

Understanding the phoenix landscape for employees

*Helen Anderson**

The adverse effect of phoenix activity on employees is well-established. Much attention is given to the size of the problem and possible law reform measures to tackle it. This article takes a different approach and looks at the issue from the perspective of an employee affected by phoenix activity. It suggests that an understanding of the political and regulatory environment in which phoenix activity exists is necessary before making suggestions for improvements. These include better transparency and the sharing of information, an emphasis on prevention rather than cure, some minor law reform and a different focus on funding. The article concludes that meaningful gains for employees are hard to achieve without significant structural change. Nonetheless, a proper understanding of the underlying complexities of the phoenix landscape will ensure that reform proposals of whatever size or nature have a better chance of acceptance and success.

I Introduction

The capacity of phoenix activity to adversely affect the recovery of employee entitlements is well recognised.¹ While there is no generally accepted definition, the concept of phoenix activity broadly centres on the idea of a second company, often newly incorporated, arising from the ashes of its failed predecessor where the second company's directors and officers and its business are essentially the same. While not all phoenix activity is illegal or even problematic,² the abuse of the business rescue process to deliberately shed debts to creditors, including employees and revenue authorities, is of great concern. Government enquiries³ and scholarly commentary⁴ have discussed the relevant legal provisions, and lack of them, at

* Professor, Centre for Employment and Labour Relations Law, Melbourne Law School, University of Melbourne. The author thanks the Australian Research Council for its generous support for this research: DP140102277, 'Phoenix Activity: Regulating Fraudulent Use of the Corporate Form'. The author also thanks the referees for their helpful comments but any errors remain her own.

¹ See, eg, Australian Government, Treasury, *Action Against Fraudulent Phoenix Activity*, Canberra, 2009 (Treasury Phoenix Proposals Paper), at [2.1]; PriceWaterhouseCoopers and Fair Work Ombudsman, *Phoenix Activity – Sizing the Problem and Matching Solutions*, June 2012 (PWC Report), at 15.

² H Anderson et al, *Defining and Profiling Phoenix Activity*, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2014, at [2.2.2].

³ See, eg, Treasury Phoenix Proposals Paper, above n 1; Parliament of Victoria Law Reform Committee, *Curbing the Phoenix Company – First Report on the Law Relating to Directors and Managers of Insolvent Corporations*, Report No 83, Melbourne, June 1994; Australian Securities Commission, *Project One: Phoenix Activity and Insolvent Trading Public Version*, Research Paper 95/01, May 1996, at 39; Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake*, Canberra, 2004; Royal Commission into the Building and Construction Industry, *Final Report*, 2003, Vol 8, at 111–219.

⁴ See, eg, the work of H Anderson et al cited at <<http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity>> (accessed 30 September 2016).; see also A Matthew,

length. This article broadens the inquiry by considering the environment in which the protection of employees from phoenix activity and solutions to benefit them are sought. Simply recommending more resources or more legislation, in the absence of an understanding of the present phoenix landscape from the perspective of an affected employee, is unlikely to achieve the best outcome.

It begins in Part II with some background including an outline of the present provisions and arrangements currently applicable to employees whose entitlements and taxation obligations are threatened by phoenix activity. Part III surveys the government agencies involved and their disparate responsibilities which give rise to intersections, overlaps and gaps in relevant information and in the prevention, detection and enforcement of phoenix activity. Part IV asks what the government wants in terms of the treatment of phoenix activity and the protection of employees from it, and how that might be achieved. This includes better transparency and the sharing of information, an emphasis on prevention rather than cure, some minor law reform and a different focus on funding. Part V concludes that an understanding of the phoenix landscape assists in formulating recommendations that can help to protect employees from its effects. While significant structural change might yield the best results, this is unlikely given Australia's current political and economic climate. Nonetheless, a proper understanding of the underlying policies and complexities of the phoenix landscape will ensure that any reform proposals, large or small, legislative, administrative or structural, have a better chance of acceptance and success.

II Background

This Part sets the scene for employees affected by phoenix activity. Unlike trade creditors who deal with many customers and who may factor into their costs the possibility of non-payment by some of them, employees are particularly affected by their employer company's collapse for a number of reasons. The employee is likely to have only one employer, and may possibly be owed wages and accrued annual and long service leave. Superannuation payable by both the employer and by the employee via salary sacrifice may not have been remitted to their fund. The employee may have difficulty finding new employment. While employees suffer the same financial loss whether the failed company's directors start another company or not, it is likely to be immensely galling for them to see those directors flourishing in the resurrected business, possibly the next day. The case of Wangaratta manufacturer Bruck Textile Technologies is a case in point.⁵ Sixty employees were made redundant when the company collapsed, with their entitlements of \$3.8 million met by the government's safety net scheme, discussed below. The business continued through a new company, Australian Textile Mills, owned by Bruck's directors.

In recognition of the special vulnerability of employees of insolvent employers, they receive a priority as non-secured creditors in the company's liquidation, ranking behind the costs of the liquidator.⁶ They also benefit from advances from the government-funded Fair

⁴ 'The Conundrum of Phoenix Activity: Is Further Reform Necessary?' (2015) 23 *Insolv LJ* 116 and references cited therein.

⁵ See J Gordon, 'Wangaratta Textile Maker Shreds Company, Sheds Worker Entitlements', *The Age*, 13 July 2014, at <<http://www.theage.com.au/victoria/wangaratta-textile-maker-shreds-company-sheds-worker-entitlements-20140713-zt65q.html#ixzz4516JkLF2>> (accessed 30 September 2016).

⁶ Corporations Act 2001 (Cth) s 556 (Corporations Act). In addition, employees enjoy priority under s 561 over the claims of a creditor with security over circulating security assets. This was formerly known as a 'floating charge'. However, there is considerable complexity for employees generated by a range of factors including

Entitlements Guarantee (FEG)⁷ which covers wages, annual and long service leave, pay in lieu of notice and redundancy, subject to various caps and limits.⁸ However, both the statutory priority and FEG are only available to employees of companies in liquidation,⁹ and do not cover companies in voluntary administration or for which no external administrator has been appointed. In 2014-15, 7,044 companies entered liquidation, 6.2% of the 112,714¹⁰ companies that were deregistered in that year.¹¹ In that same period, about 37,600 companies were deregistered by ASIC for failure to return documents and pay fees.¹² The latter are known as dormant or abandoned companies and there are potentially thousands of employees of such companies who are not paid their entitlements and who have no access to FEG. Since 2012, ASIC has had the power to wind up abandoned companies so that their employees can access FEG¹³ but between July 2014 and June 2015, ASIC only applied for the winding up of 31 abandoned companies.¹⁴

When it comes to enforcement provisions against directors who are knowingly involved in the failure to pay entitlements, the current legislative emphasis is on imposing financial penalties or disqualifying directors to achieve specific and general deterrence – benefiting the government and potential future victims – rather than on recouping amounts lost by the employees affected by the conduct. There is no express phoenix offence. The legislative provisions that might be utilised where phoenix activity has taken place span corporate law, taxation law and labour law. The Corporations Act's most explicit provision relating to employees is s 596AB, which imposes criminal liability on directors who enter arrangements with the intention of depriving employees of their entitlements. This provision has been criticised extensively because of its requirement that the directors' intention be assessed

overlapping appointments — of receivers, liquidators, and voluntary administrators – that is affected by the order of the appointments, the source of the money that is available, what has accrued and when it is payable, whether the employee is kept on in some capacity, and whether the external administrator has adopted or varied the employment contract. See eg, *Re ExDVD Pty Ltd (in liq)* (2014) 223 FCR 409; [2014] FCA 696; *Cook v Italiano Family Fruit Company Pty Ltd (in liq)* (2010) 190 FCR 474; [2010] FCA 1355. See also G Hamilton, 'Equitable Subrogation of Banks and Other Secured Creditors for the Recovery of Statutory Employee Entitlements: a 'New Class of Case' or Simply a Different Perspective?' (2016) 34 *C&SLJ* 121.

