind when reading this report.
- 10) ASIC maintains a database of company registration statistics. The database reported that 2,210,267 companies were registered in Australia in April 2015.
- 11) The industry with the most companies entering external administration in 2013-14 according to ASIC data was 'other (business & personal) services' with 3,124 companies, followed by construction with 1,802 companies, and then accommodation and food services with 819 companies.

PART 2: QUANTIFYING THE INCIDENCE OF ILLEGAL PHOENIX ACTIVITY

- 12) Because it can be legal for company controllers to rescue a failing business through the establishment of a new corporate entity, instances of suspected illegal phoenix activity may in fact involve no breach of the law.
- 13) Even where those dealing with an insolvency, such as liquidators, creditors or unions, have reason to suspect that the phoenix activity is illegal, this information is not necessarily communicated to relevant agencies such as ASIC, the ATO or FWO. As a result, this data is not captured.
- 14) The data in this report should also be considered in light of the substantial number of companies that remain dormant and are therefore not represented in external administration statistics. Dormant companies are not investigated by liquidators and may be a haven for illegal phoenix activity. The Phoenix Research Team believes that they outnumber liquidated companies ten to one.
- 15) Figure 1 depicts where legal phoenix activity and illegal phoenix activity sit within the broader context of business failures. The diagram demonstrates two key points: 1) not all phoenix activity is illegal; 2) some phoenixed companies may not be placed into liquidation or voluntary administration and simply may remain dormant.

Figure 1 Overlap between illegal phoenix activity, phoenix activity and liquidations/voluntary administrations within the context of all business failures – Not to scale



ASIC

- 16) Many of ASIC’s annual reports refer to illegal phoenix activity, acknowledge that it is a problem, and provide information about current programs and strategies adopted by the regulator to tackle the issue. However, aside from the most recent annual report, which states that, ‘6,223 companies [were] identified in the top 5 risk industries for the potential to conduct illegal phoenix activity’, ASIC’s annual reports generally do not contain statistics about the incidence of this activity.
- 17) External administration [EXAD] reports, compiled after the conclusion of a liquidation or voluntary administration, give ASIC information about suspected misconduct. Some of this could occur in the context of phoenix activity but the reports have no scope to indicate this.
- 18) Between 2011 and 2014, external administrators alleged misconduct in 28,787 reports, constituting 52,644 possible breaches. Misconduct was reported in nearly three-quarters of all EXAD reports, leading the Phoenix Research Team to conclude that there is either over-reporting of breaches or else that many company controllers commit breaches of the *Corporations Act 2001*(Cth) in the lead-up to or during insolvency. Because the Phoenix Research Team has no evidence as to which of these possibilities is true, no conclusions can be drawn.
- 19) To give a sense of possible current reporting of illegal phoenix activity, the Phoenix Research Team examined the allegations of criminal and civil misconduct in EXAD reports to isolate those that related to provisions that frequently arise in the context of phoenix activity. On average, external administrators suspected that there were more breaches of both the criminal and the civil insolvent trading provisions than of any of the other provisions reported upon.
- 20) External administrators reported that a company was assetless when it failed in 41.2% of EXAD reports over the course of the 2013-14 financial year. It is common for phoenix companies to

have few or no assets but companies may be assetless for reasons not associated with illegal phoenix activity.

- 21) In 1996, ASIC's predecessor, the Australian Securities Commission (ASC), produced its Phoenix Activity Research Paper which contained data about the number of complaints made to the regulator. It indicated that 43 complaints relating to phoenix activity were received by the ASC between 1 July 1995 and 31 January 1996. This represented only 1.06% of all complaints to the ASC nationally. However, a nationwide telephone survey of 390 small-to-medium enterprise (SME) operators conducted by ASC for the 1996 Research Paper indicated that 18% of the 390 SME 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 illegal phoenix activity to the authorities.
- 22) The Phoenix Research Team searched all ASIC media releases from 1 January 2004 to 30 June 2014 for directors that were disqualified by ASIC pursuant to s 206F of the *Corporations Act* in circumstances involving illegal phoenix activity, as well as searching the Administrative Appeals Tribunal (AAT) database for information on 206F disqualifications that had been reviewed by the AAT. Media releases using the term 'phoenix activity' showed that 51 directors were disqualified in circumstances involving problematic or illegal phoenix activity. This is a small percentage of all directors disqualified pursuant to s 206F. There were 165 companies involved in these 51 disqualifications.

ATO

- 23) The ATO's submission to the Senate Standing Committee on Economics Inquiry into Insolvency in the Australian Construction Industry in April 2015 reported that the regulator has identified 3,355 individuals in control of over 13,000 entities with a history of insolvency in the property development industry. The ATO reported that these entities form part of its phoenix risk population. Collectively, the 3,355 individuals have had in excess of \$2 billion of debt written off by the ATO and have claimed \$1.3 billion in GST credits over the past four years.
- 24) In the same submission the ATO reported 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 over time.
- 25) In 2011, the ATO estimated that, at any given time, there are around 6,000 phoenix companies operating in Australia, run by between 7,500–9,000 company directors. The ATO believes that a significant number of phoenix companies operate in the SME market — that is, enterprises with a turnover of \$2 million to \$250 million. However, the ATO also notes that phoenix operators are very active in the micro-market (below \$2 million turnover).
- 26) Through its internal modeling and sophisticated data collection techniques, the ATO has identified a 'phoenix' population. The phoenix population can be broken into two groups: the *confirmed* operators being those that have been audited and the *candidate* operators being those that are suspected of illegal phoenix activity but have not yet been audited.
- 27) Data provided by the ATO as at 1 August 2014 indicated that 19,714 candidate and confirmed phoenix groups were operating, comprising 335,837 unique entities. The ATO data reveals information about the characteristics of those entities; and in particular, their market segment, industry and state of registration.

- 28) As at 1 August 2014, the industry with the highest number of confirmed and candidate phoenix entities was the financial asset investing industry (30,646 entities), followed by the auxiliary finance and investment services industry (21,902 entities). Nearly 43% of confirmed or candidate phoenix entities in the top ten industries operate in either of these two financial services industries. The only building related industry that was represented in the top-ten list is the housing construction industry at tenth with 5,247 confirmed or candidate phoenix entities.

OTHER

- 29) In 2009, credit reporting agency Dun & Bradstreet issued a press release noting a 'dramatic spike' in the numbers of directors associated with multiple business failures and warned that a 'disturbing trend' was emerging of directors 'winding up companies only to become associated with others in a short period of time'.
- 30) According to a 2010 press report, Veda Advantage research found 'a significant rise in the number of phoenix companies since the GFC', with '[o]ne in 10 directors behind newly registered companies in March 2010 [being] linked to an adverse credit history with another company in the six months prior to starting the new company'.

PART 3: QUANTIFYING THE COST OF ILLEGAL PHOENIX ACTIVITY

ASIC

- 31) In its 1996 Phoenix Activity Research Paper, the ASC estimated that illegal phoenix activity caused annual losses to the Australian economy in the range of \$670 million to \$1.3 billion, representing 0.13% to 0.28% of gross domestic product.
- 32) One of the criteria that ASIC considers when conducting risk assessments of EXAD reports is the size of the reported deficiency (ie, the shortfall between the failed company's estimated assets and its estimated liabilities) of each liquidation. While a total yearly amount is unavailable, the Phoenix Research Team has calculated an estimated lower and upper range for 2013-14, based on data drawn from EXAD reports published by ASIC.
- 33) An examination of the data for 2013-14 reveals that the largest group of companies (3,065) were those that failed with deficiencies within the \$50,001 to \$250,000 range, for an estimated total range of \$153.25 million to \$766.25 million. This group can be compared with the group of companies that failed with deficiencies in the \$1 million to less than \$5 million range. While this group only comprised 1,462 companies, it accounted for the vast majority of estimated total deficiencies owed, at \$1.46 billion to \$7.31 billion.
- 34) It would be beneficial for EXAD reports to indicate smaller ranges of deficiencies so that more accurate quantification can be achieved. Given that external administrators must calculate deficiencies with reasonable accuracy and that reporting is a matter of ticking the appropriate box, this should not be difficult to achieve.
- 35) In 80.4% of 2013-14 EXAD reports, external administrators indicated that no wages were owed. In 12.3% of reports, external administrators estimated unpaid wages at between \$1 and \$10,000,

and in 7.2% of reports external administrators indicated that employees were owed between \$10,001 to over \$5 million.

- 36) ASIC media releases reported the amount of loss caused by the phoenix activity in nine cases relating to the disqualification of 13 directors. The Phoenix Research Team calculated that the average across all these cases was in excess of \$1.75 million per company. Among those media releases that did not specifically quantify the loss involved in the respective case, media releases relating to the disqualification of nine directors state that the companies involved failed owing 'substantial' or 'significant' amounts to the ATO and/or other creditors.

ATO

- 37) An examination of the ATO's debt holdings - particularly insolvency debt holdings held at the end of the financial year - is informative. Only a percentage of the debt reported as 'insolvency debt' will have accrued as a result of illegal phoenix activity and the Phoenix Research Team has no means to quantify what that percentage is.
- 38) Small businesses account for the majority of all collectable debt with the ATO (62.4%). In 2013-14, the ATO wrote off \$3.4 billion of debt as either irrecoverable at law or uneconomic to pursue, compared with \$1.2 billion of debt in 2012-13. At state-level, the total amount of tax debt written off by the Victorian State Revenue Office for the 2013-14 financial year was around \$28.7 million, and the total payroll tax owed for the same financial year was \$30.5 million.
- 39) As noted above one of the costs of phoenix activity borne by employees is the non-payment of superannuation. The ATO annual reports for the periods 2009-10 to 2013-14 indicate that this debt increased from \$82.2 million in 2011 to \$256.8 million in 2014. The 2010 Inspector-General of Taxation (IGT) report into the ATO's administration of the Superannuation Guarantee Charge (SGC) estimated that the amount of non-compliance was approximately \$1.5 billion at that time. However, the IGT report acknowledged that '[t]he actual SG non-compliance could actually be much greater than the figures suggest' since this amount only encapsulates known non-compliance 'raised through the employee lodging a SGC Statement or the ATO issuing a default assessment'.
- 40) The ATO reported in April 2015 that it is a creditor in 98.6% of total company winding-ups in the construction industry.
- 41) In July 2009, the ATO estimated the cost of illegal phoenix activity at between \$1 billion and \$2.4 billion each year. This estimate included 'competitors being unfairly priced out of business, trade creditors being left unpaid and employees missing out on vital superannuation payments'.
- 42) The ATO reported in its submission to the Senate Standing Committee on Economics Inquiry into insolvency in the Australian Construction Industry in April 2015 that potential phoenix groups it has identified, with links to around 360,000 entities, owe \$1.8 billion in debt collectively to the ATO, 'although this is not all as a result of confirmed phoenix behaviour'.

FEG, GEERS AND THE PWC REPORT

- 43) The Fair Entitlements Guarantee (FEG) applies to terminations of employees of insolvent employers after 6 December 2012. FEG and its predecessors, the Employee Entitlement Support

Scheme (EESS) and the General Employee Entitlements and Redundancy Scheme (GEERS), have cost approximately \$1.5 billion since they were introduced in 2001, only 14% of which has been recovered by the government via its right of subrogation in liquidations.

- 44) The various government safety net schemes cover all businesses in all of their forms, not just companies, so this figure overstates loss of entitlements of the employees of liquidated corporate employers. Conversely, there is a likelihood that corporate employee losses are understated because the scheme does not cover all entitlements. In addition, employees of dormant companies and companies in voluntary administration are not covered. Most importantly, it is impossible to know the proportion of employee entitlement losses covered by the schemes that result from illegal phoenix activity. GEERS and FEG data should therefore be treated with great caution in a discussion of employee losses through illegal phoenix activity.
- 45) In 2012, PriceWaterhouseCoopers (PWC) prepared a report for the FWO entitled 'Phoenix Activity Sizing the Problem and Matching Solutions' ('PWC Report'). The PWC Report 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. Amongst other things, data from GEERS was used by PWC as a basis for its modelling.

TREASURY

- 46) In November 2009, the Treasury released the Treasury Phoenix Proposals Paper in which it quoted the ATO's estimates that the losses caused by illegal phoenix activity were mounting and that it was costing the ATO around \$600 million per year in lost tax revenue.

PART 4: QUANTIFYING THE ENFORCEMENT OF LAWS TACKLING PHOENIX ACTIVITY

- 47) While illegal phoenix activity is neither legislatively defined nor expressly proscribed, there is a range of enforcement options available to a number of different regulators and enforcement agencies. These are set out in full in the Phoenix Research Team's *Defining and Profiling Phoenix Activity* report.

ASIC

- 48) In April 2015, ASIC noted it had 'identified approximately 2,500 directors who met the criteria for triggering the director disqualification provisions of the *Corporations Act* and who are currently operating over 7,000 registered companies'. ASIC is currently using an external data service provider to financially risk-rate those 7,000 companies to identify directors who may contemplate engaging in future illegal phoenix activity. Using that information, ASIC is actively engaging with directors whose companies are at greatest risk of being placed in external administration and using coercive powers to obtain information enabling ASIC to determine if these directors are likely to engage in illegal phoenix activity.
- 49) A search of ASIC's media releases from 1 January 2004 to 31 December 2014 detailed 19 separate occasions when ASIC applied for a declaration of contravention of civil penalty provisions alleging a breach of a director's duty. In only one of those applications did the facts giving rise to the alleged breach of duty amount to illegal phoenix activity.

- 50) The Phoenix Research Team's search of ASIC's media releases and the Austlii database did not reveal any ASIC applications commenced between 2004 and 2014 alleging directors had engaged in insolvent trading pursuant to *Corporations Act* s 588G in circumstances that may have involved illegal phoenix activity.
- 51) ASIC's principal enforcement avenue against directors of multiple insolvent companies is disqualification under s 206F. In 2013-14, there were 62 disqualifications under this provision. However, not all directors disqualified by ASIC under s 206F will have engaged in illegal phoenix activity.
- 52) Searches of the Austlii database were also undertaken to identify relevant court-based enforcement actions issued by ASIC between January 2004 and December 2014. A search for the term "206F AND corporations act" across all Austlii caselaw databases (for both state/territory and commonwealth cases) for the period January 2004 – December 2014 revealed a number of cases where a director was disqualified under s 206F or where ASIC was applying for such an order. Analysis of the remaining cases revealed that two cases involved phoenix activity.
- 53) A search for the term "206C AND corporations act" on all Austlii caselaw databases for the time period 1 January 2004 to 31 December 2014 showed that only three cases involved phoenix activity, and these three cases all pertained to the same matter, that of Somerville.
- 54) Searches were also undertaken on all Austlii caselaw databases for the time period January 2004 to December 2014 for the terms "206D AND corporations act" and "206E AND corporations act". These searches revealed a number of cases in which ASIC was seeking disqualification under one of these provisions or else where the disqualification had already occurred. None of the cases appeared to involve phoenix activity.
- 55) ASIC has had the Assetless Administration Fund (AAF) at its disposal since 2006, with funds provided by the government to finance 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 thorough investigations due to financial constraints. ASIC's Regulatory Guide 109 indicates that '[a] particular focus of the AAF is to curb fraudulent phoenix activity'. ASIC's EXAD report summary for 2013-14 noted that 459 of the 8,959 reports indicated the liquidator had applied or was intending to apply for funding from the AAF. The introduction of the AAF led to a sharp increase in the number of disqualifications ASIC has pursued under s 206F.
- 56) In 2013, ASIC published statistics on the total number of director disqualifications funded by the AAF between July 2006 and December 2011, stating that a total of 332 directors were disqualified and that 193 of those were as a result of AAF funding. This means that over half of all director disqualifications from July 2006 until December 2011 were funded by the AAF (58.13%)

ATO

- 57) The ATO's approach to phoenix activity is that of a creditor as well as a regulator. That is, the ATO can take action to seek to recover the amount owing in unpaid taxes but the ATO also has a number of other measures at its disposal that may be relevant in the phoenix context.

- 58) The ATO's Phoenix teams conduct reviews and audits. Reviews are primarily used to gain and develop a more in-depth understanding of the taxpayers' business operations and to assess whether there are phoenix or other risks that require further treatment. Audits may examine all aspects of taxpayers' tax affairs. In 2013-14, a total of 1,453 reviews were held and 303 audits were conducted.
- 59) After becoming aware of a suspected case of illegal phoenix activity, Phoenix Risk and Intelligence may determine that the matter is one that is suitable for early intervention under its Phoenix Early Intervention Strategy ('PEIS').
- 60) The ATO supplied the Phoenix Research Team with PEIS statistics drawn from its databases on 1 August 2014. Ninety-two groups with 542 group entities, of which 394 were active, were in this category in the 2013-14 financial year. One hundred and one letters were sent to directors of corporations within those groups and 92 letters were sent to tax agents.
- 61) As at 1 August 2014 the ATO determined that a number of matters were suitable for early intervention under its PEIS Lodgement scheme. Thirty groups made up of 292 group members and 180 active entities were created as of that date. In relation to those groups 48 letters were sent to directors and 30 were sent to tax agents.
- 62) As at 1 August 2014 the ATO estimated that there would be an additional 40 groups, comprising 400 group members and 240 active entities, referred by the ATO's phoenix risk and intelligence for PEIS lodgement before the end of the financial year.
- 63) The ATO initiates bankruptcies and liquidations for unpaid debt with a focus on businesses that are not engaging to address their debts and are obtaining an unfair financial advantage, or where there are indicators a business is trading insolvently. These companies and individuals are not necessarily involved in illegal phoenix activity. As such, the data shows the upper limit of bankruptcy and winding up procedures that might have been taken against illegal phoenix operators and their companies. In 2013-14, the ATO initiated 1,333 of the 9,916 liquidations that occurred in that year.
- 64) In June 2015, the Australian National Audit Office (ANAO) released a report entitled 'Promoting Compliance with Superannuation Guarantee Obligations – Australian Taxation Office'. According to the report, in 2014, approximately 846,000 employers were required to make Superannuation Guarantee (SG) payments on behalf of about 11.7 million employees to about 548,000 superannuation funds, totalling approximately \$77 billion. The ANAO report outlined the following key statistics in relation to SG entitlements:
 - a. The ATO received approximately 18,000 employee notifications of potential super underpayments each year between 2010 and 2014;
 - b. The ATO conducted between 5,000 and 6,000 audits of employers at risk of non-compliance with their SG obligations each year between 2010 and 2014, as a result of which the ATO raised approximately \$640 million and collected roughly half this amount per year in SG charge liabilities;
 - c. ATO audits had a strike rate of more than 70% when it came to identifying non-compliant employers and raising unpaid SG;

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

- d. Almost half (46%) of the cases finalised by the ATO over the period 2010-2014 represented a 'compliance issue' leading to a SGC being raised. Of the remaining 54% of cases finalised as 'no further action', almost a third were only classified this way due to employer insolvency, 'which meant that although employers were non-compliant and an SGC amount was due, it was likely to remain unpaid';
 - e. Between 2010 and 2014, the amount of debt relating to the SGC written off as a result of employer insolvency increased by 133%, from \$99 million to \$233 million;
 - f. In 2013-14 alone, the ATO wrote off \$257 million in SG debt, 91% of which related to insolvent employers;
 - g. The ATO issued DPNs to 219 insolvent companies with a SG charge debt in 2013-14.
- 65) The Phoenix Research Team searched the ATO website, ATO annual reports, and various ATO documents and was not able to find any statistics on the number of DPNs issued by the ATO over the period of the study. As such, the Phoenix Research Team requested data on DPNs from the ATO, who provided some information directly, and this is contained in the body of this report. It must be stressed that the issue of a DPN is triggered by the non-payment of PAYG(W) tax or superannuation. While some DPNs are issued to directors who have phoenixed their companies, the ATO does not record how many DPNs were issued in the phoenix context, and the Phoenix Research Team has no way of deriving or estimating that figure.
- 66) In August 2015, the ATO responded to a request for additional data on security bonds as little data is available publicly. In its response, the ATO stated: '[s]ince 1 July 2010, less than 100 security bond demands (SBDs) have been issued. Of these less than 20 complied. Several have been referred for prosecution however only 2 matters have been progressed to date'.
- 67) The Phoenix Research Team searched the ATO website, ATO annual reports, and various ATO documents and was not able to find any statistics on the number of persons prosecuted under s 8Y of the TAA. A search in Austlii for cases on this provision produced no useful results.
- 68) The ATO's dedicated phoenix risk management team refers some suspected phoenix matters to ASIC for investigation. In financial year 2013-14, the ATO sent 15 referrals to ASIC.

CDPP

- 69) The CDPP does not directly regulate illegal phoenix activity. It receives referrals from ASIC, the ATO, and the FWO in relation to criminal activity associated with the behaviour. The Phoenix Research Team was unable to ascertain how many referrals were made by the ATO, ASIC or the FWO to the CDPP relating to alleged criminal phoenix activity.

FWO

- 70) The FWO has no direct role in targeting phoenix operators, but has jurisdiction in relation to some consequences of phoenix activity, such as the non-payment or underpayment of employee entitlements. While the FWO is very active in recovering underpayment of employees' wages and other entitlements from corporate employers and their controllers as accessories, it keeps no data on those underpayments that occur in the phoenix context where the employer has been placed into liquidation. FWO refers suitable matters to ASIC.

CONCLUSION

- 71) This report acknowledges and outlines the difficulties associated with the quantification task in relation to phoenix activity, both for regulators and other agencies historically, as well as for the Phoenix Research Team in undertaking this empirical study.
- 72) Despite the efforts of the Phoenix Research Team to capture reliable and reconcilable statistics on the cost, incidence, and enforcement of laws dealing with illegal phoenix activity, this report demonstrates the absence of reliable relevant data.
- 73) At present, the inconsistencies and gaps in datasets relating to the incidence, cost, and enforcement of laws tackling illegal phoenix activity render its accurate quantification impossible. Nevertheless, in the opinion of the Phoenix Research Team, illegal phoenix activity is a significant problem that justifies the commitment of substantial government resources.

THE PROJECT

This is the second major output of the Phoenix Research Team on a project funded over three years under the Australian Research Council's Discovery Projects funding scheme (DP 140102277). The research project, entitled 'Phoenix Activity: Regulating Fraudulent Use of the Corporate Form', concerns a subject of real practical significance in Australia. Recently, the issue has become an urgent concern, as highlighted by the 2009 Treasury *Phoenix Proposals Paper*.¹

In recognition of the Government's stated need to find effective solutions to the issue of illegal phoenix activity, this project seeks to enhance Australia's economic stability by identifying the scale and scope of this activity and determining the optimal method of addressing the current misuse of the corporate form without unduly inhibiting its proper use. As this report will demonstrate, there is no reliable empirical evidence in Australia on the incidence or cost of illegal phoenix activity, and only a little data about its enforcement. The next stage of the project comprises interviews and surveys of insolvency practitioners and others to seek their views on the scope of the problem and to identify possible reform options.

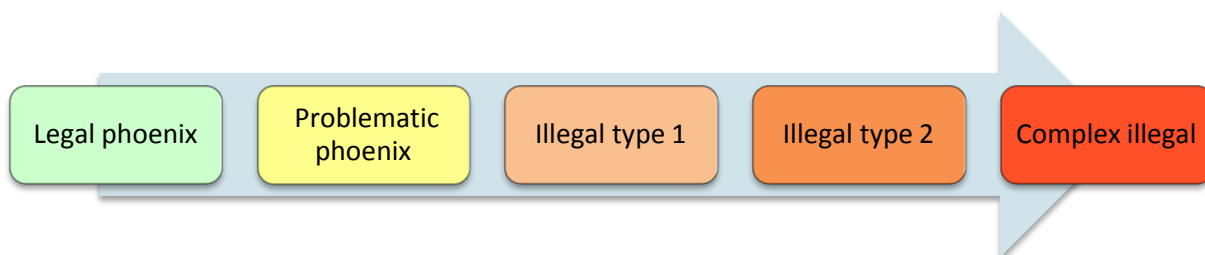
The first output of this project, *Defining and Profiling Phoenix Activity*, published in December 2014, profiled the characteristics of both legal and illegal phoenix activity to assist regulators (including but not limited to ASIC and the ATO) in formulating education, detection, and enforcement strategies. In the Phoenix Research Team's first report, *Defining and Profiling Phoenix Activity*, the Phoenix Research Team identified five categories of phoenixing, two of which are legal, and three of which are illegal.

The five categories

1. The legal phoenix, or business rescue
2. The problematic phoenix
3. Illegal type 1 phoenix: intention to avoid debts formed as company starts to fail

¹ Australian Government, Treasury, *Action against Fraudulent Phoenix Activity*, 2009 (2009 Treasury Phoenix Proposals Paper).

4. Illegal type 2 phoenix: phoenix as a business model
5. Complex illegal phoenix activity



Legal phoenix activity is often termed ‘business rescue’. Typically, a company ‘Oldco’ is in financial trouble and is placed in liquidation or voluntary administration, or becomes dormant. In this scenario, following the failure of Oldco, the same controllers or their associates transfer the assets of Oldco to a newly incorporated or existing entity, ‘Newco’, through which they carry on Oldco’s business.

The company’s controllers in this scenario have no intention to defraud creditors, including employees. In this scenario, considering all options, saving the business but not the company is the preferable course of action for the company’s controllers to take. The Phoenix Research Team’s conception of legal phoenixing presupposes that the outcome for the company’s creditors and/or employees is better than it would have been had the business not been resurrected. Legal phoenixing can also be beneficial to society at large because it encourages entrepreneurship. Based on these features, regulators should permit this type of phoenixing, which is a legitimate use of the company as a separate legal entity whose shareholders enjoy limited liability and are therefore not personally liable for the debts of the company.

What the Phoenix Research Team has termed the ‘problematic phoenix’ is technically legal and evidences no intention on the part of the company controllers to defraud creditors or avoid other obligations. However, the phoenixing is problematic because the resurrection of the business is not beneficial to creditors or wider society. One way of determining whether or not the resurrection of the business is beneficial is to look at the number of business failures associated with the same controller/s, and within each failure, to determine how much creditors receive of what they are owed. Did the entrepreneurs learn valuable lessons that they apply to their later business ventures? Or are the same mistakes being made? Governments need to decide as an issue of policy the extent to which problematic phoenix activity is tolerated.

Phoenixing becomes illegal where the intention of the company’s controllers is to use the company’s failure as a device to avoid paying Oldco’s creditors (who may include the company’s employees and revenue agencies) that which they otherwise would have received had the company’s assets been properly dealt with. The Phoenix Research Team has separated this into three types.

The first type of illegal phoenixing occurs where a company was set up with the best of intentions but nonetheless finds itself in financial difficulties. This could be as a result of bad luck or bad business practice. The intention to engage in the phoenixing behaviour is formed at a later time, at, or immediately prior to, the failure of the business. The controllers in this scenario deliberately seek to separate the business from its debts, including loans, tax debts, trading debts, judgment debts, or employee entitlements. The illegality of the behaviour turns on the improper intention of the company’s controllers, which inevitably involves a contravention of one or more laws such as the

directors' duties or the provisions governing the fraudulent removal of company property. Often a feature of this behaviour is the transfer of Oldco assets at below market value to Newco.

In the second type of illegal behaviour, the company is deliberately set up to be phoenixed; that is, its controllers never intend the company to succeed. After accumulating tax debts, trading debts, judgment debts or other liabilities, the controllers transfer the assets out of the company and liquidate it or leave it dormant to be eventually deregistered by ASIC. These actions are taken deliberately with the intent of separating the business from its obligations, and the same individuals may be involved in this behaviour repeatedly.

Company controllers in the illegal type 2 scenario may facilitate the illegal behaviour through a corporate group structure by deliberately undercapitalising a subsidiary then liquidating it to avoid the payment of tax liabilities and employee entitlements. The subsidiary's assets may have been transferred to another entity in the group prior to the liquidation in an uncommercial transaction, or alternatively, the subsidiary may never have owned any assets, acting simply as the contracting or labour hire arm of the corporate group. While some of a liquidated company's employees may be transferred to another entity in the group, especially where their skills are needed in the new business, it is common for employees to be made redundant so their outstanding wage, leave and redundancy entitlements are met by the government's safety net scheme, currently called the Fair Entitlements Guarantee.

Complex illegal phoenix activity exhibits the same characteristics as the second type of illegal phoenixing in that the company was deliberately set up to avoid payment of debts from the outset. However, complex illegal phoenix activity is also likely to coincide with other forms of illegality, such as:

- The use of false invoices, including GST fraud;
- False identities;
- Fictitious transactions;
- Money laundering;
- Visa breaches and misuse of migrant labour;
- Sham contracting.

A third report will address the regulatory approach taken towards this issue in international jurisdictions. Together, these endeavours will provide the first detailed investigation of illegal phoenix activity in Australia. They will enable the Phoenix Research Team to draw conclusions and make recommendations as to how an improved regime to tackle illegal phoenix activity may be most effectively implemented and enforced.

More information about the project can be accessed through the following website:

<http://law.unimelb.edu.au/cclsr/centre-activities/research/major-research-projects/regulating-fraudulent-phoenix-activity>.

THE PHOENIX RESEARCH TEAM

Helen Anderson is Associate Professor at Melbourne Law School specialising in corporations law. She holds an LLB (Hons) from the University of Melbourne, as well as a Grad Dip Bus (Acc), LLM and PhD from Monash University. She is a member of the Insolvency and Reconstruction Committee of the Business Law Section of the Law Council of Australia and an academic member of the Australian

Restructuring Insolvency and Turnaround Association (ARITA, formerly IPAA). Her teaching has predominantly been in the areas of Business Law and Company Law, and her abiding research interest has been the fair treatment of vulnerable parties. Her Master's major thesis dealt with parties who rely on published audit opinions, and her doctoral thesis was concerned with creditors in corporate insolvency. She continues this interest with her ARC funded work on improving the recovery rights of employees in corporate insolvency and this project, which looks at ways to regulate fraudulent phoenix activity. She has recently published a book entitled *The Protection of Employee Entitlements in Insolvency: an Australian Perspective*.

Ann O'Connell is Professor at Melbourne Law School specialising in taxation. She is Special Counsel at Allens Solicitors, a member of the Advisory Panel to the Board of Taxation, and a member of the ATO Public Rulings Panel and General Anti-Avoidance Panel (GAAR Panel). She was also a member of the Working Group established by the Assistant Treasurer in 2012 to consider the tax concessions for the Not-For-Profit Sector. Ann lectures in taxation and in corporations and securities regulation. In the Melbourne Law Masters program she teaches Taxation of Remuneration, Taxation of Superannuation, Taxation of Sport and Capital Gains Tax - Problems in Practice as well as Regulation of Securities Offerings and Regulation of Securities Markets. She is co-editor of *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) and co-author of *Incentivising Employees: The Theory, Policy and Practice of Employee Share Ownership Plans in Australia* (Melbourne University Press, 2013) and *Income Tax: Text, Materials and Essential Cases* (Federation Press) now in its 8th edition.

Ian Ramsay is the Harold Ford Professor of Commercial Law at the Melbourne Law School. Ian practised law in New York and Sydney and is a member of the Corporations Law Committee of the Law Council of Australia. Former positions he has held include Head of the Federal Government inquiry on auditor independence, member of the Australian Government's Corporations and Markets Advisory Committee, member of the Takeovers Panel, member of ASIC's External Advisory Panel, member of the Audit Quality Review Board, member of the Australian Government's Auditors and Liquidators Disciplinary Board, member of the Law Committee of the Australian Institute of Company Directors and member of the International Federation of Accountants taskforce on rebuilding confidence in financial reporting. Ian has published extensively on corporate law and corporate governance issues both internationally and in Australia.

Michelle Welsh is an Associate Professor in the Department of Business Law and Taxation, Monash Business School and is the coordinator of the Ethical Regulation Research Group in the Centre for Global Business and is the current President of the Corporate Law Teachers Association. Michelle undertakes research and supervision in the area of corporate law, corporate regulation, enforcement and compliance. Michelle has published her research in leading Australian corporate law journals and a number of international journals. Michelle's PhD thesis, concerning Civil Penalties under the *Corporations Act 2001* (Cth) was awarded the Melbourne University Law Faculty prize for the top PhD thesis in 2009. In 2013 Michelle was awarded the Dean's Award for Excellence in Research by an Early Career Researcher.

Hannah Withers is a full time Research Fellow on the regulating fraudulent phoenix activity project. She holds a Bachelor of Laws and Bachelor of Arts from the University of NSW and a Master of Human Rights (with Merit) from the University of Sydney.

THIS REPORT

The aim of this report is to capture all available data relating to the incidence, cost and enforcement of laws tackling illegal phoenix activity. While the report does shed some light on the possible upper limits of the incidence, cost and enforcement of laws relating to this activity, the available data does not allow firm conclusions to be drawn on any of these three issues. It is especially problematic to quantify either the incidence or cost of illegal phoenix activity.

In terms of enforcement, one difficulty with data collection is that there is no specific phoenix offence. Each enforcement action is therefore a breach of some other law *in the phoenix context*. For simplicity, the Phoenix Research Team calls this ‘illegal phoenix activity’, although the ATO’s chosen terminology, ‘fraudulent phoenix activity’ is also noted in parts of this report relating to the ATO. Because regulators do not always note whether they are enforcing their laws *in the phoenix context*, the Phoenix Research Team cannot categorically state the number of enforcement actions relating to illegal phoenix activity. However, data is available on total enforcement actions of laws relevant to phoenix activity, and therefore this data provides a maximum amount of enforcement that was undertaken in the phoenix context.

The report is useful in the following ways:

1. It provides important background information on the regulators and other enforcement agencies dealing with illegal phoenix activity or the symptoms of this behaviour in Australia. It contains statistics on the business environment in which illegal phoenix activity takes place.
2. It gives the reader as much data as is available to the general public about matters relating directly or indirectly to the incidence, cost and enforcement of laws tackling phoenix activity. This includes data collated and tabulated by the researchers from publicly-available sources.
3. It contains data obtained directly from regulators which is not otherwise available to the public.
4. It highlights the disparity of information obtained from different sources.
5. It encourages the government to put in place better data-gathering mechanisms.


The report comprises four parts:

1. **INTRODUCTION.** The introduction sets the scene by introducing the regulators and agencies from whom the Phoenix Research Team sourced the majority of the data contained in this report. The introduction also briefly explains the information flows that exist between these parties and others, either formally through memoranda of understanding (MOUs), or else through the referral of complaints. This section also notes other key sources of data used in this report and explains the report’s methodology. Importantly, this introductory part of the report contains valuable data to provide context about the total business population in Australia.
2. **QUANTIFYING THE INCIDENCE OF PHOENIX ACTIVITY.** This part begins by considering the insolvency landscape through published statistics on external administrations and business exits, obtained from the Australian Securities and Investments Commission (ASIC) and the Australian Bureau of Statistics (ABS). Tables show external administrator reports to ASIC about possible civil and criminal misconduct, whether relating to phoenix activity or otherwise. The little data available about the incidence of phoenix activity is then presented, including the

Australian Taxation Office (ATO)'s identification and quantification of 'confirmed' and 'candidate' phoenix groups.

3. **QUANTIFYING THE COST OF PHOENIX ACTIVITY.** This part presents data on the non-payment of tax and employee entitlements. There is no reliable way to quantify creditor losses that are attributable to illegal phoenix activity. However, the Phoenix Research Team has calculated some bands of cost based on information released by ASIC relating to director disqualifications.
4. **QUANTIFYING THE ENFORCEMENT OF PHOENIX ACTIVITY.** This part considers enforcement data on the various offences that can be committed as part of illegal phoenix activity. Because there is no specific phoenix offence, the Phoenix Research Team cannot say reliably that these enforcement actions relate to illegality *in the phoenix context*. Private enforcement data was not examined.

The report does not seek to recommend any solutions to tackle illegal phoenix activity, such as the creation of a specific phoenix offence. This task will be undertaken in a later report by this research team. However, it is recommended that regulators and others record comprehensive information from complaints or enforcement actions that arise where phoenix activity is suspected. This would give a clearer view of the incidence, cost and enforcement of laws in the phoenix context.

 Where this symbol is contained in the margins it indicates that additional relevant data is contained in [the appendix](#). Section numbers are also hyperlinked for convenience.

WHY QUANTIFY?

Quantifying the incidence, cost and enforcement of laws tackling illegal phoenix activity in Australia is important. Point-in-time data provides a benchmark against which future comparisons can be made. These comparisons may be important for the assessment of the impact of future changes to the law, including the introduction of new enforcement mechanisms, or changes to the relevant regulators' priorities, procedures, and resources. This allows, to a degree, an assessment of the effectiveness of measures taken to combat illegal phoenix activity.

It is useful to consider the amount of enforcement activity in the context of the available data on the incidence of illegal phoenix activity but it is important to be clear that the number of enforcement activities initiated by the relevant regulators does not provide any indication of the incidence of illegal phoenix activity.² Some studies that have sought to draw conclusions based on this type of data have been the subject of criticism.³ 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,

² See for example Bridget M Hutter 'Regulation: Standard Setting and Enforcement' (1993) 27 *Law and Society Review* 233, 246.

³ See for example Herbert M Kritzer, 'Enforcing the Selective Service Act: Deterrence of Potential Violators' (1978) 30 *Stanford Law Journal* 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.

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

resources, and surveillance capabilities. In other words, greater enforcement does not mean greater incidence of the behaviour, and vice versa.

Likewise, the reader should not draw adverse conclusions by comparing a large incidence figure with a small enforcement figure. For instance, 'there are X cases of phoenix activity in Australia costing the economy \$Y, yet only Z% of cases lead to enforcement action'. Resource constraints faced by most regulators mean that it is not possible to detect, investigate or initiate enforcement activity following every contravention that occurs. It is therefore unreasonable to expect the number of enforcement actions to equate to the number of suspected cases of illegal activity.

Finally, it is crucial to point out that the quantification task is not straightforward. Statistics are appealing because they appear to reduce complexity to simple and quotable numbers. However, the Phoenix Research Team cautions against firm conclusions being drawn on the incidence and cost of illegal phoenix activity in Australia. Based on information presently available, neither of these can be reliably known.

1. INTRODUCTION

Part 1 of this report explains the roles played by each of the key agencies in detecting and enforcing illegal phoenix activity and sets out the relationships between these agencies, including how information moves between them. The introduction also contains an explanation of the methodology used in compiling this report. The Phoenix Research Team's report recognises the difficulties faced by regulators in obtaining meaningful data about illegal phoenix activity, highlighting the key reasons for data deficiencies. Finally, Part 1 contains a section entitled Companies in Australia, which sets out useful background data to provide context to the data that follows in the main body of the report.

1.1. THE ROLES OF KEY REGULATORS

This section sets out the roles played by the key agencies that come into contact with illegal phoenix activity through their spheres of operation and administer laws or undertake enforcement activities to regulate it or mitigate its symptoms in some way. These agencies are the key sources of the Phoenix Research Team's data.

1.1.1. AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

The Australian Securities and Investments Commission (ASIC) is an independent Commonwealth government body mandated to regulate Australian corporations, markets and financial services. Formerly known as the Australian Securities Commission (ASC), the organisation changed names in 1998 when it assumed responsibility for consumer protection in superannuation, insurance and deposit-taking. Its role, functions and powers are set out in the *Australian Securities and Investments Commission Act 2001* (Cth) and it carries out the majority of its work under the *Corporations Act 2001* (Cth) ('*Corporations Act*').⁴ ASIC's mandate was expanded in 2010 to incorporate responsibility for regulating consumer credit, finance broking, trustee companies, and trading on Australian-licensed equity, derivatives, and futures markets.

1.1.2. AUSTRALIAN TAXATION OFFICE

The Australian Taxation Office (ATO) is an independent Commonwealth government body and is the principal revenue collection agency of the Australian government. The ATO administers federal taxation legislation and collects income tax, Goods and Services Tax (GST), the Superannuation Guarantee Charge (SGC) and other federal taxes on behalf of the Australian government. The ATO delivers various incentive and economic benefit programs, administers the Higher Education Loan Program, and oversees an increasingly important part of the Australian superannuation system, namely the more than 500,000 self-managed superannuation funds. The ATO is also the custodian of the Australian Business Register (ABR).⁵

⁴ ASIC, *How We Operate* (29 October 2014) <<http://www.asic.gov.au/about-asic/what-we-do/how-we-operate/>>.

⁵ ATO, *About Us* (4 November 2014) <<https://www.ato.gov.au/About-ATO/About-us/>>.

1.1.3. COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

The Commonwealth Director of Public Prosecutions (CDPP) is Australia’s Federal Prosecutor. It is an independent body mandated to prosecute Commonwealth criminal offences. The CDPP was established under the *Director of Public Prosecutions Act 1983* (‘DPP Act’). Though it operates independently of the Attorney-General and the political process, the CDPP falls within the Commonwealth Attorney-General’s portfolio, and the latter ‘has power under section 8 of the DPP Act to issue directions or guidelines to the Director’. These directions must first be tabled in Parliament.

1.1.4. DEPARTMENT OF EMPLOYMENT [FORMERLY THE DEPARTMENT OF EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS]

The Department of Employment has been in operation since 18 September 2013. Immediately prior to that time, the department formed part of a broader portfolio within the Department of Education, Employment and Workplace Relations (DEEWR). According to its website, the Department of Employment ‘is responsible for national policies and programmes that help Australians find and keep employment and work in safe, fair and productive workplaces’.⁶

1.1.5. FAIR WORK OMBUDSMAN

The Fair Work Ombudsman (FWO) is an independent statutory office established under the *Fair Work Act 2009* (Cth) (‘FWA’). Previously the FWO and Fair Work Commission were jointly known as Fair Work Australia. They are now independent government bodies. The FWO’s functions are set out in s 682 of the FWA and include ensuring compliance with Australian workplace laws, promoting harmonious cooperative and productive workplace relations, educating, assisting and advising Australian workers about their rights and obligations, referring matters to other relevant authorities and litigating to enforce workplace laws.

1.1.6. STATE AND TERRITORY REVENUE OFFICES

The State and Territory Revenue Offices (hereinafter referred to collectively as ‘SROs’) are responsible for administration and collection of duty (formerly stamp duty), land tax, payroll tax as well as a range of levies for each state and territory government in Australia. The structure of each SRO is determined by the relevant state or territory legislation. For example, the Victorian SRO operates under a framework agreement between the Victorian Treasurer, the Secretary of the Department of Treasury and Finance, and the Commissioner of State Revenue. The Victorian SRO also administers the First Home Owners Grant scheme.

1.2. RELATIONSHIPS BETWEEN AGENCIES

This section sets out key relationships and partnerships between the agencies listed in Part 1.1. It lists the various Memoranda of Understanding (MOUs) that exist between a number of these agencies, and explains the role of two key inter-agency initiatives in the phoenix activity space: the Phoenix Watchlist

⁶ Department of Employment, *About the Department* (28 October 2014) <<https://employment.gov.au/about-department>>.

and the Interagency Phoenix Forum (IAPF). This section also explains how relevant agencies share information with one another.

1.2.1. MEMORANDA OF UNDERSTANDING

A number of MOUs between regulators exist, although these do not result in publicly available data that can be utilised for the purposes of this report. These MOUs aim to assist the flow of information between regulators in order to assist them in their surveillance and enforcement efforts.