⁷ Fair Entitlements Guarantee Act 2012 (Cth) (Fair Entitlements Guarantee Act).

⁸ Australian Department of Employment, *Fair Entitlements Guarantee (FEG)* <<https://www.employment.gov.au/fair-entitlements-guarantee-feg>> (accessed 30 September 2016).

⁹ The Fair Entitlements Guarantee Act applies to 'an insolvency event' which, in the corporate context, is defined in s 5(a) of that Act as 'when a liquidator of the employer is appointed ... under the Corporations Act 2001.' In addition, s 49(2) of the Act allows FEG to apply to employees of a company in administration where a decision to enter liquidation is expected to be made.

¹⁰ Australian Securities and Investment Commission (ASIC), *Annual Report 2014–2015*, October 2015, at 66.

¹¹ Note that the year of liquidation and the year of deregistration may not correspond exactly. However, these statistics give a sense of the scale of liquidations compared to deregistrations.

¹² Corporations Act 2001 (Cth) (Corporations Act) s 601AB. Data supplied by Adrian Brown of ASIC to the author, email dated 18 March 2016.

¹³ Corporations Act s 489EA, which was introduced by the Corporations Amendment (Phoenixing and Other Measures) Act 2012 (Cth).

¹⁴ ASIC, *Report 444 ASIC Enforcement Outcomes: January to June 2015*, August 2015, at 29; ASIC, *Report 421 ASIC Enforcement Outcomes: July to December 2014*, January 2015, at 51. It is possible that many dormant companies either did not have employees or that those employees were fully paid out and therefore not in need of ASIC's assistance here. However, in my opinion, this is unlikely. The fact that the legislation was enacted in the first place indicates that the non-payment of employees of dormant companies was a significant problem. It is unlikely to be limited to 30 or so per year, out of the 37,600 companies that are deregistered under these provisions. A more likely cause of the small number of ASIC actions is that ASIC only becomes involved in very limited circumstances. This includes where the number is not so small to be not worth their involvement but not so large that the employees could protect themselves via the appointment of a liquidator. See further ASIC, *Regulatory Guide 242 ASIC's Power to Wind Up Abandoned Companies*, January 2013, Table 1.

subjectively and proved beyond reasonable doubt,¹⁵ and no cases, successful or otherwise, have been pursued by ASIC.

Phoenix activity may involve directors breaching their duties under the Corporations Act, for example, by misusing their position to make a gain for themselves or the new entity.¹⁶ Even where ASIC cannot establish a civil penalty or criminal case¹⁷ on these grounds, ASIC may disqualify a person for up to five years for being involved in two or more failed companies in the past seven years,¹⁸ or it may seek a court disqualification for up to 20 years.¹⁹

The Fair Work Act 2009 (Cth) (FW Act) does not contain any provisions dealing expressly with phoenix activity. As a means of ensuring that money remains in the company to meet entitlements, several actions have been brought by the Fair Work Ombudsman (FWO) against suspected phoenix operators to freeze company assets that might have been stripped from the company.²⁰ However, there is another way of tackling the problem that can provide both recovery for the employees and deterrence of wrongdoing by the company's directors and officers. Where a company fails to pay wages in contravention of a modern award, it contravenes s 45 of the FW Act, which is a civil remedy provision. Section 550 of the FW Act treats involvement in a contravention of the FW Act in the same way as the actual contravention. This then makes the orders set out in s 545 of the FW Act available against the company's directors and officers. These include pecuniary penalties and compensation orders. In the first of two test cases, the FWO succeeded in obtaining compensation on behalf of employees in June 2016.²¹ In that case, the court imposed joint and several liability on the director, after finding that he had been involved in previous failed companies that failed to pay remuneration.²²

Likewise, there are no express tax laws dealing with phoenix activity. However, directors are under an obligation to 'cause the company to comply with its obligation' to pay certain tax liabilities such as Pay-As-You-Go Withholding (PAYG(W)) tax.²³ This obligation continues

¹⁵ See H Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective*, Melbourne University Press, Melbourne, 2014, pp 39–45; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 2000, pp 14 301–2 (K Thompson); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 2000, at 14 806 (D Adams); Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on the Corporations Law Amendment (Employee Entitlements) Bill 2000* (PJC, Employee Entitlements Bill Report), [3.25],[3.27]–[3.28],[3.34] and Minority Reports; J Hill, 'Corporate Governance and the Role of the Employee', in P Gollan and G Patmore (Eds), *Partnership at Work: the Challenge of Employee Democracy: Labor Essays 2003*, Pluto Press, Sydney, 2003, p 110 at p 119.

¹⁶ Corporations Act s 182.

¹⁷ Under Corporations Act s 184(2), it is an offence for directors to misuse their position dishonestly with either intention or recklessness.

¹⁸ Corporations Act s 206F.

¹⁹ Corporations Act s 206D.

²⁰ See *FWO v Trek North*; *FWO v Grouped Property Services*, noted in FWO, Submission No DR368 to Productivity Commission, *Draft Report on the Workplace Relations Framework*, 18 September 2015 at 5 (FWO Submission No DR368). See the penalty decision in *Fair Work Ombudsman v Trek North Tours (No 2)* [2015] FCCA 1801 (19 June 2015). The application for the freezing order is not reported.

²¹ *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482 at [80] The other test case that the FWO is running in the Federal Circuit Court of Australia is *Fair Work Ombudsman v Nobrace*, filed on 31 August 2015. See FWO Submission No DR368, above n 20, at footnote 4.

²² *Step Ahead*, above n 21, at [78]. See also H Anderson and J Howe, 'Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the Fair Work Act' (2012) 36 *Melb Univ L Rev* 335 which discusses the issues addressed by Jarrett J in *Step Ahead* at [45]–[80], although the article was not cited in that judgment.

²³ Taxation Administration Act 1953 (Cth) (TAA), Sch 1, Div 269-15.

until the company has paid that tax or is wound up or placed into voluntary administration (VA). Directors become liable for a penalty through the issuance of a director penalty notice (DPN) if they do not cause the company to pay those liabilities by the due date. The DPN regime was amended in 2012 to extend it to unpaid superannuation guarantee charge (SGC) liabilities and to limit the circumstances in which directors can discharge a DPN by placing their company into VA or liquidation.²⁴ The extension to the DPN regime has increased the number of notices issued by the Australian Taxation Office (ATO)²⁵ but data is not available on how much revenue has been raised as a result of the new powers or the extent to which these notices related to phoenix activity, as opposed to non-remittance generally.

Before turning to the government and its structures for dealing with employee losses caused by phoenix activity, it is important to note the significance of external administrators, particularly liquidators, in the enforcement context. Upon appointment, they become responsible for the affairs of the failed employer company²⁶ and the payment of employee entitlements from its remaining assets.²⁷ They must also lodge reports with ASIC indicating whether they suspect misconduct by the company's directors and officers.²⁸ They are the only source of 'on the ground' investigation into failed companies, and the significance and value of the information they obtain will be discussed further in Part IV. However, liquidators are not obliged to carry out work for which they will not be paid.²⁹ Since illegal phoenix activity may be done for the purpose of ensuring that creditors are not paid what they are entitled to, phoenixed companies may have few or no assets. Illegal phoenixing may therefore escape detection and enforcement because the very act of stripping assets from the liquidated company deprives the liquidator of the means to be paid for making a proper investigation. Nonetheless, ASIC maintain that liquidators must also play a public role:

'Registered liquidators are gatekeepers in the financial system and regulation works to ensure that liquidators fulfil their role diligently and transparently. Consequently, ASIC focuses on: competence; independence; and ensuring that liquidators do not improperly gain from their appointments.'³⁰

The duality of the liquidator's role has resulted in a growing tension between ASIC and liquidators.³¹ While the debate might appear to focus on the statutory obligations of each, its foundations are arguably in resourcing, with each expecting the other to play a greater role because of their own financial inability to do more.³² This is considered further in Part IV.

²⁴ 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.

²⁵ See H Anderson et al, *Quantifying Phoenix Activity: Incidence, Cost, Enforcement*, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2015, at Table 35.