1. **ASIC and the ATO** signed a MOU in May 2007. It provides for general information sharing, for the implementation of taskforces, and for cooperation on specific areas of common interest;
2. **ATO and FWO** signed a MOU in October 2012. The Phoenix Research Team has not been able to obtain a copy of this document;
3. **ASIC and CDPP** signed a MOU in March 2006. It replaced an earlier memorandum created in 1992. It was updated to include references to ASIC's jurisdiction in relation to financial services and to reflect changes to the law. The MOU facilitates the working relationship between the two organisations;
4. **ATO and the Australian Federal Police (AFP)** signed a MOU in 2010. It provides a framework for co-operation between the two agencies in relation to the investigation of taxation cases and related matters;
5. **FWO and the FWBC** signed a MOU in 2012. It establishes an agreed framework regarding the cross-vesting of powers and functions between personnel of the Agencies and facilitates the exchange of information.
6. **ASIC and AFP** signed a MOU in October 2013. It governs cooperation on law enforcement issues and information-sharing, and 'establishes the overall framework, mutual objectives and principles as agreed by the participants'.

Other MOUs may exist between the agencies covered by this report but if so, the Phoenix Research Team was not able to locate them.

1.2.2. THE PHOENIX WATCH LIST

The Phoenix Watchlist ('the Watchlist') is administered by the Australian Taxation Office. The Watchlist is intended to allow participating agencies to disclose information about phoenix activity to the Commissioner. This information can then be accessed by other participating agencies. The Watchlist is still in its nascent stages having only become operational in January 2015.

1.2.3. INTER-AGENCY PHOENIX FORUM AND TASKFORCE

The IAPF was formed in 2011 'to identify, design and implement cross agency strategies to mitigate and deter fraudulent phoenix activity'.⁷

The Phoenix Taskforce ('the Taskforce') was subsequently established by the *Tax and Superannuation Laws Amendment (2014 Measures No 3) Regulation 2014* on 13 November 2014 to formalise the activities of the IAPF and to 'expand these activities by developing and using sophisticated data matching tools to identify, manage and monitor suspected fraudulent phoenix operators'. The *Taxation*

⁷ Explanatory Statement, *Tax and Superannuation Laws Amendment (2014 Measures No 3) Regulation 2014* (Cth).

Administration Regulations 1976 (Cth) were amended to give the Taskforce prescribed status, enabling the ATO to share “protected information” with taskforce members.⁸

The Taskforce is led by the ATO.⁹ Its other members are:

- ASIC
- Australian Crime Commission (ACC)
- ABR
- AFP
- FWO
- FWBC
- Department of the Environment
- Department of Employment
- Department of Immigration and Border Protection
- SROs
- Clean Energy Regulator
- Northern Territory Treasury
- Office of the Migration Agents Registration Authority.

1.2.4. INFORMATION FLOWS

There are multiple parties with an interest in the eradication or minimisation of illegal phoenix activity. These include the regulators and agencies nominated above, as well as liquidators, professional bodies such as ARITA, superannuation funds, trade unions, and of course creditors as victims.

However, information does not always flow freely between these parties. For example, unions commonly report suspected breaches of the FWA to the FWO and are seen as partners in enforcement, but they have indicated to the Phoenix Research Team that regulators other than the FWO are not receptive to their complaints about employers. The Phoenix Research Team is unable to ascertain the extent to which this is currently true, as we were advised that ASIC and the ATO have met with the CFMEU on several occasions and have given them the channels to make any referrals they deem necessary. Liquidators make statutory reports to ASIC under the *Corporations Act* but no information flows back to the liquidators that might be useful in either the current or any future liquidations involving identified suspected phoenix operators. The ATO can obtain extensive information from banks, but the reverse is not true. The ATO is constrained from reporting directly to banks and credit rating agencies regarding the taxes owed by companies or directors subject to Director Penalty Notices (DPNs).

Specific legislative provisions¹⁰ allow the sharing of tax information where that information is used for the purpose of investigation or enforcement activities that impose a pecuniary penalty or create an

⁸ *Tax and Superannuation Laws Amendment (2014 Measures No 3) Regulation 2014* (Cth) sch 1 item 1; *Taxation Administration Regulations 1976* (Cth) reg 48. This amendment commenced on 18 November 2014: *Tax and Superannuation Laws Amendment (2014 Measures No 3) Regulation 2014* (Cth) reg 2. It is an offence for taxation officers to disclose information that was disclosed or obtained for the purposes of a taxation law (‘protected information’); however, such information can be disclosed in connection with a purpose of a prescribed taskforce under sch 1 s 355-70 (exception regarding disclosure for law enforcement and related purposes): TAA sch 1 ss 355-25, 355-30, 355-70.

⁹ See ATO, *The fight against tax crime* (25 September 2014) See <<https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/Inter-Agency-Phoenix-Forum/Inter-Agency-Phoenix-Forum/?page=3#Membership>>.

offence. Other agencies are also governed by their own privacy restrictions. For example, s 127 of the *ASIC Act 2001* (Cth) provides that ‘ASIC must take all reasonable measures to protect from unauthorised use or disclosure information: (a) given to it in confidence in or in connection with the performance of its functions or the exercise of its powers under the corporations legislation’. However, it is open to the Chairman of ASIC to authorise disclosure of information where it ‘(b) will enable or assist the government, or an agency, of a State or Territory to perform a function or exercise a power; or ... (d) will enable or assist a prescribed professional disciplinary body to perform one of its functions’.

Another example is s 91 of the *Taxation Administration Act 1997* (Vic) which governs the Victorian SRO. This section provides that ‘(1) A person who is or was a tax officer must not disclose any information obtained under or in relation to the administration or execution of a taxation law, except as permitted by this Part’. Disclosure is permitted under s 92 in relation to the administration of a tax law or to a wide range of government agencies including the ATO, ASIC, and the Legal Services Board, provided, according to s 94, (a) the disclosure is made to enable the person to exercise a function conferred on the person by law for the purpose of the enforcement of a law or protecting the public revenue; and (b) the Commissioner consents to the disclosure’.

It is hoped that the relevant chairmen and commissioners exercise their powers and give consent to the sharing of information relating to illegal phoenix activity so that the objectives of the IAPF Prescribed Taskforce and Phoenix Watchlist can be met. Nevertheless, given that there is no specific phoenix offence, regulators may be wary of sharing information about breaches or suspected breaches of the laws they administer, lest they be accused of breaching confidentiality restrictions. This is a matter for the government to address.

While it is clear that privacy considerations do and should constrain some information flows, these limitations undoubtedly distort the collection of reliable statistics about the incidence and cost of illegal phoenix activity. More importantly, any unjustifiable limitations on the availability of information about those engaged in illegal phoenix activity interfere with the ability of potential victims of illegal phoenix activity to self-protect.

1.3. METHODOLOGY

As noted previously, there is no specific phoenix offence. As a result, all data relating enforcement contained in this report necessarily concerns enforcement in relation to breach of some other provision, such as the directors’ duties under the *Corporations Act*, or the imposition of some other liability, such as the issue of a DPN in the context of unremitted PAYG(W) taxes, or accessory liability for a company’s failure to pay wages, or disqualification of a director. The significant range of possible federal actions that may be taken in the phoenix context is set out in the Phoenix Research Team’s report *Defining and Profiling Phoenix Activity*, at <<http://law.unimelb.edu.au/cclsr/centre-activities/research/major-research-projects/regulating-fraudulent-phoenix-activity>>.

When searching for data on incidence, cost and enforcement the Phoenix Research Team initially collected data on all matters that could potentially involve phoenix activity. Where it was possible to do so, the data was scrutinised for the purpose of identifying those activities that clearly arose in the phoenix context. Where this was not possible, the data is described as including a broad range of

¹⁰ *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* (Cth).

activities, some of which may constitute illegal phoenix activity. This method of classifying the data is particularly useful in the context of enforcement because it allows the Phoenix Research Team to indicate the maximum amount of enforcement taken by the relevant regulators that could relate to illegal phoenix activity.

The data contained in this report falls into two broad categories: first, data that was obtained from publicly available sources, and second, data that was supplied by the regulators following a request by the Phoenix Research Team. This report is not a point-in-time capture of all data sources as at the date of this report. The date range which was examined for each data source is noted within each section. As such, each data set should be considered exclusively.

1.3.1. PUBLICLY-AVAILABLE DATA

In order to identify publicly-available data the Phoenix Research Team searched regulators' websites for documents that contained information about the incidence, cost and enforcement of activities that potentially involved illegal phoenix activity. The types of documents the Phoenix Research Team identified included media releases, annual reports, other regulator reports, Hansard transcripts, published statistics, speeches, and miscellaneous documents and webpages. The Phoenix Research Team also searched traditional legal databases, such as Austlii, and reviewed relevant scholarly articles. After identifying all relevant documents and other sources, the Phoenix Research Team undertook a content analysis to extract relevant data.

In relation to ASIC, the Phoenix Research Team searched the regulator's media releases for the period January 2004 to June 2014,¹¹ annual reports for the period 2003-04 to 2013-14¹² and enforcement reports for the period July-December 2011 to January-June 2014.¹³ The Phoenix Research Team searched for data relating to enforcement undertaken by ASIC including enforcement actions requiring a court order as well as administrative enforcement between 2004 and 2014. In addition, searches of the Austlii database were undertaken to identify relevant court-based enforcement actions issued by ASIC between January 2004 and December 2014.¹⁴ Data drawn from ASC's 1996 Phoenix Activity Research Paper¹⁵ and its evidence given to the 2003 Cole Royal Commission¹⁶ informed the sections of this report dealing with the cost and incidence of illegal phoenix activity.

The Phoenix Research Team examined external administrators' (EXAD) reports and other published insolvency statistics covering the financial years from 2008-09 to 2013-14 which contain data on the possible incidence of illegal phoenix activity.¹⁷ The Phoenix Research Team also searched the

¹¹ See ASIC, *Find a media release* (2 February 2015) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/>>.

¹² See ASIC, *ASIC Annual Reports* (20 May 2015) <<http://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/>>.

¹³ See ASIC, *ASIC Enforcement Outcomes* (3 March 2015) <<http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/>>.

¹⁴ Australasian Legal Information Institute (14 July 2015) <<http://www.austlii.edu.au/>>.

¹⁵ ASC, *Project One: Phoenix Activity and Insolvent Trading Public Version* (Research Paper 95/01, released May 1996) (1996 ASC Phoenix Activity Research Paper).

¹⁶ Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003), vol 8 (2003 Cole Commission Report).

¹⁷ See ASIC, *Insolvency statistics* (2 February 2015) <<http://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/>>.

Administrative Appeals Tribunal (AAT) database for information on director disqualifications issued administratively by ASIC that were appealed, for the date range January 2006 – June 2014, and analysed these cases for those that referred expressly or by implication to phoenix activity.¹⁸

Publicly-available ATO data drawn from numerous sources contributed to all three major sections of this report. The Phoenix Research Team searched the ATO's annual reports from 2005-06 to 2013-14,¹⁹ the ATO's *Compliance in Focus 2013-14*,²⁰ the ATO's *Compliance Program* from 2011-12 to 2012-13,²¹ and the ATO's *Targeting Tax Crime: A Whole of Government Approach* from the first edition in 2009 up until the latest edition in 2015.²² Other data was drawn from the ATO's website and from comments made by the regulator before the Joint Committee of Public Accounts and Audit (JCPAA).

Data relating to the FWO's enforcement actions against directors whose companies breached the FWA by underpaying wages or other entitlements to employees was derived from the FWO's litigation webpages between 2010 and 2014.²³

The Phoenix Research Team also searched the annual reports of the Department of Employment and its previous incarnations including DEEWR from 2000-01 to 2013-14.²⁴ Publicly-available data on the government safety net schemes, FEG and GEERS, is noted in relation to the quantification of the cost of illegal phoenix activity in this report. While there is no link between the amounts paid by the safety net scheme and the cost of illegal phoenix activity, data on the number of businesses where employees sought advances from FEG and its predecessors provides useful background information and is therefore also outlined in this report. This data was also the basis for the PriceWaterhouseCoopers (PWC) Report prepared for the FWO in 2012, noted in 3.2.3.²⁵

This report includes relevant background data extracted from the CDPP *2013/14 Annual Report*,²⁶ which was the most current at the time of the publication of this report. It includes data on summary and indictable charges issued by the CDPP, as well as data extracted from ATO annual reports from 2007 until 2014²⁷ on criminal investigations and prosecutions for tax offences undertaken by the CDPP.

FWO does not collect data on the incidence of illegal phoenix activity. Its significant contribution to the task of quantifying the cost and incidence of illegal phoenix activity has been the commissioning of the PWC Report.

¹⁸ Austlii, *Administrative Appeals Tribunal of Australia* (13 July 2015)

<<http://www.austlii.edu.au/au/cases/cth/AATA/>>.

¹⁹ ATO, *Access, accountability and reporting – Annual Report* (1 April 2015) <<https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/Reporting-to-parliament/Annual-report/>>.

²⁰ ATO, *Compliance in Focus 2013-14* (July 2013)

<https://www.ato.gov.au/uploadedFiles/Content/CS_C/downloads/CSC35735NAT74689.pdf>.

²¹ ATO, *Compliance Program 2011-12* (June 2011); ATO, *Compliance Program 2012-13* (July 2012) (on file with authors).

²² ATO, *The fight against tax crime* (29 June 2015) <<https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/Targeting-Tax-Crime-magazine/Targeting-tax-crime--A-whole-of-government-approach/>>.

²³ FWO, *Litigation* (2015) <<http://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation>>.

²⁴ Department of Employment, *Annual Reports* (19 June 2015) <<https://employment.gov.au/annual-reports?resource=>>>.

²⁵ PWC and FWO, *Phoenix Activity - Sizing the Problem and Matching Solutions* (June 2012) ('PWC Report').

²⁶ CDPP, *Annual Report 2013/14* (30 September 2014).

²⁷ ATO, *Access, accountability and reporting – Annual Report* (1 April 2015) <<https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/Reporting-to-parliament/Annual-report/>>.

This report contains a small amount of data from the Victorian SRO on outstanding revenue debt taken from its *Annual Review 2013-14*,²⁸ which gives a total of the amount of unremitted state taxes. At most, this figure provides the upper limit of what debt might be associated with illegal phoenix activity. The Phoenix Research Team was unable to estimate what proportion of that unpaid tax, particularly payroll tax, might relate to illegal phoenix activity, as this information is not collected by the SROs.

The Phoenix Research Team searched evidence and submissions made to relevant government inquiries including the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry²⁹ and submissions to the Productivity Commission's Inquiry into Business Set-up, Transfer and Closure.³⁰ The Phoenix Research Team also searched the submissions made to the Cole Royal Commission, as well as the 2003 Cole Commission Report itself.³¹ Recent transcripts of Senate Estimates hearings and JCPAA hearings were also searched more broadly for mentions of phoenix activity.

Other publicly-available documents searched for content relating to illegal phoenix activity included the 2009 Treasury *Action Against Fraudulent Phoenix Activity Proposals Paper*³² and various ANAO Reports.³³

In addition, publicly-available background data about the number and type of entities in Australia was obtained from the Australian Bureau of Statistics (ABS)³⁴ and the Department of Industry, Innovation, Science, Research and Tertiary Education.³⁵ Publicly-available reports of research conducted by credit ratings agencies Dun & Bradstreet³⁶ and Veda Advantage³⁷ were also examined and data included where relevant.

As yet, the ABR has not issued any publicly available data on the incidence, cost or enforcement of laws tackling phoenix activity.

²⁸ State Revenue Office of Victoria, *Annual Review 2014*.

²⁹ See Parliament of Australia, *Insolvency in the Australian construction industry* (2015)

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction>.

³⁰ See Australian Government Productivity Commission, *Business Set-up, Transfer and Closure Public inquiry* (2015) <<http://www.pc.gov.au/inquiries/current/business>>.

³¹ 2003 Cole Commission Report, above n 16; Royal Commission into the Building and Construction Industry (2001).

³² Treasury 2009 Proposals Paper, above n 1.

³³ ANAO, *Promoting Compliance with Superannuation Guarantee Obligations – Australian Taxation Office* (The Auditor-General ANAO Report No.39 2014–15 Performance Audit, 3 June 2015); ANAO, *ASIC's Processes for Receiving and Referring for Investigation Statutory Reports of Suspected Breaches of the Corporations Act 2001* (The Auditor-General Audit Report No.18 2006–07 Performance Audit, 24 January 2007); ANAO, *The Management of Compliance in the Small to Medium Enterprises Market - Australian Taxation Office* (The Auditor-General Audit Report No.16 2011-12 Performance Audit, 8 December 2011).

³⁴ ABS, *8165.0 - Counts of Australian Businesses, including Entries and Exits, Jun 2010 to Jun 2014* (2 March 2015); ASIC <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8165.0Main+Features1Jun%202010%20to%20Jun%202014?OpenDocument>>

³⁵ Department of Industry, Innovation, Science, Research and Tertiary Education, *Australian Small Business Key Statistics and Analysis* (December 2012).

³⁶ Dun & Bradstreet, *Australia Experiences a Dramatic Spike in Directors Associated with Multiple Business Failures* (2009) (Dun & Bradstreet Report).

³⁷ Peter Switzer, 'Solvency statement would bury phoenix companies', *The Australian*, 17 July 2010.

1.3.2. DATA REQUESTED FROM REGULATORS

In addition to the above, the Phoenix Research Team requested some data from the key regulators involved in the detection and regulation of illegal phoenix activity. Some of these requests were general in that the Phoenix Research Team asked for any available information held by the regulator in question pertaining to illegal phoenix activity. Other requests were specific, such as requests to ASIC for details of all administrative disqualifications and requests to the ATO for information on DPNs and the breakdown of the population identified by the ATO as ‘phoenix’ through its internal modelling.

The Phoenix Research Team is very grateful for the co-operation it has received from regulators who are members of the IAPF/Phoenix Taskforce. Throughout the report the Phoenix Research Team has acknowledged where the data in question was obtained through a direct request to a regulator.

1.3.3. DISPLAYING THE DATA

Throughout the report the Phoenix Research Team has acknowledged the method and source of the data and have provided a description of the way that it has been collated and displayed. Various methods have been adopted:

- Some data has been copied directly from the source. For example, an entire table may have been copied from the ABS.
- Other published tables have been trimmed or summarised. In some cases, the Phoenix Research Team displayed the data for the latest year or the totals for an item in the body of the report and indicated where the full table is available in the appendix at the end of this report.
- Some data was calculated by the Phoenix Research Team from larger published data sets. For example, in some instances percentages were calculated based on numbers presented in regulator publications.
- Some tables were compiled by the Phoenix Research Team from primary sources. An example is the data compiled by examining ASIC media releases.

1.4. LIMITATIONS OF THE DATA

The dissemination of information held by regulators is subject to specific limitations contained in their governing legislation, as well as general limitations in privacy laws. The Phoenix Research Team acknowledges these limitations and remind the reader that they must be borne in mind when reading this report.

It would be fair to say that while the regulators and others have been concerned about illegal phoenix activity within companies for at least 20 years, there has been no systematic attempt by anyone to capture reliable data on the incidence, cost, and enforcement of laws tackling illegal phoenix activity. In 1996, the ASC collected data on suspected phoenix activity via a survey of complaints made by phone, and published it in its 1996 ASC Phoenix Activity Research Paper.³⁸ This is discussed further at [2.3.2.1](#). It appears that there has been no further survey of this kind since.

³⁸ 1996 ASC Phoenix Activity Research Paper, above n 15.

In November 2009, Treasury released its *Action Against Fraudulent Phoenix Activity Proposals Paper*,³⁹ mentioned throughout this report. It estimated the cost of fraudulent phoenix activity in lost tax revenue to be \$600 million. The paper did not state the method of calculation of this figure.

The paucity of data relating to insolvency has been recognised previously. For example, Symes and Brown noted this in 2010⁴⁰ and called for ASIC to make a 1% sample of EXAD reports available on an anonymised basis for statistical research. The ATO does this in relation to individual tax returns. Governing legislation would need to be amended to allow ASIC to do this.

1.5. COMPANIES IN AUSTRALIA – BACKGROUND DATA

Section 1.5. provides statistics that show the overall environment of companies in Australia. This is intended to provide context for the data in Parts 2, 3, and 4 of this report concerning incidence, cost, and enforcement of laws tackling illegal phoenix activity.

1.5.1. ASIC COMPANY REGISTRATION STATISTICS

ASIC maintains a database of company registration statistics. [Table 1](#) outlines the number of companies registered in Australia as at December 2009 to April 2015.

Table 1 ASIC Company Registration Statistics December 2009 - April 2015⁴¹

Dec 2009	Dec 2010	Dec 2011	Dec 2012	Dec 2013	Dec 2014	April 2015
1,727,353	1,796,738	1,872,983	1,957,276	2,055,840	2,169,524	2,210,267

Source: ASIC

1.5.2. ABS STATISTICS

[Table 2](#) is extracted from the ABS March 2015 publication *Counts of Australian Businesses, including Entries and Exits, Jun 2010 to Jun 2014*.⁴² It shows the number of companies in Australia for the period June 2010 to June 2014.

Table 2 Number of Corporations in Australia June 2010 - June 2014⁴³

	Operating at start of financial year	Entries	Exits	Operating at end of financial year	Change	Percentage change	Entry rate	Exit rate
	no.	no.	no.	no.	no.	%	%	%
2010-11	688,651	94,051	80,380	702,322	13,671	2.0	13.7	11.7
2011-12	702,322	100,926	76,335	726,913	24,591	3.5	14.4	10.9
2012-13	726,913	88,566	93,271	722,208	-4,705	-0.6	12.2	12.8

³⁹ Treasury 2009 Proposals Paper, above n 1.

⁴⁰ Christopher Symes and David Brown, "What's the latest"? Corporate Insolvency Statistics' (2010) *Insolvency Law Bulletin*, 2.

⁴¹ ASIC, *Company Registration Statistics* (2 May 2015) <<http://asic.gov.au/regulatory-resources/find-a-document/statistics/company-registration-statistics/>>.

⁴² ABS, above n 34.

⁴³ *Ibid.*

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

2013-14	722,208	108,541	83,170	747,579	25,371	3.5	15.0	11.5
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Source: ABS

Further statistical information extracted from the *ABS Counts of Australian Businesses, including Entries and Exits, Jun 2010 to Jun 2014* is reproduced in [section 5.1](#) in the appendix, including data and tables on the following:

- The number and percentage of companies operating in 2010 which survived in the years leading up to 2014;
- Actively trading businesses by main state/territory of operation;
- Institutional sector of actively trading businesses;
- Type of legal organisation of actively trading businesses;
- Business entry and exit rates by number of employees;
- Business entry and exit rates by annual turnover;
- Business employment size ranges;
- Business turnover size ranges.

The extracted ABS data pertains to all businesses types (including corporations, partnerships, sole traders and trusts), and not just corporations.

[Section 5.10](#) in the appendix also contains data from Dun & Bradstreet research on payment of debt by businesses, and [section 5.9](#) contains 2012 data extracted from the Department of Industry, Innovation, Science, Research and Tertiary Education report *Australian Small Business Key Statistics and Analysis*, including:

- The number of businesses in Australia by industry as at June 2011, compared with the number of small businesses (defined as a business employing fewer than 20 people) ([Table 70](#));
- The amount of nascent (in the process of being created) and young firms (operational for up to four years) operating in Australia broken down by state and territory ([Table 71](#));
- The industry break-down for start-up small businesses; and
- Data on survival rates for start-up-firms after 36 months of operation.

2. QUANTIFYING THE INCIDENCE OF ILLEGAL PHOENIX ACTIVITY

This section of the report draws together all the available data on the incidence of illegal phoenix activity.

Three important limitations must be acknowledged:

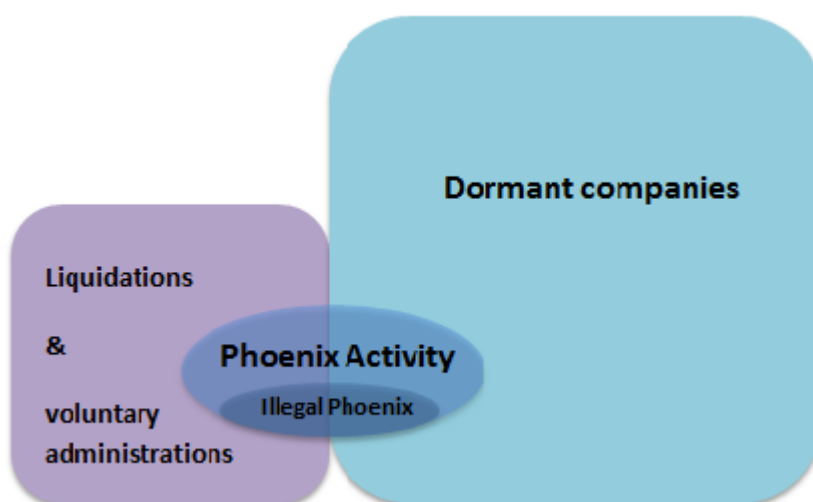
1. The lack of an illegal phoenix activity offence means that these statistics only capture breaches or suspected breaches of *other legislative provisions*, in circumstances where phoenix activity might be present;
2. Not all data is captured by regulators, and not all that is captured is publicly available;
3. For a variety of reasons, much of the data produced by regulators and others is only an estimate of illegal phoenix activity, and is not an actual quantification of it.

Estimates of the incidence of illegal phoenix activity were obtained from government sources, including the Treasury and government ministers, ASIC and the ATO. Some of the data contained in this section of the report was obtained from public sources and some was supplied by regulators upon request. The data collection methodology and sources were explained in the first part of this report.

2.1. BUSINESS FAILURES AND PHOENIX ACTIVITY

Figure 2 depicts where legal phoenix activity and illegal phoenix activity sit within the broader context of business failures. The diagram demonstrates two key points: 1) not all phoenix activity is illegal; 2) phoenixed companies are not all placed into liquidation or voluntary administration, they may remain dormant.

Figure 2 Overlap between illegal phoenix activity, phoenix activity and liquidations/voluntary administrations within the context of all business failures (not to scale)



2.2. RELEVANT BACKGROUND INFORMATION

The paucity of available data on the incidence of illegal phoenix activity means that estimates must be made. This background information is presented to show some upper limits of possible illegal phoenix

activity. For example, 9,822 companies entered some form of external administration in 2013-14; therefore it is possible to conclude that no more than 9,822 companies in that year could have been placed into liquidation for the purpose of illegal phoenix activity. The Phoenix Research Team makes no estimate of what proportion of those 9,822 companies were the targets of the behaviour. This report is not suggesting that the incidence is at or near this upper limit.

2.2.1. INSOLVENCY STATISTICS

According to ASIC, 50,453 companies entered external administration from the beginning of the financial year 2009 until the end of the financial year 2014. ASIC reported in its 2015 submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry that directors initiated the appointment of the liquidator in 59% (29,743) of all insolvencies across all industries.⁴⁴

The data contained in [Table 3](#) was extracted from ASIC’s January 2015 publication *Australian Insolvency Statistics*. It details the number of companies entering external administration for the financial years from 1999 until 2014, broken down by appointment type.

Table 3 Total Companies entering EXAD – by Appointment Type 1 July 1999 - 30 June 2014⁴⁵

Financial year	Court wind-up	Creditors wind-up	Voluntary administration	Other	Total
1999-00	1,412	691	1,533	569	4,205
2000-01	1,854	1,097	2,126	890	5,967
2001-02	2,279	894	2,482	756	6,411
2002-03	2,160	1,203	2,666	562	6,591
2003-04	2,329	1,280	2,488	452	6,549
2004-05	2,291	1,509	2,359	465	6,624
2005-06	2,727	1,790	2,784	517	7,818
2006-07	2,653	1,975	2,360	499	7,487
2007-08	2,472	2,732	2,064	639	7,907
2008-09	2,915	3,682	2,123	1,285	10,005
2009-10	2,446	3,939	1,527	1,369	9,281
2010-11	2,638	4,337	1,486	1,368	9,829
2011-12	3,180	4,741	1,523	1,313	10,757
2012-13	2,965	4,995	1,560	1,226	10,746
2013-14	2,971	4,428	1,207	1,216	9,822

Source: ASIC

The data in [Table 4](#) was taken from ASIC’s regulatory resources on its website. The table sets out the number of companies entering into a form of external administration for the first time each month from July 2013 onwards, broken down by industry. The website notes ‘[a] company will be included only once

⁴⁴ ASIC, *Senate Inquiry into Insolvency in the Construction Industry - Submission by the Australian Securities and Investments Commission* (April 2015), 3.

⁴⁵ ASIC, *Insolvency Statistics - Series 1: Table 1.3 Companies entering external administration, January 1999–November 2014* (January 2015).

in these statistics, regardless of whether it subsequently enters into another form of external administration. The only exception occurs where a company is taken out of external administration (eg as the result of a court order), and at a later date re-enters external administration'.⁴⁶

An examination of the data in [Table 4](#) reveals that the industry with the vast majority of companies entering external administration in the 2013-14 financial year was 'other (business & personal) services' with 3,124 companies, followed by construction with 1,802 companies, and accommodation and food services with 819 companies.

Table 4 Total Number of Companies entering EXAD by Appointment type and Industry 1 July 2013 - 30 June 2014⁴⁷

Industry	Court wind-up	Creditors wind-up	Voluntary administration	Other	Total for 2013-14
Other (business & personal) services	1,055	1,473	279	317	3,124
Construction	556	891	237	118	1,802
Accommodation & food services	223	431	92	73	819
Retail trade	237	388	103	37	765
Transport, postal & warehousing	166	206	66	40	478
Manufacturing	103	236	102	31	472
Unknown	1	0	0	320	321
Rental, hiring & real estate services	68	87	31	132	318
Information media & telecommunications	60	109	41	12	222
Wholesale trade	60	91	54	16	221
Financial and Insurance Services	81	65	32	40	218
Agriculture, forestry & fishing	55	49	20	94	218
Electricity, gas, water & waste services	56	92	29	12	189
Professional, scientific & technical services	40	74	24	11	149
Mining	29	49	51	17	146
Arts & recreation services	37	52	13	6	108
Health care & social assistance	28	31	13	13	85
Education & training	20	36	11	2	69
Public administration and safety	4	8	2	1	15
Total	2,899	4,420	1,207	1,296	9,822

Source: ASIC

To gain a more informed picture of the incidence of company insolvency by industry the data contained in [Table 3](#) and [Table 4](#) should be compared with the total number of registered companies in each industry in the same time period.

⁴⁶ ASIC, *Series 1A: Companies entering external administration - by industry, July 2013 – July 2015*, Table 1A2.1.

⁴⁷ Ibid.

Unfortunately, while data on the total number of *businesses* is publicly-available (including sole traders, partnerships, corporations, and trusts) (and contained in [Table 43](#) in the appendix), data on the total number of *companies* registered in each industry annually is not. Nevertheless, anecdotally, while it would appear that the construction sector is the main source of all external administrations, it is probable that more companies operate overall within the sector than other sectors, meaning that the percentage of companies entering external administration is far lower than the raw figure would suggest.

The high rates of company formation and liquidation within the sector do not automatically equate to high levels of illegal behaviour or improper exploitation of the corporate form. This is not to deny the prevalence of illegal phoenix activity in the construction industry; rather it should prompt better data collection from relevant regulators and enforcement agencies.

The above data should also be considered in light of the substantial number of companies that remain dormant and which are therefore not represented in external administration statistics.

2.2.2. LIQUIDATION STATISTICS

In a 2013 article in the *Australian Insolvency Journal*, author Amanda Phillips outlined the results of a survey she issued to all IPAA members who were registered liquidators (including official liquidators) at that time, representing approximately 80% of all registered liquidators in Australia. In response, Phillips received data from 16 official liquidators in relation to 90 liquidations (10% of the total amount of liquidations Australia-wide over the period spanning 1 July 2011 to 30 September 2011). Around 78% of responses related to NSW-based liquidations. Thirty-one official liquidators and ten registered liquidators who are not official liquidators provided responses to the survey's written questions but did not provide data. It must be borne in mind that limited conclusions can be drawn from this data given the small size of the sample.

Using the data Phillips amassed she created the profile of a 'typical' liquidation based on those categories that received the highest percentage in the survey results (extracted in full in [section 5.2.](#) in the appendix). The key findings were:

- The ...ATO... is the largest petitioning creditor for official liquidation matters in relation to the number of appointments.
- Most official liquidations take seven to 12 months to complete.
- The construction industry has the highest number of official liquidations followed by 'other (business and personal) services'.
- The majority of companies placed into official liquidation involve small businesses with a turnover of less than or equal to \$100,000, few or no employees at the date of liquidation and less than or equal to \$250,000 in unsecured creditor claims.
- 76 percent of official liquidations have realisable assets of less than or equal to \$10,000. 62 percent of official liquidations have realisable assets of less than \$1.
- 90 percent of official liquidations result in no dividend to unsecured creditors.⁴⁸

[Section 5.2.](#) in the appendix also contains Phillips' findings on costs borne by liquidators.

⁴⁸ Amanda Phillips, 'An analysis of official liquidations in Australia', *Australian Insolvency Journal* (April- June 2013), 4-5.

2.2.3. DORMANT AND DEREGISTERED COMPANIES

Dormant companies are companies that have ceased to trade but have not been liquidated, presumably because the costs of doing so exceed expected returns. 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 an unattractive engagement to liquidators who risk not being paid for their services.⁴⁹ Creditors are then faced with the difficult choice of putting up additional funds to seek the company’s liquidation or letting the matter go.

ASIC has the power to deregister dormant companies for failure to submit required annual paperwork and to pay fees.⁵⁰ Deregistration occurs when the company is removed from the register of companies, and the company ceases to exist at that time.⁵¹ The 2012 *Phoenixing Act* inserted a provision into the *Corporations Act* empowering ASIC to order the winding up of a company where it has reason to believe that the company is not carrying on business.⁵² The amendment was inserted principally in order to assist employees of dormant companies to access the federal safety net scheme, rather than as a means through which the company would be subjected to external administrator scrutiny.⁵³

It is not possible to accurately calculate the exact 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 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,⁵⁵ as well as companies which are deregistered following external administration. Companies entering liquidation are deregistered once the liquidator has carried out the realisation and distribution of the company’s assets. Companies entering voluntary

⁴⁹ If the liquidator takes on the engagement, they are required to perform certain statutory duties even if they will not be paid for doing so: *Corporations Act* s 545(3): ‘Nothing in this section is taken to relieve a liquidator of any obligation to lodge a document (including a report) with ASIC under any provision of this Act by reason only that he or she would be required to incur expense in order to perform that obligation.’ Otherwise, liquidators are not required to perform work for which they will not be paid: *Corporations Act* s 545(1).

⁵⁰ *Corporations Act* s 601AB.

⁵¹ *Corporations Act* s 601AD.

⁵² *Corporations Act* s 489EA(1)(c).

⁵³ Helen Anderson, ‘Comment on Consultation Paper 180: ASIC’s Power to Wind Up Abandoned Companies’, (2012) 30(8) *Company and Securities Law Journal*, 528-33. The Explanatory Memorandum to the *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth) stated at [1.10] that ASIC ‘will be able to take into account policy considerations [including] the ability for employees of the company to access GEERS, or suspicions of possible phoenixing behaviour by the directors of the company’. However, ASIC has also stated that ‘[i]n determining whether to exercise our power to wind up a company, our primary consideration will be to facilitate employee access to GEERS’. See ASIC, *Regulatory Guide 242: ASIC’s Power to Wind Up Abandoned Companies* (January 2013), 6.

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

⁵⁵ *Corporations Act* s 601AA(1). Voluntary deregistration is only available where the company’s assets are less than \$1000; it has paid all fees and penalties payable under this Act; has no outstanding liabilities; and is not a party to any legal proceedings: *Corporations Act* s 601AA(2).

administration may continue as they are, but a more likely outcome is that their business is sold, the creditors execute a deed of company arrangement or the creditors resolve to have the company liquidated. In these situations, again, the company itself will be deregistered at the conclusion of this process.

As a result, estimates of deregistered *dormant* companies are necessarily vague. According to ASIC's annual reports, the total numbers of companies deregistered in 2011-12, 2012-13, and 2013-14 were 97,198,⁵⁶ 105,627,⁵⁷ and 109,147⁵⁸ 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 10,757, 10,746, and 9,822⁵⁹ respectively. There are no readily available statistics that show the numbers of voluntary deregistrations of solvent companies.

It is vital to stress that even if a company is dormant and subsequently deregistered by ASIC for failing to submit returns and pay fees, the Phoenix Research Team has no way of estimating how many of those companies might be involved in the breaches of the *Corporations Act* or other laws that arise in the phoenix context. Nonetheless, given the fact that deregistered companies appear, very approximately, to outnumber companies in external administration by about ten to one, the Phoenix Research Team believes that this is an issue that deserves further investigation.

2.2.4. EXTERNAL ADMINISTRATORS' REPORTS STATISTICS

Following the completion of an external administration, liquidators, receivers and voluntary administrators must lodge statutory reports ('EXAD reports') through which they notify ASIC of any suspected misconduct. These reports do not contain a specific question about alleged illegal phoenix activity. As such, suspicions that illegal phoenix activity has occurred will be reported as a breach of some other provision, for example, breaches of directors' duties, insolvent trading, or 'other', rendering accurate quantification of illegal phoenix activity impossible.

The statistics below therefore represent reported suspected illegal behaviour, which may or may not involve illegal phoenix activity. It must be borne in mind that administrators may over-report the suspected illegal behaviour because they would rather be cautious than miss something; and conversely, it is also possible that under-reporting may occur. It should also be remembered that not every report of a breach of the directors' duties, insolvent trading or the uncommercial transaction provisions will necessarily amount to illegal phoenix activity.

Undoubtedly, even in the absence of a phoenix offence, it would be highly beneficial to the future quantification of illegal phoenix activity for external administrators to be able to report suspected illegal phoenix activity to ASIC. If such a change were made to the EXAD report, more accurate statistics of the suspected cases involving phoenix activity could be obtained.

2.2.4.1. EXAD REPORTS - POSSIBLE MISCONDUCT

⁵⁶ ASIC, *Annual Report 2011-12* (10 October 2012), 40.

⁵⁷ ASIC, *Annual Report 2012-2013* (10 October 2013), 47.

⁵⁸ ASIC, *Annual Report 2013-2014* (10 October 2014), 52.

⁵⁹ ASIC, *Insolvency Statistics - Series 1: Companies entering external administration, January 1999–November 2014* (January 2015).

Table 5 shows the numbers of reports in which external administrators alleged misconduct, as well as the number of breaches contained in those reports, between 1 July 2011 and 30 June 2014.

Table 5 EXAD reports - Possible misconduct reported 1 July 2011 - 30 June 2014⁶⁰

	2011-12			2012-13			2013-14		
	No. of reports	% of reports	No. of breaches	No. of reports	% of reports	No. of breaches	No. of reports	% of reports	No. of breaches
No misconduct reported	2,821	28%	-	2,493	26.9%	-	2,241	23.7%	-
'Possible misconduct' reported	7,253	72%	17,887	6,761	73.1%	16,652	7,218	76.3%	18,195
Total	10,074	100%	17,887	9,254	100%	16,652	9,459	100%	18,195

Source: ASIC, as compiled by the Phoenix Research Team

Misconduct was reported in nearly three-quarters of all EXAD reports. It is not possible to draw firm conclusions as to the accuracy of these figures given the possibility of over-reporting noted above.

ASIC's published insolvency statistics then break down these reports of possible misconduct further. For example, from July 2011 until June 2014, 15.7% of all reported criminal misconduct related to post-appointment misconduct (8,275 breaches), and 7.8% related to pre-appointment misconduct (4,086 breaches), as demonstrated by Table 6. The most common breaches during this timeframe were alleged breaches of civil obligations (39,636 or 75.3% of all reported misconduct).

Table 6 EXAD reports - Categories of possible misconduct 1 July 2011 - 30 June 2014⁶¹

Categories of possible misconduct	No. of breaches (% of breaches)			
	2011-12	2012-13	2013-14	Total
Alleged criminal misconduct under <i>Corporations Act</i> by officers or employees (pre-appointment criminal misconduct)	1,565 (8.8%)	1,322 (8.0%)	1,199 (6.6%)	4,086 (7.8%)
Alleged criminal misconduct under <i>Corporations Act</i> by officers or employees (post-appointment criminal misconduct)	2,970 (16.6%)	2,469 (14.9%)	2,836 (15.6%)	8,275 (15.7%)
Alleged breaches of civil obligations	13,093 (73.2%)	12,593 (76.0%)	13,950 (76.7%)	39,636 (75.3%)
Other criminal offences ⁶²	80 (0.4%)	60 (0.4%)	55 (0.3%)	195 (0.4%)

⁶⁰ ASIC, *REP 412 Insolvency statistics: External administrators' reports (July 2013 to June 2014)* (September 2014) (ASIC REP 412), Table 10; ASIC, *REP 372 Insolvency statistics: External administrators reports (July 2012 to June 2013)* (October 2013) (ASIC REP 372), Table 10; ASIC, *REP 297 Insolvency statistics: External administrators reports (1 July 2011 to 30 June 2012)* (September 2012), Table 17.

⁶¹ ASIC REP 412, above n 60, Table 13; ASIC REP 372, above n 60, Table 13; ASIC REP 297, above n 60, Table 18.

⁶² ASIC defines 'Other criminal offences' as including 'breaches by a member or contributory under the *Corporations Act* or breaches under other Commonwealth statutes or state or territory laws': ASIC REP 412, above n 60.

Other possible misconduct ⁶³	179 (1.0%)	118 (0.7%)	155 (0.9%)	452 (0.9%)
Total	17,887 (100%)	16,562 (100%)	18,195 (100%)	52,644 (100%)

Source: ASIC, as compiled by the Phoenix Research Team

To give a sense of possible current reporting of illegal phoenix activity, the Phoenix Research Team 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 of good faith, use of position, and use of information), s 588G(3) (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*.

Table 7 sets out the number of EXAD reports filed with ASIC for each financial year from 2008-09 to 2013-14 where the external administrator indicated that he or she suspected that criminal breaches of these provisions occurred. The behaviour which gave rise to the suspicion may or may not have involved illegal phoenix activity.

The figures in the table that are not in parentheses represent the number of EXAD reports filed with ASIC in the relevant years indicating that the external administrators suspected a breach of the *Corporations Act's* criminal provisions occurred. Some of these might involve illegal phoenix activity. The figures within parentheses represent the number of EXAD reports filed in the given year in which the external administrator indicated that they held documentary evidence of the suspected breach.

An examination of the data in Table 7 reveals that on average external administrators suspected that there were more breaches of the insolvent trading provisions than of any of the other provisions captured in the table.

Table 7 ASIC EXAD Reports – Suspected Criminal Activity 1 July 2008 - 30 June 2014⁶⁴

	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
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)
S 588G(3) Insolvent trading	678 (453)	651 (385)	604 (404)	536 (353)	408 (312)	381 (277)
S 596AB Agreements to avoid employee entitlements	13 (9)	14 (6)	9 (6)	8 (6)	13 (12)	5 (4)
S 590 Offences by officers or	154	155	146	166	113	116

⁶³ ASIC defines 'Other possible misconduct' as conduct that 'relates to people who have taken part in the formation, promotion, administration, management or winding up of the company and may have misapplied or retained, or become liable or accountable for, any money or property of the company; or been guilty of any negligence, default, breach of duty or trust in relation to the company: ASIC REP 412, above n 60.

⁶⁴ ASIC REP 412, above n 60, Table 22; ASIC REP 372, above n 60, Table 21; ASIC REP 297, above n 60, Table 24; ASIC, *REP 263 Insolvency statistics: External administrators reports (1 July 2010 to 30 June 2011)* (November 2011) (ASIC REP 263), Table 24; ASIC, *REP 225 Insolvency statistics: External administrators reports (1 July 2007 to 30 June 2010)* (December 2010)(ASIC REP 225), Tables 18 and 45; 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.