²⁶ For liquidators, see Corporations Act s 477; for administrators, see s 437A.

²⁷ Priority payments are made by liquidators under Corporations Act s 556(1)(e)–(h); the same priority is retained under a voluntary administration unless employees vote otherwise: s 444DA.

²⁸ Corporations Act s 533 (by a liquidator); s 422 (by a receiver); and s 438D (by a voluntary administrator).

²⁹ Corporations Act s 545.

³⁰ Australian Government, Treasury, *Proposed Industry Funding Model for the Australian Securities and Investments Commission*, Consultation Paper, 28 August 2015, at 49.

³¹ See the lengthy debate on the issue in Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014 (Senate ERC, *Performance of ASIC*), chap 15 and 16.

³² *Ibid.* See eg, Australian Restructuring Insolvency and Turnaround Association (ARITA), Submission No 31 to Productivity Commission, *Inquiry into Business Set-up, Transfer and Closure*, 2 March 2015 at http://www.pc.gov.au/_data/assets/pdf_file/0007/187387/sub031-business.pdf (accessed 30 September 2016), at 30, where ARITA noted court ordered liquidations costing liquidators \$40 million in unpaid time and expenses; See also, ARITA, submission to Treasury, *Insolvency Law Reform Bill 2014*, 18 December 2014 at

III Our regulators and phoenix activity

This Part provides an overview of the key agencies that an employee, facing non-payment of entitlements through phoenix activity, might deal with. They are ASIC, the ATO, the Department of Employment, the FWO and the Fair Work Building and Construction (FWBC). It demonstrates the intersections between agencies, and the overlaps and gaps in their powers and sources of information. In the case of ASIC, the primary regulator here, this Part also considers its response to phoenix activity.

ASIC

Phoenix companies are essentially a creation of company law, because the separate legal personality of the company and the limited liability of its shareholders facilitate a business enterprise leaving behind its debts and starting again through a new corporate entity. This makes ASIC the regulator that ought to tackle phoenix activity as an abuse of the corporate form. ASIC's total remit is considerable,³³ although its main focus appears to be financial markets.³⁴ While ASIC lacks an inspectorate to visit the 2.1 million companies in Australia, it receives complaints from the public and referrals from other agencies informally or pursuant to memoranda of understanding,³⁵ in addition to the statutory reports from external administrators noted above.³⁶

While ASIC's powers are also considerable,³⁷ it is not, nor can it be, a general corporate police force. It recognises this limitation through its website, for example in its published enforcement policy.³⁸ ASIC expects the company's external administrators to handle unpaid entitlements in relation to the recovery of employee entitlements,³⁹ in addition to detecting and reporting wrongdoing to ASIC, but the external administrators' statutory reports are 'tick box' reports,⁴⁰ processed by computers. They do not include a question about whether

[3.5] where it stated that 'it is not reasonable for a practitioner to attend to tasks if there are no funds from which they will be remunerated, or for which no security can be taken. However if the law is to require practitioners to undertake work for which they cannot be paid it should clearly say so.'

³³ 'We regulate Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.' ASIC, *Our Role*, at <<http://www.asic.gov.au/about-asic/what-we-do/our-role/>>(accessed 30 September 2016).

³⁴ ASIC, *Annual Report 2014-2015*, above n 10, at 2: 'Ensuring investors and financial consumers have trust and confidence in the financial system is at the heart of everything we do.'

³⁵ A list is contained in Senate ERC, *Performance of ASIC*, above n 31, at [23.15], footnote 16.

³⁶ See above n 28.

³⁷ ASIC's powers are contained in both the Corporations Act and the ASIC Act, in addition to other legislation relating to insurance, financial services and consumer protection.

³⁸ ASIC, *Information Sheet 151: ASIC's Approach to Enforcement*, 20 February 2012, at 3:

We carefully consider how to respond to all potential breaches of the law, but we do not undertake a formal investigation of every matter that comes to our attention. We consider a range of factors when deciding whether to investigate and possibly take enforcement action, to ensure that we direct our finite resources appropriately.

³⁹ See ASIC, *Information Sheet 46: Liquidation: A Guide for Employees*, 13 December 2010, available at <<http://asic.gov.au/regulatory-resources/insolvency/insolvency-for-employees/liquidation-a-guide-for-employees/>>(accessed 30 September 2016). This guide has not been updated to refer to FEG or to reflect the more generous redundancy entitlements which began in 2012. See also ASIC, *Information Sheet 160: Disputes About Employee Entitlements*, available at <<http://asic.gov.au/about-asic/contact-us/how-to-complain/disputes-about-employee-entitlements/>>(accessed 30 September 2016): 'If a company is in liquidation or external administration, you will most likely have been contacted by the liquidator or administrator. If so, report your concerns to the liquidator or administrator as they are best placed to investigate them.'

⁴⁰ ASIC, *Regulatory Guide 16, External Administrators: Reporting and Lodging*, July 2008 (RG 16). The form completed by the external administrator is EX01 Schedule B of RG 16 – Report to ASIC under s 422, s 438D or s 533 of the Corporations Act or for statistical purposes.

phoenix activity was suspected, nor is there the capacity for the administrator to make qualitative comments about what they have discovered.

However, ASIC raises expectations through its public statements. In a statement made to the Australian Institute of Company Directors, Commissioner Greg Tanzer said:

The message is clear: Phoenix activity affects many ordinary Australians, be they employees or creditors of failed companies. And, ASIC and other agencies, such as the ATO, are actively pursuing strategies to deter it. If you have concerns that you may be the victim of phoenix activity, please report it to us.⁴¹

ASIC media releases have also indicated a lack of tolerance for phoenix activity through statements such as ‘ASIC will not hesitate to act against directors who fail to uphold their responsibilities and in doing so, put the livelihoods of employees, customers and other businesses at risk.’⁴² Nonetheless, it has brought comparatively few enforcement actions. A 2015 half yearly enforcement report⁴³ said:

As part of our proactive phoenix surveillance program, we have identified approximately 2,500 directors who meet the criteria for triggering the director disqualification provisions of the Corporations Act. These directors currently operate over 7,000 registered companies.⁴⁴

However, the same report noted that in that period, ASIC had disqualified just 19 directors.⁴⁵ The most recent ASIC enforcement report⁴⁶ does not contain any statistics about the use of ASIC’s administrative power to disqualify directors associated with multiple failed companies, speaking in more general terms about ‘actions against directors’ or ‘insolvency’ in various contexts. There are no statistics quoted in its discussion of phoenix activity.⁴⁷

That is not to say that ASIC has stopped disqualifying directors. One 2016 ASIC media release recounting the banning of a Sydney director⁴⁸ stated that ‘[t]he disqualification follows an ASIC investigation which found that Mr Teys breached his duties as a director, including failing to comply with financial services laws.’ He had been the director of three liquidated companies,⁴⁹ one of which operated as an incorporated legal practice. It stated that Mr Teys had managed the companies ‘such that each incurred a deficiency’, that the incorporated legal practice had ‘preferred trade creditors over the ATO and in so doing acted with a lack of commercial morality’, that Mr Teys had ‘[u]sed his position as a director of Teys Lawyers and TPL improperly to gain financial advantages for himself and other related

⁴¹ G Tanzer, ‘Stopping the Phoenix’s Flight’, *Company Director Magazine*, 1 July 2014, at <<http://www.companydirectors.com.au/Director-Resource-Centre/Publications/Company-Director-magazine/2014-back-editions/July/ASIC-Report-Stopping-the-phoenixs-flight>> (accessed 1 October 2016).

⁴² ASIC, ‘05-198 Melbourne woman banned from managing corporations for five years’, Media Release, 13 July 2015, at <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2005-releases/05-198-melbourne-woman-banned-from-managing-corporations-for-five-years/>> (accessed 30 September 2016). The statement related to the disqualification of Joan Armitage in relation to five companies that had entered liquidation with liabilities over \$3million.

⁴³ ASIC, *Report 444 ASIC Enforcement Outcomes: January to June 2015*, August 2015.