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Employees	(120)	(108)	(110)	(137)	(90)	(92)
Other criminal offences under the <i>Corporations Act</i>	52 (45)	53 (36)	59 (51)	58 (52)	97 (90)	47 (35)
Total	1,180 (841)	1,144 (721)	1,062 (758)	1,029 (748)	1,375 (668)	1,199 (862)

Source: ASIC, as compiled by the Phoenix Research Team

Table 8 contains data relating to the number of EXAD reports filed with ASIC in the relevant years indicating that the external administrators suspected a breach of civil obligations occurred. Illegal phoenix activity may be reported as a breach of these civil obligations but not all breaches of these obligations involve illegal phoenix activity. The civil breaches of the *Corporations Act* analysed by the Phoenix Research Team and set out in Table 8 are the directors' duties of s 180 (civil duty of care and diligence), s 181 (civil duties to act in the best interests of the company and for a proper purpose), s 182 (civil duty to properly use position), and s 588G(2) (civil duty to prevent insolvent trading).

As above in Table 7, the figures within parentheses represent the number of EXAD reports filed in the given year in which the external administrator indicated that they held documentary evidence of the suspected civil breach. The figures not in parentheses represent the number of EXAD reports filed with ASIC in the relevant years indicating that the external administrators suspected a breach of the *Corporations Act's* civil provisions occurred.

An examination of the data in Table 8 reveals for the financial years 2008 to 2014 that civil breaches of insolvent trading provisions account for the majority of suspected breaches nominated by external administrators in their EXAD reports, followed by suspected breaches of the civil duty of care and diligence.

Table 8 EXAD Reports – Suspected breaches of civil obligations 1 July 2008 - 30 June 2014⁶⁵

	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
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)
S 181 Good faith, best interests, proper purpose	790 (564)	839 (582)	789 (582)	1,114 (807)	1,204 (868)	1,302 (978)
S 182 Use of position	582 (443)	626 (491)	645 (481)	871 (683)	735 (601)	900 (713)
S 183 Use of information	216 (150)	257 (196)	257 (182)	296 (243)	217 (176)	295 (228)
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)
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)

Source: ASIC, as compiled by the Phoenix Research Team

⁶⁵ ASIC, *Australian insolvency statistics: Series 3.3 - External administrators' reports time series for 1 July 2004–30 June 2014* (October 2014), Table 3.3.16.3; ASIC REP 412, above n 60, Table 23; ASIC REP 372, above n 60, Table 22; ASIC REP 297, above n 60, Table 25; ASIC REP 263, above n 60, Table 24; ASIC REP 225, above n 60, Tables 19 and 46.

2.2.4.2. NUMBER OF EXAD REPORTS BY INDUSTRY

The three industries with the highest number of EXAD reports lodged in 2013-14 were: other (business and personal) services (2,482 reports or 26.2%), construction (2,153 reports or 22.8%) and accommodation and food services (916 reports or 9.7%). [Table 9](#) sets out the number of EXAD reports lodged by industry for the 2013-14 financial year.

Table 9 EXAD reports – No of reports lodged by Industry 1 July 2013 - 30 June 2014⁶⁶

Industry type	No.	%
Other (business and personal) services	2,482	26.2%
Construction	2,153	22.8%
Accommodation and food services	916	9.7%
Retail trade	870	9.2%
Transport, postal and warehousing	508	5.4%
Manufacturing	463	4.9%
Rental, hiring and real estate services	272	2.9%
Wholesale trade	244	2.6%
Information media and telecommunications	223	2.4%
Agriculture, forestry and fishing	195	2.1%
Professional, scientific and technical services	187	2.0%
Electricity, gas, water and waste services	179	1.9%
FIS—Other financial services	147	1.6%
Administrative and support services	143	1.5%
Mining	108	1.1%
Arts and recreation services	102	1.1%
Health care and social assistance	92	1.0%
Education and training	73	0.8%
FIS—Managed investments	54	0.6%
FIS—Credit provider	19	0.2%
Public administration and safety	11	0.1%
FIS—Insurance	8	0.1%
FIS—Superannuation	7	0.1%
FIS—Deposit taking institutions	3	0.0%
Total	9,459	100.0%

Source: ASIC

2.2.4.3. EXAD REPORTS 2013-14 - ASSETS

External administrators reported that a company was assetless when it failed in 41.2% of EXAD reports over the course of the 2013-14 financial year. Companies were reported as having estimated assets of \$10,000 or less in 61.8% of reports, \$100,000 or less in 85.6% of reports, and greater than \$250,000 in 8.6% of reports. The greatest percentage of reports estimating assets of \$10,000 or less were in the

⁶⁶ ASIC REP 412, above n 60, Table 9.

other (business and personal) services (71%), accommodation and food services (62.1%), and construction (60.4%) categories. Those that most exceeded this percentage for assetless administrations (41.2%) were the other (business and personal) services (50%), rental, hiring and real estate services (43.8%), and wholesale trade (40.6%) categories.⁶⁷

2.2.4.4. EXAD REPORTS - NOMINATED CAUSES OF FAILURE BY INDUSTRY (1 JULY 2011 TO 30 JUNE 2014)

Table 49 in the appendix contains data on nominated causes of failure for companies by industry contained in ASIC’s collation of EXAD report data for the years 2011-12 to 2013-14.

2.2.4.5. SUMMARY OF KEY EXAD STATISTICS

The data contained in Table 10 summarises the key findings from EXAD reports for the period July 2011 to June 2014.

Table 10 Summary of key information – EXAD Reports 1 July 2011 - 30 June 2014⁶⁸

	2011-12	2012-13	2013-14
No. of employees affected	<ul style="list-style-type: none"> 81% of reports concerned companies with less than 20 employees 	<ul style="list-style-type: none"> 81% of reports concerned companies with less than 20 employees 	<ul style="list-style-type: none"> 78% of reports concerned companies with less than 20 employees
Industries with most lodgements	<ul style="list-style-type: none"> Other (business and personal) services (2,482 reports or 26%) Construction (2,153 reports or 23%) Accommodation and food services (916 reports or 10%) 	<ul style="list-style-type: none"> Construction (2,245 reports or 24%) Other (business and personal) services (2,220 reports or 24%) Retail trade (904 reports or 10%) 	<ul style="list-style-type: none"> Other (business and personal) services (2,369 reports or 24%) Construction (2,229 reports or 22%) Retail trade (1,024 reports or 10%)
Top 3 nominated causes of failure	<ul style="list-style-type: none"> Inadequate cash flow or high cash use (4,031 or 43% of reports) Poor strategic management of business (3,975 or 42% of reports) Trading losses (3,078 or 33% of reports) 	<ul style="list-style-type: none"> Poor strategic management of business (3,908 or 42% of reports) Inadequate cash flow or high cash use (3,829 or 41% of reports) Trading losses (2,989 or 32% of reports) 	<ul style="list-style-type: none"> Poor strategic management of business (4,449 or 44% of reports) Inadequate cash flow or high cash use (4,048 or 40% of reports) Trading losses (3,326 or 33% of reports)
Top 3 alleged possible misconduct	<ul style="list-style-type: none"> s 588G(1)–(2) Insolvent trading (5,425 or 57% of reports) ss 286 and 344(1) Obligation to keep financial records (3,486 or 37% of reports) 	<ul style="list-style-type: none"> s 588G(1)–(2) Insolvent trading (4,872 or 53% of reports) ss 286 and 344(1) Obligation to keep financial records 	<ul style="list-style-type: none"> s 588G(1)–(2) Insolvent trading (5,075 or 50% of reports) ss 286 and 344(1) Obligation to keep financial records

⁶⁷ Ibid, 33-34.

⁶⁸ ASIC REP 412, above n 60, 6-7.

	<ul style="list-style-type: none"> • s 180 Care and diligence—Directors’ and officers’ duties (2,542 or 27% of reports) 	<ul style="list-style-type: none"> • s 180 Care and diligence—Directors’ and officers’ duties (2,302 or 25% of reports) 	<ul style="list-style-type: none"> • s 180 Care and diligence—Directors’ and officers’ duties (2,376 or 24% of reports)
Dividends to unsecured creditors	<ul style="list-style-type: none"> • In 97% of cases, the dividend estimate was less than 11 cents in the dollar 	<ul style="list-style-type: none"> • In 97% of cases, the dividend estimate was less than 11 cents in the dollar 	<ul style="list-style-type: none"> • In 98% of cases, the dividend estimate was less than 11 cents in the dollar

Source: ASIC

2.2.5. THE BUILDING AND CONSTRUCTION SECTOR

In its submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry, the construction sector union the CFMEU (Construction, Forestry, Mining and Energy Union) noted that around one in five of all insolvencies over the past decade occurred in the construction industry, and that ‘[t]he industry has consistently ranked either first or second amongst all industry categories for the number of mandatory reports lodged with ASIC by external administrators’.⁶⁹ Table 11 sets out the number of insolvencies in the sector from financial year 2004-05 until financial year 2011-12 as well as the percentage this number represents across all industries.⁷⁰

Table 11 Construction industry insolvencies compared to all industry insolvencies 1 July 2004 - 30 June 2012⁷¹

Financial Year	No. of construction industry insolvency events	Construction industry insolvencies as a percentage of all insolvencies
2004-05	935	20.1%
2005-06	1,177	20.3%
2006-07	1,396	20.3%
2007-08	1,517	21.9%
2008-09	1,760	22.8%
2009-10	1,905	24.1%
2010-11	1,862	23.1%
2011-12	2,229	22.1%

Source: CFMEU

The ATO’s submission to the same inquiry reported low payment-on-time rates and high levels of tax debt and insolvency within the small business segment of the construction industry.⁷² The submission

⁶⁹ CFMEU, *Senate Economics References Committee Insolvency in the Australian Construction Industry - Submission by the Construction, Forestry, Mining and Energy Union* (1 May 2015), 3.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, 7.

contained the following background statistics on the scale and incidence of debt in the construction industry:

- There are around 600,000 active taxpayer entities in the industry;
- Approximately 330,000 of these have a debt to the ATO; however the majority of these will pay the debt off within a year of it becoming due;
- Voluntary payment on time in the sector is low at 81% for activity statements and 44% for income tax liabilities in terms of the 'value of liabilities due'. This can be compared with 89.2% of the 'value of liabilities due' paid on time and 95.5% paid within 90 days within the general population of taxpayers;
- Almost 79% of insolvent tax debt covers businesses that were at least four years old and 21.4% of insolvent debt related to business that had been operating for less than four years;
- The state with the highest share of the construction industry's insolvent tax debt was NSW at 38.7%; Queensland and Victoria also had high figures of 20.0% and 23.4% respectively;
- Approximately 50% of the taxpayers in the sector are individual taxpayers (eg sub-contractors, tradespeople). Even though just under 21% are companies, they comprise 80% of the debt owed to the ATO;
- Due to the 'project-based nature of the construction industry, where new entities may be started for each project, some entities identified by the ATO as "micro entities" will be related to a large private group or high wealth individuals'.⁷³

Additionally, the ATO reported that in 2013-14 it issued DPNs to over 1,500 businesses operating in the construction sector, although these may or may not be associated with phoenix activity.

Master Builders Australia, the peak building and construction industry association, noted in its submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry that the high attrition rates for new firms within the sector were particularly concerning, with 27% of new firms failing within one year of commencing operation, 45% failing within two years, and 56% failing within three years.⁷⁴ These failed companies may or may not have closed their doors with unpaid debt.

In a recent report, ASIC observed that many companies involved in misconduct were in the construction industry.⁷⁵ ASIC also highlighted that while there is no specific phoenix offence, illegal phoenix activity may involve the offences contained in [Table 12](#) which shows the number of reports of alleged misconduct in the industry for each financial year dating back to 2009. These statistics should be read in the context of the overall reports of misconduct noted above in [Table 7](#), [Table 8](#) and [Table 9](#).

⁷² ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015), 5.

⁷³ *Ibid*, 18.

⁷⁴ Master Builders Australia, *Submission to the Senate Economic References Committee on Insolvency in the Australian Construction Industry* (April 2015), 1.

⁷⁵ ASIC, *Report 444, ASIC enforcement outcomes: January to June 2015* (August 2015), 34; ASIC, *Senate Inquiry into Insolvency in the Construction Industry Submission by the Australian Securities and Investments Commission* (April 2015), 30 [116].

Table 12 Statistics on reports of alleged misconduct in the construction industry 1 July 2009 - 30 June 2014⁷⁶

<i>Corporations Act</i>	2009-10	2010-11	2011-12	2012-13	2013-14
S 180	314	339	518	513	507
S 181	167	144	215	274	280
S 182	122	118	172	184	196
S 183	33	43	46	53	73
S 184	57	48	44	39	42
S 588G	896 (civil) 169 (criminal)	901 (civil) 164 (criminal)	1,101 (civil) 125 (criminal)	1,218 (civil) 109 (criminal)	1,220 (civil) 75 (criminal)
S 590	32	31	37	23	25

Source: ASIC

In its May 2015 submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry the CFMEU reported that ‘[m]ore than three quarters of all administrators’ reports lodged in 2013-14 identified some form of civil or criminal misconduct by insolvent companies and their directors’; and that more than 20% of these were attributable to the construction sector.

2.2.6. REPORT AS TO AFFAIRS BREACHES

Under s 475(1) of the *Corporations Act*, ‘[t]here must be made out and verified by a statement in writing in the prescribed form, and submitted to the liquidator, by the persons who were, at the date of the winding up order ... the directors and secretary of the company a report in the prescribed form as to the affairs of the company as at the date concerned’. This is called a Report as to Affairs (RATA). The purpose of the RATA, submitted by the company’s directors to the liquidator on Form 507, is to assist the liquidator in discovering what assets and liabilities the company has. Failure to provide the report is an offence (s 475(9)).

In the years 2011-12, 2012-13, and 2013-14, RATA breaches or failures to provide books and records to insolvency practitioners were recorded in 10%, 11%, and 13% of liquidations respectively.⁷⁷ According to ASIC’s answers to questions on notice to a Senate Standing Committee on Economics, from July 2006 until March 2010, ASIC prosecuted 1,955 officers in respect of 2,317 contraventions of RATA requirements.⁷⁸

There is no direct correlation between RATA breaches and illegal phoenix activity. At most, the data given here shows a degree of uncooperativeness of directors at the time of their company’s demise.

⁷⁶ Ibid, 22.

⁷⁷ ASIC, *Annual Report 2011-12* (10 October 2012), 48; ASIC, *Annual Report 2012-2013* (10 October 2013), 55; ASIC, *Annual Report 2013-2014* (10 October 2014), 60.

⁷⁸ Senate Standing Committee on Economics, *Answers to questions on notice (Treasury Portfolio)*, Supplementary Budget Estimates (20-21 October 2010, PSU Reference No. SBT 24), 2.

2.3. INCIDENCE OF PHOENIX ACTIVITY

This part of the report collates estimates as to the incidence of phoenix activity made by government and non-government sources.

2.3.1. ASIC

On a number of occasions ASIC and its predecessor the ASC produced reports, other documentation or oral evidence which shed light on the estimated incidence or extent of illegal phoenix activity. ASIC also publishes data from reports it receives from insolvency practitioners. The Phoenix Research Team first outlines the occasions on which ASIC or ASC estimated the incidence of illegal phoenix activity, before turning to an examination of its published insolvency statistics.

2.3.1.1. ASC PHOENIX ACTIVITY RESEARCH PAPER

In 1996, the ASC released its Phoenix Activity Research Paper which contained data about the number of complaints made to the regulator relating to phoenix activity. Typically those complaints came from three main sources: the public; statutory or informal reports from company liquidators, receivers, administrators and auditors; and from internally generated references sourced from intelligence reports, the media, referrals from other government agencies, surveillance, and internal inquiries.⁷⁹ The paper indicated that 43 complaints relating to phoenix activity were received by the ASC between 1 July 1995 and 31 January 1996. This represented only 1.06% of all complaints to the ASC nationally.

It is unlikely that the figure of 1.06% accurately reflected the incidence of illegal phoenix activity at that time. Some individuals affected by illegal phoenix activity would not have recognised the behaviour as such and would therefore not have reported it that way. Similarly, those dealing with complaints may not have accurately identified and reported activity as illegal phoenix activity.

The more accurate figure is likely to be the one reflected in the results of a nationwide telephone survey of 390 small-to-medium enterprise (SME) operators conducted by ASC for the research paper. The survey results indicated that 18% of the 390 small-to-medium enterprise (SME) 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 illegal phoenix activity to the authorities. The ASC Report stated that ‘the primary reason phoenix activity was not reported was because respondents did not expect the authorities to do anything about the complaint/activity’.

2.3.1.2. ASIC’S EVIDENCE TO THE COLE ROYAL COMMISSION

In 2003, the former ASIC Commissioner, Professor Berna Collier, gave evidence to the Cole Royal Commission in which she estimated the extent of illegal phoenix activity. In reaching her estimate, Professor Collier drew on the 1996 ASC Phoenix Activity Research Paper, anecdotal evidence, and complaints received by ASIC.⁸⁰

⁷⁹ 2003 Cole Commission Report, above n 16, vol 8, 128 [68].

⁸⁰ *Ibid*, 127 [67]. It should be noted that ASIC expressed concern about relying ‘heavily on anecdotal evidence without an appropriate level of underlying statistical support or analysis. Parliamentary Joint Committee on Corporations and Financial Services’ (PJC), *Corporate Insolvency Laws: A Stocktake* (2004) [8.21] referring to ASIC’s

After quoting the figures relating to the 1995-1996 period drawn from the 1996 ASC Phoenix Activity Research Paper, Professor Collier also provided the figures for two other periods. According to the Cole Commission Report:

Between 1 June 2001 and 31 May 2002, ASIC dealt with 12 434 complaints, of which 194 could be identified as related to phoenix activities within the terms of ASIC definition, representing 1.6% of all complaints. ASIC informed the Commission that between 1 July 2001 and 30 June 2002, it dealt with 11 897 complaints, of which 80 complaints could be identified as related to 'phoenix' type activity within the terms of the ASIC definition. This represented 0.7% of all complaints received by ASIC.⁸¹

The Phoenix Research Team is not aware of how the data presented by ASIC Commissioner Berna Collier to the Cole Royal Commission was collected.

Despite ASIC's evidence to the Cole Royal Commission that the number of complaints concerning illegal phoenix activity was relatively low, the following year ASIC did acknowledge that 'unlawful phoenix activity was a serious matter'.⁸² This acknowledgement was perhaps made in recognition of the results of the telephone survey of SMEs and the issues arising from defining and identifying the behaviour outlined in the preceding section.

2.3.1.3. ASIC ANNUAL REPORT 2013-14

Many of ASIC's annual reports refer to illegal phoenix activity, acknowledge that it is a problem, and provide information about current programs and strategies adopted by the regulator to tackle the issue. However, aside from the most recent report, which states that, '6,223 companies [were] identified in the top 5 risk industries for the potential to conduct illegal phoenix activity',⁸³ ASIC's annual reports generally do not contain statistics about the incidence of this activity. The most recent ASIC annual report states:

Our surveillance program targeted company directors with a history of failed companies to detect and combat illegal phoenix activity. During 2013–14, we identified a target 1,400 companies and 2,500 individuals in the building and construction, labour hire, transport, security and cleaning industries.⁸⁴

There is no similar quantification in ASIC annual reports back to 2000.

2.3.1.4. ASIC MEDIA RELEASES

The Phoenix Research Team searched all ASIC media releases from 1 January 2004 to 30 June 2014 for directors that were disqualified by ASIC pursuant to s 206F of the *Corporations Act* in circumstances involving illegal phoenix activity, as well as searching the AAT database for information on 206F disqualifications that had gone to appeal. ASIC's use of s 206F is discussed in more detail in Part 4 of this report.

response to and comments on Final Submission of Counsel Assisting concerning Phoenix Companies, 20 December 2002, Cole Royal Commission.

⁸¹ 2003 Cole Commission Report, above n 16, vol 8, 128 [70].

⁸² Parliamentary Joint Committee on Corporations and Financial Services' (PJC), *Corporate Insolvency Laws: A Stocktake* (2004) [8.21].

⁸³ ASIC, *Annual Report 2013-2014* (10 October 2014), 22.

⁸⁴ *Ibid*, 43. See also ASIC, '13-253MR ASIC surveillance targets illegal phoenix activity' (Media Release, 9 September 2013).

This 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 activity⁸⁵ (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). The definitions of problematic and illegal phoenix activity are outlined in the **preface** to this report. This is a small percentage of all directors disqualified pursuant to s 206F. There were 165 companies involved in these 51 disqualifications.

Nevertheless, and while the number of directors disqualified is not of itself a measure of the incidence of problematic or illegal phoenix activity, a closer examination of the relevant media releases reveals interesting information about the characteristics of the companies that were phoenixed and reflects the broader need for enhanced data collection by regulators. The results of this search are further discussed at **3.2.1.** and **4.2.1.4.** of this report.

The data in **Table 13** was taken from these 32 ASIC media releases. It provides further information about the timing of the transferral of assets involved in the problematic or illegal phoenix activity. It is only explicitly stated that one director deliberately undercapitalised the phoenixed company from its inception. Media releases covering the disqualification of 40 of the directors explicitly state that the assets were transferred from the phoenixed companies prior to the company entering external administration and a further three media releases *imply* that this was the case. Two of the directors that were subsequently disqualified transferred assets *during* external administration.

Table 13 Timing of the transferal of assets in s 206F disqualifications – as reported in ASIC media releases 1 January 2004 - 30 June 2014⁸⁶

Timing of the phoenix activity	Number of Directors
Media release explicitly states that the director/s in question deliberately undercapitalised the phoenixed company from its inception.	1
Media release explicitly states that the director/s in question transferred assets from the phoenixed company prior to the company entering external administration	40
Media release implies that the director/s in question transferred assets from the phoenixed company prior to the company entering external administration	3
Media release explicitly states that the director/s in question transferred assets <i>during</i> external administration	2
Neither implied nor explicitly mentioned	5
Total	51

Source: ASIC Media Releases as analysed by the Phoenix Research Team

The majority of the 51 directors disqualified by ASIC pursuant to s 206F transferred assets from the phoenixed company prior to the company entering liquidation.

⁸⁵ In the Phoenix Research Team’s first report *Defining and Profiling Phoenix Activity* we identified five categories of phoenixing; two of which are legal, and three of which are illegal.

⁸⁶ Media releases are available on the ASIC website, see ASIC, *Find a media release* (2 February 2015) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/>>.

Only a small number of media releases specifically mentioned the location of the companies affected by the phoenix activity that led to the disqualification under s 206F (as opposed to mentioning where the director/s was or were based). Media releases mentioned the locations of only 18 out of a total of 165 companies. The locations of 147 companies were not mentioned. Eight were based in New South Wales, six in Queensland, three in the Australian Capital Territory and one in Victoria.

2.3.2. ATO

Unlike ASIC, the ATO is primarily interested in phoenix activity as a creditor. Typically this arises because of an employer's failure to remit PAYG(W), failure to make superannuation contributions on behalf of employees, or failure to account for GST collected. The ATO has made submissions and provided evidence to various committees relating to the estimated incidence or extent of illegal phoenix activity.

2.3.2.1. ATO DATA THAT IS PUBLICLY AVAILABLE

The ATO has previously estimated that, at any given time, there are around 6,000 phoenix companies operating in Australia.⁸⁷ Not all of those companies are run by a single director. In 2011, the ATO estimated that at any particular time, there are around 7,500-9,000 company directors who are fraudulent phoenix operators.⁸⁸ The ATO believes that a significant number of phoenix companies operate in the SME market — that is, enterprises with a turnover of \$2 million to \$250 million.⁸⁹ The ATO also notes that phoenix operators are also very active in the micro-market (below \$2 million turnover).⁹⁰ However, the ATO acknowledged in Treasury's 2009 *Action Against Fraudulent Phoenix Activity Proposals Paper* ('2009 Proposals Paper') that illegal phoenix activity had been observed amongst large businesses in the years prior 'by individuals who already have significant levels of wealth'.⁹¹

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.⁹²

⁸⁷ Evidence to House of Representatives Standing Committee on Economics, Parliament of Australia, Canberra, 27 October 2011, 29 (Grant Darmanin, Senior Director/Phoenix Risk Manager, Australian Taxation Office). In 2009, the ATO's Second Commissioner, Bruce Quigley, told the Committee that since 2008 the ATO employer obligations audit program had identified 6,013 employers as being a high-risk of defaulting on their obligations — of these over 4,600 had not complied with their PAYG withholding obligations and almost 3,000 had not met their superannuation guarantee obligations: Evidence to Joint Committee of Public Accounts and Audit, Parliament of Australia, Canberra, 23 October 2009, 26–7 (Bruce Quigley, Second Commissioner, Australian Taxation Office).

⁸⁸ Evidence to House of Representatives Standing Committee on Economics, Parliament of Australia, Canberra, 27 October 2011, 29 (Grant Darmanin, Senior Director/Phoenix Risk Manager, Australian Taxation Office).

⁸⁹ ATO, *Inter-Agency Phoenix Forum Minutes: Update on the analysis of GEERS data* (1 August 2012) <<https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/Inter-Agency-Phoenix-Forum/Inter-Agency-Phoenix-Forum-minutes---1-August-2012/?page=9>>.

⁹⁰ Evidence to House of Representatives Standing Committee on Economics, Parliament of Australia, Canberra, 27 October 2011, 29 (Grant Darmanin, Senior Director/Phoenix Risk Manager, Australian Taxation Office); Treasury 2009 Proposals Paper, above n 1, 6. See also Explanatory Memorandum, Tax Laws Amendment (2012 Measures No. 2) Bill 2012 (Cth), Pay as You Go Withholding Non-compliance Tax Bill 2012 (Cth), Income Tax (Managed Investment Trust Withholding Tax) Amendment Bill 2012 (Cth), 48 [1.181].

⁹² ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015), 20.

In 2009, Mr Mark Konza, Deputy Commissioner of Taxation of the SME market, told the JCPAA in answer to a question about the number of phoenix cases prosecuted in the preceding 12 months: '[t]he incidence of phoenix activity is growing. It is hard to say whether it is due to the economic conditions or whether it is due to people promoting and getting more involved in such activities'.⁹³

In an earlier appearance before the same Committee in 2007, Mr Konza explained that illegal phoenix activity mainly takes place 'in the micro and medium segments of the economy because the larger businesses cannot afford the risk to their reputations'.⁹⁴

2.3.2.2. THE ATO AND PROPERTY DEVELOPERS

The ATO has made a number of statements concerning phoenix activity in the construction industry. The ATO's submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry in April 2015 also considered property developers as a separate risk area. The ATO reported that they had identified 3,355 individuals in control of over 13,000 entities with a history of insolvency in the property development industry. The ATO reported that these entities formed part of its phoenix risk population. Collectively, the 3,355 individuals had over \$2 billion of debt written off by the ATO and claimed \$1.3 billion in GST credits over four years.⁹⁵

In *ATO Compliance in Focus 2013-14*, the ATO stated that illegal phoenix activity:

... is widespread among labour intensive industries, and we also regularly see property developers engaging in this behaviour. Some developers deliberately disengage from the tax system at the point of sale and fail to meet their GST obligations. They then create new entities for future property developments.

We have identified over 2,000 property developers who have placed companies into liquidation with outstanding GST obligations on multiple occasions. This behaviour is a key indicator of potential phoenix activity. In 2013–14 we will engage with developers who do this by demanding lodgment, enforcing payment and applying penalties. Through this action we aim to deter potential phoenix activity before this behaviour becomes persistent.⁹⁶

The ATO had earlier elaborated on the risk of property developers engaging in illegal phoenix activity in the 24 July 2013 IAPF minutes, stating the following:

There are around 2,179 individuals identified associated with between 2 – 5 insolvencies, more than 372 of these had more than \$1 million in debt written off from their previous entities and there are 27 individuals that have more than \$1 million in debt written off in 20 or more entities. Where individuals have liquidated up to 2 entities, the ATO views this as poor business management however where someone has liquidated up to 20 entities, it is reasonable to assume this is not the case.

⁹³ Commonwealth of Australia, Official Committee Hansard, Joint Committee of Public Accounts and Audit, Reference: Biannual Hearing with Commissioner of Taxation, Friday, 23 October 2009, PA 8.

⁹⁴ Evidence to Joint Committee of Public Accounts and Audit, Parliament of Australia, Canberra, 21 September 2007, 10 (Mark Konza, Deputy Commissioner, Small and Medium Enterprises, Australian Taxation Office); Joint Committee of Public Accounts and Audit, Parliament of Australia, *Report 410 into Tax Administration* (2008) 42 [2.47].

⁹⁵ ATO, *ATO submission – Inquiry into insolvency in the Australian construction industry* (April 2015), 14.

⁹⁶ ATO, *Compliance in Focus 2013-14* (July 2013)

<https://www.ato.gov.au/uploadedFiles/Content/CS_C/downloads/CSC35735NAT74689.pdf>.

The 2,179 identified individuals have been linked to over 10,000 liquidated entities and the ATO has written off in excess of \$1.8 billion which are linked to over 30,000 active entities. These are companies with trusts ‘as trustee for’. Trusts are becoming a growth area in respect of fraudulent phoenix activity.

Around 72% of the disengaged property developer population are in NSW, Victoria and Queensland with 21% individuals going into personal bankruptcy to avoid obligations.⁹⁷

2.3.2.3. DATA OBTAINED FROM THE ATO

In response to a request by the Phoenix Research Team, the ATO provided additional data for the purpose of preparing this report. The data, drawn from databases on 1 August 2014, represents a point-in-time snapshot of the data held by the ATO, and is displayed in the five tables that follow.

Some of the data supplied by the ATO is a count of ‘entities’ and some is a count of ‘groups’. An ‘entity’ is any individual client in the ATO system and may be a company, a trust, an individual, a partnership and/ or a superannuation fund. A group consists of a collection of entities that have links to an individual who has been identified as someone with a level of control, or influence over those entities. The ATO refers to such individuals as ‘controlling minds’, or ‘group heads’. Links between controlling minds and entities are identified using a number of methods including shareholding, directorships (current and historical), family relationships and intelligence or casework. Individual entities could be linked to other controlling minds and could therefore be present in more than one group.

Through its internal modeling and sophisticated data collection the ATO has identified the ‘phoenix’ population. The phoenix population can be broken into two groups: the confirmed operators being those that have been confirmed as a result of an audit and the candidate operators being those that are suspected of illegal phoenix activity but have not yet been audited.

2.3.2.3.1. CONFIRMED AND CANDIDATE PHOENIX GROUPS

Table 14 sets out the number of candidate and confirmed phoenix groups according to data obtained directly from the ATO. There were 19,569 candidate groups and 145 confirmed groups as at 1 August 2014.

Table 14 Number of Phoenix related groups as at 1 August 2014

Phoenix Population	No. of Groups
Candidate Phoenix Groups	19,569
Confirmed Phoenix Groups	145
Total	19,714

Source: Data directly supplied by the ATO

2.3.2.3.2. CHARACTERISTICS OF THE CONFIRMED AND CANDIDATE PHOENIX GROUPS

The data provided by the ATO indicated that the 19,714 candidate and confirmed phoenix groups were comprised of 335,837 unique entities. The ATO data reveals information about the characteristics of those entities; and in particular market segment, industry and state or territory of registration.

Table 15 classifies the candidate and confirmed phoenix entities according to the market segment they occupy.

⁹⁷ ATO, *Inter-Agency Phoenix Forum minutes - 24 July 2013* (17 December 2013).

Table 15: Phoenix population entities by market segment as at 1 August 2014

Population	Micro Businesses	SME	Other	Total
Candidate Phoenix	243,014	45,839	45,439	334,292
Confirmed Phoenix	1,062	221	262	1,545
Total	244,076	46,060	45,701	335,837
% of Population	72.68%	13.71%	13.61%	100.00%

Source: Data directly supplied by ATO

An entity is defined as a micro business if it has an annual income that falls within the range of a loss of \$2 million to positive income of \$2 million. SMEs are classified as such where an entity’s business income is between \$2 million and \$250 million. It also includes entities that make a loss between \$2 million and \$250 million. Entities falling outside these income brackets are counted as ‘other’. Micro businesses account for the vast majority (72%) of both candidate and confirmed phoenix entities.

The ATO supplied the Phoenix Research Team with a comprehensive breakdown of the number of confirmed and candidate phoenix entities by industry. The complete list of entities and the number of confirmed and candidate phoenix groups is contained in [Table 50](#) in the appendix. [Table 16](#) lists the ten industries that recorded the most number of confirmed and candidate phoenix entities from highest to lowest.

Table 16 Number of Confirmed and Candidate Phoenix Entities by Industry – Top Ten Industries as at 1 August 2014

	Industry ⁹⁸	No. of phoenix entities	% of top 10 industries
1	Financial Asset Investing	30,646	24.97%
2	Other Auxiliary Finance and Investment Services	21,902	17.84%
3	Non-Residential Property Operators	16,502	13.44%
4	Superannuation Funds	11,507	9.37%
5	Residential Property Operators	9,752	7.94%
6	Management Advice and Related Consulting Services	8,816	7.18%
7	Subsidiary return income from non-Primary Production partnership or trust	6,856	5.59%
8	Real Estate Services	6,254	5.10%
9	Computer System Design and Related Services	5,264	4.28%
10	House Construction	5,247	4.27%
	Total	122,746	100.00%

Source: Data directly supplied by ATO

The industry with the highest number of confirmed and candidate phoenix entities was the financial asset investing industry (30,646 entities), followed by the auxiliary finance and investment services industry (21,902 entities). Nearly 43% of confirmed or candidate phoenix entities in the top ten industries operate in either of these two financial services industries. The only building related industry

⁹⁸ Note that the ATO uses either ANZIC classification or BIC classification for industries. As a result, not all ATO industry data is comparable.


that is represented in the top-ten list is the housing construction industry at tenth with 5,247 confirmed or candidate phoenix entities.

The data supplied by the ATO contained a breakdown of the number of confirmed and candidate phoenix entities by state or territory of registration, displayed in [Table 17](#).

Table 17 Total Number of Confirmed and Candidate Phoenix Entities by State of Registration as at 1 August 2014

State	NSW	VIC	QLD	WA	SA	ACT	TAS	NT	Unknown	Total
Number	124,000	75,032	50,022	24,639	14,485	3,940	2,529	787	40,403	335,837 (295,434 where state is known)
% of total where state known	42%	25%	17%	8%	5%	1%	>1%	>1%		

Source: Data directly supplied by ATO

 **Section 5.4** in the appendix contains additional data requested by the Phoenix Research Team from the ATO. This data breaks down the number of confirmed and candidate phoenix entities by registered state or territory and entity type.

2.3.3. TREASURY

In 2011, the Hon Bill Shorten, then Assistant Treasurer and Minister for Financial Services and Superannuation, estimated that there were 6,000 phoenix companies in Australia in a media release relating to employee entitlements.⁹⁹

2.3.4. OTHER SOURCES

2.3.4.1. DUN & BRADSTREET

In 2009, credit reporting agency Dun & Bradstreet 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’.¹⁰⁰

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;
- 25% more companies entered external administration with at least one director previously involved in the management of another defunct company;

⁹⁹ The Hon Bill Shorten, Media Release, no 138, ‘Protecting Employee Super and Strengthening the Obligations of Company Directors’ (13 October 2011).

¹⁰⁰ Dun & Bradstreet Report, above n 36.

- There was an 18% increase in the number of directors associated with at least four failed ventures;
- There were nearly 400 directors sitting on boards of operating entities at the time of the research who had been associated with ten 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 is a 250% greater likelihood that directors on the boards of businesses that enter external administration will be involved in another insolvent wind-up in the twelve months that follow.

2.3.4.2. VEDA ADVANTAGE

According to a 2010 press report, research by Veda Advantage, another credit reporting agency, found ‘a significant rise in the number of phoenix companies since the GFC’, with ‘[o]ne in 10 directors behind newly registered companies in March 2010 [being] linked to an adverse credit history with another company in the six months prior to starting the new company’.¹⁰¹

2.4. SUMMARY

While federal and state governments and regulatory bodies all recognise that illegal phoenix activity is a significant problem, the Phoenix Research Team’s examination of data on the incidence of this activity illustrates that no one has been able to accurately quantify the extent of the problem. Useful data about suspected misconduct is contained in the ASIC EXAD reports, and this could be improved if the current reporting regime were changed to allow external administrators to stipulate when criminal or civil breaches they are reporting on are instances of illegal phoenix activity. The Phoenix Research Team aim to further clarify this issue in the latter part of this project from interviews and surveys with insolvency practitioners.

¹⁰¹ Peter Switzer, ‘Solvency statement would bury phoenix companies’, *The Australian*, 17 July 2010.

3. QUANTIFYING THE COST OF ILLEGAL PHOENIX ACTIVITY

3.1. RELEVANT BACKGROUND INFORMATION

Part 2 of the report reviewed all available data on the incidence of illegal phoenix activity. The report now turns to an examination of the data estimating the cost of illegal phoenix activity in Australia. From the outset it must be acknowledged that there is very little available data on the cost of this activity. Some ‘costs’ are easier to quantify than others. For example, it is possible to know the amounts owed to employees or the ATO; however, it is much harder to quantify the costs of detection and enforcement, or the costs to the economy or competitors. Most significantly in the present context, the principle difficulty with establishing the cost of illegal phoenix activity is knowing which unpaid debts or other costs are attributable to improper behaviour, as opposed to legal, proper business rescues. As with the section preceding, this section begins by offering background data that might establish some upper limits to its cost or provide context.

3.1.1. EXAD REPORTS - TOTAL ESTIMATED DEFICIENCIES

One of the criteria that ASIC considers when conducting risk assessments of EXAD reports is the size of the reported deficiency (the shortfall between the failed company’s estimated assets and its estimated liabilities) pertaining to each liquidation. While a total yearly amount is unavailable, the Phoenix Research Team has calculated an estimated lower and upper range for 2013-14 based on data drawn from *REP 412 Insolvency statistics: External administrators' reports (July 2013 to June 2014)*. This is set out in [Table 18](#).

An examination of the data reveals that 46% of companies (4,371) failed with deficiencies on or below \$250,000. This group can be compared with the group of companies that failed with deficiencies in the \$1 million to less than \$5 million range. While this group only comprised 1,462 companies, [Table 18](#) shows that it nevertheless accounted for the vast majority of estimated total deficiencies owed, at between \$1.46 billion to \$7.31 billion.

Unfortunately, it is impossible to reach a more precise total upper limit than \$15.9 billion or greater, since ASIC’s largest deficiency category is \$10 million or greater, and the estimated total range of deficiencies for this category is between \$3.03 billion and anything greater than that sum.

Table 18 Estimated deficiencies - shortfall between estimated assets and estimated liabilities 1 July 2013 - 30 June 2014¹⁰²

Deficiency categories	Total no. of companies	Estimated total range of deficiencies
\$0 - \$50,000	1,306	\$0 - \$6.53 mill
\$50,001 - \$250,000	3,065	\$153.25 mill - \$766.25 mill
\$250,001 - < \$500,000	1,748	\$437.0 mill - \$874.0 mill
\$500,000 - < \$1 mill	1,316	\$658.0 mill - \$1.32 bill
\$1 mill - < \$5 mill	1,462	\$1.46 bill - \$7.31 bill

¹⁰² ASIC REP 412, above n 60, Table 25.

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\$5 mill - 10 mill	259	\$1.29 bill - \$2.59 bill
> \$10 mill	303	> \$3.03 bill
Total	9,459	Total lower limit: \$7.09 bill Total upper limit: > \$15.9 bill

Source: ASIC, as analysed by the Phoenix Research Team

Table 19 sets out the size of reported deficiencies for 3,951 companies (including where the deficiency was assessed and recorded, as well as where further inquiry was recommended by the external administrator) for the financial years spanning 1 July 2011 to 30 June 2014.

Table 19 EXAD reports - Evidence with liquidator and further inquiry recommended by deficiency categories 1 July 2011 - 30 June 2014¹⁰³

Deficiency	2011-12	2012-13	2013-14	Total
\$0 - \$50,000	74	67	133	274
\$50,001 - \$250,000	333	263	411	1,007
\$250,001 - < \$500,000	219	226	279	724
\$500,000 - < \$1 mill	185	50	236	471
\$1 mill - < \$5 mill	288	364	304	956
\$5 mill - \$10 mill	55	217	67	339
> \$10 mill	61	66	53	180
Total	1,215	1,253	1,483	3,951

Source: ASIC, as compiled by the Phoenix Research Team

3.1.2. EXAD REPORTS - AMOUNT OWED TO SECURED CREDITORS

In a majority of EXAD reports for the 2013-14 financial year (68.4%), external administrators indicated that nothing was owed to secured creditors. Approximately 23% of reports indicated that the failed company owed secured creditors between \$1 and less than \$1 million and in 2.5% of reports the company owed secured creditors more than \$10 million.¹⁰⁴ The data is set out in full in Table 48 in the appendix.

3.1.3. REALISABLE ASSETS

Table 44 in the appendix contains data from a survey of registered liquidators undertaken by Amanda Phillips setting out the value of realisable assets for liquidations undertaken from 1 July 2011 to 30 September 2011.¹⁰⁵

3.1.4. UNPAID TAX LIABILITIES

When a company engages in phoenix activity, the ATO will often be the biggest creditor. The three main areas where amounts are unpaid are amounts required to be deducted from payments of salary or wages to employees and remitted to the ATO under the Pay As You Go (Withholding) (PAYG(W))

¹⁰³ ASIC REP 412, above n 60, Table 15; ASIC REP 372, above n 60, Table 15; ASIC REP 297, above n 60, Table 19.

¹⁰⁴ ASIC REP 412, above n 60, Table 28.

¹⁰⁵ Phillips, above n 48.

provisions in the TAA, payments on behalf of employees under the *Superannuation Guarantee (Administration) Act 1992*, as well as unremitted payments of GST and inappropriate refunds of input tax credits (ITC). As company income tax is payable in advance it is unlikely that the tax debt relates to that liability.

In the Senate Inquiry on the 9 April 2010, in answer to a question on notice by Senator Fierravanti-Wells, the ATO advised that ‘during the financial year ending 30 June 2008, an estimate of \$1.06 billion in taxation was foregone as a consequence of known corporate failures’. Further, according to the ATO, ‘[t]he estimated amount for the financial year ending 30 June 2009 was \$1.3 billion. These amounts relate to known or reported taxation liabilities and do not include unpaid or uncollected superannuation liabilities’.¹⁰⁶ The Phoenix Research Team assumes that these losses relate to unremitted PAYG(W) tax.

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 ‘insolvent debt’ (ie when liabilities are due and payable but the taxpayer is subject to some form of insolvency administration). An examination of the ATO’s collectable debt holdings and insolvency debt holdings held at the end of the financial year is informative. Only a percentage of the debt reported as ‘insolvency debt’ will have accrued as a result of illegal phoenix activity and the Phoenix Research Team cannot estimate what that percentage might be.

Table 20 ATO Total Debt and Insolvency Debt 1 July 2004 - 30 June 2014

Year ending 30 June	Total collectable debt (\$ bill) ¹⁰⁷	Insolvency debt (\$ bill) ¹⁰⁸	Insolvency debt as a percentage of collectable debt
2004 ¹⁰⁹	Detail not provided	\$1.16	N/A
2005 ¹¹⁰	\$17.5	\$1.27	7.26%
2006 ¹¹¹	Detail not provided	\$1.72	N/A
2007 ¹¹²	\$19.57	\$1.86	9.50%
2008 ¹¹³	\$22.11	\$2.27	10.27%
2009 ¹¹⁴	\$24.57	\$2.88	11.72%
2010 ¹¹⁵	\$27.48	\$3.0	10.92%
2011 ¹¹⁶	\$27.5	\$5.3	19.27%
2012 ¹¹⁷	\$31.7	\$6.2	19.59%

¹⁰⁶ Answer to question on notice by Senator Fierravanti-Wells, Senate Economics References Committee, Liquidators and administrators (9 April 2010), 4 <<http://www.aph.gov.au/DocumentStore.ashx?id=72c09524-1cc6-45e7-9d05-e4e925360cf3>>.