⁴⁴ *Ibid* at [40].

⁴⁵ *Ibid* at [4]. The report does not state whether these related to phoenix activity or not.

⁴⁶ ASIC, *Report 476 ASIC Enforcement Outcomes: July to December 2015*, March 2016.

⁴⁷ *Ibid* at [22]–[23].

⁴⁸ ASIC, ‘16-037MR ASIC disqualifies Sydney director’, Media Release, 18 February 2016.

⁴⁹ These three companies were ACN 127 707 671 Pty Ltd (formerly known as Teys Lawyers Pty Ltd) ACN 127 707 671 (Tey’s Lawyers), TPFL Ltd ACN 105 164 047 (TPFL), and TPL Holdings Pty Ltd ACN 010 892 243 (TPL).

parties' and that several breaches of the duty of care had also occurred. The three company's deficiencies to creditors were in excess of \$5 million.⁵⁰ Given that the media release speaks of Mr Teys breaching his duties as a director, it is arguable that something more severe than a five year disqualification was warranted in these circumstances. Directors' duties are civil penalty provisions, allowing ASIC to seek a director's disqualification by the court under s 206C. The court can order whatever period it deems appropriate, including a permanent ban. As noted above,⁵¹ under s 206D, the court can disqualify a person for up to 20 years where they have been involved in managing two or more failed companies in the past seven years and the management of the companies was wholly or partly responsible for the failure.

ATO

The ATO primarily deals with government revenue collection, including PAYG(W) and superannuation. It is both a creditor in relation to unpaid taxes, and an agency with enforcement responsibilities for breaches of taxation legislation. The ATO plays a hybrid role as protector of superannuation, levying the SGC as a tax but remitting recovered contributions to employees' own funds. In its role as a creditor of unremitted PAYG(W) and company taxes, the ATO is a major victim of phoenix activity but without the relationship with companies that ASIC has. While it has excellent databases to detect wrongdoing, it does not have direct access to ASIC's incorporation data or reports of director misconduct, either those made by the public or submitted by external administrators.

The Department of Employment

It is arguable that neither ASIC nor the ATO is a logical place to which an average employee would know to report their concerns about their unpaid employee entitlements and superannuation in phoenix circumstances. An employee may not even be aware that their legal employer is a company, rather than the individual who hired them and who appears to be paying their wages. A more likely destination would be the Department of Employment (DE). However, the DE is limited in what it can offer employees affected by phoenix activity. Its website refers employees to the FWO for information about their entitlements and to the FEG, which it administers, for those whose employers have entered liquidation or bankruptcy.⁵² Dormant companies and the ATO's role in recovering superannuation are both dealt with under the FEG frequently asked questions,⁵³ which may not be the most logical place for them, and there are no references to employers in voluntary administration or receivership. Phoenix activity, FEG fraud and reporting misconduct to ASIC are dealt with

⁵⁰ In a similar vein, see ASIC, '15-270MR ASIC disqualifies Melbourne director', Media Release, 7 December 2015, at <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-370mr-asic-disqualifies-melbourne-director/>>(accessed 30 September 2016), regarding John Paulding, whose insolvent companies lost over \$3.5million. ASIC's media release noted that he '[f]ailed to exercise his duty to act in good faith in the best interest of Paulding Constructions or for a proper purpose' and he '[c]oncealed and removed assets of Paulding Constructions so that they were not readily realisable by the current liquidators.'

⁵¹ Above n 19 and accompanying text.

⁵² Department of Employment, Australian Government (DE), *Employees* <<https://www.employment.gov.au/employees#my-employer-has-entered-liquidation>>(accessed 30 September 2016).

⁵³ DE, *Fair Entitlements Guarantee: Frequently Asked Questions* <<https://www.employment.gov.au/frequently-asked-questions-fair-entitlements-guarantee-feg>>(accessed 30 September 2016).

on a separate page.⁵⁴ The DE has taken the initiative of introducing the FEG Recovery Programme⁵⁵ (FEGRP) which funds liquidators to make inquiries into director misconduct for the purpose of recovering advances made by the department to employees. The DE also uses the FEGRP to initiate those recovery actions itself. There does not appear to be a memorandum of understanding between ASIC and the DE,⁵⁶ for the sharing of information between the two organisations.

FWO

The other logical destination for those unpaid by their employers is the FWO. It provides website information under an 'Ending Employment' tab that includes bankruptcy and liquidation.⁵⁷ Those affected by voluntary administration are referred to ASIC and those with unpaid superannuation are referred to the ATO,⁵⁸ even though the FWO does have recovery powers in relation to superannuation entitlements provided by modern awards.⁵⁹ The FWO may utilise its powers under the FW Act outlined in Part II above in relation to unpaid wages, but it lacks a power to seek the disqualification of directors involved in wrongdoing. Like the other agencies referred to above, the FWO has no access to ASIC's databases about directors and companies.

FWBC

Even though phoenix activity is said to be rife within the building and construction industries, FWBC's⁶⁰ website refers those affected by phoenix activity to the ASIC and ATO websites,⁶¹ and those with unpaid entitlements to the FEG. FWBC has jurisdiction in relation to unpaid employee entitlements pursuant to the FW Act, but since November 2013, it has referred those matters to the FWO.⁶² However, no reference to the FWO is to be found on the FWBC page entitled 'Unpaid employee entitlements? Where to go for help'.⁶³

Across agencies

⁵⁴ Information about reporting fraud is found under the FEG: DE, *Fair Entitlements Guarantee: How to Report Fraud and Other Fraud Information* <<http://www.employment.gov.au/how-report-fraud-and-other-fraud-information>>(accessed 30 September 2016).

⁵⁵ DE, *Fair Entitlements Guarantee: FEG Recovery Programme* (FEG Recovery Programme) <<https://www.employment.gov.au/feg-recovery-programme>>(accessed 30 September 2016).

⁵⁶ ASIC, *Our role* at <<http://asic.gov.au/about-asic/what-we-do/our-role/other-regulators-and-organisations/>>(accessed 30 September 2016).

⁵⁷ FWO, *Bankruptcy and Liquidation* at <<https://www.fairwork.gov.au/ending-employment/bankruptcy-and-liquidation>>(accessed 30 September 2016).

⁵⁸ FWO, *Help resolving workplace issues* at <<https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues>>(accessed 30 September 2016).

⁵⁹ Under the FW Act, s 539 allows an inspector to bring an action under s 45 for breach of a modern award, an instrument which must require employers to meet their superannuation guarantee obligations (s 149B).

⁶⁰ FWBC's correct name is the Fair Work Building Industry Inspectorate: Fair Work (Building Industry) Act 2012 (Cth) chap 2.

⁶¹ FWBC, *Insolvency and Phoenix Activities* at <<https://www.fwbc.gov.au/industry-issues/insolvency-and-phoenix-activities>>(accessed 30 September 2016).

⁶² FWBC, *Industry Update: New Arrangements for Wages and Entitlements* (November 2013) at <<https://www.fwbc.gov.au/news-and-media/industry-update/past-industry-updates/industry-update-november-2013/new-arrangements-wages-and-entitlements>>(accessed 30 September 2016).

⁶³ FWBC, *Industry Update: Unpaid Employee Entitlements? Where to go for Help?* (April 2013) at <<https://www.fwbc.gov.au/news-and-media/industry-update/past-industry-updates/industry-update-april-2013/unpaid-employee-entitlements-where-go-help>>(accessed 30 September 2016).

As a result of the spread of responsibilities and information between these organisations, an employee of a building company whose award wages and superannuation entitlements are unpaid because of phoenix activity could have dealings with all five bodies. If the employee is a migrant worker, add to that list the Department of Immigration and Border Protection and possibly the Australian Federal Police. With websites frequently referring inquiries to other agencies, the result may be that no complaint is made, no enforcement action is taken and no recovery is obtained.

The somewhat contradictory and incomplete website information outlined above exists despite the fact that each of these organisations is a member of the Interagency Phoenix Forum (IAPF), hosted by the ATO.⁶⁴ The IAPF webpage only suggests reporting phoenix activity to the ATO or the FWO, although it indicates that the ‘Phoenix Taskforce agencies support businesses that want to do the right thing and will deal firmly with those who choose not to meet their obligations.’⁶⁵ The IAPF claims that it:

is a key component of the Australian Government's commitment to addressing fraudulent phoenix activity. The forum was established to bring together government agencies to share intelligence, and identify, design and implement cross-agency strategies to reduce and deter phoenix activity.⁶⁶

In practice, this has not happened. The IAPF is now a prescribed taskforce,⁶⁷ which allows the exchange of tax information within the forum.⁶⁸ However, according to the ATO, taskforce status does not permit that information to be passed on by recipient agencies to others within the forum, or for the ATO to receive information from other agencies.⁶⁹ This apparent lack of co-operation led the Senate Economic References Committee to make a formal recommendation in 2015 that ‘consideration be given to amending confidentiality requirements in statutory frameworks of agencies participating in the Phoenix Taskforce to permit dissemination of relevant information to the ATO.’⁷⁰ The Coalition Senators' Additional Comments at the end of that report also noted that:

As these agencies are characterised by a diversity of aims, powers and responsibilities, any changes to the operation of the Taskforce, including the changes to confidentiality requirements outlined in Recommendation 12, would need to be considered by all the relevant agencies and would take time to resolve.⁷¹

The Phoenix Watchlist, managed by the Registrar of the Australian Business Register, was established as ‘a register of known or suspected phoenix operators’ following an allocation in

⁶⁴ ATO, *Fraudulent Phoenix Activities* (20 May 2016) at <<https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Fraudulent-phoenix-activities/>>(accessed 30 September 2016).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ TAA sch 1 s 355-70(12): ‘The [Taxation Administration Regulations 1976] may prescribe a taskforce for the purposes of item 4 of the table in subsection (1). A major purpose of the taskforce must be protecting the public finances of Australia.’ Regulation 48 of the Taxation Administration Regulations 1976 has the current list of prescribed taskforces: Taxation Administration Regulations 1976 (Cth) reg 48.

⁶⁸ TAA sch 1 s 355-70, table headed ‘Records or disclosures for law enforcement and related purposes’ item 4, inserted by the Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010 (Cth).

⁶⁹ Senate Economics References Committee, *‘I Just Want to be Paid’: Insolvency in the Australian Construction Industry*, December 2015 (2015 Senate ERC, Construction Insolvency Report), at [5.64].

⁷⁰ *Ibid* at [5.84], recommendation 12.

⁷¹ *Ibid* at 197.

the May 2013 federal budget. There is little publicly available information about the watchlist, but it appears to be receiving information only from the ATO.⁷² The ATO has a direct phoenix complaint mechanism – phoenix@ato.gov.au – but ASIC does not.⁷³

IV Analysis

Parts II and III above have explained the disparate actions available to government agencies in relation to phoenix activity, their avenues for enforcement, and the poor sharing of information between them. It also noted the difficulty confronting an employee whose entitlements might be lost through phoenix activity, especially where the failed company does not have a liquidator appointed. This part seeks to elucidate what our governments want in terms of a response to phoenix activity. It then makes some suggestions as to how to achieve that in a way that is of maximum benefit to affected employees.

So what does the government want?

It is not possible to say conclusively what a government wants at a particular time, but in the current context some generalisations are probably permissible. Governments want taxes paid, losses of employee entitlements from corporate insolvency minimised, and less reliance on government assistance such as FEG.

While the Coalition government was re-elected in 2016, its narrow majority in the House of Representatives and the interesting composition of the Senate make it relevant to consider what legislation, if any, the Coalition or the Australian Labor Party (ALP) might propose to overcome the damaging consequences of phoenix activity for employees. Labor appears now, and in the past, to be more employee-focused.⁷⁴ This is illustrated by the FEG legislation in 2012,⁷⁵ and changes to tax⁷⁶ and corporate law⁷⁷ that notionally addressed phoenix activity.

⁷² In its April 2015 submission to the Senate ERC inquiry into insolvency in the Australian construction industry, the ATO noted that it had ‘provided information regarding 154 confirmed phoenix operator groups with 2,184 linked entities through the Phoenix Watchlist’ and that it was working to provide further data in the future: ATO, Submission No 5 to the Senate Economic References Committee, *Inquiry into Insolvency in the Construction Industry*, 17 April 2015, at 20. No other submissions by regulators indicated that any intelligence had been provided to the Watchlist, nor is there any other publicly available information to that effect.

⁷³ In response to an emailed request to ASIC ‘How do I complain about phoenix activity’, the author was directed to ASIC’s general complaint process, at ASIC, *Contact Us: How to Complain*, at <<http://asic.gov.au/about-asic/contact-us/how-to-complain>>(accessed 30 September 2016) and to ASIC, *Illegal Phoenix Activity* at <<http://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/>>(accessed 30 September 2016). On this latter page, called Information Sheet 212, issued in March 2016, it states the following:

If you are an employee of a company and the company owes you entitlements (outstanding wages and superannuation) [c]ontact the Fair Work Ombudsman or call 13 13 94. Contact the Australian Taxation Office or call 13 28 61. If the company is in liquidation you should report your concerns to the liquidator... If you are an employee of a company and you have evidence that the company cannot pay its debts or has transferred assets to another, related company, [r]eport your concerns to ASIC. Information on how to report your concerns is available on the ASIC website.

This ASIC website link is the general How to Complain link, noted above.

⁷⁴ Julia Gillard and Labor, *Protecting Workers’ Entitlements Package*, Australian Labor Party, Canberra, 2010 at

<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2FNQGX6%22>>(accessed 30 September 2016).

⁷⁵ Fair Entitlements Guarantee Act s 23. The previous scheme was the General Employee Entitlements and Redundancy Scheme (GEERS). Previously, the redundancy entitlement had been capped at 16 weeks. Under FEG, it was extended to up to 4 weeks per year of service.

In a similar vein, the Shorten Opposition in 2016 announced a package of measures designed to tackle the exploitation of workers, including underpayments, sham contracting and misuse of migrant labour.⁷⁸ A private members' Bill to address these issues was introduced into the Senate in March 2016 and contained a provision expressly imposing liability on directors for phoenix activity.⁷⁹ This Bill lapsed with the proroguing of Parliament prior to the July 2016 election, and Labor's intentions for this Bill in the new Parliament are unknown.

The Coalition government, first elected in 2013, brought with it a different focus, reflected by a policy of red-tape reduction, with the aim of reducing the regulatory burden on businesses and individuals;⁸⁰ a pro-innovation stance where the stigma of business failure is removed as a means of building stronger businesses to drive employment and economic growth;⁸¹ and as part of the implementation of its 'Jobs and Small Business package',⁸² legislation was passed in early 2016 to provide tax relief for 'genuine restructures' of small businesses.⁸³ This is not to say that the plight of employees has been ignored by the Coalition, which released its own pre-election policy to protect vulnerable workers before the 2016 election.⁸⁴ However, that policy concentrated largely on the problems confronting employees of franchises, particularly migrant workers, in response to the 7-Eleven non-compliance scandal.⁸⁵ In contrast with the ALP policy, it did not address workers affected by phoenix activity, making it unlikely that the Coalition will consider reform in this area now that it has been returned to government.

It is evident from the actions of both parties over the past two decades⁸⁶ that governments, however favourably inclined towards employees and however vocally opposed to phoenix activity, will only act incrementally and timidly. The ALP's difficulties with passing DPN

⁷⁶ Tax Laws Amendment (2012 Measures No 2) Act 2012 (Cth), which tightened the director penalty notice mechanism and extended its reach to unremitted superannuation.

⁷⁷ Corporations Amendment (Phoenixing And Other Measures) Act 2012 (Cth), which gave ASIC power to wind up dormant companies to allow access to the taxpayer funded scheme.

⁷⁸ Australian Labor Party, 'Protecting Rights at Work Fact Sheet', 2016, available at www.100positivepolicies.org.au/protecting_rights_at_work_fact_sheet.