¹⁰⁷ Inspector General of Taxation, *Debt Collection* (July 2015) [1.30].

¹⁰⁸ *Ibid*, [1.30]

¹⁰⁹ ATO, *Annual Report 2003-04* (2004), 42.

¹¹⁰ ATO, *Annual Report 2004-05* (2005), 48.

¹¹¹ ATO, *Annual Report 2005-06* (26 September 2006), 103.

¹¹² ATO, *Annual Report 2006-07* (10 December 2007), 74.

¹¹³ ATO, *Annual Report 2007-08* (3 October 2008), 45.

¹¹⁴ ATO, *Annual Report 2008-09* (8 October 2009), 54.

¹¹⁵ ATO, *Annual Report 2009-10* (7 October 2010), 55.

¹¹⁶ ATO, *Annual Report 2010-11* (30 September 2011), 51.

¹¹⁷ ATO, *Annual Report 2011-12* (4 October 2012), 58.

2013 ¹¹⁸	\$33.2	\$5.4	16.26%
2014 ¹¹⁹	\$34.2	\$6.2	18.13%

Source: ATO, as compiled by the Phoenix Research Team

Small businesses account for the majority of all collectable debt with the ATO (62.4%). In 2013-14, the ATO wrote off \$3.4 billion of debt as either irrecoverable at law or uneconomic to pursue. According to the ATO, '[o]f this, \$2.3 billion (67.3%) was irrecoverable at law (as a result of bankruptcy or company wind-up) and while we have seen a decrease in value compared to last year, the number of cases finalised as irrecoverable at law has increased'.¹²⁰

At state level, using the Victorian SRO as an example, the total amount of written-off tax debt for the 2013-14 financial year was around \$28.7 million, and the total payroll tax owed for the same financial year was \$30.5 million.¹²¹

As noted above one of the costs of phoenix activity borne by employees is the non-payment of superannuation contributions. Where an employer has not made the required contribution on behalf of an employee within 28 days after the end of a quarter, the employer is subject to a superannuation guarantee charge (SGC). The ATO annual reports for the financial years 2009-10 to 2013-14 indicate the amount of existing SGC debt that was not able to be recovered by the regulator during the relevant year because employers had entered some form of insolvency administration. This information has been reproduced in Table 51 in the appendix. What is notable is the significant increase in this debt from \$82.2 million in 2011 to \$256.8 million in 2014.

The 2010 Inspector-General of Taxation (IGT) report into the ATO's administration of the SGC estimated that the amount of non-compliance was approximately \$1.5 billion,¹²² however the IGT report acknowledged that '[t]he actual SG non-compliance could actually be much greater than the figures suggest' since this amount only encapsulates known non-compliance 'raised through the employee lodging a SGC Statement or the ATO issuing a default assessment'.¹²³

Table 52 in the appendix sets out the total debt holdings with the ATO for the financial years 2009-10 until 2013-14.

The majority of EXAD reports for the 2013-14 financial year (81.7%) indicated that the average amount of unpaid taxes and charges by industry of failed companies as nominated by external administrators in their EXAD reports to ASIC for the 2013-14 financial year was \$250,000 or less.¹²⁴ Table 47 in the

¹¹⁸ ATO, *Annual Report 2012-13* (3 October 2013), 39.

¹¹⁹ ATO, *Annual Report 2013-14* (10 October 2014), 50.

¹²⁰ ATO, *Annual Report 2013-14* (10 October 2014), 49.

¹²¹ State Revenue Office of Victoria, *Annual Review 2014* (2014) <<http://www.sro.vic.gov.au/publications/annual-review-2014>>.

¹²² The report notes: 'Over an eleven year period, the difference between SGC raised and SGC collected has accumulated to \$936.1 million, increasing substantially from 2000-01. Together with the current SGC debt relating to insolvent employers, approximately \$600.8 million in SGC raised by the ATO has not been recovered, with most of this debt having been written-off and representing known lost employee retirement savings'. Inspector General of Taxation, *Review into the ATO's administration of the Superannuation Guarantee Charge* (March 2010), 3 [2.6.1].

¹²³ *Ibid.*

¹²⁴ ASIC REP 412, above n 60, 39.

appendix contains data breaking down unpaid taxes and charges by industry for the 2013-14 financial year.

3.1.5. UNPAID EMPLOYEE ENTITLEMENTS

Table 21 outlines the amounts owed by employers to their employees in unpaid entitlements, as nominated by external administrators in their EXAD reports to ASIC. Of note is that in 80.4% of reports external administrators indicated that no wages were owed. In 12.3% of reports, external administrators estimated unpaid wages at between \$1 and \$10,000, and in 7.2% of reports external administrators indicated that employees were owed between \$10,001 to over \$5 million.

Table 21 EXAD reports—Amounts owed in unpaid employee entitlements 1 July 2013 - 30 June 2014¹²⁵

Amount owed	Unpaid wages		Unpaid annual leave		Unpaid pay in lieu of notice		Unpaid redundancy		Unpaid long service leave	
	No.	%	No.	%	No.	%	No.	%	No.	%
\$1 - \$1,000	287	3.0%	201	2.1%	176	1.9%	135	1.4%	144	1.5%
\$1,001 - \$10,000	875	9.3%	851	9.0%	415	4.4%	162	1.7%	224	2.4%
\$10,001 - \$50,000	468	5.0%	706	7.5%	445	4.7%	261	2.8%	340	3.6%
\$50,001 - \$150,000	148	1.6%	306	3.2%	168	1.8%	201	2.1%	152	1.6%
\$150,001 - \$250,000	32	0.3%	62	0.7%	41	0.4%	76	0.8%	27	0.3%
\$250,001 - \$500,000	23	0.2%	35	0.4%	19	0.2%	54	0.6%	20	0.2%
\$500,001 - < \$1.5 mill	9	0.1%	12	0.1%	15	0.2%	24	0.3%	4	0.0%
\$1.5 mill - \$5 mill	2	0.0%	6	0.1%	1	0.0%	5	0.1%	3	0.0%
> \$5 mill	1	0.0%	1	0.0%	2	0.0%	9	0.10%	3	0.0%
Not applicable	7,591	80.4%	7,256	76.9%	8,154	86.4%	8,509	90.2%	8,519	90.3%
Total	9,436	100.0%	9,436	100.0%	9,436	100.0%	9,436	100.0%	9,436	100.0%

Source: ASIC

3.1.6. PAYMENTS UNDER THE EESS, GEERS AND FEG

The government introduced a scheme in 2000 to recompense employees whose employment was terminated due to insolvency and who had not received their entitlements. The Employee Entitlements Support Scheme (EESS) was introduced on 8 February 2000 but backdated to 1 January 2000. The taxpayer-funded scheme was introduced as a legislated safety net administered by the Department of Employment. The General Employee Entitlements and Redundancy Scheme (GEERS) succeeded the EESS and applied to those whose employment was terminated between 12 September 2001 and 5 December 2012. The current scheme, the Fair Entitlements Guarantee (FEG), applies to terminations of employees of insolvent employers after 6 December 2012. The various government safety net schemes cover all businesses in all of their forms, not just companies. The amount that employees are able to recover

¹²⁵ Ibid, 37.

under the legislative scheme may not cover their total loss. One reason for this is that the scheme does not cover unpaid superannuation contributions. Recovery is also subject to caps, both on annual wage amounts and according to category.

The CFMEU noted in its May 2015 submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry that FEG and its predecessors have cost \$1.3 billion since they were introduced across all industries, only 14% of which has been recovered through liquidations.¹²⁶

Data sourced from the Department of Employment relating to payments under these schemes is set out in [Table 22](#). While the total figures relating to the safety net schemes appear very high - a total of 156,848 employees receiving assistance - [Table 65](#) in the appendix shows that the number of insolvent businesses whose employees sought assistance was around 16,000 over 13 years. Unfortunately, a more accurate figure cannot be ascertained, because the Department did not publish the number of insolvent businesses for the years 2010-11 and 2011-12, and the most recent year's figure is not yet available. In addition, the data does not differentiate between businesses that were incorporated and those that were not. This means that the following data is over-inclusive, as the Phoenix Research Team is only concerned with employees of companies.

Employees of liquidated companies are priority creditors under s 556 of the *Corporations Act*. This means that if the employees receive little or nothing from the liquidation, non-priority unsecured creditors will receive nothing. The Phoenix Research Team can conclude that these companies have entered liquidation without significant assets. However, it is not possible to say how many, if any, of the approximately 16,000 insolvent businesses engaged in illegal phoenix activity for the following reasons:

1. A company being assetless and its controllers engaging in illegal phoenix activity are two separate things, only occasionally coinciding. There are many reasons for a company to collapse without significant assets - illegal phoenix activity is only one of those. The safety net scheme data does *not* show the number or percentage of insolvent businesses that were reopened via a new phoenix company.
2. Conversely, it is possible for employees to be paid even if the controllers engage in illegal phoenix activity. The intended victims of the liquidation might be unsecured non-priority creditors such as the ATO, SROs and suppliers. In such cases, the employees might receive their entitlements directly from the company, either before or during the liquidation, without resort to the safety net scheme. The scheme data will therefore not capture these companies. Where employees do receive an advance from the scheme, the government, which is a subrogated creditor to the employees' s 556 priority, may recover some or all of the money paid to employees. This has occurred on average in about 13.8% of cases. Therefore these companies were not, strictly speaking, 'assetless'.

The figure of 16,000 insolvent businesses over 13 years appears to be relatively modest. However, the safety net scheme data should be taken into account in conjunction with the deregistration data in [section 2.2.3](#). The employees of a deregistered company are unable to access safety net schemes, so

¹²⁶ CFMEU, *Senate Economics References Committee Insolvency in the Australian Construction Industry -Submission by the Construction, Forestry, Mining and Energy Union* (1 May 2015), 3.

there should be no overlap between these statistics.¹²⁷ It would therefore appear that while the number of liquidated companies with employees that access GEERS or FEG is quite small, the total number of companies deregistered with few or no assets is estimated to exceed 50,000 annually.

Table 22 Total Payments under the EESS, GEERS and FEG 1 July 2001 - 30 June 2015¹²⁸

Total assistance	No. of Employees paid	Average payment per employee	Recovery amount	Recovery rate against amount paid
\$1.519 bill	156,848	\$9,685	\$210.8 mill	13.9%

Source: Department of Employment

For a complete version of this table, please refer to [Table 65](#) in the appendix.

The most recent data collected was for the period 1 July 2014 to 31 December 2014 and shows that the majority of claims came from small businesses (0 to 15 employees) at over 72%, compared with 25.3% from medium size employers (15 to 200 employees). Less than 1% of claims were made on behalf of employees of insolvent large businesses. These percentages have remained relatively constant for the last ten years.¹²⁹

The majority of the cost of claims paid out under the scheme conversely lies with medium size employers, representing 62.58% of the cost of claims under the scheme from 1 July 2014 to 31 December 2014. Department of Employment data for the period 1 July 2014 to 31 December 2014 shows small businesses at 19% and large businesses at 18%, although there is variation from year to year.¹³⁰

In February and August 2015, the Department of Employment submitted statistics on FEG/GEERS to the Productivity Commission’s Inquiry into Business Set-up, Transfer and Closure, which are extracted in [section 5.8](#) in the appendix. These include:

- Data on claims paid by business size for the financial years 2012-13 to 2014-15 (at 31 December 2014) ([Table 66](#));
- Data on the business size profile of assistance paid under schemes for the financial years 2004-05 to 2014-15 (as at 31 December 2014) ([Table 67](#));
- Data on the top five industries with largest proportion of cases (insolvent employers) finalised for the financial years 2011-12 to 2013-14 ([Table 68](#));

¹²⁷ Note that ASIC has the power to order the liquidation of a dormant company pursuant to s 489EA(1) and (2) of the *Corporations Act*. The aim of this provision is to allow the company’s employees to access the government safety net scheme. In addition, ASIC has the power under s 601AH(1) to reinstate the registration of a deregistered company, and may then seek its liquidation under s 489EA(3).

¹²⁸ DEWR, *Annual Reports 2013-14, 2012-13, 2011-12, 2010-11, 2009-10, 2008-09 and 2007-08*; DEWR, *Annual Reports 2006-07, 2005-06, 2004-05, 2003-04, 2002-03 and 2001-02*; DEWR, *Annual Report 2000-01*.

¹²⁹ The Department of Employment noted the following key trends for the years January 2004 - December 2014 in relation to entities that applied for FEG funds: 76.8% were small business employers, 22.5% were medium business employers; 60% were large business employers. Department of Employment, *Productivity Commission Inquiry into Business Set-up, Transfer and Closure Submission of the Department of Employment* (February 2015), 10 [39].

¹³⁰ *Ibid*, 10.

- Data on scheme use proportional to the companies entering liquidation for the financial years spanning 1 July 2006 to 30 June 2014 (Table 69).

While the number of insolvent entities associated with processed FEG claims is highest in the construction industry, the industry does not in fact account for the largest proportion of individual claims. There are two key reasons this may be so: first, the project-based nature of construction work means that there are higher rates of company formation and liquidation in the construction sector than in other sectors; and second, contractors, who comprise just over 50% of the taxpayers associated with the construction industry workforce, are not eligible for FEG assistance in the event of an insolvency.

According to the Department of Employment, in the 2013-14 financial year, the five industries with the largest amount of individual FEG or GEERS claims finalised were the 'other services' (22.7%), followed by manufacturing (15.1%), construction (13.2%), mining (10.4%), and electricity, gas, water, and waste services (9.2%).¹³¹

The Department of Employment also observed the following in relation to the cost of FEG assistance paid out across industries for the five financial years 2009-10 to 2013-14:

Overall the amount of FEG assistance paid (\$178.63 million) was second highest for workers in the construction industry and represented 17.4 % of all assistance paid under the programme over the period. This is considerably lower than FEG assistance paid for workers in the Manufacturing industry (\$300.70 million) and considerably higher than \$85.12 million paid to workers in the Retail Trade industry which represented the third highest cost. While the number of claims processed across the manufacturing and construction industries are similar (16,940 to 15,600 respectively), the significant difference in the cost of claims between the two industries arises due to the existence of redundancy trust funds in the construction industry.¹³²

In the 2013-14 financial year, around 11,000 employees from 1,100 businesses (11% of businesses entering liquidation) received FEG benefits. While the numbers of businesses and employees receiving benefits have fluctuated with general liquidation activity since the scheme's introduction, average payouts have increased substantially in recent years. Commentators including the Department of Employment have noted that there is some evidence of moral hazard associated with the schemes. The Department highlighted the following analyses of this data that it claims support this theory:

- The proportion of insolvent entities using the scheme increased from 16.8% in the financial year 2006-07 to 20.7% in the financial year 2013-14 (peaking at 22.7% in the financial year 2009-10);
- An increasing number of workplace agreements made during this timeframe offered a total maximum redundancy payment of more than 16 weeks, from 22.3% of agreements in 2011 to 31.6% of agreements in 2014. The Department underscored that this 'may indicate that some employers are offering generous redundancy terms in Enterprise Agreements, knowing that the Commonwealth can provide a safety net should they become insolvent';¹³³

¹³¹ Ibid, 11.

¹³² Department of Employment, *Inquiry into Insolvency in the Construction Industry – Submission 22* (August 2015), 2.

¹³³ Department of Employment, *Productivity Commission Inquiry into Business Set-up, Transfer and Closure Submission of the Department of Employment* (February 2015), 9-10.

- The disproportionate increase in redundancy payouts under the schemes when compared with other types of entitlements (29.5% of total cost in the financial year 2006-07 to 39.3% in the financial year 2013-14).¹³⁴

The Government is currently legislating to address the area of the disproportionate increase in redundancy payments under the scheme through a 16-week cap on FEG redundancy payments through the *Fair Entitlements Guarantee Amendment Bill 2014* (Cth).

Data depicting FEG/GEERS scheme use proportional to the number of companies entering liquidation for the financial years 2007-08 to 2013-14 is extracted in [Table 69](#) in the appendix.

3.1.7. REALISABLE ASSETS

[Table 44](#) in the appendix contains data from a survey of registered liquidators undertaken by author Amanda Philips setting out the value of realisable assets for liquidations undertaken from 1 July 2011 to 30 September 2011.¹³⁵

3.1.8. THE BUILDING AND CONSTRUCTION SECTOR

The ATO reported in April 2015 that it is a creditor in 98.6% of total company winding-ups in the construction industry.¹³⁶ At that time it was owed approximately \$5.5 billion across the sector, \$3.9 billion of which was potentially collectable debt and \$1.5 billion of which related to insolvent debt, representing approximately 16% of the total debt owed to the ATO.¹³⁷ The ATO wrote off approximately \$463 million of insolvent tax debt as irrecoverable at law in the financial year 2011-2012, \$884 million in the financial year 2012-2013, and \$545 million in the financial year 2013-2014.¹³⁸

According to ASIC, EXAD reports for the financial years 2009-10 to 2013-14 demonstrate that within the construction sector:

- 17% of insolvencies reported no tax debt and around 78% reported a tax debt of \$1 million or greater;
- 67% of insolvencies did not involve a secured creditor;
- 19% of reports noted that secured creditors were owed less than \$500,000;
- 14% of reports noted that secured creditors were owed more than \$500,000;
- In 73% of cases, unsecured creditors had losses less than \$500,000;
- In 27% of cases, unsecured creditors had losses greater than \$500,000.¹³⁹

In 2015, the CFMEU claimed the following figures in relation to insolvent companies in the construction sector in 2013-14:

¹³⁴ Ibid, 9-10 [37].

¹³⁵ Amanda Phillips, 'An analysis of official liquidations in Australia', *Australian Insolvency Journal* (April-June 2013).

¹³⁶ ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015), 18 [64].

¹³⁷ Ibid, 21.

¹³⁸ Ibid, 18-19.


¹³⁹ ASIC, *Senate Inquiry into Insolvency in the Construction Industry - Submission by the Australian Securities and Investments Commission* (April 2015), Table 3, 13.

- The lower end of unpaid employee entitlements was around \$57 million, the median being around \$137 million, \$63 million of which was unpaid employee superannuation contributions;¹⁴⁰
- The lower end of unpaid taxes and charges was \$178 million, the median amount being around \$487 million.¹⁴¹

The CFMEU highlighted that there is a 92% chance that an unsecured creditor will receive nothing from an insolvency.¹⁴²

According to the CFMEU:

More than three quarters of all insolvent companies in the industry are indebted to less than 25 unsecured creditors. But whilst almost 60% of these companies owe their unsecured creditors less than \$250,000, in 2013-14, of all the industry categories, the construction industry had the second highest number of insolvencies - twenty-four – of those where unsecured creditors are owed in excess of \$10 million.¹⁴³

 **Section 5.7** in the appendix contains additional information on the quantification of the cost of insolvencies in the construction sector:

- Extracted tables from the CFMEU's submission to the 2015 Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry breaking down the quantity of unsecured creditors ([Table 54](#)) and the amounts they are owed ([Table 55](#)), as derived from EXAD reports for the 2013-14 financial year;
- Extracted tables from ASIC's EXAD reports breaking down construction industry insolvency losses by the estimated amounts owed to secured creditors ([Table 56](#)) and amounts owed to unsecured creditors ([Table 57](#)), the amount of tax liabilities owed ([Table 58](#)), and the amounts of unpaid employee entitlements (wages: [Table 59](#), annual leave: [Table 60](#), pay in lieu of notice: [Table 61](#), redundancy: [Table 62](#), long service leave: [Table 63](#), and superannuation contributions: [Table 64](#)) for insolvencies in the construction sector for the financial years 1 July 2009 to 30 June 2014;
- 2015 estimates on the cost to creditors of insolvencies in the construction industry from superannuation fund Cbus, including data on SG payment non-compliance.

3.2. COST OF ILLEGAL PHOENIX ACTIVITY

This part of the report collates estimates as to the cost of illegal phoenix activity made by government and non-government sources, listed in alphabetical order.

3.2.1. ASC/ASIC

In its 1996 ASC Phoenix Activity Research Paper, the ASC estimated that illegal phoenix activity caused annual losses to the Australian economy in the range of \$670 million to \$1.3 billion, representing 0.13%

¹⁴⁰ CFMEU, *Senate Economics References Committee Insolvency in the Australian Construction Industry -Submission by the Construction, Forestry, Mining and Energy Union* (1 May 2015), 3.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, 9.

to 0.28% of gross domestic product.¹⁴⁴ In terms of the cost of illegal phoenix activity to the creditors of phoenix companies within groups, the Research Paper stated that:

... the average phoenix company group over its lifetime generates creditor losses of about \$557, 000 which equates roughly to \$90,000 per Phoenix company group per annum. ...The average minimum number of creditors affected by a Phoenix company group,... over its lifetime, appears to be around 838 who lose on average \$10,300 each.¹⁴⁵

One of the enforcement mechanisms available to ASIC is an administrative director disqualification order.¹⁴⁶ An examination of the information that is released by ASIC when some of these disqualification orders are imposed provides a snapshot of the type of loss suffered by creditors of corporations that have been phoenixed.

A search of ASIC’s media releases between 1 January 2004 and 30 June 2014 was undertaken in order to obtain information pertaining to the disqualification of directors in circumstances that appeared on analysis to involve problematic or illegal phoenix activity, as previously discussed at [2.3.2.4](#).

This 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.

The Phoenix Research Team examined the media releases for information about the amount of loss caused by the behaviour. This was noted in nine media releases relating to the disqualification of 13 directors. Media releases relating to the disqualification of another nine directors stated that the companies involved failed owing ‘substantial’ or ‘significant’ amounts to the ATO and/or other creditors but did not specifically quantify the loss involved.

The nine cases where the ASIC media releases provided the details of the loss suffered are analysed in [Table 23](#). Column one lists the amount lost as a result of the illegal phoenix activity arranged from largest to smallest. Where the number of companies involved was contained in the media release it is listed in column two. Column three lists the number of directors that were disqualified relating to the case and an average loss per company is listed in column four.

Table 23 Cases where the loss caused by the problematic or illegal phoenixing was specifically quantified 1 January 2004 - 30 June 2014

Case no.	Amount of loss per group	No. of companies in the group (where disclosed)	No. of directors disqualified	Average loss per company
1	\$23 mill ¹⁴⁷	6	4	\$3.83 mill
2	\$13 mill ¹⁴⁸	6	1	\$2.17 mill

¹⁴⁴ 1996 ASC Phoenix Activity Research Paper, above n 15, 13.

¹⁴⁵ Ibid, 74.

¹⁴⁶ *Corporations Act* s 206F.

¹⁴⁷ ASIC, ‘08-86 ASIC disqualifies Morgan and Bay Group directors’ (Media Release, 9 May 2008): ‘The total deficiency of the corporations is \$23,308,127. The companies owe unsecured creditors a total of \$22,789,454’.

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3	> \$5 mill ¹⁴⁹	4	1	\$1.25 mill
4	\$4.96 mill ¹⁵⁰	6	2	\$1.67 mill
5	\$4.7 mill ¹⁵¹	3	1	\$1.57 mill
6	\$4.02 mill ¹⁵²	5	1	\$0.80 mill
7	\$1.66 mill ¹⁵³	4	1	\$0.41 mill
8	\$0.87 mill ¹⁵⁴	2	1	\$0.43 mill
9	\$0.53 mill ¹⁵⁵	3	1	\$0.18 mill
Total	> \$57.74 mill	33	13	Average across all cases of > \$1.75 mill per company

Source: ASIC Media Releases as compiled by the Phoenix Research Team.

This means that across all the companies mentioned in the ASIC media releases, there was an average loss of \$1.75 million per company. However, this figure is likely to greatly overstate the true average loss per company from problematic or illegal phoenix activity. ASIC's enforcement policy, noted in Part 4 of this report, specifically mentions that the extent of harm or loss is a key consideration in deciding whether or not to take action against suspected offenders. It is therefore highly likely that these disqualification actions have been taken where there are substantial creditor losses. Such losses are not necessarily representative of the entire population of phoenix companies.

3.2.2. ATO

In July 2009, the ATO published the first edition of the biannual online magazine *Targeting Tax Crime: A Whole of Government Approach*, in which it signalled that phoenix practices were on its radar and that

¹⁴⁸ ASIC, '07-19 ASIC bans Sydney caravan operator (Media Release, 30 January 2007): 'All six companies were involved in the manufacture and sale of 'Viscount' caravans and were wound up owing debts to creditors totalling \$13,048,778. These debts included outstanding statutory liabilities and money owed to customers and trade creditors.'

¹⁴⁹ ASIC, '08-22 ASIC disqualifies Queensland director from managing corporations' (Media Release, 12 February 2008): 'Since May 2000, each of the four companies have either been wound up or are in the process of being wound up, owing in excess of \$5 million collectively'.

¹⁵⁰ ASIC, '05-386 ASIC bans three directors involved in the management of failed companies' (Media Release, 12 December 2005): 'Kemps Creek, NAP Trading, Aamac, Drisha, Kalicain and Pan Express were wound up with an estimated deficiency of assets of \$1,962,128, \$886,211, \$812,449, \$804,881, \$465,000, and \$33,000 respectively'.

¹⁵¹ ASIC, '13-033MR ASIC cancels Melbourne liquidator's registration and bans him from managing corporations' (Media Release, 25 February 2013): '[...] combined deficiencies of over \$4.7 mill'.

¹⁵² ASIC, '05-198 Melbourne woman banned from managing corporations for five years' (Media Release, 13 July 2005): 'PC and Colorclad went into liquidation with net deficiencies of \$548,849 and \$961,609, respectively. Mecelec was severely under-capitalised from its inception and went into liquidation with nil assets and liabilities of \$2,348,156 to unsecured creditors. Drews went into liquidation with outstanding employee entitlements of \$148,778 and a liability of \$16,628 for unpaid superannuation guarantee charges' [amount owed by fifth company not mentioned].

¹⁵³ ASIC, '10-172AD ASIC disqualifies 13 directors of failed companies from managing corporations' (Media Release, 12 August 2010): 'Companies were wound up with significant deficiencies owed to creditors and the ATO, collectively totalling \$1,658,288'.

¹⁵⁴ ASIC, '06-395 ASIC bans five directors' (Media Release, 10 November 2006): 'These companies were wound up owing in excess of \$866,000'.

¹⁵⁵ ASIC, '06-354 ASIC bans company directors in New South Wales and Victoria' (Media Release, 5 October 2006): 'The companies were wound up owing in excess of \$530,000'.

the risks posed to the community as a result of this behaviour were increasing.¹⁵⁶ The ATO highlighted the estimated cost of illegal phoenix activity in the publication 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.¹⁵⁷

Acting Deputy Commissioner Will Day drew on the PWC Report in a press release issued by the ATO on 6 March 2015 when he stated that illegal phoenix activity costs the Australian economy \$3.2 billion each year, \$2 billion of which Mr Day claimed was comprised of unpaid debts and the non-supply of purchased goods and services to other businesses. Mr Day also stated that illegal phoenix activity was costing employees up to \$655 million in unpaid wages and entitlements.¹⁵⁸

The ATO reported in its submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry in April 2015 that potential phoenix groups it has identified, with links to around 360,000 entities, owe \$1.8 billion in debt collectively to the ATO, 'although this is not all as a result of confirmed phoenix behaviour'.¹⁵⁹

3.2.3. FWO & PWC

In 2012, PWC prepared a report for the FWO entitled 'Phoenix Activity - Sizing the Problem and Matching Solutions' ('PWC Report').¹⁶⁰ The PWC Report sought to model the overall cost to business and the community as a whole from illegal phoenix activity. The PWC Report 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.¹⁶¹ It also estimated that illegal phoenix activity resulted in lost employee entitlements between \$191,253,476 and \$655,202,019 annually.¹⁶² Amongst other things, data from GEERS discussed above was used by PWC as a basis for modelling lost employee entitlements.

This wide margin of error reflects the lack of reliable data available to PWC and its necessary reliance on feedback from stakeholders.¹⁶³ 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.

¹⁵⁶ ATO, *Targeting tax crime: a whole-of-government approach - July 2009* (July 2009).

¹⁵⁷ *Ibid.*

¹⁵⁸ ATO, 'ATO leads taskforces on serious financial crime' (Media Release, 6 March 2015).

¹⁵⁹ ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015), 20.

¹⁶⁰ PWC Report, above n 25.

¹⁶¹ *Ibid.*, 15.

¹⁶² *Ibid.*, 15.

¹⁶³ *Ibid.*, 2.

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.¹⁶⁴

Assumptions were made by PWC based on data available from GEERS. The use of that data is problematic in estimating the cost to employees of illegal phoenix activity, as opposed to legitimate liquidations or legal phoenix activity in the form of business rescues. It also fails to capture the significant losses to employees from illegal phoenix activity that occurs through dormant companies. It should be noted that PWC included data from insolvent *unincorporated employer businesses* in reaching its calculation. Additionally, it should be noted that none of the following were included in the 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.

Most importantly, it should be borne in mind that there is no direct or automatic correlation between unpaid employees seeking help from GEERS and illegal phoenix activity. Potentially, therefore, the GEERS data could understate or overstate the cost of illegal phoenix activity to employees.

3.2.4. TREASURY

In November 2009, the Treasury released its Proposals Paper¹⁶⁵ in which it quoted the ATO's estimates that the losses caused by illegal phoenix activity were mounting and that it was costing the ATO around \$600 million per year in lost tax revenue.¹⁶⁶

3.3. SUMMARY

This part of the report collates the various estimates about the cost of illegal phoenix activity in Australia. It also provides background data, such as the cost to the government of employee entitlement schemes. While none of the figures in this part can claim to be an accurate representation of the true cost of illegal phoenix activity, they nonetheless give a sense of the potential size of the issue, which the Phoenix Research Team argues is sufficiently costly to the government and the economy generally to justify the commitment of substantial government resources to tackle it.

¹⁶⁴ Ibid, 14.

¹⁶⁵ Treasury 2009 Proposals Paper, above n 1.

¹⁶⁶ Ibid, [2].

4. QUANTIFYING THE ENFORCEMENT OF LAWS TACKLING ILLEGAL PHOENIX ACTIVITY

ASIC and the ATO are the only two agencies with the targeted ability to take enforcement action following suspected cases of illegal phoenix activity, however the FWO undertakes enforcement actions that address the consequences or symptoms of the behaviour more broadly. Additionally, the CDPP may instigate criminal prosecutions on referral from ASIC and the ATO. This section seeks to quantify the enforcement activity undertaken by these regulators/enforcement agencies by examining available data. In this report the Phoenix Research Team is interested in the enforcement activity of the public regulators only; therefore private enforcement is not considered.

One key difficulty that arises in seeking to quantify the enforcement of illegal phoenix activity is the absence of a specific phoenix offence. Nevertheless, while illegal phoenix activity is neither legislatively defined nor expressly proscribed, a range of enforcement options is available to various regulators and agencies to combat the problem. These are set out in full in the Phoenix Research Team's *Defining and Profiling Phoenix Activity* report.

In Part 4, key background information and statistics is first outlined about the approaches taken by ASIC, the ATO, the CDPP, and the FWO towards enforcement of illegal phoenix activity, as well as more broadly. Then data is displayed that the Phoenix Research Team has collated from each of these regulators and from other sources pertaining to the enforcement of laws directly or indirectly regulating illegal phoenix activity.

4.1. BACKGROUND INFORMATION

4.1.1. ASIC

ASIC's webpage on small business outlines the agency's approach to illegal phoenix activity as follows:

ASIC currently has a number of initiatives to combat illegal phoenix activity.

Funding liquidators: The Assetless Administration Fund was established by the Australian Government and is administered by ASIC. It is used to finance preliminary investigations by liquidators into the cause of the failure of companies with few or no assets. Liquidators prepare and lodge reports with us. We may then consider taking enforcement action.

Disqualifying directors: We can also disqualify directors from managing corporations where they have been involved in two or more companies that have been placed into liquidation within the past seven years. We rely on statutory reports provided by liquidators to support our decisions to disqualify directors from managing corporations. A significant number of statutory reports allege illegal phoenix activity. Directors can be disqualified for up to five years.

Liquidators Assistance Program: ASIC regularly helps liquidators to secure the books and information of companies in external administration by ensuring that directors comply with their legal obligations. Directors who fail to meet their obligations may face court action

Identifying and deterring illegal phoenix activity: In July 2013, ASIC launched a new surveillance initiative aimed at deterring illegal phoenix activity, with a focus on failed companies in the construction, labour

hire, transport, security and cleaning industries where there have been allegations of illegal phoenix activity.¹⁶⁷

ASIC's approach to enforcement generally is set out in its Information Sheet 151.¹⁶⁸ ASIC takes the following matters into account when determining whether to take an enforcement action:

- What is the extent of harm or loss?
- What are the benefits of pursuing the misconduct, relative to the expense?
- How do other issues, like the type and seriousness of the misconduct and the evidence available, affect the matter?
- Is an alternative course of action available?

ASIC can rely on the following provisions of the *Corporations Act* in relation to illegal phoenix activity:

- *Breaches of directors' duties under the Corporations Act.*
 1. S 180: the duty of care and diligence;
 2. S 181: the duties to act in the best interests of the company and for a proper purpose;
 3. S 182: the duty not to make improper use of their position;
 4. S 588G(2): the duty to prevent insolvent trading by the company. The incurring of a debt under s 588G includes the entry into an uncommercial transaction, as defined by s 588FB: s 588G(1A).

A breach of any of these provisions is a civil penalty breach pursuant to Part 9.4B of the *Corporations Act*. This allows ASIC to apply for an order disqualifying the director under s 206C, a pecuniary penalty up to a maximum of \$200,000,¹⁶⁹ and/or a compensation order.¹⁷⁰

- *Other disqualifications under Part 2D.6 of the Act:*
 1. ASIC may apply to the court to have a director disqualified for up to 20 years where the person, within the last seven years, has been an officer of two or more corporations when they have failed and the court is satisfied that the manner in which the corporation was managed was wholly or partly responsible for the corporation failing and the disqualification is justified: s 206D;
 2. ASIC may also apply to the court for a disqualification order where a person has twice been a director of a corporation that has contravened the Act and each time has failed to take reasonable steps to prevent the contravention or where a person has twice contravened the Act while they were an officer of a body corporate: s 206E;

¹⁶⁷ 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/>>.

¹⁶⁸ ASIC, Information Sheet 151 ASIC's approach to enforcement (22 March 2016) <<http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>>.

¹⁶⁹ *Corporations Act* s 1317G(1).

¹⁷⁰ *Corporations Act* s 1317H.

3. ASIC may itself disqualify a person for up to five years if, within the past seven years, the person has been an officer of two or more corporations where adverse liquidator reports have been lodged with ASIC: s 206F.
- ASIC may wind up a dormant company under s 489EA where it becomes apparent that it is not carrying on business, evidenced, for example, by the non-return of ASIC forms or the non-payment of fees. ASIC may then appoint a liquidator to wind up the affairs of the company.
 - A variety of criminal provisions, outlined at [4.3.2](#).

Some of these mechanisms require ASIC to make an application to the court, considered at [4.2.1.3](#). Others may be implemented administratively by ASIC, considered at [4.2.1.4](#).

In a speech to the Council of Small Business Australia on 17 July 2015, ASIC Commissioner Mr Greg Tanzer stated that ASIC is extending its surveillance work in relation to illegal phoenix activity, 'to focus on the building and construction industry – in particular, the issue of false statutory declarations submitted by contractors as a means of getting paid for goods and services'.¹⁷¹

4.1.2. ATO

The ATO's approach to phoenix activity is that of a creditor as well as a regulator. That is, the ATO can take action to seek to recover the amount owing in unpaid taxes but the ATO also has a number of other measures at its disposal that may be relevant in the phoenix context.

The ATO runs several targeted phoenix enforcement programs, canvassed here first, followed by a brief outline of the ATO's enforcement approach more broadly in areas that are not necessarily aimed at illegal phoenix activity, but may nonetheless regulate its symptoms, such as the underpayment of employees' superannuation entitlements.

4.1.2.1. ATO TARGETED PHOENIX ENFORCEMENT PROGRAMS

The ATO has been concerned about illegal phoenix activity for some time. What follows are some of the recent comments made by senior ATO officers about its approach to the enforcement of laws tackling phoenix activity. For example, on 23 October 2009 Deputy Commissioner of Taxation Mr Mark Konza, when answering questions before the JCPAA, said:

We are working with ASIC to try to identify phoenix operators and take appropriate action between us. It is so difficult to investigate and prosecute all these cases. What we are trying to do is identify those who get involved in phoenix and monitor their activities very directly so that they cannot get into a position of indebtedness to the tax office. We received funds in the last budget to help us do that. To try to suppress the risk we identify those who are active phoenixes. We have people who check their BAS lodgements

¹⁷¹ ASIC, *COSBOA Conference - What is ASIC doing to help small business? - A speech by Greg Tanzer, Commissioner, Australian Securities and Investments Commission*, (Council of Small Business Australia (COSBOA) Conference Sydney, 17 July 2015) <<http://asic.gov.au/about-asic/media-centre/speeches/cosboa-conference-what-is-asic-doing-to-help-small-business/>>.

and their income tax return lodgement every period and are on to them straightaway if they are the slightest bit late. That is a suppression technique more than anything else.¹⁷²

In a paper presented to the Tenth Annual States' Taxation Conference on 29 and 30 July 2010, then ATO Phoenix Risk Manager Grant Darmanin noted:

The ATO has maintained a specific focus on fraudulent phoenix arrangements since 1998. During this period over 1,600 businesses involved in fraudulent phoenix behaviour have been audited – resulting in tax and penalties raised exceeding \$775 million... Since year 2000, twelve prosecutions against company directors involved in fraudulent phoenix-type activity have been finalised. There are a number of other matters previously identified by the ATO which are currently before the courts. Further prosecutions are expected.¹⁷³

In the speech, Mr Darmanin drew attention to the fact that regardless of this ongoing focus, 'most of the taxes and penalties raised have not been collected and probably never will... because the companies concerned generally have nil or negligible assets or are insolvent and do not have the capacity to pay the tax or superannuation liabilities owed'. Hence, he noted, these companies generally 'proceed into liquidation as soon as the ATO commences recovery action'.¹⁷⁴

In the May 2011 federal budget, the government flagged a crackdown on tax avoidance, including illegal phoenix activity. In total, over \$146 million over four years was allocated to tackling fraudulent claims, estimated to provide the government with a further \$900 million in revenue over the following four years. A 2011 budget measure, 'Tax Compliance – countering fraudulent phoenix activities by company directors' allocated the following sums to deal with phoenixing: 2010-11: \$0.6 million; 2011-12 million: \$5.8 million; 2012-2013: \$7.5 million; 2013-14: \$4.4 million; 2014-15: \$3.8 million.¹⁷⁵

More recently, the ATO has restated that it is targeting illegal phoenix activity. For example, *ATO Compliance in Focus 2013-14* states that:

... we will continue our efforts to reduce phoenix activity more broadly by monitoring, auditing and enforcing debt collection. If necessary, we will take action on directors where their company has unpaid PAYG withholding liabilities and super guarantee charge liabilities. The most serious cases will be referred to ASIC or prosecuted.¹⁷⁶

4.1.2.2. RISK ASSESSMENT AND PHOENIX EARLY INTERVENTION STRATEGY

The ATO has developed its enforcement approach to deal with certain high-risk sectors, such as the building and construction, and property development sectors. The approach includes measures to identify potential illegal phoenix risks and to enable early intervention where risk is identified.

¹⁷² Commonwealth of Australia, Official Committee Hansard, Joint Committee of Public Accounts and Audit, Reference: Biannual Hearing with Commissioner of Taxation (Friday 23 October 2009), PA 8-9.

¹⁷³ Grant Darmanin, 'Understanding the Need to Work Collaboratively to Address Fraudulent Phoenix Behaviour' (Tenth Annual States' Taxation Conference, 29 & 30 July 2010, Brisbane), 3 (on file with authors).

¹⁷⁴ Ibid.

¹⁷⁵ Wayne Swan MP and Senator Penny Wong, *Budget Measures Budget Paper No. 2 2011-12* (10 May 2011), 45 <<http://www.budget.gov.au/2011-12/content/bp2/download/bp2.pdf>>.

¹⁷⁶ ATO, *Compliance in Focus 2013-14* (2013) <https://www.ato.gov.au/uploadedFiles/Content/CS_C/downloads/CSC35735NAT74689.pdf>. Similarly, the ATO *Annual Report 2013-14* states 'we continued to target fraudulent phoenix activity as part of a whole-of-government strategy. We aim to maintain a level playing field for honest businesses, prevent ongoing revenue loss and support our law enforcement partners'. ATO, *Annual Report 2013-14* (10 October 2014), 62.

For example, in its submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry in April 2015, the ATO reported on the implementation of a new system designed to address compliance risks in the building and construction sector, particularly in relation to non-payment of GST, including (but not limited to) illegal phoenix activity. The system, called the 'Taxable Payment Reporting System', requires businesses in this sector to report payments made to other companies, including contractors, for services. In its submission, the ATO noted that the Taxable Payment Reporting System had 'achieved significant improvements (eg \$2.3 billion in additional reporting in 2012-13) in lodgement and reporting of liabilities in the business-to-business component of this sector, together with some improvement in collections'.¹⁷⁷ A total of 1.58 million transactions valued at \$163 billion were reported in the first full year of its operation.

Another high-risk area relevant to illegal phoenix activity that the ATO has been specifically targeting in recent years is the property development industry. The 2012-13 *GST Administration Annual Performance Report* further explained the ATO's enforcement approach towards phoenix activity in the property development sector:

We seek to identify individuals with links to numerous insolvencies and new registrants in the property sector who have a higher likelihood of not meeting their obligations. Our intent is to detect these 'disengaged' property developers early in the property development cycle and undertake appropriate action to protect the revenue and enhance voluntary compliance.¹⁷⁸

The ATO's submission to the 2015 Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry also commented on the 'Working together to improve Voluntary Compliance' program, a six-year initiative implemented in 2010 designed to improve the rate of cash collections of GST through a focus on increasing lodgements, addressing GST-related fraud, and dealing with disengaged property developers. The submission reported that since its inception the program has achieved the following results:

In 2013-14 the whole program raised an additional \$1.72 billion in GST liabilities through compliance activities and collected an additional \$2.12 billion through debt collection activities. These results exceed the four year commitments of \$1.52 billion in GST liabilities and \$325.2 million in GST debt collections. Liabilities relating to 'disengaged' property developers for the 2013-14 year included more than \$188 million in GST. GST cash collections improved from a rate of 35.8% in 2012-13 to 48.7% in 2013-14. The improved cash collection rates are a direct result of the deliberate and intentional early compliance interventions with 'disengaged' property developers. This strategy is resource intensive but still sees more than 50% of the GST liabilities remain uncollected.¹⁷⁹

The ATO is alerted to possible cases of illegal phoenix activity in a variety of ways. These include referrals, investigations and visits to taxpayers, and the operation of its own phoenix risk model system, through which it profiles suspected phoenix operators, described here in its April 2015 submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry:

The ATO has recently implemented a sophisticated system-based Phoenix Risk Model that provides a demographic and risk-based profile of the overall potential and confirmed phoenix population. This Phoenix Risk Model also access (sic) the ATO's Group Wealth System which enables the ATO to link

¹⁷⁷ Ibid, 5 [10].

¹⁷⁸ Ibid.

¹⁷⁹ Ibid, 22.

associated entities within private group structures to entities suspected of being phoenix operators. By running this data against the ATO debt management data, we are now able to more accurately identify which connected private groups and their controlling minds may be illegitimately building their wealth through fraudulent phoenix behaviours.¹⁸⁰

The ATO has also formulated an early intervention strategy to try to deter illegal phoenix activity or minimise the risk of loss. After becoming aware of a suspected case of illegal phoenix activity the ATO Phoenix Risk and Intelligence team may determine that the matter is one that is suitable for early intervention under its Phoenix Early Intervention Strategy (PEIS).

The two early intervention strategies adopted by the ATO Phoenix Risk and Intelligence team under this scheme are (i) 'PEIS Lodgement', where contact is made with identified phoenix candidates via letter (two behavioural economics based 'nudge' letter templates were provided by the ATO directly and are contained in the appendix, at 5.5. and 5.6. respectively) and/or telephone to encourage lodgement, and (ii) 'PEIS Reporting Integrity', where letters are sent and desk and/or field audits are undertaken to check for inappropriate activity.

4.1.2.3. ATO ENFORCEMENT MECHANISMS AGAINST PHOENIX ACTIVITY

There is no specific taxation offence relating to illegal phoenix activity. Therefore, when the ATO takes action against suspected phoenix operators, it will do so pursuant to provisions which cover non-payment of taxes in the broader context. These enforcement actions available to the ATO can be categorised as follows:

- (i) **Identifying and acting to prevent phoenix activity and its consequences**
 - Risk assessment and PEIS, noted above at 4.1.2.2;
 - Requiring security bonds for tax-related liabilities under Div 255 of the *Taxation Administration Act 1953* ('TAA');
 - Making estimates and recovery of PAYG withholding liabilities and superannuation guarantee charge amounts under Div 268 of the TAA.
- (ii) **Tax debt recovery**
 - Issuing a creditor's statutory demand under s 459E of the *Corporations Act*;
 - Issuing a garnishee notice under Div 260 of the TAA;
 - Recovery from directors under the DPN regime in Div 269 of the TAA.
- (iii) **Other enforcement mechanisms**
 - Imposing administrative penalties under the TAA;
 - Criminal offences (including under s 8Y TAA and s 21B of the *Crimes Act 1914* (Cth) ('*Crimes Act*'));
 - Prosecution for defrauding the Commonwealth (under Divs 134 and 135 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'));
 - Prosecution under the *Crimes (Tax Offences) Act 1980* (Cth) ('CTOA').

¹⁸⁰ ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015), 21.

4.1.2.3.1. Identifying and acting to prevent illegal phoenix activity

- **Security bonds for tax-related liabilities**

Under schedule 1, s 255-100 of the TAA, the Commissioner of Taxation may require a taxpayer to give security for the payment of an existing or future ‘tax-related liability’¹⁸¹ where the Commissioner has reason to believe that a taxpayer establishing or carrying on a business in Australia intends to carry on the business for a limited period only, or reasonably believes that the requirement to give security is otherwise appropriate.¹⁸²

Prior to 2010, security bonds could only be required by the Commissioner in relation to the payment of income tax.¹⁸³ The Commissioner can now require security to be given in relation to a wide variety of federal tax liabilities,¹⁸⁴ including SGC, PAYG(W) amounts, PAYG(W) non-compliance tax, estimates of amounts payable relating to SGC and PAYG(W) under Div 268 and penalties under a DPN.¹⁸⁵

The Commissioner may require the taxpayer to give the security by way of a bond or deposit (including payments in instalments), or any other means that the Commissioner believes is appropriate (eg a mortgage over property, floating charges, liens and guarantees).¹⁸⁶ The Commissioner may require the security to be given at any time and as often as the Commissioner reasonably believes is appropriate.¹⁸⁷ The Explanatory Memorandum to the Tax Laws Amendment (Transfer of Provisions) Bill 2010 (Cth) that extended the operation of security bonds stated that the Commissioner could do so ‘to protect the integrity of the tax system against schemes such as fraudulent phoenix activity’.¹⁸⁸

If a taxpayer is required to give security, the Commissioner must give written notice to the taxpayer.¹⁸⁹ If a person is required to give security and fails to do so, he or she commits an offence which has a penalty of 100 penalty units (currently \$18,000).¹⁹⁰ The provisions apply to companies as well as individuals, and the penalty for companies is 500 penalty units (currently \$90,000).¹⁹¹

A taxpayer may be able to rely on a *Criminal Code* defence, such as ‘involuntariness’ in circumstances where the taxpayer is unable to provide security; however, a taxpayer is expected to comply with the

¹⁸¹ ‘A ‘tax-related liability’ is a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable): TAA sch 1 s 255-1(1). A taxation law, or a provision of it, that is prescribed by the regulations is excluded: TAA sch 1 ss 255-1(1) (Note 2), 265-65.

¹⁸² TAA sch 1 s 255-100(1)(a). A ‘tax-related liability’ includes a liability under sch 1 s 269-20 of the director penalty provisions: TAA sch 1 ss 250-1(1), 250-10(2).

¹⁸³ 2009 Treasury Phoenix Proposals Paper, above n 1, 10–11 [3.1.5]; *Income Tax Assessment Act 1936* (Cth) s 213 (repealed).

¹⁸⁴ TAA sch 1 s 250-10(1),(2).

¹⁸⁵ TAA sch 1 s 250-10(2) table items 60 (superannuation guarantee charge), 105 (payment of withheld amount to Commissioner), 110 (PAYG withholding non-compliance tax), 138 (estimate of payable amounts), 139 (penalty under Subdivision 269-B).

¹⁸⁶ TAA sch 1 s 255-100(2); Explanatory Memorandum, Tax Laws Amendment (Transfer of Provisions) Bill 2010 (Cth) 18 [2.47].

¹⁸⁷ TAA sch 1 s 255-100(3).

¹⁸⁸ Explanatory Memorandum to the Tax Laws Amendment (Transfer of Provisions) Bill 2010 (Cth), [2.42].

¹⁸⁹ TAA sch 1 s 255-105.

¹⁹⁰ TAA sch 1 s 255-110. A penalty unit is \$180: *Crimes Act 1914* (Cth) s 4AA.

¹⁹¹ Explanatory Memorandum, Tax Laws Amendment (Transfers of Provisions) Bill 2010 (Cth) 19–20 [2.53]; *Crimes Act* s 4B(3).

Commissioner's request as far as they are capable and is expected to refrain from the activity that will generate the relevant tax liabilities.¹⁹²

In December 2010 it was noted in *The Sydney Morning Herald* that despite the increase in the penalty for non-compliance with a requirement to provide security — at that time from \$2,200 to \$11,000 for individuals and from \$11,000 to \$55,000 for companies — ATO sources said that the fines were 'still too low and the security bond is not very practical because it starts a chain of litigation while the company is still trading and when the company collapses the bond is never paid'.¹⁹³ Consequently, although the Commissioner has the power to seek security payments from directors suspected of serious illegal phoenix activity, these bonds have not been used very often, as the figures in 4.2.2.7 show.

- **PAYG(W) and Superannuation Guarantee Estimates**

In 2012, the ATO was granted powers to make estimates of PAYG(W) or superannuation guarantee contributions that a company has failed to pay.¹⁹⁴ The powers in relation to Superannuation Guarantee Estimates (SGE) allow the ATO to intervene when it identifies suspected illegal phoenix activity in order to protect employees' super entitlements before a company is liquidated. When it does so, the estimate becomes payable in its own right as a separate and parallel liability with the actual shortfall (s 268-20).¹⁹⁵ Under s 268-40 of the TAA the taxpayer gets two opportunities to reduce or revoke the estimate. Within seven days after the estimate is given, the taxpayer may give a statutory declaration specifying the unpaid amount of the underlying liability. Within 14 days of service of a winding up application or of appearance in a proceeding to recover the estimate the taxpayer may file an affidavit specifying the unpaid amount of the underlying liability. The estimate, and any statutory demand based on it, will then be deemed amended to such specified amount.

In January 2015, the ATO stated in a media release:

... [t]he SGE powers allow the ATO to raise liabilities against companies who fail to disclose details about their employees. The ATO can deal with this type of phoenix behaviour in real-time, by making a reasonable estimate of a company's superannuation obligations, and raising a debt on the company or its directors before the company can be put into liquidation.¹⁹⁶

4.1.2.3.2. Tax Debt Recovery

The Commissioner has a number of methods to recover tax debts including arrangements with debtors such as allowing for payment by instalments and offsetting credits with debits. The Commissioner can also take a range of other actions such as issuing a statutory creditor demand, issuing a garnishee notice to recover the debt from a third party or issuing a DPN. These are considered below. Other more drastic actions (not considered as unlikely to be appropriate in relation to illegal phoenix activity include

¹⁹² Ibid, 18 [2.45].

¹⁹³ Adele Ferguson, 'A Free Rise from the Ashes of Others', *The Sydney Morning Herald*, 11 December 2010 <<http://www.smh.com.au/business/a-free-rise-from-the-ashes-of-others-20101210-18std.html>>.

¹⁹⁴ *Tax Laws Amendment (2012 Measures No. 2) Act 2012* (Cth).

¹⁹⁵ See *Australia DIS Pty Ltd v Deputy Commissioner of Taxation* [2012] VSC 331 where it was held that the estimate was payable regardless of any dispute about the underlying liability.

¹⁹⁶ ATO, 'ATO uses new powers to recover superannuation entitlements from phoenix operators' (Media Release, 9 January 2015).

freezing orders (also known as Mareva injunctions) and Departure Prohibition Orders (DPOs) (s 14S of the TAA).

- **Creditors' statutory demand**

The Commissioner of Taxation can issue a demand to a company that owes it in excess of \$2,000, requiring the company to pay the debt or enter into a payment arrangement within 21 days of the demand being served: *Corporations Act* s 459E. Failure to comply can be used as evidence of insolvency under s 459C(2)(a) of the *Corporations Act* enabling the ATO to file an application with the Federal Court to wind up the company.

In July 2015, the IGT reported on debt collection by the ATO.¹⁹⁷ One of the matters considered was the use of tax debt recovery measures related to commencing insolvency proceedings, including by issuing a statutory demand under s 459C of the *Corporations Act*. According to information provided by the ATO to the IGT, the majority of corporate insolvencies are not initiated by the ATO.¹⁹⁸ Moreover, the ATO generally receives very little as a result of insolvency actions.¹⁹⁹

- **Garnishee notices**

The Commissioner of Taxation can require that monies payable to, or held on behalf of, a person with a tax debt (eg by banks and other financial institutions) be paid to the ATO under s 260-5 of schedule 1 to the TAA. Under this provision it is possible for the Commissioner to obtain priority of payment over secured and unsecured creditors in certain circumstances. The Commissioner serves a notice requiring payment from a person or company which holds money on behalf of the company that owes unpaid taxes. The result of such a notice is the creation of a fixed charge in favour of the Commissioner against the taxpayer company's assets rendering the Commissioner in effect a secured creditor. An advantage for the Commissioner is that the notice avoids the requirement placed on other secured creditors to obtain a judgment or a warrant of execution from the court.

The IGT's Debt Collection report to the ATO considered, inter alia, the use of garnishee notices which had been the subject of complaints by stakeholders. It was noted that garnishee notices are the most common form of 'firmer recovery action in relation to tax debt' announced by the ATO in 2013.²⁰⁰ The IGT report noted that more than 207,000 notices were issued between financial year 2011–12 and financial year 2013–14.²⁰¹ However, the IGT was critical of the inconsistent use of garnishee notices and the lack of supervision of staff issuing them. The report made a number of recommendations to ensure such notices were issued correctly.²⁰²

- **Recovery from directors under the DPN regime**

¹⁹⁷ 2015 IGT Debt Collection Report, above n 107.

¹⁹⁸ *Ibid*, [1.119].

¹⁹⁹ *Ibid*, [1.121].

²⁰⁰ See ATO, *Firmer action approach to debt collection* (8 March 2013)

<<https://www.ato.gov.au/General/Managing-your-tax-debt/In-detail/Debt-fact-sheets-and-FAQs/Firmer-action-approach-to-debt-collection/>>.

²⁰¹ 2015 IGT Debt Collection Report, above n 107, [4.30].

²⁰² *Ibid*, [4.1].

An important provision in relation to unpaid tax debts is the ability of the Commissioner of Taxation to recover amounts owing by the company from directors. Under Div 269-15 of Schedule 1 to the TAA, a director is under an obligation to ‘cause the company to comply with its obligation’ to pay its tax liability. This obligation continues until the company has paid that tax or is wound up or placed into VA. Directors become liable for a penalty through the issuance of a DPN if they do not cause the company to pay its liabilities by the due date. The DPN regime was amended in 2012 to make directors personally liable for their unpaid PAYG(W) instalments and SGC liabilities and limit the circumstances in which directors can discharge a director penalty by placing their company into VA or liquidation.²⁰³

The ATO’s submission to the 2015 Senate Economic References Committee inquiry into Insolvency in the Australian construction industry stated:

The ATO is seeing an increased reporting of liabilities through lodgement of activity statements, especially where the ATO has coupled this with communications about director penalty notices. We are sensitive to the risk that directors may report their liabilities to avoid a director penalty ‘lock down’, but not follow up with payment. We are better targeting debt collection activities to focus on such cases, where they arise – especially for potential phoenix operators and other taxpayers who may be involved in systemic non-compliance with their debt obligations.²⁰⁴

The IGT’s report in July 2015 noted that generally tax debt had increased since the GFC.²⁰⁵ The report also commented on the use of ‘firmer debt recovery activities’ of the ATO and noted that:

...between 2011–12 and 2013–14, the ATO had issued over 27,000 DPNs primarily to directors of small businesses. Furthermore, approximately 21 per cent of these taxpayers have become insolvent following the issuing of a DPN. Approximately 21 per cent of large businesses have also become insolvent following issuing of a DPN.²⁰⁶

4.1.2.3.3. Other Enforcement Mechanisms

- **Administrative Penalties**

Since 1992 Australia’s tax system has been based on self-assessment. The administrative penalty regime that allows the Commissioner to impose penalties is seen as an important part of that system. These penalties have been described as ‘designed to encourage voluntary compliance with taxation obligations’. These tax obligations may be grouped into the following four categories:

- registration obligations — registration with the relevant authorities for various taxation obligations;
- lodgement obligations — timely lodgement of requisite taxation information or documents;
- reporting obligations — complete and accurate information to be reported, as well as the maintenance of supporting records; and
- payment obligations — the prompt payment of taxation liabilities.

²⁰³ The TAA 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.

²⁰⁴ ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015), 30.

²⁰⁵ 2015 IGT Debt Collection Report, above n 107, [4.1].

²⁰⁶ *Ibid*, [4.20].

Since 2000, there has been a system of 'uniform penalties', that is, the penalties apply to obligations under various tax laws, including under the GST legislation. The uniform penalty provisions are in Part 2-45, Schedule 1 of the TAA. There are four main types of administrative penalties:

- penalties relating to taxpayer statements (Subdiv 284-B TAA);
- penalties relating to schemes to reduce tax-related liabilities (Subdiv 284-C TAA);
- penalties for failing to lodge returns and other documents on time (Div 286 TAA); and
- other miscellaneous penalties, such as failing to register or cancel registration and failing to issue a tax invoice (Div 288 TAA).

The penalties imposed are either a percentage of the tax not paid (a shortfall penalty) or based on penalty units. The ATO imposes a significant number of administrative penalties each year but does not produce disaggregated data to indicate the obligation that the penalty relates to. In any event, illegal phoenix activity by its nature is likely to involve criminal behaviour and will be dealt with under the provisions of tax and other legislation creating tax offences.

- **Criminal offences under the TAA**

In addition to the administrative penalty regime there are a number of provisions in Part III of the TAA (ss 8A to 8ZN) that create criminal offences. There are three main types of offences:

- failure to comply with certain requirements of a tax law (s 8C TAA);
- refusal to answer questions or provide documents (s 8D TAA); and
- making false or misleading statements (ss 8K to 8T TAA).

The requirements that can lead to an offence under s 8C are failure to:

- furnish a return or information;
- give information to the Commissioner in the required manner;
- lodge an instrument for assessment;
- cause an instrument to be duly stamped;
- notify the Commissioner of a matter or thing;
- produce a book, paper, record or other document; or
- attend before the Commissioner.

It is an offence under s 8D to refuse or fail to:

- answer questions;
- produce a book, paper, record or other document; or
- take an oath or affirmation,

when required to do so when attending before the Commissioner or another person. In such cases the court can make orders that the person comply with the obligation. Failure to do so will also be an offence (ss 8G and 8H TAA).

The maximum penalty for a first offence under these provisions is a fine of \$2,200. If the person has already been convicted of any of these offences within the previous five years, the maximum penalty is \$4,400. If the person has already been convicted of two or more of these offences within the previous five years, the maximum penalty is \$5,500 (\$27,500 for companies) or imprisonment for 12 months, or both (s 8E TAA). A taxation offence that is punishable by a fine or imprisonment for a period of 12 months or less is treated as a summary offence (s 8ZA). This means that the ATO can institute proceedings rather than refer the matter to the CDPP.

The offences relating to the making of false statements depend on whether the statements are made negligently (s 8K TAA), recklessly (s 8N TAA) or with the intent to deceive or obstruct (s 8T). The maximum penalty for a first offence under s 8T is a fine of \$5,500 (\$27,500 for companies) or imprisonment for 12 months, or both. If the person already has a previous conviction within the previous 10 years the maximum penalty is a fine of \$11,000 (\$55,000 for companies) or imprisonment for two years, or both (s 8U TAA).

Another important provision is s 8Y of the TAA. It provides that where a company does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person who is concerned in, or takes part in, the management of the company is deemed to have committed the taxation offence. In the past, an option for the ATO was to take action under s 8Y and apply for a court ordered penalty. Section 8Y deems offences to have been committed by a person who takes part, or is concerned, in the management of the corporation²⁰⁷ and so captures management, as well as directors, in the taxation offence.²⁰⁸

In proceedings under s 8Y the Commissioner has relied on s 21B of the *Crimes Act* which allows for the making of reparation orders where an offence has been committed. In 1998 in *Gould v FCT* a director placed his company into liquidation after receiving a director penalty notice. Under the law at that time he was able to avoid the director penalty for the unpaid PAYE liability of the company. However, he was convicted by virtue of s 8Y of the TAA in relation to the company's failure to remit PAYE amounts to the Commissioner. The Commissioner then asked the Court to use s 21B of the *Crimes Act* to require the director to make reparation for the unpaid PAYE amounts. The Court held that the use of s 21B in this way was not inconsistent with the (then) ability of a director to avoid penalties by placing the company in liquidation.²⁰⁹

- **Defrauding the Commonwealth**

The most common provisions for dealing with serious tax fraud and evasion are under the general criminal law. This includes provisions dealing with 'defrauding the Commonwealth' contrary to s 135.1 of the *Criminal Code* or conspiracy to defraud under s 135.4 of the *Criminal Code*. Prosecutions under these provisions are referred to the CDPP. The term 'defraud' is not used in the current provisions. The heading to s 135.1 is 'General dishonesty' and the section states a person is guilty of an offence if the person does anything with the intention of dishonestly obtaining a gain from another person; and the other person is a Commonwealth entity. The penalty under this provision is imprisonment for 5 years.

²⁰⁷ TAA s 8Y(1).

²⁰⁸ Defined by s 8A TAA as 'an offence against a taxation law' or certain provisions dealing with aiding and abetting under the *Crimes Act* or the *Criminal Code*.

²⁰⁹ See *Michael Stephen Gould & Ors v Federal Commissioner of Taxation & Anor* [1998] WASCA 260 (25 September 1998).

- **CTOA**

The CTOA is directed at attempts to evade tax by rendering a company unable to pay tax. The legislation was enacted to stamp out ‘bottom of the harbour’ schemes. The legislation imposes criminal penalties upon taxpayers (and their advisers²¹⁰) if the person is a party to, (or aids and abets another person to) entering into an arrangement or transaction which is designed to ensure that a company is unable to pay assessed income tax, or income tax that may be assessed, if the person concerned had the intention of securing that result.²¹¹ The penalty for an offence under the CTOA is imprisonment of up to 10 years and/or a fine of up to 1,000 penalty units (\$170,000); and, in addition, under s 12(1) the court may order a person to pay to the Commonwealth ‘such amount as the court thinks fit but not exceeding the amount of the ... tax moneys due and payable by the company... on the day of the conviction’. Because the Act creates criminal offences, the defendant’s guilt must be proved beyond reasonable doubt.

The provisions apply to various taxes as well as income tax including PAYG(W) amounts payable to the Commissioner, superannuation guarantee charges and GST.²¹² Such offences are subject to a penalty of 10 years’ imprisonment, 1000 penalty units (\$180,000) or both.²¹³

Although the penalties under the CTOA are significant, the legislation has not been used in the past 10 years. This may be because of the difficulty of proving the relevant intention beyond reasonable doubt. It may be that the CDPP believes it is more straightforward to rely on the defrauding the Commonwealth provisions in the *Criminal Code*. In response to Treasury’s 2009 Proposals Paper, Pitcher Partners made a submission arguing that the CTOA is an ‘ideal’ vehicle ‘for taking action to address fraudulent phoenix activity’.²¹⁴

4.1.3. CDPP

The CDPP does not directly regulate illegal phoenix activity, however it receives referrals from ASIC, the ATO, and the FWO in relation to criminal activity associated with the behaviour. Since there is no specific phoenix offence, the Phoenix Research Team was constrained in the data it could locate and include in this report. This background section outlines some general statistics taken from the latest CDPP annual report on enforcement actions undertaken over the course of the 2013-14 financial year under relevant legislative provisions that could potentially (but don’t necessarily) involve illegal phoenix activity.

The following relevant background data was taken from the CDPP’s *Annual Report 2013/14*. In that year:

²¹⁰ CTOA 1980 ss 6, 17.

²¹¹ *Ibid*, s 5.

²¹² Offences under part 2 of the CTOA relate to ‘income tax’ and this is defined to include any amount payable to the Commissioner under subdiv 16-A or 16-B in sch 1 to the TAA: s 3 (Interpretation). There are also offences relating to the superannuation guarantee charge under part 7 and relating to GST under part 8 of the Act.

²¹³ See, eg, CTOA, ss 5, 6. A penalty unit is \$180: *Crimes Act* s 4AA.

²¹⁴ Pitcher Partners, *Submission into Proposals Paper Action against Fraudulent Phoenix Activity* (8 January 2010), 5 <http://archive.treasury.gov.au/documents/1892/PDF/Pitcher_Partners.PDF>.

- The CDPP issued 367 summary charges and no indictable charges under the TAA;²¹⁵
- The CDPP issued 165 summary charges and 107 indictable charges under the *Corporations Act*;²¹⁶
- The ATO referred 72 defendants on summary charges to the CDPP;²¹⁷
- The ATO referred 14 defendants on indictable charges to the CDPP;²¹⁸
- ASIC referred 27 defendants on summary charges to the CDPP;²¹⁹
- ASIC referred 27 defendants on indictable charges to the CDPP;²²⁰
- The CDPP's operating revenue was \$83.45 million (\$11.18 million (11.8%) less than operating revenue for the 2012–13 year);²²¹
- The CDPP received less funding for tax compliance prosecution (\$0.75 million less);²²²
- The CDPP received \$3.2 million from the ATO under the terms of their joint MOU 'to cover the cost of prosecutions for offences under ... GST legislation'.²²³

In addition ASIC and the ATO may arrange with the CDPP to conduct summary prosecutions for straightforward regulatory offences. In its *Annual Report 2013/14* the CDPP reported the following data:

- The ATO 'conducted more than 1700 prosecutions of over 1400 individuals and 300 companies. Fines, costs and reparation orders totaling more than \$13 million were imposed';
- ASIC 'conducted more than 600 prosecutions of over 300 defendants. Fines and costs totaling more than \$760,000 were imposed'.²²⁴

The CDPP described its enforcement activities and approach towards revenue fraud as follows:

Prosecuting tax frauds continued to be a significant part of our practice this year. As in previous years, there were a significant number of cases of fraud relating to income tax and the goods and services tax (GST). We prosecute tax frauds referred by the Serious Non-Compliance area of the Australian Taxation Office (ATO) as well as the AFP. We also prosecute regulatory offences under tax legislation. By arrangement with us, the ATO prosecutes straightforward regulatory offences, but if a matter becomes a defended hearing it is referred to us to continue the prosecution. This cooperative relationship helps the ATO with its compliance programme by enabling the efficient and effective prosecution of regulatory offences relating to the proper administration of Australia's tax laws. The GST is a key element of the Australian tax system. Prosecutions relating to GST vary in sophistication from small-scale fraud to large, complex schemes. Prosecuting people who exploit that system—for example, by failing to report cash income they receive or by falsifying claims for GST credits—is an important way in which we help to maintain acceptable levels of voluntary compliance with tax laws.²²⁵

²¹⁵ CDPP, *Annual Report 2013/14* (30 September 2014), 36.

²¹⁶ *Ibid*, 35.

²¹⁷ *Ibid*, 37.

²¹⁸ *Ibid*.

²¹⁹ *Ibid*, 36.

²²⁰ *Ibid*.

²²¹ *Ibid*, 88.

²²² *Ibid*.

²²³ *Ibid*.

²²⁴ *Ibid*, 16.

²²⁵ *Ibid*, 43.

4.1.4. FWO

While the FWO has powers under the FWA to recover unpaid and underpaid wages and entitlements and to seek penalties against employers,²²⁶ it has no express powers to pursue illegal phoenix activity. The FWO described its role in regulating illegal phoenix activity thus in a joint submission with the Department of Employment to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry:

The FWO has no direct role in targeting phoenix operators, but has jurisdiction in relation to some consequences of phoenix activities, such as the possible underpayment of employee entitlements. The FWO cannot recover employee entitlements from an insolvent company that has been placed into liquidation or declared bankrupt. In these circumstances, the FWO refers employees to the Fair Entitlements Guarantee. The FWO also works collaboratively with other regulators to reduce the incidence and impact of phoenix activity. The FWO has established arrangements to refer matters involving suspected phoenix activities to the Australian Securities and Investments Commission and the Australian Taxation Office.²²⁷

The FWO can refer a matter to ASIC in writing, including information and evidence it has gathered. Currently there is no automated formal feedback process in place for ASIC referrals. Referrals by the FWO to ASIC occur when there is a suspected offence under the *Corporations Act*, which is primarily one of the following (however not limited to):

- s 184 – Directors’ duties;
- s 206A – Disqualified person not to manage corporations (bankrupts, convicted persons, ASIC prohibition);
- s 286 – Obligation to keep financial records;
- s 588G(3) – Director’s duty to prevent insolvent trading.

4.2. PHOENIX ENFORCEMENT DATA

4.2.1. ASIC

This section sets out data the Phoenix Research Team collated in relation to ASIC’s key enforcement programs and activities that target illegal phoenix activity (see [4.1.1.](#) for more information on these programs and activities), including its Proactive Phoenix Surveillance Programs, the Liquidator Assistance Program (LAP), enforcement requiring a court order, and finally, administrative enforcement. Data pertaining to the implementation of the Assetless Administration Fund (AAF) is examined in the administrative enforcement section, as well as data relating to disqualifications by ASIC under s 206F of the *Corporations Act*, which play an increasingly important role in the regulation of illegal phoenix

²²⁶ See the Phoenix Research Team’s *Defining and Profiling Phoenix Activity Report, December 2014*, Part 6.4 <<http://law.unimelb.edu.au/cclsr/centre-activities/research/major-research-projects/regulating-fraudulent-phoenix-activity>>.

²²⁷ Department of Employment, *Inquiry into Insolvency in the Construction Industry – Submission 22* (August 2015), 4.

activity. To this end, data compiled by the Phoenix Research Team pertaining to the review of s 206F disqualifications by the Administrative Appeals Tribunal (AAT) is also examined.

4.2.1.1. DATA ON ASIC'S PROACTIVE PHOENIX SURVEILLANCE PROGRAMS

In its submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry in April 2015, ASIC stated the following:

Since commencing the surveillance campaign in September 2013 a number of matters have been referred for enforcement action within ASIC and to the ATO for investigation. The aim of ASIC's above surveillance campaign and enforcement work is to change the attitudes of directors and to deter or prevent them from engaging in future illegal phoenix activity. What is clear from the campaign is that many directors are not aware of their obligations in respect of illegal phoenix activity. In order to raise awareness of those obligations, ASIC undertakes education of directors and their advisors through attendance at various industry conferences, site visits during surveillance activities and through information held on the ASIC website.²²⁸

Additionally, the submission noted:

ASIC has identified approximately 2,500 directors who met the criteria for triggering the director disqualification provisions of the Corporations Act and who are currently operating over 7,000 registered companies. ASIC is currently using an external data service provider to financially riskrate those 7,000 companies to identify directors who may contemplate engaging in future illegal phoenix activity. Using that information, ASIC is actively engaging with directors whose companies are at greatest risk of being placed in external administration and using coercive powers to get information to determine if they will engage in illegal phoenix activity.²²⁹

It is not clear from the submission whether these 7,000 companies are only in the construction sector or whether they are spread across other industries also. As mentioned in [section 2.3.2.3.](#), ASIC's annual report for 2013-14 stated that in 2013-14 the surveillance program identified 'a target 1,400 companies and 2,500 individuals in the building and construction, labour hire, transport, security and cleaning industries'. Based on these figures it might be construed that the figure of 2,500 directors and 7,000 companies mentioned in ASIC's submission to the Senate Standing Committee on Economics inquiry into Insolvency in the Australian construction industry in April 2015 refers to companies across *all* industries.

ASIC's *Annual Report 2013-2014* states:

Our surveillance program targeted company directors with a history of failed companies to detect and combat illegal phoenix activity. During 2013-14 ... [a]s a result of our risk assessment, we conducted 214 surveillances. We identified a range of concerns, including the use of false statutory declarations in Australia's building and construction sector. Our investigations are ongoing.²³⁰

4.2.1.2. DATA ON ASIC'S LIQUIDATOR ASSISTANCE PROGRAM

The ASIC-run LAP aims to ensure directors of companies that have entered EXAD 'comply with their obligations to provide information to the liquidator or ASIC about the companies they manage'.²³¹ ASIC

²²⁸ ASIC, *Senate Inquiry into Insolvency in the Construction Industry Submission by the Australian Securities and Investments Commission* (April 2015), 31-2.

²²⁹ *Ibid*, 31.

²³⁰ ASIC, *Annual Report 2013-2014* (29 October 2014), 43.

²³¹ *Ibid*, 33.

may choose to initiate court action against directors who do not meet these obligations. Every year ASIC receives approximately 1,200 to 1,500 requests from liquidators for assistance through this program.

Table 24 shows the amount of LAP requests for the financial years 2009-10 through to 2013-14, as well as the compliance levels and enforcement outcomes achieved as a result of these requests. The data indicates that there has been an increase in the compliance rate over this time frame, with a commensurate decrease in the numbers of directors prosecuted for breaches.²³² The compliance rate refers to how many directors complied with their obligations to provide books and accounts as a result of LAP intervention.

Table 24 Summary of LAP Statistics 1 July 2009 - 30 June 2014²³³

Financial year	Liquidator requests	Compliance rate	Directors prosecuted	Offences prosecuted	Fines
2009-10	1,563	33%	554	1,010	\$813,768
2010-11	1,386	40%	425	761	\$873,562
2011-12	1,410	44%	402	817	\$1.05 mill
2012-13	1,484	45%	528	966	\$1.15 mill
2013-14	1,559	39%	314	609	\$768,000

Source: ASIC

4.2.1.3. DATA ON ASIC ENFORCEMENT REQUIRING A COURT ORDER

Court-based enforcement mechanisms available to ASIC include civil penalty proceedings that may be instigated against directors alleging that they have breached a directors’ duty²³⁴ or the duty to prevent insolvent trading.²³⁵

ASIC’s media releases from 1 January 2004 to 31 December 2014 detail 19 separate occasions when ASIC applied for a declaration of contravention of civil penalty provisions alleging a breach of a director’s duty.²³⁶ A search of all Austlii caselaw databases for the same period revealed the same 19 occasions. In only one of those applications did the facts giving rise to the alleged breach of duty amount to illegal phoenix activity. The Phoenix Research Team’s search of ASIC’s media releases and the Austlii database did not reveal any ASIC applications commenced between 1 January 2004 and 30 June 2014 alleging directors had engaged in insolvent trading pursuant to *Corporations Act* s 588G in circumstances that may have involved illegal phoenix activity.

A search for the term “206F AND corporations act” across all Austlii caselaw databases (for both state/territory and commonwealth cases) for the period 1 January 2004 to 31 December 2014 revealed a number of cases where a director was disqualified under s 206F or where ASIC was applying for such

²³² Ibid.

²³³ ASIC, *Senate Inquiry into Insolvency in the Construction Industry, Submission by the Australian Securities and Investments Commission* (April 2015), 33.

²³⁴ *Corporations Act* ss 180, 181–182, 206C, 1317E, and 1317H respectively.

²³⁵ *Corporations Act* ss 588FG and 588FB.

²³⁶ See Michelle Welsh, ‘Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia’ (2014) 42 (1) *Federal Law Review* 217 – 240; Michelle Welsh, ‘Civil Penalties and Responsive Regulation: the Gap Between Theory and Practice’ (2009) 33(3) *Melbourne University Law Review* 908 – 933; Michelle Welsh, ‘The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors’ Duty Provisions’ (2009) 27 *Company and Securities Law Journal* 370 - 388.

an order. When the AAT cases were removed from the results, analysis of the remaining cases revealed that two cases involved phoenix activity.²³⁷ One was the Federal Court trial of Desley Soong,²³⁸ a complex illegal phoenix activity case extensively analysed in the Phoenix Research Team's *Defining and Profiling Phoenix Activity* report at 2.2.5.2. The second case was heard in the Federal Magistrates Court and was based on a contravention of the *Workplace Relations Act 1996* (Cth). The case also featured in the Phoenix Research Team's search of ASIC's media releases.²³⁹ The judgment included the following summary of the illegal phoenix type 1 engaged in by the director Mr Zarfati:

There is evidence that on 31 July 2008 ASIC disqualified Mr Zarfati from managing a corporation under s.206F(1) of the Corporations Act 2001 (Cth) for a period of three years, after an investigation into his role in four failed companies (Empire Printing Pty Ltd, ACN 095 910 357 Pty Ltd, Empire Creative Services Pty Ltd, and MAC PRO Productions Pty Ltd). It was found that Mr Zarfati had engaged in "phoenix" activity by transferring the business of Empire Printing Pty Ltd to three other companies for the purpose of defeating claims of creditors and that he had failed to assist the liquidator of that company (although that decision was partly stayed by the AAT in *Zarfati and Australian Securities and Investments Commission* [2008] AATA 989 on 6 November 2008).²⁴⁰

The judgment did not specify the total amount of losses owed by Mr Zarfati to all of his companies' creditors.

A search was also undertaken on all of Austlii's caselaw databases for the term "206C AND corporations act" for the time period January 2004 to December 2014 which yielded a number of results. Analysis of the results showed that only three cases involved phoenix activity, and these three cases all pertained to the same matter, that of *Somerville*.²⁴¹ *Somerville* was an illegal type 1 phoenix activity case previously analysed in the Phoenix Research Team's *Defining and Profiling Phoenix Activity* report at 2.2.3.2. *Somerville* also featured in the search undertaken of ASIC media releases.²⁴²

Searches were also undertaken on all Austlii caselaw databases for the time period January 2004 to December 2014 for the terms "206D AND corporations act" and "206E AND corporations act". These searches revealed a number of cases in which ASIC was seeking disqualification under one of these provisions or else where the disqualification had already occurred. None of the cases appeared to involve phoenix activity.

²³⁷ *Deputy Commissioner of Taxation v Wellnora Pty Limited* (includes corrigendum 28 September 2007) [2007] FCA 1234 (15 August 2007); *Torpia v Empire Printing (Australia) Pty Ltd & Anor* [2009] FMCA 853 (11 September 2009).

²³⁸ *Deputy Commissioner of Taxation v Wellnora Pty Limited* (includes corrigendum 28 September 2007) [2007] FCA 1234 (15 August 2007)

²³⁹ ASIC, '08-178 ASIC disqualifies six directors' (Media Release, 1 August 2008).

²⁴⁰ *Torpia v Empire Printing (Australia) Pty Ltd & Anor* [2009] FMCA 853 (11 September 2009)

²⁴¹ *ASIC v Somerville* [2009] NSWSC 1149 (27 October 2009); *ASIC v Somerville & Ors (No 2)* [2009] NSWSC 998 (24 September 2009); *ASIC v Somerville* [2008] NSWSC 788 (4 August 2008).

²⁴² ASIC, '09-174AD Legal adviser and company directors found liable in relation to 'phoenix' activity' (Media Release, 14 September 2009); ASIC '08-110 ASIC launches action against alleged phoenix activity' (Media Release, 27 May 2008).

In 2007, the ANAO’s report entitled *ASIC’s Processes for Receiving and Referring for Investigation Statutory Reports of Suspected Breaches of the Corporations Act 2001* noted a decline in the use of the disqualification power prior to that time.²⁴³

4.2.1.4. DATA ON ASIC ADMINISTRATIVE ENFORCEMENT

As noted above at 4.1.1., in addition to court-based applications ASIC is empowered to administratively disqualify directors pursuant to s 206F *Corporations Act*.

It is difficult to ascertain precisely the total number of director disqualifications under s 206F of the *Corporations Act*. The Phoenix Research Team searched ASIC’s annual reports for each year between 1 January 2008 and 30 June 2014. These are referred to interchangeably by ASIC as “bannings” and “disqualifications”. In some years it is clear that ASIC disqualified the directors under s 206F but the language used is not consistent between annual reports so accurate data could not be collated. As a result, the Phoenix Research Team contacted ASIC to obtain this s 206F information, which is presented in Table 25.

Table 25 ASIC Director Disqualifications under s 206F 1 July 2008 - 30 June 2014

Financial year	No. of directors
2008-09 ²⁴⁴	49
2009-10	70
2010-11	72
2011-12	84
2012-13	57
2013-14	62
Total	394

Source: Data directly supplied by ASIC

However, it is not possible to say how many of the directors disqualified by ASIC under s 206F will have engaged in illegal phoenix activity. The most that can be claimed from an examination of the data in Table 25 is that a percentage of those directors may have been disqualified because they engaged in illegal phoenix activity.

In order to probe director disqualification further, the Phoenix Research Team searched all ASIC media releases from 1 January 2004 to 30 June 2014 for information about the reasons why directors were disqualified under s 206F. The Phoenix Research Team also searched the AAT database for information on s 206F disqualifications that had gone to appeal (discussed at 4.2.1.4.2.).

The Phoenix Research Team found the media releases to be a valuable source of qualitative information about the disqualifications that involve phoenix activity. However, the Phoenix Research Team’s media release search covers a longer period than the data supplied directly by ASIC in Table 25, and it is

²⁴³ ANAO, *ASIC’s Processes for Receiving and Referring for Investigation Statutory Reports of Suspected Breaches of the Corporations Act 2001* (The Auditor-General Audit Report No.18 2006–07 Performance Audit, 24 January 2007), 96.

²⁴⁴ Note that according to a 2009 ASIC Oversight hearing, in 2008-2009, ASIC disqualified 44 directors involved in 2 or more failed companies. Parliamentary Joint Committee on Corporations and Financial Services, *Oversight of ASIC Public Hearing* (Canberra, Wednesday 25 November 2009), CFS25.

recognised that not all of the disqualifications during the period covered by the ASIC s 206F data (2008 to 2014) were necessarily reported via ASIC media releases during that period. Therefore the s 206F data in [Table 25](#) and the media release data in [Table 26](#) are not comparable.

During the period 1 January 2004 to 30 June 2014, 32 media releases reported that 51 directors were disqualified in circumstances involving problematic or illegal phoenix activity. There were 165 companies involved in these 51 disqualifications. The maximum period of disqualification that ASIC can impose is five years. The media releases provided information on the duration of the disqualification for 50 of the 51 directors. [Table 26](#) breaks this information down. It appears from the table that ASIC prefers to disqualify for periods towards the maximum allowed.

Table 26 Length of director disqualification under s 206F as reported in ASIC media releases 1 January 2004 - 30 June 2014

Length of disqualification (years)	Number of directors
1	2
1.5	1 (overturned on appeal)
2	4
2.5	0
3	10
3.5	0
4	18*
4.5	1
5	14
Not mentioned	1
Total	51

*Two of these directors had disqualifications of four years reduced to three and a half years on appeal to the AAT.

Source: ASIC media releases as compiled and analysed by the Phoenix Research Team

4.2.1.4.1. THE ASSETLESS ADMINISTRATION FUND AND SECTION 206F

ASIC has had the Assetless Administration Fund ('AAF') at its disposal since it was launched on 23 February 2006,²⁴⁵ with funds provided by the government to finance 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.²⁴⁶

There is a cap, currently \$7,500, or \$8,250 once GST is included, on the amount of funding provided.²⁴⁷ Approval for funding over \$7,500 may be given only where ASIC considers the extent and nature of the work proposed to be undertaken is necessary and justifies the additional cost; and ASIC and the

²⁴⁵ See ASIC, *Assetless administration fund* (8 July 2015)

<<http://www.asic.gov.au/asic/asic.nsf/byheadline/Assetless+Administration+Fund?openDocument>>.

²⁴⁶ ASIC, *Regulatory Guide 109: Assetless Administration Fund: Funding Criteria and Guidelines* (November 2012), RG109.1.

²⁴⁷ *Ibid*, RG109.41.

liquidator come to an agreement on the amount of funding.²⁴⁸ AAF funding is only available for investigations where director disqualification proceedings by ASIC may be appropriate, or where court proceedings for serious misconduct pursuant to the *Corporations Act* may be warranted.²⁴⁹

ASIC's Regulatory Guide 109 indicates that '[a] particular focus of the AAF is to curb fraudulent phoenix activity'.²⁵⁰ AAF data is of particular interest in the context of quantifying illegal phoenix activity in that it appears to capture data relating to companies that have been stripped of assets. However, these figures do not provide a proxy for quantifying the number of directors involved in phoenix activity. Companies may be assetless in circumstances that do not involve any illegal behaviour: they may have had no assets from the time of their incorporation and this is perfectly legal in Australia because of the absence of mandatory minimum capitalisation.

ASIC's EXAD report summary for 2013-14 noted that 459 of the 8,959 reports indicated the liquidator applied or was intending to apply for funding from the AAF.²⁵¹ A 2009 update by Stefan Dopking, then a senior executive with ASIC, tells of increased participation rates: in financial year 2007-08, ASIC received 232 applications for AA funding, being 129 for disqualifications and 103 for non-disqualification matters. Between 1 July 2008 and 30 April 2009, ASIC received a total of 219 applications relating to disqualifications and 105 relating to other matters.²⁵²

According to a 2009 ASIC oversight hearing:

Up to June 2009, 436 disqualification applications were approved by ASIC with \$2.3 million in funding approved for payment to those liquidators. Since [the 2007 financial year] 198 directors have been disqualified by ASIC from managing corporations and of those 128 were funded by the AA Fund.²⁵³

Additionally, according to a Senate Estimates answer in 2010, 265 directors were disqualified between July 2006 and the time of the Committee hearing, 166 of which were reportedly funded by the AAF.²⁵⁴ In this same Senate Standing Committee on Economics hearing, ASIC noted:

Project Phoenix was launched on 1 July 2009 with the objective of increasing our focus on disqualification of directors with a history of corporate failure. ASIC also launched on 1 July 2009, a new electronic sweeping tool to assist in better detecting director disqualification candidates under s206F. ASIC's systems can now more easily identify potential disqualification subjects using a variety of information held on our register as well as documents lodged with ASIC by insolvency practitioners.²⁵⁵

In relation to the National Insolvent Trading Program (NITP), ASIC stated: '[a] number of sources of information are used to identify the companies selected under the program. This includes identifying previous history of failures; potential previous phoenix activity; credit ratings data; and industry intelligence'.²⁵⁶

²⁴⁸ Ibid, RG 109.42.