⁷⁹ Commonwealth, Legislative Assembly, First Reading, Fair Work Amendment (Protecting Australian Workers) Bill 2016, 15 March 2016, at 54 (D Cameron).

⁸⁰ See, eg, the statement of the Assistant Minister for Productivity, the Hon Peter Hendy, at <https://cuttingredtape.gov.au/statement-assistant-minister-productivity-hon-peter-hendy-mp>.

⁸¹ Australian Government, National Science and Innovation Agenda, *Welcome to the Ideas Boom*, at 6, accessible at <http://www.innovation.gov.au/system/files/case-study/National%20Innovation%20and%20Science%20Agenda%20-%20Report.pdf> (accessed 30 September 2016):

We need a greater emphasis on celebrating success rather than penalising failure. This takes a cultural shift to encourage more Australians and businesses to take a risk on a smart idea. We need to leave behind the fear of failure, and challenge each other to be more ambitious.

⁸² ATO, *Growing Jobs and Small Business – Small business restructure roll-over (capital gains roll-over relief)* at <https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-for-businesses/Small-Business---CGT-roll-over-relief-for-changes-to-entity-structure/> (accessed 30 September 2016).

⁸³ Tax Laws Amendment (Small Business Restructure Roll-over) Act 2016 (Cth).

⁸⁴ The Turnbull Coalition Team, *The Coalition's Policy to Protect Vulnerable Workers*, Liberal Party of Australia and National Party of Australia, Canberra, May 2016, at <https://cdn.liberal.org.au/pdf/policy/2016%20Coalition%20Election%20Policy%20-%20Protecting%20Vulnerable%20Workers.pdf> (accessed 30 September 2016).

⁸⁵ The Coalition policy promised a Migrant Workers' Taskforce within the FWO, greater funding and powers for the FWO, harsher penalties on employers, and new offences to capture franchisors and parent companies.

⁸⁶ See also Anderson, above n 15.

reforms in 2011 and 2012 illustrate the power of the business lobby,⁸⁷ and resulted in significantly diluted laws.⁸⁸

Any government seeking to deal with phoenix activity must confront the breadth and complexity of the factors that contribute to the environment that allows it to exist. There is no single government brain to come to grips with all the issues – prevention, detection, enforcement, sharing of information amongst others – because these issues span corporate, tax and labour law, and impact upon budgeting, departmental structures and privacy laws. As in the past, it is tempting to focus on a single detail – for example, tightening DPN laws,⁸⁹ or access to FEG for employees of dormant companies⁹⁰ – and imply that the problem is at least partly solved. The following discussion moves beyond this narrow approach to suggest some bolder initiatives that the future government of Australia might like to consider, to get what it wants.

How can it get it?

This section examines how it might be possible to achieve the objective of stopping destructive, illegal phoenix activity while still allowing genuine restructures to take place, all with a view to ensuring that employees are properly looked after in either circumstance. It begins by addressing some of the shortcomings in the present landscape identified earlier, before suggesting significant structural reform through the creation of a new organisation to deal exclusively with insolvency. These suggestions do not necessarily provide an immediate remedy for employees, nor are their benefits confined to employees. Nonetheless, by enhancing transparency and deterring those tempted to engage in phoenix activity, these structural reforms should directly or indirectly provide significant assistance to employees.

Better transparency and sharing of information

The abuse of the corporate form through phoenix activity is able to exist because of its ability to masquerade as a legitimate business rescue. The more information that is in the hands of creditors before the event, and enforcement agencies after the event, the more likely it is that illegal phoenix activity will lose its appeal.⁹¹ Currently, it is simply too easy and too profitable for many offenders to resist, since it is unlikely that anyone will ‘join the dots’.

⁸⁷ House of Representatives Standing Committee on Economics, Parliament of Australia, *Advisory Report on the Tax Laws Amendment (2011 Measures No 8) Bill and the Pay As You Go Withholding Non-compliance Tax Bill 2011*, 2011 at 35–6 [2.78]–[2.80].

⁸⁸ See H Anderson, ‘The Proposed Deterrence of Phoenix Activity: An Opportunity Lost?’ (2012) 34 *Syd LR* 411 at 416–18.

⁸⁹ B Shorten, ‘Protecting employee super and strengthening the obligations of company directors’, Media Release, 13 October 2011.

⁹⁰ See, eg, D Bradbury, ‘Gillard Government releases draft laws to crack down on “phoenixing”’, Media Release, 20 December 2011. The Corporations Amendment (Phoenixing and Other Measures) Bill 2012 (Cth) was released at the same time as the Corporations Amendment (Similar Names) Bill 2012 (Cth), with an announcement that:

This will stop directors from exploiting the limited liability protections in the corporations law to avoid having to pay any debts, including workers' entitlements, that they incur in a ‘phoenix’ company. This will ensure that directors cannot keep racking up debts through multiple ‘phoenix’ companies and escape their obligations to pay workers’ entitlements and other creditors.

However, the Similar Names Bill was never introduced into parliament. See also Anderson, above n 88.

⁹¹ For example, the Senate Economic References Committee noted that ‘information is critical in inhibiting illegal phoenix activity and in preventing small-scale insolvencies turning into larger collapses’. 2015 Senate ERC, Construction Insolvency Report, above n 69, at [12.15].

Employees have little chance of detecting a history of phoenix activity from publicly available records. There is limited information available for free on ASIC's databases,⁹² and even if company documents are bought, they do not reveal the past corporate history of directors or other company officers. There is no 'red-tape reduction' justification for the lack of directors' prior corporate history. It simply needs to be collected from existing document lodgements, then made available, by ASIC.

Although it is understood that ASIC's corporate registry is essentially a technology function, separate from its regulatory or enforcement functions, it is concerning that the government is moving towards the privatisation of the corporate registry.⁹³ A private registry operator, while committed by the tender terms to 'open and equal access',⁹⁴ will necessarily charge for the majority of the information it provides, as ASIC does at present. It appears that the drive towards registry privatisation is based on a need to upgrade ASIC's computing capabilities without the cost of that process being borne by the government. While government-mandated cost recovery⁹⁵ for providing registry services and access to information may be the same, whether it is provided by ASIC or a private operator, the privatisation of the registry is likely to frustrate the argument to remove the cost of access to corporate information. In terms of cost recovery, it is noteworthy that according to the ASIC Annual Report from 2014-15, it raised \$824 million in fees and charges that financial year, and spent \$313 million on its various activities.⁹⁶ This was an increase in revenue and a decrease in expenditure.

If anything, there is a strong justification for ASIC information being more freely available, not less. The Senate Committee looking at ASIC's performance in 2014 recommended that ASIC 'promote "informed participation" in the market by making information more accessible and presented in an informative way'.⁹⁷ Increased transparency in Australia would follow the trend set in European Union countries.⁹⁸ The government should accept the economic benefits of free information to assist creditor self-protection, as the UK government has done.⁹⁹ According to UK Business Secretary, the Hon Dr Vince Cable:

⁹² It is possible to search for a director disqualification for free, but relatively few directors are disqualified. In addition, it is only searchable by the name of the director, not the name of the company. As a result, a prospective employee of a company who is unaware of the names of its directors cannot search to see if they are disqualified.

⁹³ Australian Government, Department of Finance, *Australian Securities and Investments Commission (ASIC) Registry – FAQs: Scoping Study*, at <<http://www.finance.gov.au/procurement/scoping-studies/asic-faqs/>>(accessed 30 September 2016): 'The Government announced in the 2014-15 Budget that it would commission a scoping study into future ownership options for the operation and ownership of the registry functions of the Australian Securities and Investments Commission (ASIC) Registry.' Expressions of interest closed on 19 October, 2015. Indicative bids closed on 23 February 2016 and final bids on 29 August 2016.

⁹⁴ *Ibid.*

⁹⁵ Note that charging for access to information is consistent with Department of Finance, *Australian Government Cost Recovery Guidelines*, 3rd edn, July 2014. See also Public Governance, Performance and Accountability Act 2013 (Cth). The Australian Financial Security Authority (AFSA), which administers aspects of personal bankruptcy, released a Cost Recovery Implementation Statement in 2015.