²⁴⁹ Ibid, RG109.26

²⁵⁰ Ibid, RG109.4.

²⁵¹ ASIC REP 412, above n 60, 32.

²⁵² Stefan Dopking, 'Assetless Administration Fund Reaps Results' (2009) 2 *Australian Insolvency Journal* 36.

²⁵³ Parliamentary Joint Committee on Corporations and Financial Services, *Oversight of ASIC Public Hearing* (Canberra, Wednesday 25 November 2009), 15.

²⁵⁴ Senate Standing Committee on Economics, *Answers to questions on notice, Supplementary Budget Estimates* (20-21 October 2010).

²⁵⁵ Ibid.

²⁵⁶ Ibid.

The introduction of the AAF led to a sharp increase in the number of disqualifications ASIC has pursued under s 206F.²⁵⁷ Symes and Simpson commented on this increase in 2012, noting that ‘prior to the introduction of the AA Fund, s 206F was seldom used’:

ASIC reported to the PJC that in the year to June 2003, no persons were banned under s 206F ... and as at November 2003 [that is, four months] only three disqualifications have been taken. This can be contrasted to the 2006-2007, the first year of the AA Fund in which there were 52 AA Fund director bannings from 198 applications.²⁵⁸

Table 27 sets out the total number of disqualifications under s 206F per year for the financial years 2009-10 to 2013-14 and compares this data with the number of disqualifications funded through the AAF. The data was obtained from ASIC’s April 2015 submission to the Senate Inquiry into Insolvency in the Australian Construction Industry.

Table 27 Director disqualifications under s206F and AAF funded director disqualifications 1 July 2009 - 30 June 2014²⁵⁹

Financial year	Directors disqualified under s 206F	AAF funded director disqualifications	% of total
2009-10	70	42	60%
2010-11	72	49	68.05%
2011-12	84	52	61.90%
2012-13	57	42	73.68%
2013-14	62	47	75.81%

Source: ASIC, with percentages calculated by the Phoenix Research Team

In 2013, ASIC published statistics on the total number of director disqualifications funded by the AAF between July 2006 and December 2011, stating that a total of 332 directors were disqualified and that 193 of those were as a result of AAF funding.²⁶⁰ This means that over half of all director disqualifications from July 2006 until December 2011 were funded by the AAF (58.13%). The 2012-2013 ASIC *Annual Report* stated that the AAF funding allocation for 2012–2013 was \$3.5 million, and further reported:

This year, under the grant scheme, ASIC received 426 banning (EX02) applications and 102 ‘Matters other than section 206F – Director banning’ (EX03) applications – a record number. Funded reports assisted in approximately 58% of director bannings [under all banning provisions²⁶¹] in 2012–13 (increase of 4% on 2011–12).²⁶²

The 2013-2014 ASIC *Annual Report* stated that in that year under the grant scheme:

ASIC received 462 banning (EX02) applications, 121 ‘Matters other than section 206F – Director banning’ (EX03) applications – a record number – and 32 winding-up activities. ASIC paid and committed \$2.8

²⁵⁷ Chris Symes and Matt Simpson, 'Phoenix companies and the AA fund' (2012) 20(4) *Insolvency Law Journal* 227.

²⁵⁸ *Ibid*, 233.

²⁵⁹ ASIC, *Senate Inquiry into Insolvency in the Construction Industry Submission by the Australian Securities and Investments Commission* (April 2015), 32.

²⁶⁰ See ASIC, *Insolvency practitioners complaints statistics* (March 2011), 1.

²⁶¹ Compare this with the data for the same period in Table 27, which indicates that 73.68% of bannings *under s 206F* were funded by the AAF. This higher number is to be expected, since s 206F targets directors associated with multiple insolvencies where liquidators have lodged reports indicating an inability to pay company debts.

²⁶² ASIC, *Annual Report 2013-2014* (29 October 2014), 155.

million to liquidators during 2013–14. Funded reports assisted in approximately 76% of director bannings for 2013–14, an increase of 18% on 2012–13.²⁶³

4.2.1.4.2. AAT REVIEWS OF SECTION 206F DISQUALIFICATIONS

ASIC’s decision to disqualify a director is subject to review by the AAT pursuant to s 1317B(1) of the *Corporations Act*. Section 27 of the *Administrative Appeals Tribunal Act 1975* (Cth) allows a person whose interests have been affected by the decision to apply to the Tribunal for the review of the decision. While the number of appeals dealing with phoenix activity is small (six cases only), this data is important because unlike the s 206F disqualifications that are not appealed, AAT appeal decisions provide a greater level of detail about the nature of the behaviour.

The Phoenix Research Team searched the AAT database through Austlii for the term “206F” for the date range 1 January 2006 to 30 June 2014, which yielded a total of 38 cases. Analysis of these 38 cases revealed a total of six cases covering five separate matters relating to phoenix activity. Out of the five matters, one related to legal phoenixing,²⁶⁴ one matter involved problematic phoenixing (heard across two cases),²⁶⁵ and three matters involved illegal type 1 phoenixing.²⁶⁶ These categories are set out in the preface to this report.

In analysing these cases, the following points were observed:

- The director disqualified in the sole legal phoenixing case identified in the search had his original disqualification of 18 months overturned on appeal.
- The director’s disqualification in the one problematic phoenix matter that was covered in two separate AAT appeals was increased from three to five years.
- Disqualifications for the three illegal type 1 cases were all affirmed by the AAT (one disqualification of two years,²⁶⁷ and two disqualifications of five years²⁶⁸).
- In all of the matters bar one, the companies involved were proprietary limited companies.²⁶⁹ The exception was the legal phoenix case, which concerned two companies: one proprietary and the other an unlisted public company.²⁷⁰
- The smallest number of companies in an individual case was two²⁷¹ and the largest was approximately 70.²⁷²
- Of the five matters, the sole problematic phoenix matter²⁷³ and two of the illegal type 1 cases²⁷⁴ mentioned that insolvent trading had taken place.

²⁶³ *Ibid*, 165.

²⁶⁴ *Andrews and Australian Securities and Investments Commission* [2006] AATA 25 (16 January 2006) (Andrews).

²⁶⁵ *Quinlivan and Australian Securities and Investments Commission* [2010] AATA 113 (15 February 2010) (Quinlivan 2); [2008] AATA 1094 (8 December 2008) (Quinlivan 1).

²⁶⁶ *Boyle and Australian Securities and Investment Commission* [2009] AATA 122 (25 February 2009) (Boyle); *Grossman and Australian Securities and Investments Commission* [2011] AATA 6 (12 January 2011) (Grossman); *Guss and Australian Securities and Investments Commission* [2006] AATA 401 (9 May 2006) (Guss).

²⁶⁷ *Boyle*, above n 266.

²⁶⁸ *Grossman*, above n 266; *Guss*, above n 266.

²⁶⁹ *Boyle* above n 266; *Grossman*, above n 266; *Guss*, above n 266; *Quinlivan 1 and 2*, above n 265.

²⁷⁰ *Andrews*, above n 264.

²⁷¹ *Ibid*.

²⁷² *Quinlivan 1 and 2*, above n 265.

²⁷³ *Ibid*.

²⁷⁴ *Boyle*, above n 266; *Grossman*, above n 266.

- The problematic phoenix matter²⁷⁵ and all three illegal type 1 cases²⁷⁶ involved directors’ duties breaches.
- Two illegal type 1 cases mentioned that the director/s involved breached the statutory requirement to provide the liquidators with the company’s books of account.²⁷⁷
- One illegal type 1 case mentioned that advice was given by an advisor in relation to the phoenixing.²⁷⁸
- Two illegal type 1 cases mentioned that at least one of the companies involved in the illegal phoenixing was undercapitalised from inception.²⁷⁹
- All three illegal type 1 cases and the one problematic phoenix case involved the transfer of assets prior to the companies in each case entering external administration.²⁸⁰
- One illegal type 1 case²⁸¹ as well as the problematic phoenix case²⁸² involved a failure to keep financial records in contravention of s 286 of the *Corporations Act*.
- One illegal type 1 case used the term ‘phoenix’ to describe the behaviour that took place.²⁸³
- Two illegal type 1 cases *implied* that phoenix activity had taken place without specifically mentioning the term.²⁸⁴ In relation to the problematic phoenix case, while it was open to the AAT to infer that the director involved had deliberately set up the corporate group structure to avoid the payment of debts and protect himself from liability to creditors, the AAT did not do so due to lack of evidence.²⁸⁵

4.2.2. ATO

This section sets out data compiled by the Phoenix Research Team on the key programs and enforcement activities undertaken by the ATO to deal with illegal phoenix activity. This includes data on referrals received by the ATO, data relating to the implementation of the ATO Phoenix Risk Model System, the PEIS (including data on the number of reviews and audits conducted by the Phoenix Risk and Intelligence team), and data on penalties raised by the ATO.

4.2.2.1. DATA ON REFERRALS RECEIVED BY THE ATO

Another method utilised by the ATO’s Phoenix Risk and Intelligence team to identify potential illegal phoenix activity is through referrals from other agencies and the public. [Table 28](#) depicts the referrals received by the ATO between 1 July 2013, when this data was first collected, and 19 September 2014.

Table 28 Referrals received by the ATO Phoenix Risk and Intelligence Team 1 July 2013 - 19 September 2014

Referred By	1/7/2013 – 30/6/2014	1/7/2014 – 19/9/2014	Total
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²⁷⁵ *Quinlivan 1 and 2*, above n 265.

²⁷⁶ *Boyle* above n 266; *Grossman*, above n 266; *Guss*, above n 266.

²⁷⁷ *Boyle* above n 266; *Guss*, above n 266.

²⁷⁸ *Boyle*, above n 266.

²⁷⁹ *Grossman*, above n 266; *Guss*, above n 266.

²⁸⁰ *Boyle* above n 266; *Grossman*, above n 266; *Guss*, above n 266.

²⁸¹ *Guss*, above n 266

²⁸² *Quinlivan 1 and 2*, above n 265.

²⁸³ *Grossman*, above n 266;

²⁸⁴ *Boyle* above n 266; *Guss*, above n 266.

²⁸⁵ *Quinlivan 1 and 2*, above n 265.

Other areas within the ATO (internal referrals)	215	13	228
Taxpayers	133	10	143
Other	5	1	6
Other agencies	1	2	3
Total	354	26	380

Source: Data supplied directly by the ATO

An examination of the data in [Table 28](#) reveals that the majority of referrals received by the ATO’s Phoenix Risk and Intelligence team came from other areas within the ATO. The second greatest source of referrals was taxpayers. Very few referrals were received from other agencies. The referrals in the ‘other’ category came from a variety of sources including relevant Ministers, who may refer a complaint from a taxpayer or an Ombudsman following a review. Some referrals may arise from evidence presented at a Senate Estimates hearing or a Royal Commission.

4.2.2.2. DATA ON ATO INVESTIGATIONS AND RAIDS

Information about suspected illegal phoenix activity may also come to light as a result of investigations and/or raids conducted by the ATO. For example, in June 2015 the ATO made surprise visits in conjunction with NSW and Federal Police to over a dozen business sites in Sydney to investigate potentially illegal phoenix activity.

In a media statement released after the raids had taken place, Deputy Commissioner of Taxation Michael Cranston said: ‘[w]e believe more than \$40 million in tax revenue is at risk in this Sydney network alone and we have more than 100 officers involved in these visits’. Mr Cranston also stated that the raids were focussing on ‘tax agents and lawyers who may be helping to set up phoenix businesses’.²⁸⁶

4.2.2.3. DATA FROM THE ATO’S PEIS

[Table 29](#) details PEIS statistics drawn from the ATO’s databases on 1 August 2014.

Table 29 ATO PEIS Statistics – Work Type PEIS Lodgement 1 July 2013 - 1 August 2014

Financial Year	Case status	Groups	Group members	Active entities	Director Letters	Tax Agent Letters
2013 - 14	Closed	92	542	394	101	92
2014 - 15	Created	30	292	180	48	30
2014 - 15	Planned	40	400	240	50	45

Source: Data directly supplied by ATO

The second column indicates the case status. Cases designated as ‘closed’ are the cases where the ATO Phoenix Risk and Intelligence team has finalised its processes in relation to that matter. No further action was required in some of these cases and others were referred to other sections within the ATO for further action. Ninety-two groups with 542 group entities, of which 394 were active, were in this

²⁸⁶ ATO, ‘ATO swoops on phoenix businesses’ (Media Release, 11 June 2015).

category in the 2013-14 financial year. One hundred and one letters were sent to directors of corporations within those groups and 92 letters were sent to tax agents.

As at 1 August 2014 the ATO determined that a number of matters were suitable for early intervention under its PEIS Lodgement scheme. The third row of [Table 32](#) indicates that 30 groups made up of 292 group members and 180 active entities were created as of that date. In relation to those groups 48 letters were sent to directors and 30 were sent to tax agents.

As at 1 August 2014 the ATO estimated that there would be an additional 40 groups, comprising 400 group members and 240 active entities, referred by the ATO Phoenix Risk and Intelligence team for PEIS Lodgement before the end of the financial year. These are listed as ‘planned’ in [Table 32](#). The ATO estimated that it would send 50 letters to directors and 45 to tax agents under this scheme.

In relation to PEIS Reporting Integrity, the ATO estimated that it would refer an additional 40 groups, also comprising 400 group members and 240 active entities before the end of the financial year. It was estimated that this too would also result in an additional 50 letters to directors and 45 to tax agents. The PEIS Lodgement scheme and PEIS Reporting Integrity are explained at [4.1.2.2](#).

4.2.2.4. DATA ON ATO PHOENIX CASEWORK: REVIEWS AND AUDITS

[Table 30](#) contains data on the number of reviews and audits conducted by the Phoenix Risk and Intelligence team during the period for the financial years 2011-12 to 2014-15, as at 1 August 2014. Reviews are primarily used to gain and develop a more in-depth understanding of the taxpayers’ business operations and to assess whether there are phoenix or other risks that require further treatment. Audits may examine all aspects of taxpayers’ tax affairs. This could include examination of any related companies and personal finances. They may cover a single tax period or year, or multiple years.

Table 30 ATO reviews and audits conducted by Phoenix Risk and Intelligence team as at 1 August 2014

Financial year	Review	Audit	Total
2011-12	59	56	115
2012-13	1,141	419	1,560
2013-14	1,453	303	1,756
2014-15 (partial year)	300	35	335

Source: Data directly supplied by ATO

The auditing system was described in greater detail in the ATO publication *Targeting Tax Crime: A Whole-of-Government Approach*, July 2009:

Where we see this behaviour emerging, we write to people highlighting the range of potential sanctions that can be applied and point out the very serious consequences. We effectively take these cases out of the self-assessment regime and actively investigate. Serial offenders are closely monitored to ensure tax payments are made on time. Cases are managed by a dedicated phoenix risk management team with around 36 staff, which carries out phoenix-specific reviews and audits. Increased resources for this work

were provided in the 2009 Federal Budget. The most serious cases are referred to the Australian Federal Police and Commonwealth Director of Public Prosecutions for prosecution.²⁸⁷

Since financial year 2010-11, ATO annual reports have made specific reference to phoenix activity and indicated the number of phoenix cases finalised or the number of reviews and audits the ATO undertook in the relevant year under its program targeting this activity and the amount of liabilities it raised as a result. [Table 31](#) collates this annual report data. However, the annual report data does not reflect the full extent of the ATO’s reviews and audits, as shown in [Table 30](#).

Table 31 ATO Reviews, Audits and Liabilities relating to phoenix activity 1 July 2009 - 30 June 2014

	2009-10 ²⁸⁸	2010-11 ²⁸⁹	2011-12 ²⁹⁰	2012-13 ²⁹¹	2013-14 ²⁹²
No. of phoenix cases finalised*	139	N/A	N/A	N/A	N/A
No. of reviews/ audits*	N/A	133	115	220	270
Taxes and penalties raised in \$ millions**	\$85.7	N/A	N/A	N/A	N/A
Liabilities raised in \$ millions**	N/A	\$70.7	\$56	\$74.5	\$76.7

Source: ATO, as compiled by the Phoenix Research Team

* The 2009-10 Annual Report noted the number of phoenix cases finalised. The 2010-11 to 2012-13 annual reports reported the number of reviews of audits undertaken.

** The 2009-10 Annual Report reported taxes and penalties raised. The 2010-11 to 2012-13 annual reports reported liabilities raised.

In addition, the 2012-13 *ATO Annual Report* says that of the \$74.5 million raised in liabilities, there were cash collections of \$14.6 million. The report goes on to say:

Over 2,800 reviews and audits of property developers were also undertaken, many of which showed signs of fraudulent phoenix behaviour. These cases resulted in further liabilities of \$215.1million, with cash collections of \$61.7million. Cash collections for fraudulent phoenix operators are lower than for many other compliance risks, as the phoenix business model is designed to evade collection obligations. As a result, the phoenix strategy is intended to disrupt this business model, to prevent ongoing losses to revenue and to support law enforcement and prosecution treatments of fraudulent phoenix operators.²⁹³

The ANAO released a report entitled *The Management of Compliance in the Small to Medium Enterprises Market: Performance Report ATO* in December 2011, which also contained data on planned and actual audits and reviews undertaken by the ATO for the financial years 2008 to 2011. The data relating to phoenix activity is set out in [Table 32](#).

²⁸⁷ ATO, *Targeting tax crime: a whole-of-government approach - July 2009* (July 2009), 17.

²⁸⁸ ATO, *Annual Report 2009-10* (7 October 2010), 60.

²⁸⁹ ATO, *Annual Report 2010-11* (30 September 2011), 102.

²⁹⁰ ATO, *Annual Report 2011-12* (4 October 2012), 73.

²⁹¹ ATO, *Annual Report 2012-13* (3 October 2013), 45.

²⁹² ATO, *Annual Report 2013-14* (10 October 2014), 62.

²⁹³ ATO, *Annual Report 2012-13* (3 October 2013), 45.

Table 32 ANAO data - Number of ATO reviews and audit cases relating to ‘priority risk phoenix activity’ 1 July 2008 - 30 June 2011²⁹⁴

2008-09	2008-09	2009-10	2009-10	2010-11	2010-11
Planned	Actual	Planned	Actual	Planned	Actual
90	124	161	139	137	133

Source: ANAO

In the building and construction sector the ATO reported that it had undertaken the following audits in 2013-14:

... cash economy field teams undertook 1,045 building and construction audits resulting in nearly \$26 million in tax adjustments and penalties. To March this year cash economy income teams have undertaken 854 audits in the construction industry generating \$12.7 million in tax adjustments and penalties. We have also written to 35,000 building and construction businesses we identified as operating primarily in the business-to-consumer component of this sector and where these businesses exhibit some of the higher characteristics of omitted income.²⁹⁵

4.2.2.5. DATA ON ADMINISTRATIVE PENALTIES RAISED BY THE ATO

A February 2014 report by the IGT to the Assistant Treasurer entitled ‘Review into the Australian Taxation Office’s administration of penalties’ contained the following statistics about the imposition of penalties,²⁹⁶ which the Phoenix Research Team has extracted in [Table 33](#) and [Table 34](#). The Phoenix Research Team was not able to identify any direct link between these penalties and illegal phoenix activity. They simply quantify penalties that were raised in the SME and micro-enterprise markets, which is where illegal phoenix activity is most likely to occur, and relate to unremitted PAYG(W) taxes, unpaid GST and unremitted superannuation contribution, which are common targets of illegal phoenix activity.

Table 33 Penalties raised by market segment 1 July 2010 - 30 June 2012²⁹⁷

Market segment	2010-11	2011-12
SME	204,921,503	234,236,062
Micro	694,110,927	709,433,149

Source: IGT

Table 34 Penalties raised by revenue product 1 July 2010 - 30 June 2012²⁹⁸

Revenue product	2010-11	2011-12
GST	223,777,923	338,561,094
PAYG(W)	55,165,494	75,673,161
SPR guarantee	29,864,049	50,982,634

²⁹⁴ ANAO, *The Management of Compliance in the Small to Medium Enterprises Market: Performance Report ATO* (The Auditor-General Audit Report No.16 2011-12 Performance Audit, 8 December 2011), 89 [Table 4.3].

²⁹⁵ ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015), 25.

²⁹⁶ 2010 IGT Superannuation Guarantee Charge Review, above n 122, 54-55.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

Source: IGT

4.2.2.6. DATA ON ATO-INITIATED LIQUIDATIONS

The SGC is levied on employers who fail to make payment of superannuation contributions to their employees' designated funds. In 2014, approximately 846,000 employers were required to make SG payments on behalf of about 11.7 million employees to about 548,000 superannuation funds, totalling approximately \$77 billion.²⁹⁹ SG non-compliance among employers has been estimated by the ATO to be somewhere between 11% and 20%.³⁰⁰ The ATO raised \$844 million in SG Charges and collected \$395 million in 2013-14, representing around half the amount it raised in liabilities. However, as ANAO's June 2015 report *Promoting Compliance with Superannuation Guarantee Obligations* noted, as at 30 June 2014, SG debt was in excess of \$1 billion, and since 2011–12 the debt has been growing at a rate of 12% every year.³⁰¹

Employees can submit a complaint about unpaid superannuation to the ATO using a form called an 'Employee Notification of Insufficient Employer Contributions'. The information provided on the employee notification is used both to inform the ATO's risk-based approach to non-compliance, as well as to action individual complaints by employees. The 'risk-based' approach allows the ATO to establish a database of non-compliance behaviour so that patterns can be determined and enforcement action targeted towards areas of particular non-compliance.³⁰² The ANAO report states that insolvency is the predominant reason employee notifications are closed without an audit being carried out on respective employers.³⁰³

The ANAO report outlined the following key statistics in relation to SG entitlements:

- The ATO received approximately 18,000 employee notifications of potential super underpayments each year between 2010 and 2014;³⁰⁴
- The ATO conducted between 5,000 and 6,000 audits of employers at risk of non-compliance with their SG obligations each year between 2010 and 2014, as a result of which the ATO raised approximately \$640 million and collected roughly half this amount per year in SG charge liabilities;³⁰⁵
- ATO audits had a strike rate of more than 70% when it came to identifying non-compliant employers and raising unpaid SG contributions;³⁰⁶
- Almost half (46%) of the cases finalised by the ATO over the period 2010-2014 represented a 'compliance issue' leading to a SGC being raised. Of the remaining 54% of cases finalised as 'no further action', almost a third were only classified this way due to employer insolvency, 'which

²⁹⁹ ANAO, *Promoting Compliance with Superannuation Guarantee Obligations – Australian Taxation Office* (The Auditor-General ANAO Report No.39 2014–15 Performance Audit, 3 June 2015), 13 [2].

³⁰⁰ *Ibid*, 17 [14].

³⁰¹ *Ibid*, 25 [40].

³⁰² Senate Select Committee on Superannuation and Financial Services, Parliament of Australia, *Enforcement of the Superannuation Guarantee Charge*, (2001), [3.28].

³⁰³ ANAO, *Promoting Compliance with Superannuation Guarantee Obligations – Australian Taxation Office* (The Auditor-General ANAO Report No.39 2014–15 Performance Audit, 3 June 2015), 11 [4.57].

³⁰⁴ *Ibid*, 19 at [17].

³⁰⁵ *Ibid*, 17 [12].

³⁰⁶ *Ibid*, 19 [17].

meant that although employers were non-compliant and an SGC amount was due, it was likely to remain unpaid',³⁰⁷

- Between 2010 and 2014, the amount of debt relating to the SGC written off as a result of employer insolvency increased by 133%, from \$99 million to \$233 million;³⁰⁸
- In financial year 2013-14 alone, the ATO wrote off \$257 million in SGC debt, 91% of which related to insolvent employers;³⁰⁹
- The ATO issued DPNs to 219 insolvent companies with a SGC debt in 2013-14.³¹⁰

Since the SGE powers mentioned above were enacted, the ATO has recovered \$8 million in employees' super entitlements from labour-hire companies in South Australia and Victoria.³¹¹

4.2.2.7. DATA ON ATO SECURITY BONDS

In August 2015, the ATO responded to a request from the Phoenix Research Team for additional data on security bonds as little data is available publicly. In its response, the ATO stated: '[s]ince 1 July 2010, less than 100 security bond demands (SBDs) have issued. Of these less than 20 complied. Several have been referred for prosecution however only 2 matters have been progressed to date'.

4.2.2.8. DATA ON ATO DPNs

According to information provided to the ATO to the IGT and relied on in his report on Debt Collection, between financial year 2011–12 and financial year 2013–14, the ATO had issued over 27,000 DPNs primarily to directors of small businesses.³¹² The Phoenix Research Team searched the ATO website, ATO annual reports, and various ATO documents and was not able to find any other statistics on the number of DPNs issued by the ATO over the period of the Phoenix Research Team's study. The Phoenix Research Team therefore requested data on DPNs from the ATO, who provided some information to us, outlined below.

The following points are relevant to understanding the DPN data:

- *Business segments*

The ATO advised that it classifies business market segments as follows:

- MIC: Micro businesses with business income < \$2,000,000 and > -\$2,000,000
- SME: Small to Medium Enterprises with business income between \$2,000,000 and \$250,000,000 OR between -\$2,000,000 and -\$250,000,000
- LGE: Large market businesses with business income > \$250,000,000 or < -\$250,000,000
- NFP: Not-for-profit businesses

- *Unique DPN count*

Table 36 contains details of the number of unique DPNs issued at the company level. The data is displayed according to business market segment, whether the DPN relates to PAYGW or superannuation

³⁰⁷ Ibid, 23 [33].

³⁰⁸ Ibid, 100 [4.56].

³⁰⁹ Ibid, 100 [4.56].

³¹⁰ Ibid, 19 [18].

³¹¹ ATO, 'ATO uses new powers to recover superannuation entitlements from phoenix operators' (Media Release, 9 January 2015).

³¹² 2015 IGT Debt Collection, above n 107, [4.44].

and whether the notice was a lockdown or standard DPN. This data is not limited to those entities identified as potential or known phoenix operators.

- *Lockdown and standard DPNs*

‘Lockdown’ DPNs are those issued by the ATO where the amount owing by the company was not reported in a timely manner to the ATO and the relevant amount was not paid. This deprives the director of the ability to avoid personal liability for the unremitted amounts by placing the company into external administration. This ‘lockdown’ mechanism, introduced in 2012,³¹³ was a significant addition to the ATO’s regulatory tools against illegal phoenix activity. Standard DPNs, on the other hand, are issued where the amount has been reported as owing but not paid.

Table 35 Unique DPNs Issued by Account Type, DPN Type, and Business Market Segment 1 July 2010 - 30 June 2015

	2010-11	2011-12	2012-13	2013-14	2014-15
Large	13	6	13	31	11
PAYG(W)	13	6	13	30	11
Lockdown			1		2
Standard	13	6	12	30	9
Super				1	
Standard				1	
Micro	1,738	1,469	3,513	6,088	3,936
PAYG(W)	1,650	954	2,928	4,055	3,478
Lockdown			1,134	1,759	1,474
Standard	1,650	954	1,794	2,296	2,004
Super	88	515	585	2,033	458
Lockdown			271	1,177	314
Standard	88	515	314	856	144
Not-for-profit	13	19	31	24	33
PAYG(W)	12	19	29	16	28
Lockdown			5	6	8
Standard	12	19	24	10	20
Super	1		2	8	5
Lockdown			2	5	3
Standard	1			3	2
SME	724	663	1,347	2,343	1,659
PAYG(W)	708	599	1,249	1,961	1,525
Lockdown			297	522	444
Standard	708	599	952	1,439	1,081
Super	16	64	98	382	134
Lockdown			30	190	84
Standard	16	64	68	192	50
Total	2,488	2,157	4,904	8,486	5,639

Source: Data directly supplied by ATO

³¹³ *Tax Laws Amendment (2012 Measures No 2) Act 2012 (Cth); Pay As You Go Withholding Non-compliance Tax Act 2012 (Cth).*

- *Distinct company count*

The figures contained in [Table 35](#) represent a distinct count of companies whose directors were issued DPNs. It is not a count of how many directors were issued with a DPN. A company may have more than one director who may have received a notice or notices, for a single or multiple periods. Irrespective of the number of DPN's issued in respect of this company for the relevant financial year, the company count will be 1.

Table 36 ATO – Number of DPNs issued to Distinct Companies by Business Market Segment 1 July 2010 - 30 June 2015

	2010-11	2011-12	2012-13	2013-14	2014-15
Large	13	4	11	29	8
Micro	1,561	1,244	2,090	3,104	2,290
Not-for-profit	12	13	17	13	17
SME	620	539	886	1,282	1,027
Total	2,206	1,800	3,004	4,428	3,342

Source: Data directly supplied by ATO

Table 37 ATO – Total Number of Distinct Companies by Business Market Segment 1 July 2010 - 30 June 2015

Financial Year	Business market segment	No. of companies
2010-11	Large	13
	Micro	1,561
	NFP	12
	SME	620
2011-12	Large	4
	Micro	1,244
	NFP	13
	SME	539
2012-13	Large	11
	Micro	2,090
	NFP	17
	SME	886
2013-14	Large	29
	Micro	3,104
	NFP	13
	SME	1,282
2014-15	Large	8
	Micro	2,290
	NFP	17
	SME	1,027

Source: Data directly supplied by ATO

4.2.2.9. DATA ON CRIMINAL ACTIONS UNDER THE TAA

The ATO provides data on its website relating to summary prosecutions under the TAA (ie prosecutions carried out by the ATO), reproduced in [Table 38](#).³¹⁴

Table 38 ATO Summary Prosecutions 1 July 2007 – 30 June 2014

Financial year	Cases*	Convictions*	Dismissals and withdrawals	Fines (\$m)
2007-08	2,510	2,207	303	7.1
2008-09	3,253	2,912	341	10.85
2009-10	2,792	2,517	275	10.35
2010-11	1,747	1,518	229	7.51
2011-12	2,146	1,961	185	7.41
2012-13	1,944	1,691	253	7.38
2013-14	1,773	1,540	233	13.02
2014-15**	997	926	71	7.12

*Does not include multiple cases/convictions for the same individuals or companies.

** Year to date at 31 March 2015.

The Phoenix Research Team searched the ATO website, ATO annual reports, and various ATO documents for the period 1 July 2004 to 30 June 2014, and was not able to find any statistics on the number of persons prosecuted under s 8Y of the TAA. A search in Austlii for cases on this provision produced no useful results. This may be because the increased availability of issuing a DPN means that this approach is no longer required.

4.2.2.10. DATA ON ATO REFERRALS TO ASIC

The ATO Phoenix Risk and Intelligence team refers some suspected phoenix matters to ASIC for investigation. The data in [Table 39](#), supplied by the ATO to the Phoenix Research Team, indicates the number of referrals from the ATO to ASIC from 1 July 2013 to 19 September 2014.

Table 39 Referrals from the ATO Phoenix Risk and Intelligence team to ASIC 1 July 2013 - 19 September 2014

ASIC Referrals Sent	Sent 1/7/2013 – 30/6/2014	Sent 1/7/2014 – 19/9/2014
Total	15	2

Source: Data directly supplied by ATO

4.3. CDPP

As mentioned previously, the CDPP does not directly regulate illegal phoenix activity. It receives referrals from ASIC, the ATO, and the FWO in relation to criminal activity associated with the behaviour. This section outlines data the Phoenix Research Team compiled in relation to these referrals for criminal prosecution.

³¹⁴ ATO, *Tax crime prosecution results* (6 October 2015) <<https://www.ato.gov.au/General/The-fight-against-tax-crime/News-and-results/Tax-crime-prosecution-results/>>.

4.3.1. ATO REFERRALS TO THE CDPP

Table 40 Criminal investigations and prosecutions for tax offences 1 July 2006 - 30 June 2014

	2006-07 ³¹⁵	2007-08 ³¹⁶	2008-09 ³¹⁷	2009-10 ³¹⁸	2010-11 ³¹⁹	2011-12 ³²⁰	2012-13 ³²¹	2013-14 ³²²
Criminal investigations for serious tax-fraud-related offences	269	N/A	161	117	142	271	N/A	N/A
No. of matters referred by the ATO to the CDPP	126	83	70	57	90	105	N/A	N/A
No of prosecutions by the CDPP for serious tax-fraud related offences	N/A	76	54		62 including 8 from Project Wickenby	39	44	36 including 7 under Project Wickenby
No of criminal prosecutions by the ATO	4,014	3,022	3,234	2,486	1,890	2,218	Over 1,900	1,730

Source: ATO, as compiled by the Phoenix Research Team

4.3.2. ASIC REFERRALS TO THE CDPP

If ASIC suspects that certain crimes have been committed it can refer the matter to the CDPP for action. Those relevant to illegal phoenix activity include:

- ss 180-184 *Corporations Act*: breaches of directors' duties where the conduct in question involved intentional dishonesty;³²³

³¹⁵ ATO, *Annual Report 2006-07* (10 December 2007), 98, 100. ATO, *Annual Report 2013-14* (10 October 2014), 50.

³¹⁵ ATO, *Annual Report 2012-13* (3 October 2013), 39.

³¹⁵ ATO, *Annual Report 2011-12* (4 October 2012), 58.

³¹⁵ ATO, *Annual Report 2010-11* (30 September 2011), 51.

³¹⁵ ATO, *Annual Report 2009-10* (7 October 2010), 55.

³¹⁵ ATO, *Annual Report 2008-09* (8 October 2009), 54.

³¹⁵ ATO, *Annual Report 2007-08* (3 October 2008), 45.

³¹⁵ ATO, *Annual Report 2006-07* (10 December 2007), 74.

³¹⁵ ATO, *Annual Report 2005-06* (26 September 2006), 103.

³¹⁵ ATO, *Annual Report 2004-05* (2005), 48.

³¹⁵ ATO, *Annual Report 2003-04* (2004), 42.

³¹⁵ ATO, *Annual Report 2013-14* (10 October 2014), 49.

³¹⁶ ATO, *Annual Report 2007-08* (3 October 2008), 60, 62.

³¹⁷ ATO, *Annual Report 2008-09* (8 October 2009), 79-80.

³¹⁸ ATO, *Annual Report 2009-10* (7 October 2010), 83.

³¹⁹ ATO, *Annual Report 2010-11* (30 September 2011), 103-4.

³²⁰ ATO, *Annual Report 2011-12* (4 October 2012), 68, 83.

³²¹ ATO, *Annual Report 2012-13* (3 October 2013), 14, 29.

³²² ATO, *Annual Report 2013-14* (10 October 2014), 61-3.

³²³ See, for example, *R v Heilbronn* (1999) 30 ACSR 488. The breach under the present *Corporations Act* is of s 184.

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- ss 588G(1A) and (3) *Corporations Act*. Particularly egregious breaches of the insolvent trading provisions;
- s 590 *Corporations Act*. A past or present officer of a corporation contravened s 590 if they '(i) engaged in conduct that resulted in the fraudulent concealment or removal of any part of the property of the company to the value of \$100 or more [...] within the past ten years;
- s 596AB *Corporations Act*. A criminal penalty may be imposed pursuant to s 596AB where a person enters into a transaction with the intention of preventing or significantly reducing the recovery of the entitlements of employees of a company.

In financial year 2010-11, ASIC referred 27 briefs of evidence to the CDPP for a variety of offences.³²⁴ In its answer to a question on notice taken by Greg Medcraft, Chairman of ASIC, at a Senate Standing Committee on Economics meeting on 29 May 2012, ASIC outlined the following number of referrals from ASIC to CDPP broken down by breach type for the preceding 12 months.

Table 41 ASIC referrals to CDPP 1 May 2011 - 31 May 2012³²⁵

No. of referrals	<i>Corporations Act</i> section breached	Nature of breach
14	s 319 and related offences	Lodgement of annual reports with ASIC
6	s 206A	Managing a corporation while disqualified
4	s 1308(2)	False or misleading statements
2	s 324CH	Auditor independence
1	ss 590 and 471A	Directors exercising powers during a winding up

Source: ASIC

These offences were not necessarily committed in the context of illegal phoenix activity. What this data shows is the quantity and type of offence referred by ASIC to the CDPP in that year. In addition, ASIC can prosecute certain offences of its own volition. For example, in 2012, ASIC reported that under the LAP (discussed at [4.2.1.2.](#)), 'ASIC prosecuted 425 directors for 761 offences' in relation to RATA breaches.³²⁶

In its 2015 submission to Senate Economics References Committee inquiry into Insolvency in the Australian Construction Industry, the CFMEU stated:

Across the entire economy ASIC reported only two 'enforcement outcomes' under the heading 'insolvency' for the full two year period 2013 and 2014. For 2014, there were 51 'corporate governance' enforcement outcomes, including only 19 'actions against directors'. Forty company directors were disqualified in that year. There has not been a single prosecution taken under s 596AB of the *Corporations Act* – a section directed to agreements or transactions that prevent the recovery, or reduce the amount of, recoverable employee entitlements.³²⁷ The Federal Government has recently cut ASIC's funding by \$120 million over a

³²⁴ Senate Standing Committee on Economics, *Answers to Questions on Notice*, Treasury Portfolio, Budget Estimates, 29-31 May 2012.

³²⁵ Senate Standing Committee on Economics, *Answers to Questions on Notice: ASIC Investigations – Number of Cases (Senator Bushby to Greg Medcraft, Question: BET 66, Hansard Page: Tuesday 29 May 2012, page 96)*, Treasury Portfolio, Budget Estimates, 29-31 May 2012, 2.

³²⁶ *Ibid.*

³²⁷ CFMEU, *Senate Economics References Committee Insolvency in the Australian Construction Industry -Submission by the Construction, Forestry, Mining and Energy Union* (1 May 2015), 3.

four year period. In the current financial year it will lose 12% of its operating budget and 209 staff. By contrast, the Government has increased funding for the industrial watchdog, FWBC.³²⁸

4.4. FWO

As mentioned previously, the FWO does not directly regulate illegal phoenix activity, however it does have jurisdiction in relation to some consequences of phoenix activities, including the underpayment of employee entitlements. As such, the Phoenix Research Team undertook a search of the FWO litigation page on the regulator's website for data on cases relating to the underpayment of employees' wages and other entitlements.

This search revealed a total of 115 cases from 1 July 2010 to 30 June 2014 relating to the underpayment of wages or other entitlements, with five cases still awaiting written decisions, and another five decisions unavailable. Not all cases brought by the FWO are represented on their published litigation webpage.

In these 115 cases of underpayment of wages and other entitlements, 94 involved company controllers being joined as respondents to the proceedings because they were accessories to the company's breach. In 36 cases, the company in question was in liquidation. A further case involved a company that was not yet in liquidation but the decision indicated that it soon would be without the payments being rectified. In eight of the cases, the company appears to have been placed into liquidation deliberately to avoid payment of wages or other entitlements. The Phoenix Research Team was unable to ascertain how many times the liquidated company's controllers went on to establish a new company and transfer the business of the failed company to the new company.

4.5. SUMMARY

This report has noted throughout that there is no specific phoenix offence. The purpose of this report is not to argue for the introduction of such an offence. However, the absence of a specific offence makes the quantification of the incidence, cost, and enforcement of laws tackling illegal phoenix activity problematic. Whether such an offence should be introduced will be considered in the Phoenix Research Team's final report dealing with recommendations.

At present, the inconsistencies and gaps in datasets relating to the incidence, cost, and enforcement of laws tackling illegal phoenix activity render its accurate quantification impossible. Nevertheless, in the opinion of the Phoenix Research Team illegal phoenix activity is a significant issue causing considerable difficulties for creditors, regulators, and competitors. This justifies the commitment of government time and resources to attempt to minimise its impacts.

³²⁸ Ibid.

5. APPENDIX

5.1. ABS STATISTICS

The data in section 5.1. is extracted from the Australian Bureau of Statistics' March 2015 publication '*Counts of Australian Businesses, including Entries and Exits, Jun 2010 to Jun 2014*'. The data pertains to all business types (including corporations, partnerships, sole traders and trusts), and not just corporations.

SUMMARY OF FINDINGS³²⁹

Source: ABS

- There were 2,100,162 actively trading businesses in Australia in June 2014.
- The number of actively trading businesses in Australia increased by 1% between June 2013 and June 2014.
- The business entry rate increased from 11.2% in 2012-13 to 13.7% in 2013-14.
- The business exit rate decreased from 14.0% in 2012-13 to 12.7% in 2013-14.
- 61.7% of the businesses that were actively trading in Australia in June 2010 were still operating in June 2014.
- Half of the businesses that started operating in 2010-11 were still operating in June 2014.

OF THE 19 INDUSTRY DIVISIONS

- Construction had the most businesses operating in Australia in June 2014.
- Electricity, Gas, Water and Waste Services had the fewest businesses operating in Australia in June 2014.
- Accommodation and Food Services had the highest business entry rate in 2013-14.
- Agriculture, Forestry and Fishing had the lowest business entry rate in 2013-14.
- Public Administration and Safety had the highest business exit rate in 2013-14.
- Health Care and Social Assistance had the lowest business exit rate in 2013-14.
- Health Care and Social Assistance businesses were the most likely to survive from June 2010 to June 2014.
- Public Administration and Safety businesses were the least likely to survive from June 2010 to June 2014.

OF THE EMPLOYMENT SIZE RANGES

- In June 2014, 61% of actively trading businesses in Australia had no employees, 27% had 1-4, 10% had 5-19, 2% had 20-199, and less than 1% had 200 or more.
- Among businesses operating in both June 2013 and June 2014, there was net movement away from having 1-4 employees in June 2013 towards either having no employees or having more than 4 employees in June 2014.

³²⁹ ABS, above n 34.

- The more employees an ongoing business had in June 2010 the more likely it would survive.
- For a business that started operating in 2010-11, the more employees it had the more likely it would survive.
- In 2013-14, business entry and exit rates were highest for businesses with no employees.

OF THE TURNOVER SIZE RANGES

- In June 2014, most actively trading businesses had annual turnover under \$200,000.
- Among businesses operating in both June 2013 and June 2014, there was net movement away from having annual turnover of between \$50,000 and under \$2 million in June 2013, towards having annual turnover of either less than \$50,000 or at least \$2 million in June 2014.
- The more turnover a business had in June 2010 the more likely it would survive.
- Businesses that started operating in 2010-11 and had higher turnover ranges were more likely to survive.
- In 2013-14, business entry rates were highest for businesses with annual turnover of between \$50,000 and \$199,999 and lowest for businesses with annual turnover of \$2 million or more.
- In 2013-14, business exit rates were highest for businesses with annual turnover under \$50,000 and lowest for businesses with annual turnover of \$2 million or more.

OF THE STATES AND TERRITORIES

- Counts of businesses mainly operating in Tasmania and South Australia reduced in June 2014 from June 2013, while all other states and territories increased.
- The Australian Capital Territory had the highest business entry rate in 2013-14.
- The Northern Territory had the highest business exit rate in 2013-14.
- Businesses mainly operating in Tasmania were the most likely to survive from June 2010 to June 2014.
- Businesses mainly operating in the Australian Capital Territory were the least likely to survive from June 2010 to June 2014.

BUSINESS ENTRY AND EXIT STATISTICS³³⁰

Source: ABS

BUSINESS ENTRIES AND EXITS BY INSTITUTIONAL SECTORS

- Most businesses actively trading in Australia in June 2014 were unincorporated businesses owned and operated by the household sector.
- Between June 2013 and June 2014, the number of non-financial corporations and financial corporations increased while the number of household sector businesses decreased.
- The non-financial corporations sector had the highest business entry rate in 2013-14.
- The household sector had the highest exit rate in 2013-14.
- Non-financial corporations and financial corporations were more likely than household sector businesses to survive from June 2010 to June 2014.
- Financial corporations that started operating in 2010-11 were the most likely to have still been operating in June 2014.

³³⁰ Ibid.

BUSINESS ENTRIES AND EXITS BY TYPES OF LEGAL ORGANISATION

- Public sector businesses were the least common, with only 516 actively trading goods or services in Australia in June 2014.
- Between June 2013 and June 2014, the number of actively trading companies and trusts increased while the number of actively trading sole proprietors, partnerships and public sector businesses each decreased.
- The business entry rate was highest for sole proprietors in 2013-14.
- The business exit rate was highest for public sector businesses in 2013-14.
- Trusts were the most likely to survive from June 2010 to June 2014.

BUSINESS ENTRIES AND EXITS BY EMPLOYMENT SIZE RANGES

- In June 2014, 61% of actively trading businesses in Australia had no employees, 27% had 1-4, 10% had 5-19, 2% had 20-199, and less than 1% had 200 or more.
- Among businesses operating in both June 2013 and June 2014, there was net movement away from having 1-4 employees in June 2013 towards either having no employees or having more than 4 employees in June 2014.
- The more employees an ongoing business had in June 2010 the more likely it would survive.
- For a business that started operating in 2010-11, the more employees it had the more likely it would survive.
- In 2013-14, business entry and exit rates were highest for businesses with no employees.

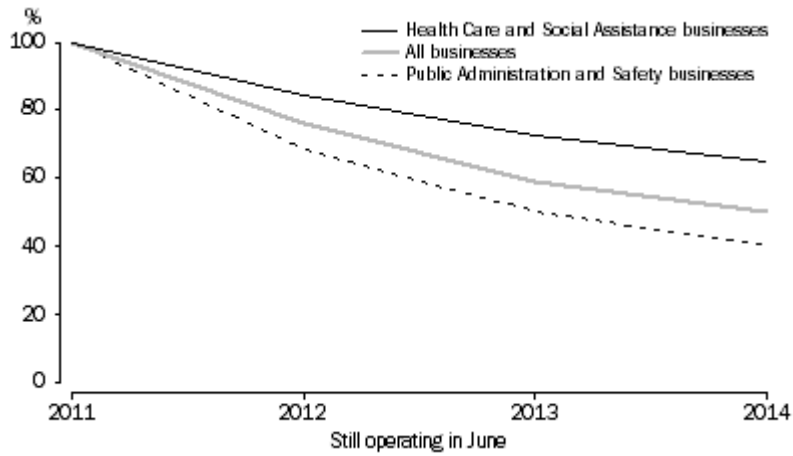
Table 42 Survival of Companies: June 2010–June 2014³³¹

	Operating in June 2010	Survived to June 2011	Survival rate	Survived to June 2012	Survival rate	Survived to June 2013	Survival rate	Survived to June 2014	Survival rate
	no.	no.	%	no.	%	no.	%	no.	%
Companies	688,651	608,271	88.3	552,095	80.2	496,651	72.1	454,457	66.0
Total (all Organisational Types)	2,124,650	1,838,202	86.5	1,630,557	76.7	1,452,113	68.3	1,310,274	61.7

Source: ABS

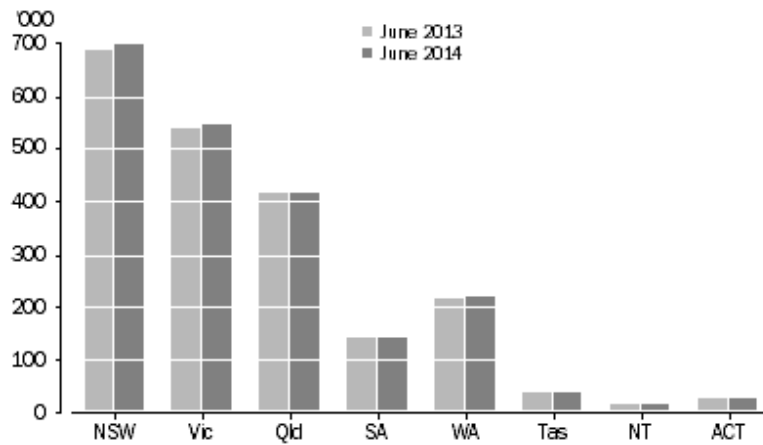
³³¹ Ibid.

Figure 3 Survival rates of businesses that started in the 2010-11 financial year³³²



Source: ABS

Figure 4 Actively trading businesses by main state/territory of operation June 2013 and June 2014³³³

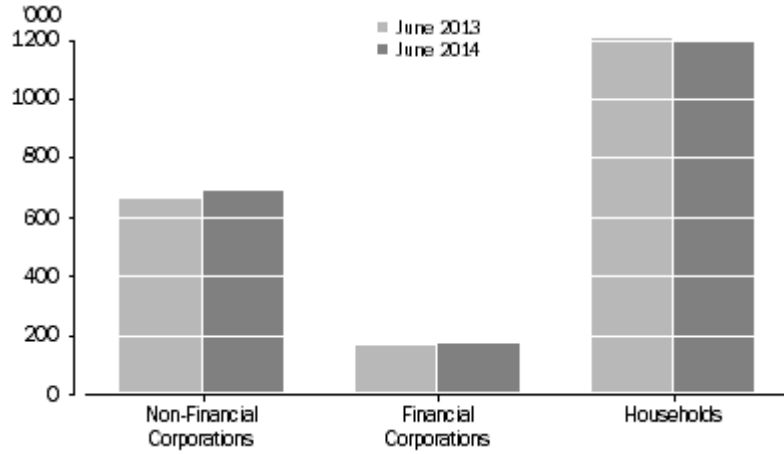


Source: ABS

³³² Ibid.

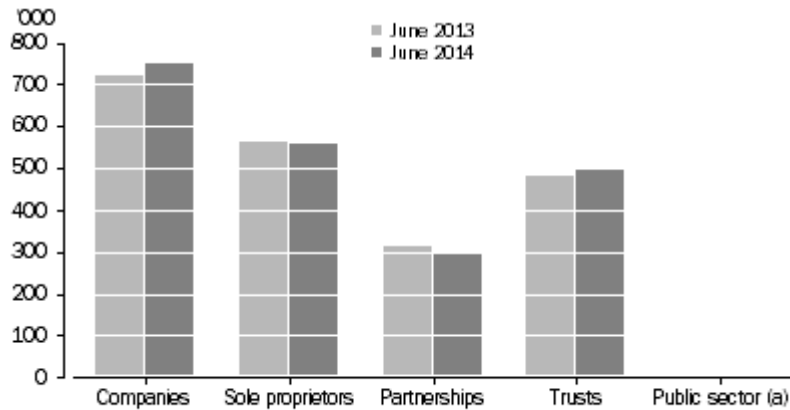
³³³ Ibid.

Figure 5 Institutional sector of actively trading businesses June 2013 and June 2014³³⁴



Source: ABS

Figure 6 Type of legal organisation of actively trading businesses June 2013 and June 2014³³⁵



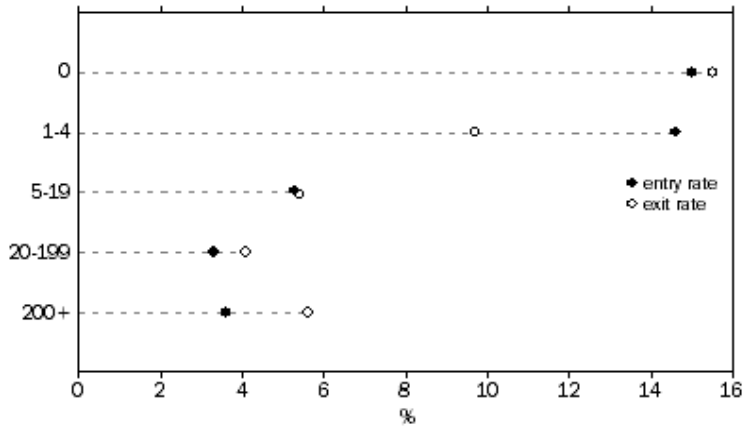
(a) There were 572 actively trading public sector businesses in June 2013 and 516 in June 2014.

Source: ABS

³³⁴ Ibid.

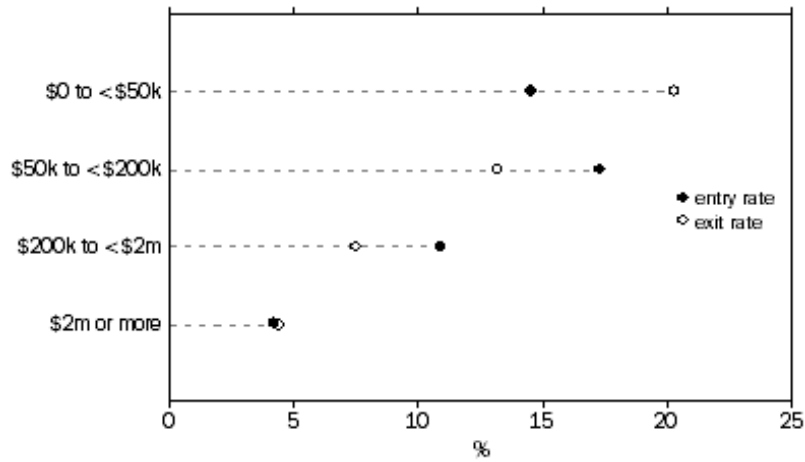
³³⁵ Ibid.

Figure 7 Business entry and exit rates by number of employees 1 July 2013 - 30 June 2014³³⁶



Source: ABS

Figure 8 Business entry and exit rates by annual turnover 1 July 2013 - 30 June 2014³³⁷



Source: ABS

Table 43 Number of Businesses by Industry 1 July 2013 - 30 June 2014³³⁸

	Operating at start of financial year	Entries	Exits	Operating at end of financial year	Change	Percentage change	Entry rate	Exit rate
	no.	no.	no.	no.	no.	%	%	%
Accommodation & Food Services	81,853	15,615	12,211	85,257	3,404	4.2	19.1	14.9
Administrative & Support Services	78,430	12,818	12,356	78,892	462	0.6	16.3	15.8
Agriculture, Forestry & Fishing	187,539	15,675	19,463	183,751	-3,788	-2.0	8.4	10.4
Arts & Recreation	26,092	3,642	3,601	26,133	41	0.2	14.0	13.8

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

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Services								
Construction	335,329	50,689	47,793	338,225	2,896	0.9	15.1	14.3
Education and Training	25,773	3,891	3,263	26,401	628	2.4	15.1	12.7
Electricity, Gas, Water & Waste Services	5,750	886	717	5,919	169	2.9	15.4	12.5
Financial & Insurance Services	168,746	22,324	16,385	174,685	5,939	3.5	13.2	9.7
Health Care & Social Assistance	107,542	13,929	8,234	113,237	5,695	5.3	13.0	7.7
Information Media & Telecommunications	18,539	3,261	2,717	19,083	544	2.9	17.6	14.7
Manufacturing	84,956	8,417	9,576	83,797	-1,159	-1.4	9.9	11.3
Mining	8,277	871	885	8,263	-14	-0.2	10.5	10.7
Other Services	87,053	11,965	11,131	87,887	834	1.0	13.7	12.8
Professional, Scientific & Technical Services	247,201	35,402	32,049	250,554	3,353	1.4	14.3	13.0
Public Administration & Safety	7,352	1,147	1,169	7,330	-22	-0.3	15.6	15.9
Rental, Hiring & Real Estate Services	225,016	23,237	18,976	229,277	4,261	1.9	10.3	8.4
Retail Trade	135,597	17,637	18,765	134,469	-1,128	-0.8	13.0	13.8
Transport, Postal & Warehousing	125,708	17,926	17,080	126,554	846	0.7	14.3	13.6
Wholesale Trade	76,226	9,166	9,043	76,349	123	0.2	12.0	11.9
Unknown	46,687	15,655	18,243	44,099	-2,588			
All Industries	2,079,666	284,153	263,657	2,100,162	20,496	1.0	13.7	12.7

Source: ABS

5.2. AMANDA PHILLIPS STATISTICS

Amanda Phillips conducted a survey of IPAA members who were either registered liquidators or official liquidators, representing about 80% of all registered liquidators in Australia, for the period 1 July 2011 to 30 September 2011. She requested participants to nominate a category for the value of assets realised for each official liquidation. This data is outlined in [Table 44](#). As Phillips notes, 76% of respondents indicated that for each official liquidation they undertook there were assets of \$10,000 or less and 62% indicated assets of less than \$1.³³⁹ It must be borne in mind that limited conclusions can be drawn from this data given the small size of the sample (only 16 respondents provided data).

³³⁹ Phillips, above n 48, 10.

Table 44 Realisable Assets for liquidations undertaken by survey participants 1 July 2011 - 30 September 2011³⁴⁰

Total realisable assets	No. of responses	% of responses
< \$1	56	62%
\$1 - \$10,000	13	14%
\$10,001 - \$20,000	3	3%
\$20,001 - \$30,000	4	4%
\$30,001 - \$50,000	2	2%
\$50,001 - \$100,000	5	6%
\$100,001 - \$250,000	2	2%
\$250,000 - \$5 mill	5	6%
> \$5 mill	-	0%

Source: Amanda Phillips

Table 45 Profile of a 'typical' liquidation³⁴¹

Survey question	Most common / average response	Survey responses
Petitioning Creditor	ATO	52%
Duration of liquidation	12 months or less	64%
Was the RATA received?	Yes	72%
Was ASIC's assistance requested to obtain the RATA?	No	80%
Industry	Construction	29%
Turnover at the date of appointment	\$0 to \$100,000	66%
Employees at the date of appointment	Not known / less than five	91%
Total realisable assets	\$0 to \$10,000 (assetless)	76%
Total employee creditors	\$0	81%
Total unsecured creditors	Less than \$250,000	62%
Total secured creditors	\$0	91%
Dividend rate to unsecured creditors	0 cents	90%
Disbursements incurred by the Official Liquidator	\$591	All responses
	\$586	Construction industry only
	\$494	Assetless official liquidations only
Recovery rate for disbursements	29%	All responses
	25%	Construction industry only
	12%	Assetless official liquidations only
Remuneration incurred by the Official Liquidator	\$17,475	All responses
	\$18,003	Construction industry only

³⁴⁰ Ibid.

³⁴¹ Phillips, above n 48, 4-5.

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

	\$13,633	Assetless official liquidations only
Recovery rate for remuneration	15%	All responses
	19%	Construction industry only
	2%	Assetless official liquidations only

Source: Amanda Phillips

Phillips extrapolated from the data that each year, insolvency practitioners personally fund disbursements of around \$1 million and remuneration of around \$32 million while undertaking liquidations, as set out in [Table 46](#).³⁴²

Table 46 Costs borne by liquidations for liquidations undertaken by survey participants 1 July 2011 - 30 September 2011³⁴³

Annual Costs	Incurred (\$ mill)	Recovered from asset realisations (\$ mill)	Funded personally by liquidators (\$ mill)
Disbursements	1.9	0.5	1.4
Remuneration	55.6	8.3	47.3
Total	57.5	8.8	48.7

Source: Amanda Phillips

³⁴² Ibid, 6.

³⁴³ Ibid, 5.

5.3. ASIC STATISTICS

Table 47 EXAD reports - Amount owed unpaid taxes and charges by industry 1 July 2013 - 30 June 2014³⁴⁴

Amount Owed	Other (business and personal) services	Construction	Accommodation and food services	Retail trade	Transport, postal and warehousing	Manufacturing	Rental, hiring and real estate services	Wholesale trade	Information media and telecommunications	Agriculture, forestry and fishing	Professional, scientific and technical services	Electricity, gas, water and waste services	Other industries ¹	Total	% of total
\$0	391	303	97	142	55	46	48	44	28	51	30	18	164	1,417	15.0%
\$1 - \$250,000	1,641	1,404	656	627	369	311	174	162	152	114	120	130	450	6,310	66.7%
\$250,001 - \$1 mill	342	358	151	85	70	93	45	21	36	26	29	26	128	1,410	14.9%
> \$1 mill	108	88	12	16	14	13	5	17	7	4	8	5	25	322	3.4%
Total for industry	2,482	2,153	916	870	508	463	272	244	223	195	187	179	767	9,459	100.0%

¹ 'Other industries' includes Administrative and support services, Arts and recreation services, all FIS sub-categories, Health care and social assistance, Mining, and Public administration and safety.

Source: ASIC

³⁴⁴ ASIC, REP 412 above n 60, [Table 29].

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Table 48 EXAD reports - Amount owed to secured creditors by industry 1 July 2013 - 30 June 2014³⁴⁵

Amount Owed	Other (business and personal) services	Construction	Accommodation and food services	Retail trade	Transport, postal and warehousing	Manufacturing	Rental, hiring and real estate services	Wholesale trade	Information media and telecommunications	Agriculture, forestry and fishing	Professional, scientific and technical services	Electricity, gas, water and waste services	Other industries ¹	Total	% of total
\$0	1,949	1,457	627	515	332	253	169	133	168	96	136	123	511	6,469	68.4%
\$1 - < \$500,000	367	436	205	221	117	119	49	55	36	34	35	41	120	1,835	19.4%
\$500,000 - <\$1 mill	48	77	30	43	17	20	12	12	6	11	5	11	18	310	3.3%
\$1 mill - \$5 mill	70	101	44	49	32	46	21	26	9	28	9	4	60	499	5.3%
\$5 mill - 10 mill	9	28	5	18	5	8	10	0	2	3	1	0	24	113	1.2%
> \$10 mill	39	54	5	24	5	17	11	18	2	23	1	0	34	233	2.5%
Total for industry	2,482	2,153	916	870	508	463	272	244	223	195	187	179	767	9,459	100.0%

Source: ASIC

³⁴⁵ Ibid, 40 [Table 28].

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Table 49 EXAD reports - Nominated causes of failure by industry 1 July 2013 - 30 June 2014³⁴⁶

Causes of failure	Other (business & personal) services	Construction	Retail trade	Accommodation & food services	Transport, postal & warehousing	Manufacturing	Rental, hiring & real estate services	Wholesale trade	Information media & telecommunications	Professional, scientific & technical services	FIS—Other financial services	Agriculture, forestry & fishing	Other industries	Total
Under capitalisation	349	435	188	165	82	111	53	50	56	44	35	34	141	1,743
Poor financial control, including lack of records	894	660	270	240	182	118	64	64	63	46	50	49	208	2,908
Poor management of accounts receivable	223	336	24	53	57	77	26	35	28	17	26	24	91	1,017
Poor strategic management of business	999	892	426	363	221	201	95	101	98	85	76	80	338	3,975
Inadequate cash flow or high cash use	949	1,000	405	399	223	214	108	81	98	86	74	80	314	4,031
Poor economic conditions	444	558	258	283	88	156	73	65	59	42	35	53	198	2,312
Natural disaster	22	17	17	15	11	8	2	2	0	21	3	1	3	122
Fraud	32	30	6	10	11	5	7	12	5	3	4	1	20	146
Deed of company arrangement failed	2	35	4	3	1	2	0	1	3	1	0	1	2	55
Dispute among directors	54	52	36	27	8	23	12	5	11	7	9	5	22	271
Trading losses	672	698	410	352	150	187	57	85	88	65	61	50	203	3,078
Industry restructuring	45	50	8	24	9	23	1	5	12	9	3	10	23	222
Other	739	611	205	220	159	121	81	82	53	64	65	52	274	2,726
Total	5,424	5,374	2,257	2,154	1,202	1,246	579	588	574	490	441	440	1,837	22,606

Source: ASIC

³⁴⁶ Ibid, 20 [Table 11].

5.4. ATO STATISTICS

Table 50 ATO data on confirmed and candidate phoenix entities by industry as at 1 August 2014

Industry	Number
Abalone Fishing (4191)	41
Accommodation (44000)	1,972
Accommodation for the Aged Operation (86012)	376
Accounting Services (69320)	5,246
Adhesive Manufacturing (19150)	11
Adult Sex Shop Operation (42793)	36
Adult, Community and Other Education n.e.c. (82199)	436
Advertising Services (69400)	2,213
Agricultural and Construction Machinery Wholesaling (34110)	181
Agricultural Machinery and Equipment Manufacturing (24610)	66
Air Conditioning and Heating Services (32330)	386
Aircraft Charter and Lease (49001)	240
Aircraft Manufacturing and Repair Services (23940)	115
Airport Operations and Other Air Transport Support Services (52200)	114
Alumina Production (21310)	7
Aluminium Rolling, Drawing, Extruding (21420)	20
Aluminium Smelting (21320)	23
Ambulance Services (85910)	9
Amusement and Other Recreational Activities n.e.c. (91390)	145
Amusement Parks and Centres Operation (91310)	157
Anaesthetist (Own Account) (85121)	14
Antiques Retailing (Except Pawnbroking or Disposal Stores) (42732)	48
ANZSIC Code pending (99900)	<5
Apple and Pear Growing (1340)	56
Architectural Aluminium Product Manufacturing (22230)	172
Architectural Services (69210)	636
Art Dealers (Incl. Art Gallery Operation Except by Direct Marketing) (42792)	97
Arts Education (82120)	109
Automotive Body, Paint and Interior Repair n.e.c. (94129)	482
Automotive Electrical Component Manufacturing (23130)	52
Automotive Electrical Services (94110)	69
Auxiliary Insurance Services (64200)	748
Bakery Product Manufacturing (Non-factory based) (11740)	220
Banking (62210)	85
Basic Inorganic Chemical Manufacturing (18130)	28
Basic Organic Chemical Manufacturing (18120)	57
Bauxite Mining (8020)	16
Beef Cattle Farming (Specialised) (1420)	971
Beef Cattle Feedlots (Specialised) (1430)	9
Beekeeping (1930)	10
Beer Manufacturing (12120)	54
Berry Fruit Growing (1330)	19
Biscuit Manufacturing (Factory based) (11730)	22
Blank (None)	10,657

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Boatbuilding and Repair Services (23920)	169
Boiler, Tank and Other Heavy Gauge Metal Container Manufacturing (22310)	57
Book and Magazine Wholesaling (37350)	67
Book Publishing (54130)	115
Book Retailing (42442)	120
Bookmaker (92091)	23
Bread Manufacturing (Factory based) (11710)	66
Bricklaying Services (32220)	486
Brothel Keeping and Prostitution Services (95340)	55
Building and Other Industrial Cleaning Services (73110)	1,506
Building Pest Control Services (73120)	96
Building Society Operation (62220)	20
Business and Professional Association Services (95510)	1,070
Business Machine (Electronic) Manufacturing n.e.c. (24219)	23
Cable and Other Subscription Broadcasting (56220)	32
Cafes and Restaurants (45110)	3,828
Cake and Pastry Manufacturing (Factory based) (11720)	78
Call Centre Operation (72940)	271
Car Retailing (39110)	445
Car Wholesaling (35010)	176
Carpentry Services (32420)	1,425
Casino Operation (92010)	12
Catering Services (45130)	469
CEASED BUSINESS (99996)	6,006
Cement and Lime Manufacturing (20310)	17
Central Banking (62100)	8
Central Government Administration (75100)	6
Cereal Grain Wholesaling (33120)	49
Cereal, Pasta and Baking Mix Manufacturing (11620)	29
Cheese and Other Dairy Product Manufacturing (11330)	60
Chemist or Pharmacy Operations (42711)	475
Child Care Services (87100)	790
Child Minding (Babysitting In the Home) (95393)	34
Chiropractic and Osteopathic Services (85340)	61
Cigarette and Tobacco Product Manufacturing (12200)	5
Citrus Fruit Growing (1360)	45
Clay Brick Manufacturing (20210)	43
Cleaning Compound Manufacturing (18510)	52
CLIENTS OF; BULK GROUP; OR GROUP SCHEME (99997)	12
Clothing and Footwear Repair (94910)	8
Clothing and Footwear Wholesaling (37120)	574
Clothing Manufacturing (13510)	360
Clothing Retailing (42510)	1,073
Coal Mining (6000)	391
Combined Primary and Secondary Education (80230)	86
Commercial Vehicle Wholesaling (35020)	46
Commission-Based Wholesaling (38000)	518
Communication Equipment Manufacturing (24220)	126
Complementary and Alternative Services (85391)	160

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Computer and Computer Peripheral Retailing (42220)	449
Computer and Computer Peripheral Wholesaling (34920)	500
Computer and Related Equipment Manufacturing (24211)	65
Computer System Design and Related Services (70000)	5,264
Computer Training (Vocational) (81011)	133
Concrete Product Manufacturing (20340)	189
Concreting Services (32210)	1,035
Confectionery Manufacturing (11820)	56
CONSOLIDATION ASSESSMENT (SECTION 219) (99060)	<5
CONTROL OF NON RESIDENT'S MONEY (SECTION 255) (99070)	35
Copper Ore Mining (8030)	42
Copper, Silver, Lead and Zinc Smelting and Refining (21330)	17
Corporate Head Office Management Services (69610)	106
Correctional and Detention Services (77140)	5
Corrugated Paperboard and Paperboard Container Manufacturing (15210)	26
Cosmetic and Toiletry Preparation Manufacturing (18520)	94
Cosmetics, Perfumes and Toiletry Goods Retailing (Except Direct Mrktg) n.e.c. (42712)	98
Cosmetics, Perfumes and Toiletry Goods Retailing Commission Based (43201)	7
Cosmetics, Perfumes and Toiletry Goods Rtlg by Direct Mrktg (Except Cmsn Based) (43101)	26
Cotton Ginning (5210)	18
Cotton Growing (1520)	70
Courier Pick-up and Delivery Services (51020)	476
Crab Potting (4112)	<5
Credit Reporting and Debt Collection Services (72930)	267
Credit Union Operation (62230)	39
Cured Meat and Smallgoods Manufacturing (11130)	37
Customs Agency Services (52910)	88
Cut and Sewn Textile Product Manufacturing (13330)	116
Dairy Cattle Farming (1600)	198
Dairy Produce Wholesaling (36030)	67
Data Processing and Web Hosting Services (59210)	186
Deer Farming (1800)	15
Defence (76000)	8
Dental Services (85310)	199
Department Stores (42600)	49
Dermatologist (Own Account) (85123)	12
Diamond Mining (9901)	35
Diet and Weight Reduction Centre Operation (95120)	37
Directory and Mailing List Publishing (54140)	16
Disposal Stores (Second Hand Goods Retailing Except Pawnbroking and Antiques) (42733)	135
Document Preparation Services (72920)	65
Dog Training (Racing) (91291)	<5
Domestic Appliance Repair and Maintenance (94210)	56
Educational Support Services (82200)	71
Electric Cable and Wire Manufacturing (24310)	24
Electric Lighting Equipment Manufacturing (24320)	83
Electrical Services (32320)	1,372
Electrical, Electronic and Gas Appliance Retailing (42210)	664
Electricity Distribution (26300)	47

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Electricity Transmission (26200)	19
Electronic (except Domestic Appliance) and Precision Eqpmt Repair and Mntnce (94220)	266
Electronic Information Storage Services (59220)	112
Employment Placement and Recruitment Services (72110)	1,796
Engineering Design and Engineering Consulting Services (69230)	2,961
Entertainment Media Retailing (42420)	140
Environmental Management Consultancy (69621)	221
Explosive Manufacturing (18920)	13
Farm Animal and Bloodstock Leasing (66200)	13
Fertiliser Manufacturing (18310)	75
FILM AND VIDEOTAPE ROYALTIES (SECTION 136A - DERIVED BY NON RESIDENTS) (99030)	<5
Financial Asset Broking Services (64110)	1,844
Financial Asset Investing (62400)	30,646
Fire and Security Alarm Installation Services (32340)	308
Fire Protection and Other Emergency Services (77130)	39
Fish and Seafood Wholesaling (36040)	109
Fish Trawling, Seining and Netting (4140)	32
Fixed Space Heating, Cooling and Ventilation Equipment Manufacturing (24520)	76
Floor Coverings Retailing (42120)	120
Floriculture Production (Outdoors) (1150)	21
Floriculture Production (Under Cover) (1140)	10
Flower Retailing (42740)	102
Flying School Operation (82191)	36
Footwear Manufacturing (13520)	21
Footwear Retailing (42520)	106
Foreign Government Representation (75520)	13
Forestry (3010)	716
Forestry Support Services (5100)	160
Fortune Telling and Similar Services (95391)	11
Fossil Fuel Electricity Generation (26110)	112
Free-to-Air Television Broadcasting (56210)	76
Freight Forwarding Services (52920)	170
Fresh Fish Retailing (41212)	62
Fresh Poultry Retailing (41213)	8
Fruit and Vegetable Processing (11400)	102
Fruit and Vegetable Retailing (41220)	216
Fruit and Vegetable Wholesaling (36050)	255
Fuel Retailing (40000)	274
Funeral, Crematorium and Cemetery Services (95200)	104
Furniture and Floor Covering Wholesaling (37310)	242
Furniture Retailing (42110)	530
Garden Supplies Retailing (42320)	194
Gardening Services (73130)	267
Gas Supply (27000)	129
Gemstone Mining (Except Opals and Diamonds) (9903)	21
General Insurance (63220)	549
General Line Grocery Wholesaling (36010)	54
General Practice Medical Services (85110)	771
Glass and Glass Product Manufacturing (20100)	99

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Glazing Services (32450)	249
Gold Ore Mining (8040)	443
Grain Mill Product Manufacturing (11610)	31
Grain Storage Services (53010)	23
Grain-Sheep or Grain-Beef Cattle Farming (1450)	369
Grape Growing (1310)	708
Gravel and Sand Quarrying (9110)	45
Gynaecologist and Obstetrician (Own Account) (85124)	11
Hairdressing and Beauty Services (95110)	955
Hardware and Building Supplies Retailing (42310)	448
Health and Fitness Centres and Gymnasias Operation (91110)	406
Health Insurance (63210)	69
Heavy Machinery and Scaffolding Rental and Hiring (66310)	1,051
Higher Education (81020)	102
Hire of Construction Machinery with Operator (32920)	203
Horse and Dog Racing Administration and Track Operation (91210)	21
Horse Farming (1910)	443
Horse Training (Racing) (91292)	166
Hospitals (Except Psychiatric Hospitals) (84010)	325
House Construction (30110)	5,247
Houseware Retailing (42130)	142
Human Pharmaceutical and Medicinal Product Manufacturing (18410)	141
Hunting and Trapping (4200)	<5
Hydro-Electricity Generation (26120)	15
Ice Cream Manufacturing (11320)	18
Industrial and Agricultural Chemical Product Wholesaling (33230)	323
Industrial Gas Manufacturing (18110)	15
Industry unknown or not stated (PP income<Non PP income) (99992)	76
Industry unknown or not stated (PP income>Non PP income) (99991)	5,003
INSURANCE AND REINSURANCE WITH A NON RESIDENT (SECTIONS 144 AND 148) (99050)	49
INTEREST ON BEARER DEBENTURES (99010)	8
Internet Publishing and Broadcasting (57000)	554
Internet Service Providers and Web Search Portals (59100)	370
Interurban and Rural Bus Transport (46210)	79
Introduction Agency Services (95392)	43
Investigation and Security Services (77120)	1,259
Iron and Steel Casting (21210)	34
Iron and Steel Forging (22100)	13
Iron Ore Mining (8010)	82
Iron Smelting and Steel Manufacturing (21100)	185
Jewellery and Silverware Manufacturing (25910)	50
Jewellery and Watch Wholesaling (37320)	134
Jewellery Retailing by Direct Marketing (Except Commission Based) (43102)	13
Jewellery Retailing Commission Based (43202)	<5
Jockeys (91121)	9
Justice (75400)	12
Kitchen and Diningware Wholesaling (37330)	84
Kiwifruit Growing (1320)	<5
Knitted Product Manufacturing (13400)	24

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Labour Association Services (95520)	50
Labour Supply Services (72120)	1,828
Land Development and Subdivision (32110)	4,842
Landscape Construction Services (32910)	475
Laundry and Dry-Cleaning Services (95310)	154
Leather Tanning, Fur Dressing and Leather Product Manufacturing (13200)	49
Legal Services (69310)	1,911
Libraries and Archives (60100)	26
Licensed Clubs (Hospitality) Operation (45301)	330
Life Insurance (63100)	87
Lifting and Material Handling Equipment Manufacturing (24910)	59
Line Fishing (4130)	20
Liquor Retailing (41230)	337
Liquor Wholesaling (36061)	413
Lobster Farming or Breeding (2031)	<5
Local Government Administration (75300)	17
Log Sawmilling (14110)	105
Logging (3020)	72
Lottery Operation (92020)	20
Machine Tool and Parts Manufacturing (24630)	70
Magazine and Other Periodical Publishing (54120)	240
Management Advice and Related Consulting Services n.e.c. (69629)	8,816
Manchester and Other Textile Goods Retailing (42140)	79
Marine Equipment Retailing (42450)	180
Marine Fishing n.e.c. (4192)	21
Market Research and Statistical Services (69500)	467
Mattress Manufacturing (25130)	13
Meat Processing (11110)	124
Meat Retailing (Except Poultry or Canned Meat) (41211)	155
Meat, Poultry and Smallgoods Wholesaling (36020)	197
Medical and Surgical Equipment Manufacturing (24120)	127
Metal Coating and Finishing (22930)	124
Metal Furniture Manufacturing (25120)	58
Metal Roof and Guttering Manufacturing (except Aluminium) (22240)	6
Metal Waste and Scrap Wholesaling (33221)	51
Milk and Cream Processing (11310)	23
Mineral Exploration (Own Account) (10121)	1,271
Mineral Exploration Services (10122)	316
Mineral Sand Mining (8050)	58
Mining and Construction Machinery Manufacturing (24620)	115
Motion Picture and Video Distribution (55120)	114
Motion Picture and Video Production (55110)	832
Motion Picture Exhibition (55130)	119
Motor Cycle Retailing (39120)	64
Motor Vehicle Battery Retailing (39211)	16
Motor Vehicle Body and Trailer Manufacturing (23120)	181
Motor Vehicle Clutch and Brake Repair and Service (94191)	27
Motor Vehicle Dismantling and Used Parts Wholesaling (35050)	47
Motor Vehicle Manufacturing (23110)	87

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Motor Vehicle Muffler and Exhaust Repair and Service (94193)	17
Motor Vehicle New Parts Wholesaling (35040)	273
Motor Vehicle Parts Retailing n.e.c. (39219)	121
Motor Vehicle Radiator Repair and Service (94192)	16
Motor Vehicle Windscreen Repair and Service (94121)	12
Museum Operation (89100)	62
Mushroom Growing (1210)	25
Music and Other Sound Recording Activities (55220)	83
Music Publishing (55210)	36
Musicians and Entertainers (90021)	229
Natural Rubber Product Manufacturing (19200)	42
Natural Textile Manufacturing (13120)	18
Nature Reserves and Conservation Parks Operation (89220)	31
Newsagents (42441)	126
Newspaper Publishing (54110)	193
Nickel Ore Mining (8060)	50
NON RESIDENT INSURANCE COMPANY (SECTION 143) (99040)	5
NON- TAXABLE, NIL COMPANY RETURNS (NO INCOME, EXPENSE OR BALANCE SHEET D	1,148
Non-Depository Financing (62300)	1,451
Non-Ferrous Metal Casting (21410)	11
Non-Financial Intangible Assets (Except Copyrights) Leasing (66400)	877
NON-OPERATING ENTITY (EXCLUDING TRUSTEES) (99999)	597
NON-OPERATING TRUSTEE (99998)	139
Non-Residential Building Construction (30200)	3,547
Non-Residential Property Operators (67120)	16,502
Non-salary or wage income returned (99760)	237
Non-Store Retailing n.e.c. (43109)	704
Nursery Production (Outdoors) (1120)	32
Nursery Production (Under Cover) (1110)	30
Nut, Bolt, Screw and Rivet Manufacturing (22920)	22
Office Administrative Services (72910)	1,980
Offshore Caged Aquaculture (2020)	<5
Offshore Longline and Rack Aquaculture (2019)	26
OHAS Consultancy Services (69622)	263
Oil and Fat Manufacturing (11500)	37
Oil and Gas Extraction (7000)	244
Olive Growing (1370)	53
On Selling Electricity and Electricity Market Operation (26400)	71
Opal Mining (9902)	14
Optometry and Optical Dispensing (85320)	121
Other Administrative Services n.e.c. (72990)	1,179
Other Agricultural Product Wholesaling (33190)	349
Other Agriculture and Fishing Support Services (5290)	309
Other Air and Space Transport (49009)	129
Other Allied Health Services (Mainstream) (85399)	284
Other Automotive Repair and Maintenance (94199)	529
Other Auxiliary Finance and Investment Services (64190)	21,902
Other Basic Chemical Product Manufacturing n.e.c. (18990)	37
Other Basic Non-Ferrous Metal Manufacturing (21390)	29

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Other Basic Non-Ferrous Metal Product Manufacturing (21490)	13
Other Basic Polymer Manufacturing (18290)	13
Other Building Installation Services (32390)	398
Other Ceramic Product Manufacturing (20290)	73
Other Construction Material Mining (9190)	176
Other Construction Services n.e.c. (32990)	1,099
Other Converted Paper Product Manufacturing (15290)	27
Other Creative Artists, Writers and Performers (90029)	340
Other Crop Growing n.e.c. (1590)	88
Other Depository Financial Intermediation (62290)	723
Other Domestic Appliance Manufacturing (24490)	55
Other Electrical and Electronic Goods Retailing (42290)	120
Other Electrical and Electronic Goods Wholesaling (34940)	702
Other Electrical Equipment Manufacturing (24390)	139
Other Electricity Generation (26190)	193
Other Electronic Equipment Manufacturing (24290)	123
Other Fabricated Metal Product Manufacturing n.e.c. (22990)	173
Other Fishing (4199)	11
Other Food Product Manufacturing n.e.c. (11990)	217
Other Fruit and Tree Nut Growing (1390)	283
Other Furniture Manufacturing (25190)	48
Other Gambling Services n.e.c. (92099)	74
Other Goods and Equipment Rental and Hiring n.e.c. (66390)	1,242
Other Goods Wholesaling n.e.c. (37390)	665
Other Grain Growing (1490)	189
Other Grocery Wholesaling (36090)	627
Other Hardware Goods Wholesaling (33390)	738
Other Health Care Services n.e.c. (85990)	111
Other Heavy and Civil Engineering Construction n.e.c. (31099)	1,043
Other Horse and Dog Racing Activities (91299)	14
Other Information Services (60200)	56
Other Interest Group Services n.e.c. (95599)	1,000
Other Livestock Farming n.e.c. (1990)	111
Other Machinery and Equipment Manufacturing n.e.c. (24990)	152
Other Machinery and Equipment Repair and Maintenance (94290)	338
Other Machinery and Equipment Wholesaling n.e.c. (34990)	343
Other Manufacturing n.e.c. (25990)	194
Other Metal and Mineral Wholesaling (33229)	203
Other Metal Container Manufacturing (22390)	19
Other Metal Ore Mining (8090)	117
Other Mining Support Services (10900)	384
Other Motor Vehicle and Transport Equipment Rental and Hiring (66190)	605
Other Motor Vehicle Parts Manufacturing (23190)	139
Other Non-Metallic Mineral Mining and Quarrying n.e.c. (9909)	271
Other Non-Metallic Mineral Product Manufacturing (20900)	126
Other Onshore Aquaculture (2039)	83
Other Pathology and Diagnostic Imaging Services (85209)	94
Other Personal Accessory Retailing (42590)	39
Other Personal Services n.e.c. (95399)	367

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Other Petroleum and Coal Product Manufacturing (17090)	58
Other Polymer Product Manufacturing (19190)	129
Other Professional and Scientific Equipment Manufacturing (24190)	106
Other Professional, Scientific and Technical Services n.e.c. (69990)	231
Other Public Order and Safety Services (77190)	49
Other Publishing (except Software, Music and Internet) (54190)	43
Other Repair and Maintenance n.e.c. (94990)	46
Other Residential Building Construction (30190)	3,824
Other Residential Care Services (86090)	71
Other Road Transport (Except Taxi) (46239)	74
Other Social Assistance Services (87900)	541
Other Specialised Design Services (69240)	792
Other Specialised Food Retailing (41290)	421
Other Specialised Industrial Machinery and Equipment Wholesaling (34190)	265
Other Specialised Machinery and Equipment Manufacturing (24690)	103
Other Store-Based Retailing n.e.c. (42799)	625
Other Structural Metal Product Manufacturing (22290)	134
Other Telecommunications Network Operation (58020)	94
Other Telecommunications Services (58090)	253
Other Transport Equipment Manufacturing n.e.c. (23990)	28
Other Transport n.e.c. (50290)	86
Other Transport Support Services n.e.c. (52999)	199
Other Warehousing and Storage Services (53090)	369
Other Waste Collection Services (29190)	24
Other Water Transport Support Services (52190)	157
Other Wood Product Manufacturing n.e.c. (14990)	91
Oyster Farming (2011)	56
Packaging Services (73200)	114
Paint and Coatings Manufacturing (19160)	53
Painting and Decorating Services (32440)	651
Paper Bag Manufacturing (15220)	<5
Paper Product Wholesaling (37360)	150
Paper Stationery Manufacturing (15230)	38
Parents and Citizens Associations (95591)	15
Parking Services (95330)	109
Passenger Car Rental and Hiring (66110)	245
Pathologist (Own Account) (85202)	63
Pawnbroking (42731)	45
Performing Arts Operation (90010)	254
Performing Arts Venue Operation (90030)	85
Pesticide Manufacturing (18320)	23
Petroleum Exploration (Own Account) (10111)	382
Petroleum Exploration Services (10112)	147
Petroleum Product Wholesaling (33210)	176
Petroleum Refining and Petroleum Fuel Manufacturing (17010)	65
Pets Retailing (42794)	150
Pharmaceutical and Toiletry Goods Wholesaling (37200)	417
Photographic Film Processing (95320)	45
Photographic, Optical and Ophthalmic Equipment Manufacturing (24110)	13

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Physiotherapy Services (85330)	145
Pig Farming (1920)	41
Pipeline Transport (50210)	46
Plaster Product Manufacturing (20320)	27
Plastering and Ceiling Services (32410)	673
Plumbing Goods Wholesaling (33320)	145
Plumbing Services (32310)	765
Police Services (77110)	39
Polymer Film and Sheet Packaging Material Manufacturing (19110)	46
Polymer Foam Product Manufacturing (19130)	39
Port and Water Transport Terminal Operations (52120)	56
Postal Services (51010)	196
Post-production Services and Other Motion Picture and Video Activities (55140)	49
Potato, Corn and Other Crisp Manufacturing (11910)	<5
Poultry Farming (Eggs) (1720)	28
Poultry Farming (Meat) (1710)	43
Poultry Processing (11120)	21
Prawn Fishing (4120)	24
Prefabricated Metal Building Manufacturing (22220)	70
Prefabricated Wooden Building Manufacturing (14910)	16
Prepared Animal and Bird Feed Manufacturing (11920)	66
Preschool Education (80100)	68
Primary Education (80210)	36
Printing (16110)	804
Printing Support Services (16120)	56
Private Households Employing Staff (96010)	33
Professional and Scientific Goods Wholesaling (34910)	294
Professional Basketballers (91122)	<5
Professional Footballers (91124)	16
Professional Photographic Services (69910)	186
Professional Sportspersons n.e.c. (91126)	42
PROFORMA - NO INDUSTRY QUESTION (99993)	<5
Property Income interest and dividend income (99792)	3,874
Property Income other (99793)	1,582
Property operators and developers (99791)	2,282
Psychiatric Hospitals (84020)	6
Psychiatrist (Own Account) (85125)	11
Pubs, Taverns and Bars (45200)	1,530
Pulp, Paper and Paperboard Manufacturing (15100)	41
Pump and Compressor Manufacturing (24510)	26
QM CODE ONLY - A PHONE CALL SHOULD HAVE BEEN MADE (99995)	67
Radio Broadcasting (56100)	198
Radiologist (Own Account) (85203)	156
Rail Freight Transport (47100)	95
Rail Passenger Transport (47200)	15
Railway Rolling Stock Manufacturing and Repair Services (23930)	41
Ready-Mixed Concrete Manufacturing (20330)	46
Real Estate Services (67200)	6,254
Reconstituted Wood Product Manufacturing (14940)	13