⁹⁶ ASIC, *Annual Report 2014–2015*, October 2015, at [1.6.2]–[1.6.3].

⁹⁷ Senate ERC, *Performance of ASIC*, above n 31, at [22.28].

⁹⁸ See European Justice, *Insolvency Registers* at <https://e-justice.europa.eu/content_insolvency_registers-110-en.do>(accessed 30 September 2016):

Insolvency registers are a very important source of information of a legal nature for facilitating daily tasks of citizens, legal professionals, state authorities, companies and other interested parties. They facilitate access to official and trusted insolvency-related information to banks, creditors, business partners and consumers. This information enhances transparency and legal certainty in European Union markets. ... the core services provided by all registers are to register, examine and store insolvency information and to make this information available to the public.

⁹⁹ The United Kingdom recently announced that 'over 170 million digital records on companies and directors including financial accounts, company filings and details on directors and secretaries throughout the life of the

The government firmly believes that the best way to maximise the value to the UK economy of the information which Companies House holds, is for it to be available as open data. By making its data freely available and free of charge, Companies House is making the UK a more transparent, efficient and effective place to do business.¹⁰⁰

Transparency could be enhanced at relatively little cost if the external administrator reports about misconduct by the company's directors and officers¹⁰¹ lodged with ASIC were both more comprehensive and more widely available to other regulators. To compensate for the lack of an ASIC inspectorate, external administrators' reports need to contain at least a 'tick-box' question about phoenix activity. This suggestion was expressly endorsed by the 2015 Senate Economic Reference Committee's report on construction insolvency.¹⁰² The committee's report on ASIC's performance in 2014 also recommended a system by which external administrators could indicate to ASIC which reports required 'the most urgent attention and investigation'¹⁰³ but this recommendation was simply 'noted' by the government, with the claim that ASIC 'has worked, and continues to work' on this.¹⁰⁴ This was the government's reply, despite the committee's report outlining 10 pages of complaints about ASIC's response to reports of misconduct,¹⁰⁵ following which the committee stated that it 'received many other complaints [about ASIC] that are too numerous to detail here.'¹⁰⁶

The external administrator reports should also provide some space in which liquidators can advise ASIC of the specific details of phoenix activity and any other relevant information about the company and its directors and officers.¹⁰⁷ Clearly, this would necessitate a move away from the automated processing of the reports of misconduct that sees nine out of ten 'filed' and only one out of ten followed with an automated request for more information.¹⁰⁸

These more comprehensive external administrator reports should be passed on by ASIC to other agencies,¹⁰⁹ particularly the ATO, where it is highly likely that taxes will remain

company' held by the UK register of companies would be searchable, free of charge. See United Kingdom Government, 'Launch of the new Companies House public beta service', *Companies House*, 22 June 2015 at <<https://www.gov.uk/government/news/launch-of-the-new-companies-house-public-beta-service>>(accessed 30 September 2016).

¹⁰⁰ United Kingdom Government, *Free Companies House data to boost UK economy*, Press Release, 15 July 2014, at <<https://www.gov.uk/government/news/free-companies-house-data-to-boost-uk-economy>>(accessed 30 September 2016).

¹⁰¹ See above n 28 and accompanying text.

¹⁰² 2015 Senate ERC, *Construction Insolvency Report*, above n 69 at [5.34], rec 11:

The committee recommends that ASIC, in consultation with ARITA, work out a method whereby external administrators can indicate clearly in their statutory reports whether they suspect phoenix activity has occurred. For example, to serve as a red flag to ASIC, include a box in the reporting form that external administrators would tick if they suspected phoenix activity.

¹⁰³ Senate ERC, *Performance of ASIC*, above n 31 at [15.66].

¹⁰⁴ Australian Government, *Australian Government Response to the Senate Economic References Committee Report, 'Performance of the Australian Securities and Investments Commission'*, October 2014, at 9.

¹⁰⁵ Senate ERC, *Performance of ASIC*, above n 31 at 227–36.

¹⁰⁶ *Ibid* at [15.38].

¹⁰⁷ See RG 16, above n 40. In December 2014, EX01 was changed to ask for additional information where insolvent trading was alleged. No amendment was made with respect to phoenix activity.

¹⁰⁸ Australian National Audit Office, *ASIC's Processes for Receiving and Referring for Investigation Statutory Reports of Suspected Breaches of the Corporations Act 2001*, Audit Report No 18 2006–2007, 2007, at [3.8]. It appears the situation has not changed since 2007. See Senate ERC, *Performance of ASIC*, above n 31 at [15.60]–[15.63].

¹⁰⁹ This would necessitate privacy safeguards and protection for the external administrators against defamation. External administrators enjoy qualified privilege in providing reports of misconduct to ASIC. This protects them

unpaid. Working to assist employees, the FWO would also find this intelligence very useful in knowing how hard to pursue directors as accessory to the company's failure to pay wages. The DE would also benefit in knowing whether they should fund a liquidator to recover from errant directors FEG payments made to their companies. Rather than referring suspected phoenix operators to ASIC for action, which may not happen due to ASIC's resourcing and enforcement priorities, organisations such as FWO and ATO should be encouraged to utilise their own regulatory tools, outlined in Part II. A more sound judgment about what action to take can be made if better intelligence is available. This should not be a case of 'turf wars' or 'silos'. Let the spirit behind the IAPF be put into practice.

The structural and legal complexity of the phoenix landscape should not be compounded, to the detriment of employees, by a contradictory administrative maze. At the barest minimum, there should be an accurate and consistent message across the websites of each of these organisations advising those affected by the failure of their employer company what steps they might take to obtain their entitlements. The page should begin with what this organisation has to offer, then list the offerings of the others in a common format, so that the employee receives the same information regardless of where they begin their search.

As an aside, liquidators winding up a phoenix company must pay ASIC to obtain documents about the company and its directors, in order to perform their statutory obligation to report *to* ASIC about director misconduct. This seems entirely the wrong way around. Liquidators should be provided by ASIC at no cost with as much information at their disposal as possible, at the commencement of the engagement, to ensure that they can perform their gatekeeper roles efficiently and effectively.

Prevention rather than cure?

It is difficult to substantiate claims about the lack of enforcement in relation to phoenix activity because regulators' data on actions in phoenix circumstances is either not kept or is not available.¹¹⁰ Nonetheless, if it can be estimated, however vaguely, that phoenix activity is costing the economy between \$1.8 billion and \$3.2 billion per annum,¹¹¹ and that there are 6,000 phoenix companies,¹¹² enforcement numbers – for example director disqualifications related to phoenix activity – are in the tens each year.¹¹³ This makes preventative measures worth considering by the government. Better the fence at the top of the cliff than an ambulance – or fleet of ambulances – at the bottom. From the perspective of an employee, who will not benefit even if a director is punished by a penalty or disqualification, prevention is infinitely preferable.

The key to prevention, whether for the benefit of employees or more widely, is accurately tracking repeat offenders. No government wants to inhibit genuine entrepreneurship, so any significant hurdle for all would-be directors would be anathema. Repeat offenders might try to conceal their later directorships under the guise of a dummy director – an obliging relative perhaps – or a fictitious character, or their own name misspelt or with a false date of birth. At present, the registration of an Australian company simply requires the name, address, and

from actions for defamation in the absence of malice: Corporations Act s 89. This is also noted in RG 16, above n 40 at [16.59].

¹¹⁰ See generally, Anderson, above n 25.

¹¹¹ PWC Report, above n 1, 15.

¹¹² Above n 89.