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Regulatory Services (77200)	52
Religious Services (95400)	216
Reproduction of Recorded Media (16200)	78
Residential Property Operators (67110)	9,752
Retail Commission-Based Buying and/or Selling n.e.c. (43209)	174
Retirement Village Operation (86011)	424
Rice Growing (1460)	<5
Rigid and Semi-Rigid Polymer Product Manufacturing (19120)	209
Road and Bridge Construction (31010)	360
Road Freight Transport (46100)	2,787
Rock Lobster Fishing (4111)	30
Roofing Services (32230)	320
Rope, Cordage and Twine Manufacturing (13320)	8
Salary & wage earner (0)	2,148
Sanitary Paper Product Manufacturing (15240)	10
Scenic and Sightseeing Transport (50100)	254
Scientific Research Services (69100)	1,346
Scientific Testing and Analysis Services (69250)	227
Seafood Processing (11200)	52
Secondary Education (80220)	37
Sewerage and Drainage Services (28120)	34
Shearing Services (5220)	34
Sheep Farming (Specialised) (1410)	230
Sheep-Beef Cattle Farming (1440)	221
Sheet Metal Prdct Manufacturing (except Metal Structural and Container Prdcts) (22400)	106
Shipbuilding and Repair Services (23910)	63
Silver-Lead-Zinc Ore Mining (8070)	34
Site Preparation Services (32120)	1,361
Soft Drink, Cordial and Syrup Manufacturing (12110)	91
Software Publishing (54200)	124
Solid Waste Collection Services (29110)	146
Special School Education (80240)	8
Specialist Medical Clinic Operation (85122)	72
Specialist Medical Services n.e.c. (85129)	295
Spirit Manufacturing (12130)	21
Sport and Camping Equipment Retailing (42410)	224
Sports and Physical Recreation Administrative Service (91140)	170
Sports and Physical Recreation Clubs n.e.c. (91129)	331
Sports and Physical Recreation Instruction (82110)	217
Sports and Physical Recreation Venues, Grounds and Facilities Operation n.e.c. (91139)	256
Spring and Wire Product Manufacturing (22910)	52
Squash and Tennis Court Operation (91131)	15
State Government Administration (75200)	5
Stationery Goods Retailing (42720)	69
Steel Pipe and Tube Manufacturing (21220)	41
Stevedoring Services (52110)	69
Stone Fruit Growing (1350)	36
Structural Steel Erection Services (32240)	425
Structural Steel Fabricating (22210)	209

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Subsidiary Rtn - income from P&P (other than Prim Prod) (99780)	6,856
Subsidiary Rtn - income from P&T (Prim Prod) (99770)	116
Sugar Cane Growing (1510)	32
Sugar Manufacturing (11810)	12
Superannuation Funds (63300)	11,507
Supermarket and Grocery Stores (41100)	522
Surveying and Mapping Services (69220)	208
Swimming and Spa Pool Cnstrctn or Instltn (Below Ground Concrete or Fibreglass) (31091)	48
Swimming Pool and Spa Retailing (42791)	38
Synthetic Resin and Synthetic Rubber Manufacturing (18210)	71
Synthetic Textile Manufacturing (13130)	10
TAB Agency Operation (92092)	12
Takeaway Food Services (45120)	1,399
Taxi Driver (52991)	32
Taxi Service Operation (46231)	148
Technical and Vocational Education and Training n.e.c. (81019)	707
Telecommunication Goods Wholesaling (34930)	167
Textile Finishing and Other Textile Product Manufacturing (13340)	65
Textile Floor Covering Manufacturing (13310)	25
Textile Product Wholesaling (37110)	160
Tiling and Carpeting Services (32430)	363
Timber Resawing and Dressing (14130)	48
Timber Wholesaling (33310)	168
Tobacco Product Wholesaling (36062)	18
Toy and Game Retailing (42430)	46
Toy and Sporting Goods Wholesaling (37340)	195
Toy, Sporting and Recreational Product Manufacturing (25920)	69
Trailer and Other Motor Vehicle Retailing (39130)	51
Trailer and Other Motor Vehicle Wholesaling (35030)	32
Travel Agency and Tour Arrangement Services (72200)	602
Turf Growing (1130)	21
Tyre Manufacturing (19140)	29
Tyre Retailing (39220)	147
UNABLE TO OBTAIN INDUSTRY DETAILS (99994)	35,139
Undifferentiated Service-Producing Activities of Private Households for Own Use (96030)	<5
Unlicensed Clubs (Hospitality) Operation (45302)	19
Urban Bus Transport (Including Tramway) (46220)	78
Vegetable Growing (Outdoors) (1230)	109
Vegetable Growing (Under Cover) (1220)	47
Veneer and Plywood Manufacturing (14930)	13
Veterinary Pharmaceutical and Medicinal Product Manufacturing (18420)	13
Veterinary Services (69700)	134
Video and Other Electronic Media Rental and Hiring (66320)	192
Waste Remediation and Materials Recovery Services (29220)	200
Waste Treatment and Disposal Services (29210)	113
Watch and Jewellery Retailing (42530)	177
Water Freight Transport (48100)	81
Water Passenger Transport (48200)	58
Water Supply (28110)	157

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Whiteware Appliance Manufacturing (24410)	28
Wine and Other Alcoholic Beverage Manufacturing (12140)	339
Wired Telecommunications Network Operation (58010)	94
Wood Chipping (14120)	10
Wooden Furniture and Upholstered Seat Manufacturing (25110)	310
Wooden Structural Fitting and Component Manufacturing (14920)	314
Wool Scouring (13110)	15
Wool Wholesaling (33110)	59
X-Ray Clinic Operation (85201)	24
Zoological and Botanical Gardens Operation (89210)	14
Total	335,837

ATO's Annual Reports do not indicate how much non-recoverable debt relates to companies where there was suspected illegal phoenix activity. Therefore the figures in the table below represent the upper limit of unrecoverable SGC debt occurring as a result of this harmful activity.

Table 51 SGC Debt not recoverable due to employers entering some form of insolvency administration
1 July 2009 - 30 June 2014

Financial year	SGC Debt not recoverable due to employers entering some form of insolvency administration (\$mill)
2013-14 ³⁴⁷	\$256.8
2012-13 ³⁴⁸	\$188.9
2011-12 ³⁴⁹	\$88.7
2010-11 ³⁵⁰	\$99.5
2009-10 ³⁵¹	\$82.2

Source: ATO

Table 52 Total debt holdings with the ATO 1 July 2009 - 30 June 2014³⁵²

	2009-10 \$b	2010-11 \$b	2011-12 \$b	2012-13 \$b	2013-14 \$b
Activity statement debt	8.7	8.2	9.1	10.0	10.4
Income tax debt	5.6	5.5	7.1	7.3	8.6
SGC debt	0.3	0.3	0.3	0.4	0.5
Collectable debt total	14.7	14.1	16.6	17.7	19.5
Debt subject to objection or appeal	8.9	8.1	8.9	10.1	8.5
Insolvency debt	3.9	5.3	6.2	5.4	6.2
Total	27.5	27.5	31.7	33.2	34.2

Source: ATO

³⁴⁷ Ibid, 87.

³⁴⁸ ATO, *Annual Report 2012-13* (3 October 2013), 55.

³⁴⁹ ATO, *Annual Report 2011-12* (4 October 2012), 89.

³⁵⁰ ATO, *Annual Report 2010-11* (30 September 2011), 89.

³⁵¹ The ATO was not able to pursue \$82.2 million in superannuation entitlements because they were irrecoverable at law or it was not economical to do so. ATO, *Annual Report 2009-10* (7 October 2010), 93.

³⁵² ATO, *Annual Report 2013-14* (October 2014), 50.

Table 53 Number of Confirmed and Candidate Phoenix entities by registered state and entity type as at 1 August 2014

State	Companies	Individuals	Partnerships	Super Funds	Trusts	Total
ACT	2,593	169	283	114	781	3,940
NSW	86,257	7,339	6,870	4,737	18,797	124,000
NT	515	47	74	26	125	787
QLD	31,477	2,834	3,201	1,751	10,759	50,022
SA	8,620	724	1,153	662	3,326	14,485
TAS	1,449	174	196	90	620	2,529
VIC	45,716	4,190	4,057	2,971	18,098	75,032
WA	16,170	1,334	1,637	954	4,544	24,639
Unknown	12,642	16,368	4,445	217	6,731	40,403
Total	205,439	33,179	21,916	11,522	63,781	335,837

Source: ATO, supplied directly

5.5. ATO BEHAVIOURAL ECONOMICS BASED NUDGE LETTER TEMPLATE 1

PO Box 896 NEWCASTLE NSW 2300

<Title> <First Name> <Middle Name> <Surname>
 <Suffix><Organisation>
 <Address Line 1>
 <Address Line 2>
 <LOCALITY> <STATE> <POSTCODE>
 <COUNTRY>

Our reference: <Phoenix Risk-PEIS>

Contact officer: <Contact officer>

Phone: <13 28 69>

Fax: <Fax No>

Client ID: <ABN >

<Issue Date>

TAKE ACTION TO AVOID BEING PERSONALLY LIABLE

FOR COMPANY TAX DEBTS

- You must lodge and pay to avoid being personally liable for your company's debts
- You now face escalating penalties and closer monitoring

Dear Sir/Madam

You have been identified as having involvement in potential phoenix company arrangements. This is because during the past 5 years you were a director of <a company> <number> <companies> that <was> <were> placed into liquidation with tax debts remaining unpaid. You are currently a director of <a company> <companies> that have outstanding lodgments <and debt>.

A phoenix arrangement occurs when a company with tax or superannuation liabilities is placed into liquidation and is then replaced by a new company to carry on the same or similar business, usually with the same management in place. The liabilities of the former company remain unpaid.

Such behaviour is harmful to the Australian community as it gives some businesses an unfair advantage and denies the Government revenue to fund essential services for all Australians.

Within 7 days we intend to call you, <and> your tax agent <and your associated director<s>> regarding our concerns.

What you need

to do

For all companies for which you are currently a director or control; and

for yourself personally; by < date > you must:

1. Ensure all overdue income tax returns and business activity statements are lodged.
2. Make arrangements to pay all overdue tax or superannuation debts.

Source: Directly supplied by the ATO

5.6. ATO BEHAVIOURAL ECONOMICS BASED NUDGE LETTER TEMPLATE 2

PO Box 896 NEWCASTLE NSW 2300

<First Name> <Middle Name> <Surname>
 <Suffix><Organisation>
 <Address Line 1>
 <Address Line 2>
 <LOCALITY> <STATE> <POSTCODE>
 <COUNTRY>

Our reference: Phoenix Risk–PEIS

Contact officer: <Contact officer>

Phone: 13 28 69

Fax: <Fax No>

Client ID: <ABN >

<Issue Date>

Your client may be personally liable for company tax debts

Dear Sir/Madam

We are writing to advise you that your client the <name of head director> business group has been identified as having involvement with potential phoenix company arrangements.

A phoenix arrangement occurs when a company with tax or superannuation liabilities is placed into liquidation and is then replaced by a new company to carry on the same or similar business, usually with the same management in place. The liabilities of the former company remain unpaid.

Such behaviour is harmful to the Australian community as it gives some businesses an unfair advantage and denies the Government revenue to fund essential services for all Australians.

We have written to your client about their potential phoenix company arrangements. Within seven days we intend to call you and your client regarding our concerns.

What your client needs to do

For all companies of which your client is currently a director or controls; and for themselves personally;

by < date > your client must:

1. Ensure all overdue income tax returns and business activity statements are lodged.
2. Make arrangements to pay all overdue tax or

IF YOUR CLIENT DOES NOT ACT IT WILL RESULT IN:

- Your client being personally liable for any unreported and unpaid PAYG withholding or superannuation charge that is three months overdue. This is irrespective of whether the company proceeds into voluntary administration or liquidation. The personal liability can only be discharged upon full payment of the debt
- Your client's PAYGW reporting cycle changing to monthly if currently quarterly or annual. This will make them liable for a Director Penalty Notice more often
- Your client potentially being liable for PAYG Withholding Non Compliance Tax. This could apply if they have personally claimed PAYG withholding credits in their income tax return and their company failed to pay these amounts to us,
- Commencement of prosecution action against your client for non lodgement and
- Notifying the Australian Securities and Investments Commission, which may lead to your client's disqualification as a director.

If you would like to discuss your client's lodgement obligations please call our Registered Agent Info Line on 13 72 86 Fast Key Code 1 3 1 1. To discuss your client's payment obligations please use Fast Key Code 1 2 2 2.

We are now closely monitoring your client's taxation and superannuation affairs. If they do not lodge and pay, their business and those associated with it will be reviewed for future audit activity.

For more information

If you want to know more about what we are doing to address phoenix arrangements, go to our website, www.ato.gov.au and search for 'phoenix forum'.

If you have any questions, please phone **13 28 69** between 8.00am and 5.00pm, Monday to Friday, and ask for <name> on extension <ext. number>.

We encourage you to work with us so that we can assist you meet your obligations under the law and reduce the level of risk your business currently poses to the Australian community.

Yours faithfully

<Deputy Commissioner's Name>

Deputy Commissioner of Taxation

Source: ATO, supplied directly

5.7. BUILDING AND CONSTRUCTION SECTOR – QUANTIFICATION OF COST

Table 54 and Table 55 are extracted from the CFMEU’s 2015 submission to the senate inquiry into construction industry insolvency and set out the quantity of unsecured creditors and the amounts they are owed, as derived from EXAD reports for the 2013-14 financial year.

Table 54 Number of Unsecured Creditors – Construction Industry 1 July 2013 - 30 June 2014³⁵³

No. of unsecured creditors	No. of reports	% of total reports for the construction industry
< 25	1,667	77.4%
25-50	231	10.7%
51-200	217	10.1%
> 200	15	0.7%
Unknown	23	1.1%
Total	2,153	100.0%

Table 55 Amounts Owed to Unsecured Creditors – Construction Industry 1 July 2013 - 30 June 2014³⁵⁴

Amount owed to unsecured creditors	No. of reports	% of total reports for the construction industry
< \$250,000	1,283	59.6%
\$250,000 - \$500,000	296	13.7%
\$500,001 - < \$1 mill	224	10.4%
\$1 mill - < \$5 mill	279	13%
\$5 mill - \$10 mill	47	2.2%
> \$10 mill	24	1.1%
Total	2,153	100.0%

Source: CFMEU

Table 56 through to Table 64 are extracted from ASIC’s 2015 submission to the inquiry into construction industry insolvency. The data has been compiled by ASIC from its EXAD reports. The tables break down the losses caused by construction industry insolvencies by the estimated amounts owed to secured creditors and unsecured creditors, the amount of tax liabilities owed, and the amounts of unpaid employee entitlements (wages, annual leave, pay in lieu of notice, redundancy, long service, and superannuation) for insolvencies in the construction sector for the financial years 2009 to 2014.

³⁵³ CFMEU, *Senate Economics References Committee Insolvency in the Australian Construction Industry -Submission by the Construction, Forestry, Mining and Energy Union* (1 May 2015), 9.

³⁵⁴ *Ibid.*

Table 56 EXAD reports (construction industry) estimated amount owed to secured creditors 1 July 2009 - 30 June 2014³⁵⁵

Amount owed	2009-10	2010-11	2011-12	2012-13	2013-14	Total	% of total
\$0	1,257	1,276	1,467	1,509	1,457	6,966	67.0%
\$500,000 - < \$1 mill	59	63	98	59	77	356	3.4%
\$1 mill - < \$5 mill	121	101	119	142	101	584	5.6%
\$5 mill - \$10 mill	56	33	34	18	28	169	1.6%
> \$10 mill	50	60	61	91	54	316	3.0%
Total no. of reports	1,905	1,862	2,229	2,245	2,153	10,394	100.0%

Source: ASIC

Table 57 EXAD reports (construction industry) estimated amount owed to unsecured creditors 1 July 2009 - 30 June 2014³⁵⁶

Amount owed	2009-10	2010-11	2011-12	2012-13	2013-14	Total	% of total
< \$250,000	1,126	1,118	1,268	1,306	1,283	6,101	58.7%
\$250,000 - \$500,000	270	266	295	323	296	1,450	14.0%
\$500,001 - < \$1 mill	230	206	258	256	224	1,174	11.3%
\$1 mill - < \$5 mill	229	224	351	287	279	1,370	13.2%
\$5 mill - \$10 mill	30	28	32	40	47	177	1.7%
> \$10 mill	20	20	25	33	24	122	1.2%
Total no. of reports	1,905	1,862	2,229	2,245	2,153	10,394	100.0%

Source: ASIC

Table 58 EXAD reports (construction industry) amount of unpaid tax liabilities creditors 1 July 2009 - 30 June 2014³⁵⁷

Amount owed	2009-10	2010-11	2011-12	2012-13	2013-14	Total	% of total
\$0	432	345	315	346	303	1,741	16.8%
\$1 - \$250,000	1,199	1,166	1,426	1,402	1,404	6,597	63.5%
\$250,001 - \$1 mill	209	262	382	352	358	1,563	15.0%
> \$1 mill	65	89	106	145	88	493	4.7%
Total no. of reports	1,905	1,862	2,229	2,245	2,153	10,394	100.0%

Source: ASIC

³⁵⁵ ASIC, *Senate Inquiry into Insolvency in the Construction Industry Submission by the Australian Securities and Investments Commission* (April 2015), 13 [Table 3].

³⁵⁶ Ibid, 14 [Table 4].

³⁵⁷ Ibid, 14 [Table 5].

Table 59 EXAD reports (construction industry) amount of unpaid employee entitlements - wages creditors 1 July 2009 - 30 June 2014³⁵⁸

Amount owed	2009-10	2010-11	2011-12	2012-13	2013-14
\$1 - \$1,000	53	66	54	60	61
\$1,001 - \$10,000	229	192	233	219	178
\$10,001 - \$50,000	96	102	129	113	116
\$50,001 - \$150,000	31	30	34	33	31
\$150,001 - \$250,000	5	10	16	3	10
\$250,001 - \$500,000	3	5	5	2	4
\$500,001 - <\$1.5 mill	1	3	6	2	2
\$1.5 mill - \$5 mill	1	0	0	0	0
> \$5 mill	0	0	0	0	0
Not applicable	1,477	1,447	1,743	1,803	1,748
Total no. of reports	1,896	1,855	2,220	2,235	2,150

Source: ASIC

Table 60 EXAD reports (construction industry) amount of unpaid employee entitlements – annual leave 1 July 2009 - 30 June 2014³⁵⁹

Amount owed	2009-10	2010-11	2011-12	2012-13	2013-14
\$1 - \$1,000	39	44	48	52	54
\$1,001 - \$10,000	209	210	197	208	171
\$10,001 - \$50,000	132	124	187	153	161
\$50,001 - \$150,000	45	34	63	76	62
\$150,001 - \$250,000	4	6	15	10	18
\$250,001 - \$500,000	0	6	5	2	6
\$500,001 - <\$1.5 mill	2	3	1	5	1
\$1.5 mill - \$5 mill	1	1	0	0	0
> \$5 mill	0	0	0	1	1
Not applicable	1,464	1,427	1,704	1,728	1,676
Total no. of reports	1,896	1,855	2,220	2,235	2,150

Source: ASIC

Table 61 EXAD reports (construction industry) amount of unpaid employee entitlements – pay in lieu of notice 1 July 2009 - 30 June 2014³⁶⁰

Amount owed	2009-10	2010-11	2011-12	2012-13	2013-14
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³⁵⁸ Ibid, 15 [Table 6].

³⁵⁹ Ibid, 15 [Table 7].

³⁶⁰ Ibid, 16 [Table 8].

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

\$1 - \$1,000	49	51	37	38	46
\$1,001 - \$10,000	78	73	106	97	90
\$10,001 - \$50,000	65	58	101	121	105
\$50,001 - \$150,000	18	23	40	47	36
\$150,001 - \$250,000	3	2	8	2	11
\$250,001 - \$500,000	1	3	5	1	3
\$500,001 - < \$1.5 mill	2	1	1	4	1
\$1.5 mill - \$5 mill	0	0	0	0	0
> \$5 mill	1	1	0	0	0
Not applicable	1,679	1,643	1,922	1,925	1,858
Total no. of reports	1,896	1,855	2,220	2,235	2,150

Source: ASIC

Table 62 EXAD reports (construction industry) amount of unpaid employee entitlements – redundancy 1 July 2009 - 30 June 2014³⁶¹

Amount owed	2009-10	2010-11	2011-12	2012-13	2013-14
\$1 - \$1,000	39	47	26	33	41
\$1,001 - \$10,000	44	41	57	46	53
\$10,001 - \$50,000	45	39	64	76	61
\$50,001 - \$150,000	26	28	41	55	48
\$150,001 - \$250,000	8	9	17	17	23
\$250,001 - \$500,000	2	3	5	6	11
\$500,001 - < \$1.5 mill	3	2	0	4	1
\$1.5 mill - \$5 mill	1	0	8	3	1
> \$5 mill	1	3	2	1	0
Not applicable	1,727	1,683	2,000	1,994	1,911
Total no. of reports	1,896	1,855	2,220	2,235	2,150

Source: ASIC

Table 63 EXAD reports (construction industry) amount of unpaid employee entitlements – long service leave 1 July 2009 - 30 June 2014³⁶²

Amount owed	2009-10	2010-11	2011-12	2012-13	2013-14
\$1 - \$1,000	48	47	31	42	43
\$1,001 - \$10,000	41	33	51	54	58
\$10,001 - \$50,000	42	34	61	81	60
\$50,001 - \$150,000	14	15	18	20	23
\$150,001 - \$250,000	1	0	2	2	3

³⁶¹ Ibid, 16 [Table 9].

³⁶² Ibid, 17 [Table 10].

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

\$250,001 - \$500,000	1	2	5	3	4
\$500,001 - < \$1.5 mill	2	1	0	3	1
\$1.5 mill - \$5 mill	0	0	0	1	0
> \$5 mill	1	1	3	0	1
Not applicable	1,746	1,722	2,049	2,029	1,957
Total no. of reports	1,896	1,855	2,220	2,235	2,150

Source: ASIC

Table 64 EXAD reports (construction industry) amount of unpaid employee entitlements – superannuation 1 July 2009 - 30 June 2014³⁶³

Amount owed	2009-10	2010-11	2011-12	2012-13	2013-14
\$1 - \$100,000	577	599	736	746	707
\$100,001 - \$250,000	34	54	69	84	72
\$250,001 - \$1 mill	8	13	26	26	20
> \$1 mill	2	0	3	2	3
Not applicable	1,284	1,196	1,395	1,387	1,351
Total no. of reports	1,905	1,862	2,229	2,245	2,153

Source: ASIC

The construction industry super fund Cbus estimated in 2015 that during the 2013-14 financial year approximately \$53.5 million dollars in superannuation guarantee payments was collected on behalf of around 96,000 members,³⁶⁴ with unpaid super featuring in nearly 42% of cases.³⁶⁵

The Cbus submission to the Senate Standing Committee on Economics Insolvency in the Australian construction industry contains data it commissioned from Tria Investment Partners, which showed that non-compliance with payment of the superannuation guarantee amounts to approximately \$2.5 billion per annum, affecting 650,000 working Australians. Tria derived this amount by adding the amount of estimated annual employer non-compliance (\$1.3 billion), effects of the cash economy (\$0.7 billion), sham contracting (\$0.2 billion), and employer insolvency (\$0.2 billion).³⁶⁶ Tria also found that in 2012, \$34 million was lost in superannuation guarantee payments in the construction industry alone. Cbus states:

More broadly, extracting from the \$2.5 billion of non-compliance, the economy foregoes some \$375 million a year in tax revenue from this lost superannuation contribution. According to Kingsway, \$2,644,725,000 is the estimated overall deficiency for insolvencies in the construction sector. They go on to claim that this amount is roughly evenly divided amongst secured and unsecured creditors and that in 92% of cases “there is no return to unsecured creditors whatsoever”.³⁶⁷

³⁶³ Ibid, 17 [Table 11].

³⁶⁴ Cbus, *Senate Standing Committee on Economics Insolvency in the Australian construction industry Cbus (United Super Pty Ltd) Submission* (April 2015), 7.

³⁶⁵ Ibid, 10.

³⁶⁶ Ibid, 5.

³⁶⁷ Ibid, 10.

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

The Cbus submission also cited Industry Funds Credit Control (IFCC) statistics which found that 23.5% of all industry superannuation insolvency cases for the ten years 2003-2014 were Cbus cases (therefore likely to pertain to insolvencies in the construction sector), and that in this timeframe there was an estimated \$120.3 million of superannuation debt from insolvencies of Cbus employers. IFCC found that of this owed amount, only \$15.2 million was recovered on Cbus Cases delivered to the Fund and only \$13.5 million was recovered on Cbus Cases delivered to the ATO.³⁶⁸

Cbus also cited statistics calculated by Kingsway Financial Assessments Pty Ltd in 2012 estimating the total cost to creditors of insolvency in the sector at \$2.64 billion annually.³⁶⁹

In addition to highlighting the monetary cost to employees of insolvency in the construction sector, Cbus underscored the broader economic and social costs of superannuation guarantee non-compliance in the sector, stating the following:

Tria estimates that some 650,000 working Australians miss out on some or all of their super contributions each year and that, on average they forego \$3,750 or nearly 9 months' worth of superannuation contributions meaning they are 2% worse off in retirement for each year this persists (assuming 40 years of contributions). This is magnified for low income and younger members. An average 25 year old impacted by SG non-compliance for 5 years loses 14% of their retirement income. The economic and social implications of such losses may be the impairment of Australian's to save enough superannuation to enjoy a comfortable retirement with the resulting affect being a greater reliance on the taxpayer through the Age Pension.³⁷⁰

5.8. DEPARTMENT OF EMPLOYMENT STATISTICS

Table 65 Payments under the EESS, GEERS and FEG 1 July 2001 - 28 February 2015³⁷¹

Financial year	Indexed salary cap \$	Total assistance \$ million	Employees paid No.	Insolvent businesses* No.	Average payment per employee \$	Total Recovery amount \$million	Recovery rate against amount paid %
2001-02	75,200	62.6	10,595	898	5,912	1.5	2.5%
2002-03	81,500	67.6	9,364	1,022	7,217	5.2	7.7%
2003-04	85,400	60.4	8,699	1,220	6,940	5.2	8.6%
2004-05	90,400	66.7	8,845	573	7,539	12.1	18.1%
2005-06	94,900	49.2	7,162	912	6,876	26.0	52.8%
2006-07	98,200	73.0	8,626	1,097	8,460	9.5	13.0%
2007-08	101,300	60.8	7,808	972	7,784	16.8	27.6%
2008-09	106,400	99.8	11,027	1,350	9,047	9.1	9.1%
2009-10	108,300	154.1	15,565	1,617	9 898	18.7	12.2%
2010-11	113,800	151.3	15,413	n/a	9,819	15.6	10.3%
2011-12	118,100	195.5	13,929	n/a	14,038	21.4	10.9%
2012-13	123,000	261.7	16,019	2,111	16,334	37.2	14.2%

³⁶⁸ Ibid, 8.

³⁶⁹ Ibid, 6.

³⁷⁰ Ibid, 9.

³⁷¹ DEEWR, *Annual Reports 2013-14, 2012-13, 2011-12, 2010-11, 2009-10, 2008-09 and 2007-08*; DEWR, *Annual Reports 2006-07, 2005-06, 2004-05, 2003-04, 2002-03 and 2001-02*; DEWRSB, *Annual Report 2000-01*.

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2013-14	127,450	197.2	11,255	1,536	17,521	19.1	9.7%
2014-15 ³⁷²	127,452 ³⁷³	176.4	10,447	N/A	16,886	13.4	7.6%
Total		1,519.0	156,848		9,685	210.8	13.9%

Source: Department of Employment,³⁷⁴ * with additional information from Phoenix Research Team³⁷⁵

Table 66 Individual claims paid by business size 1 July 2012 - 31 December 2014³⁷⁶

*Includes all cases where the first claim was paid during this time period under FEG or GEERS

Small businesses are defined as those that employ fewer than 15 employees.

Medium size businesses are defined as those that employ between 15 and 200 employees.

Large businesses are defined as those that employ more than 200 employees.

	Business size	No. of entities	Claims paid	Total cost	Average claim cost
2012-13	Small	1,327 (75.7%)	4,197	\$49,505,337	\$11,795
	Medium	412 (23.5%)	8,036	\$123,038,950	\$15,311
	Large	14 (0.8%)	3,501	\$66,720,644	\$19,058
2013-14	Small	806 (72.4%)	2,535	\$34,656,326	\$13,671
	Medium	298 (26.8%)	5,979	\$114,720,040	\$19,187
	Large	10 (0.9%)	1,925	\$33,631,364	\$17,471
2014-15	Small	458 (73.3%)	1,371	\$17,543,281	\$13,258
	Medium	158 (25.3%)	3,473	\$68,638,588	\$22,573
	Large	9 (1.4%)	2,375	\$23,485,647	\$16,103

Source: Department of Employment

Table 67 Business size profile of assistance paid under schemes 1 July 2004 - 31 December 2014 in \$ millions³⁷⁷

Business size	No. of entities	04-05	05-06	06-07	07-08	08-09	09-10	10-11	11-12	12-13	13-14	14-Dec 14
Large	89	10.8 6	4.56	9.52	9.02	12.3 4	11.4 7	26.2 2	70.2 8	65.7 8	34.2 1	23.4 9
Medium	3,142	37.5 3	29.6 7	44.9 2	32.5 6	74.5 7	113. 01	94.1 8	112. 61	137. 72	112. 39	68.6 4

³⁷² Data as at 28 February 2015, see Productivity Commission, *Inquiry into Business Set-up, Transfer and Closure: Draft Report* (21 May 2015), 377.

³⁷³ Explanatory Statement, *Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Amendment Regulation 2014*, 1; Fair Entitlements Guarantee Amendment Bill 2014 (Cth).

³⁷⁴ Productivity Commission, *Inquiry into Business Set-up, Transfer and Closure: Draft Report* (21 May 2015), 377.

³⁷⁵ Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (2014), 77.

³⁷⁶ Department of Employment, *Productivity Commission Inquiry into Business Set-up, Transfer and Closure Submission of the Department of Employment* (February 2015), 11 [39].

³⁷⁷ *Ibid*, 14.

QUANTIFYING PHOENIX ACTIVITY: INCIDENCE, COST, ENFORCEMENT

Small	10,721	18.3 5	17.2 7	20.3 1	17.5 7	24.2 2	29.2 7	37.8 7	47.8 4	53.7 6	33.4 0	17.5 4
Total	13,952	66. 74	51. 51	74. 76	59. 15	111. 12	153. 69	158. 28	230. 73	257. 25	180. 00	109. 67

Source: Department of Employment

Table 68 Top 5 Industries with largest proportion of cases finalised 1 July 2011 - 30 June 2014³⁷⁸

2011-12	2012-13	2013-14
Construction - 15.8%	Construction - 19.1%	Construction – 18.8%
Manufacturing - 14.1%	Retail Trade – 14.0%	Manufacturing – 14.6%
Retail Trade – 13.9%	Manufacturing – 13.6%	Retail Trade – 13.9%
Accommodation and Food Services – 10.9%	Accommodation and Food Services – 11.1%	Accommodation and Food Services – 11.6%
Other Services – 9.1%	Other Services – 10.2%	Other Services – 8.2%

Source: Department of Employment

Table 69 FEG/GEERS Scheme use proportional to the number of companies entering liquidation 1 July 2006 - 30 June 2014³⁷⁹

Year	Number of entities entering liquidation*	Number of entities where an employee makes a claim under GEERS or FEG*		Number of entities where an employee was paid under GEERS or FEG*	
2006-07	8,262	1,390	16.8%	1,098	13.29%
2007-08	8,612	1,416	16.4%	972	11.29%
2008-09	9,954	2,176	21.9%	1,350	13.56%
2009-10	9,392	2,132	22.7%	1,617	17.22%
2010-11	9,801	2,183	22.3%	1,619	16.52%
2011-12	10,846	2,264	20.9%	1,732	15.97%
2012-13	11,212	2,296	20.5%	1,753	15.64%
2013-14	9,938	2,057	20.7%	1,114	11.21%

Source: Department of Employment

5.9. DEPARTMENT OF INDUSTRY, INNOVATION, SCIENCE, RESEARCH AND TERTIARY EDUCATION

The latest release of the *Australian Small Business Key Statistics and Analysis* by the Department of Industry, Innovation, Science, Research and Tertiary Education was in December 2012. It details the contribution of the small business sector to the Australian economy, which accounts for approximately

³⁷⁸ Ibid, 12 [42].

³⁷⁹ Ibid, 13.

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96%³⁸⁰ of actively trading businesses in Australia for the relevant period (though 61.2% of this number was comprised of non-employed entities³⁸¹).

Table 70 outlines the number of businesses in Australia by industry as at 30 June 2011, compared with the number of small businesses.

Table 70 Business Numbers by Industry as at 30 June 2011³⁸²

Industry sector	Number of businesses (% of all businesses)	Number of small businesses (% of total small businesses)	Small business share of industry sector (%)
Agriculture, forestry and fishing	198,163 (9.3%)	193,961 (9.5%)	97.9%
Mining	8,155 (0.4%)	7,509 (0.4%)	92.1%
Manufacturing	90,228 (4.2%)	80,284 (3.9%)	89.0%
Services	1,788,775 (83.9%)	1,717,009 (83.9%)	96.0%
Financial and insurance services	164,438 (7.7%)	162,459 (7.9%)	98.8%
Rental, hiring and real estate services	226,157 (10.6%)	223,100 (10.9%)	98.6%
Construction	351,890 (16.5%)	344,238 (16.8%)	97.8%
Transport, postal and warehousing	132,065 (6.2%)	128,770 (6.3%)	97.5%
Other services	89,491 (4.2%)	87,106 (4.3%)	97.3%
Professional, scientific and technical services	250,613 (11.8%)	243,605 (11.9%)	97.2%
Health care and social assistance (private)	101,011 (4.7%)	96,092 (4.7%)	95.1%
Arts and recreation services	27,697 (1.3%)	26,338 (1.3%)	95.1%
Information media and telecommunications	18,854 (0.9%)	17,831 (0.9%)	94.6%
Administrative and support services	82,119 (3.9%)	76,155 (3.7%)	92.7%
Retail trade	143,679 (6.7%)	133,028 (6.5%)	92.6%
Wholesale trade	79,247 (3.7%)	73,366 (3.6%)	92.6%
Electricity, gas, water and waste services	5,862 (0.3%)	5,406 (0.3%)	92.2%
Education and training (private)	26,130 (1.25%)	23,979 (1.2%)	91.8%
Public administration and safety (private)	7,782 (0.4%)	6,973 (0.3%)	89.6%
Accommodation and food services	81,740 (3.8%)	68,563 (3.4%)	83.9%
Not classified	47,091 (2.2%)	46,543 (2.3%)	98.8%
Total	2,132,412	2,045,335	95.9%

Source: Department of Industry, Innovation, Science, Research and Tertiary Education

³⁸⁰ Department of Industry, Innovation, Science, Research and Tertiary Education, *Australian Small Business Key Statistics and Analysis* (December 2012), 30.

³⁸¹ *Ibid*, 29.

³⁸² *Ibid*, 30.

The *Australian Small Business Key Statistics and Analysis* report quantified the amount of nascent (in the process of being created) and young firms (operational for up to four years) operational across Australia and broken down by state and territory, displayed in Table 71. Nascent firms are defined as those in the process of being created and young firms as those that have been operational for up to four years.

Table 71 Amount of Nascent and Young Firms Operational in Australian cities vs. the rest of Australia (CAUSEE sample study 2007-2011)³⁸³

	Nascent firm	Nascent firm	Young firm	Young firm	Total	Total
	No.	%	No.	%	No.	%
Australian cities vs. The rest of Australia						
Rest of Australia	302	48%	283	51%	585	49%
Sydney	100	16%	69	12%	169	14%
Melbourne	99	16%	82	15%	181	15%
Brisbane	61	10%	70	13%	131	11%
Adelaide	36	6%	28	5%	64	5%
Perth	27	4%	27	5%	54	5%
Total	625	100%	559	100%	1184	100%
Australian states						
NSW	179	30%	150	28%	329	29%
VIC	144	24%	121	22%	265	23%
QLD	162	27%	158	29%	320	28%
SA	46	8%	39	7%	85	7%
WA	35	6%	43	8%	78	7%
TAS	19	3%	13	2%	32	3%
NT	4	1%	2	0%	6	1%
ACT	14	2%	12	2%	26	2%
Total	603	100%	538	100%	1141	100%

Source: Department of Industry, Innovation, Science, Research and Tertiary Education

The industry break-down for start-up groups was reported as follows³⁸⁴:

- Retailing (13.6%);
- Consumer services (12.5%);
- Health, Education, and Social services (11.9%);
- Business consulting/services (11.2%);
- Construction (9.5%);
- Manufacturing (6%);
- Agriculture (5.3%);
- Hospitality (hotels, restaurants, etc.) (4.1%);
- Communications (4.0%);
- Miscellaneous, other industries (22.0%).

The *Australian Small Business Key Statistics and Analysis* (December 2012) also shed some light on the success and failure of firms in the start-up market by drawing on Comprehensive Australian Study of

³⁸³ Ibid, 6.

³⁸⁴ Ibid.

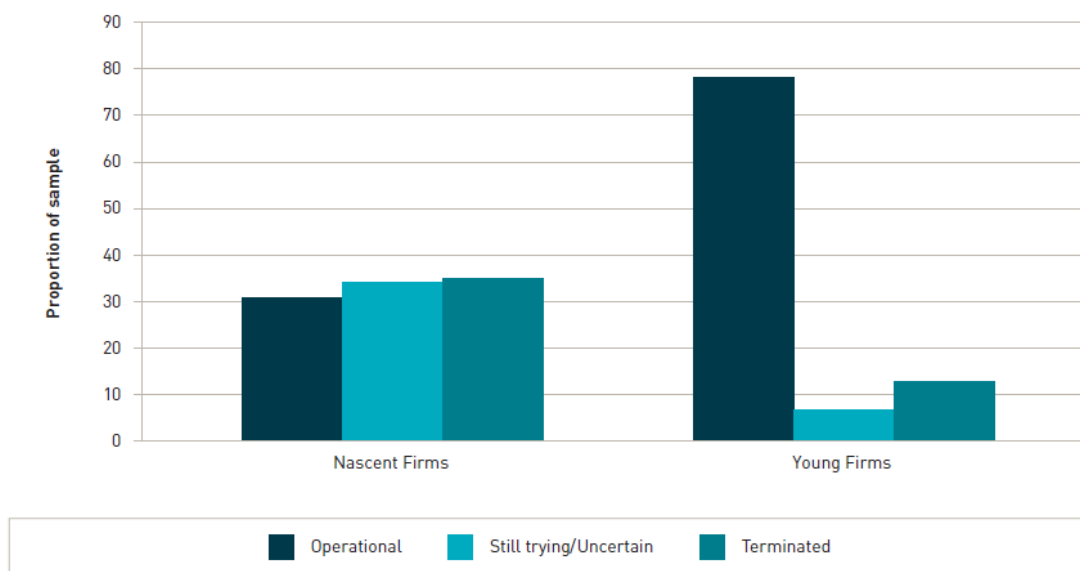
Entrepreneurial Emergence (CAUSEE) data amassed by the Australian Centre for Entrepreneurship Research (ACE) at Queensland University of Technology (QUT). The CAUSEE project tracked large numbers of ongoing business start-ups in four annual waves from 2007 to 2011.

The *Australian Small Business Key Statistics and Analysis* report notes that the CAUSEE data should be read in light of the fact that claims that a large proportion of start-ups usually fail within the first few years are usually exaggerated. According to the report, there are two key reasons for this exaggeration:

- 1) some apparent 'failures' occur in the data because on-going businesses are re-assigned to a new code due to changes in legal form, ownership, or main industry, and
- 2) even when firms are terminated (as independent entities) they may be sold at a profit or voluntarily closed without financial loss (e.g. due to retirement).³⁸⁵

With this in mind, the picture looks less bleak. The report further notes that 'studies usually do not capture terminations before the start-ups become operational businesses that are visible in statistical databases'. Therefore the data in the table below includes only those participants in the sample study that had a known status 36 months after the initial interview. The outcome for a segment of the sample is unknown due to a failure by participants to respond to data collectors, and therefore not included in the data.

Figure 9 Survival of Start-Up Firms after 36 Months (CAUSEE sample study 2007-2011)³⁸⁶



Source: Department of Industry, Innovation, Science, Research and Tertiary Education

According to the report:

The results underscore that a large proportion of nascent firms terminate before becoming an operational firm. It also appears unlikely that more than 50% will ever reach operational status. The young firm sample shows that these new ventures remain more robust to firm closure. The vast majority of young firms (78%) continue to be active in the market the last time they participated. The annual

³⁸⁵ Ibid.

³⁸⁶ Ibid, 7.

termination rate for young firms is 14% cumulatively, while young firms with an uncertain status is 8% cumulatively.

The report also notes that the failure of firms may also vary by industry, with *product-based* (predominantly retailer and manufacturer) nascent firms less likely to reach an operational state and therefore more likely to terminate compared with *services* firms. The report elaborates further:

Focusing only on industry rather than the type of market offering reveals some important differences in firm viability. Retailers have comparatively high figures for both getting operational and termination—suggesting low barriers to entry but high barriers to survival, while manufacturing start-ups have a low incidence of getting operational paired with high incidence of termination. Manufacturing firms therefore appear to be the type of start-up that is the hardest to get off the ground.³⁸⁷

Other relevant background statistics to the quantification of the incidence of phoenix activity that emerged from this sample study include:

- 29% of interviewees with failed businesses reported that they would ‘probably’ attempt a start-up again;³⁸⁸
- 53% of interviewees with failed businesses reported that they would ‘definitely’ engage in a start-up again, if presented with the right opportunity;³⁸⁹
- 76% of the small businesses categorised as young firms and 60% of nascent firms reported *no financial loss upon the failure of their business*.³⁹⁰

5.10. DUN & BRADSTREET STATISTICS ON PAYMENT OF DEBT

Dun & Bradstreet research, as reported in the ATO’s 2015 submission to the Senate Standing Committee on Economics Inquiry into Insolvency in the Australian construction industry, recently found that businesses ‘were paying their bills in an average of 53 days, more than three weeks beyond standard 30 day terms’, with large companies being the slowest to pay their bills. The research also found that 34% of businesses reported ‘having a customer or supplier that became insolvent, or was otherwise unable to pay them in the past year’.³⁹¹

³⁸⁷ Ibid, 8.

³⁸⁸ Ibid, 7.

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ ATO, *Submission to the Senate Economic References Committee on Insolvency in the Construction Industry* (17 April 2015), 10 [30-31].

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