¹¹³ Above n 45 and surrounding text.

date and place of birth of each proposed officeholder.¹¹⁴ ASIC's form¹¹⁵ does not ask for the prior corporate history of its proposed directors, and no supporting evidence about the identity of the proposed directors is required. ASIC does not independently verify the information provided to it. This could be overcome through the relatively simple and cheap process of requiring directors to establish their own identity via 100 points of identity proof, which would accord with the well-accepted and uncontroversial practice of opening bank accounts and obtaining passports. It would generate a unique director identity number (DIN) for each prospective director,¹¹⁶ and it would allow regulators to know that Frank Nadinic, Frane Nadinic and Frank Nadimic are the same person, as was the case cited to the Senate.¹¹⁷

In a report released in December, 2015, the Productivity Commission recommended adoption of the DIN both for new and existing directors,¹¹⁸ noting broad support for the concept, even from directors themselves.¹¹⁹ Countries as diverse as India¹²⁰ and Estonia¹²¹ have director verification procedures, and the DIN is part of the platform of the Australian Restructuring Insolvency and Turnaround Association (ARITA). It was also supported by the Senate Economics References Committee's inquiry into insolvency in the construction industry.¹²² However, as yet there is no response from government about the DIN recommendation.

Accurate identity information assists regulators in locating and monitoring those individuals against whom enforcement action might be taken.¹²³ This sort of identification, done solely based on names and dates of birth and their variants, and in the absence of a unique number, is expensive and extremely time-consuming. The DIN, on the other hand, readily arouses the regulator's suspicions when a person's DIN is used for the directorships of dozens of companies that the person is unlikely to be managing or supervising in compliance with their legal obligations.¹²⁴ The ATO's extensive database could prompt its phoenix risk team to investigate instances where an elderly person with no assessable income appears to be running multiple companies. The advantages of a DIN are obvious for agencies such as the

¹¹⁴ Corporations Act s 117(2).

¹¹⁵ ASIC, *Form 201 Application for Registration as an Australian Company*.

¹¹⁶ Note that the DIN proposal is not to be confused with the Coalition government's 'streamlining business registration' initiative, at <<http://www.business.gov.au/for-government/Pages/Streamlining-business-registration.aspx>>(accessed 30 September 2016). It was announced under the *Growing Jobs and Small Business* package that the government would develop a single online portal for business and company registration and establish a single business identifier. The underlying requirements for various registrations would not change; rather, a single portal would accommodate multiple registrations, such as for business names, GST or FBT.

¹¹⁷ This true example was cited in the 2015 Senate ERC, Construction Insolvency Report, above n 69, at [12.31]. Mr Nadinic acknowledged registering 32–33 companies under these names.

¹¹⁸ Productivity Commission, *Business Set-up, Transfer and Closure*, Inquiry Report No 75, Productivity Commission, Canberra, September 2015 (2015 Productivity Commission Inquiry Report), recommendation 15.6. Note that the Productivity Commission also endorsed the DIN in its report, *Workplace Relations Framework*, Inquiry Report No 76, Productivity Commission, Canberra, 2015, at 48, 915, 938.

¹¹⁹ 2015 Productivity Commission Inquiry Report, above n 118 at 426.

¹²⁰ See further <http://www.mca.gov.in/MinistryV2/applyfordin.html>, (accessed 30 September 2016).

¹²¹ Estonia offers corporate e-residency which is a form of digital identification. It requires directors to provide identity card information which has already verified the person's identity. See e-Estonia, *Estonian e-Residency* at <<https://e-estonia.com/e-residents/about/>>(accessed 30 September 2016).

¹²² 2015 Senate ERC, Construction Insolvency Report, above n 69, recommendations 36 (DIN) and 37 (proof of identity). Recommendation 38 called on the ASIC Act to be amended to require ASIC to verify company information.

¹²³ 2015 Productivity Commission Inquiry Report, above n 118 at 425:

The Commission considers that rather than crafting new offences, improvements in the detection and enforcement of existing laws are likely to be the best option for creating a genuine disincentive for directors contemplating phoenix action.'

¹²⁴ For example, their duties as directors under Corporations Act Part 2D.1.

Australian Crime Commission and the Australian Federal Police, who are seeking to track those associated with organised crime¹²⁵ and complex illegal phoenix activity.

For the protection of employees, the employer's status as a company, and the DIN of its directors, should be provided, like the Fair Work Information Statement, to employees upon commencement. This could be done in a paper format or alternatively, the company's employment paperwork could clearly direct people towards a company website that contained this information. A duty could be imposed on directors to keep it current. This overcomes any objection that each change of director would increase the red-tape burden.

As an adjunct to the DIN, the company registration process could also be improved¹²⁶ to provide significantly more information to ASIC. An online incorporation application could ask additional questions of the prospective director via drop-down menus. Having cited the director's DIN, the form could ask whether the person has ever managed any other company.¹²⁷ If the answer is no, then the rest of the application is simple and quick to complete. If yes, then a drop-down menu could require more information. Further questions could include whether the other companies are still in existence and if not, whether they paid their creditors in full or less than 50 cents in the dollar. Again, answers indicating a poor track record could prompt more questions. It is fair that a person who wants another opportunity to run a company should provide this level of detail. The aim here is to equip ASIC with information about this person, allowing the regulator to take appropriate action which may include placing them on a watch list. A secondary but equally important aim is to alert the would-be director to the fact that *ASIC knows this information*. This would discourage them from engaging in illegal phoenix activity by interfering with its invisibility. If the director provides false information, ASIC may prosecute them.¹²⁸ This information would also add to the intelligence that ASIC could share with other government agencies.

In terms of unremitted taxes and superannuation, the government appears to have acknowledged the advantages of prevention with the introduction of 'single touch payroll'.¹²⁹ Initially this was mooted as a mechanism whereby employers would pay their employees *and* related PAYG(W) remittances and superannuation contributions in a 'single touch'. However, the government has changed this proposal so that now it will only cover the reporting of tax and superannuation obligations. This alteration was in response to concerns from business about the 'cash flow' implications¹³⁰ of having to pay the taxes at an earlier time than is presently the case. Single touch payroll reporting assists the ATO in knowing what is owing but does nothing to actually gather in these amounts. The single touch reform

¹²⁵ See, eg, Commonwealth of Australia, Australian Crime Commission, *Organised Crime in Australia 2015*, May 2015, 8, 25–6, 65–6.

¹²⁶ At present, to register a company, a prospective director either completes Form 201 and mails it to ASIC with appropriate payment, or transacts through a business service provider who uses software to deal directly with ASIC. This may involve the purchase of a 'shelf' company that the business service provider has already registered. See ASIC, *How to Start a Company*, at <<http://asic.gov.au/for-business/starting-a-company/how-to-start-a-company/>>(accessed 30 September 2016).

¹²⁷ Once the directorships of all companies are updated with their directors' DINs, the form to incorporate a new company could pre-populate with this information once the DIN was entered.

¹²⁸ Corporations Act s 1308(2).

¹²⁹ See K O'Dwyer, 'Streamlining business reporting with a single touch payroll', Media Release, 21 December 2015 at <<http://kmo.ministers.treasury.gov.au/media-release/042-2015/>>(accessed 30 September 2016).

¹³⁰ See ATO, *Single Touch Payroll* at <<https://www.ato.gov.au/General/New-legislation/In-detail/Other-topics/Single-Touch-Payroll/>>(accessed 1 October).

illustrates the extent to which businesses rely on employee-related sums to finance their businesses, and also shows the hesitation of the government to interfere with this practice.

Better laws

The FWO politely but undeniably chafes against its limited enforcement powers against directors. As noted above, the FWO has recently been successful in the first of two test cases to establish its power to seek compensation orders against directors who are accessories to a company's breach of the FW Act because of the non-payment of wages.¹³¹ Its recent submission to the Productivity Commission's Draft Report on the Workplace Relations Framework noted the capacity for corporate insolvency to undermine the FWO's compliance work,¹³² and its reliance on 'creative steps within its own jurisdiction' to provide effective deterrents.¹³³ It is time to arm the FWO with some proper mechanisms to sanction errant directors,¹³⁴ and an obvious one would be providing it with the power to seek court-ordered disqualification.¹³⁵ This would save the double-handling of a matter than currently exists where the behaviour must be referred to ASIC for investigation and disqualification action. In the United Kingdom, even a liquidator can seek a director's disqualification.¹³⁶

As noted above,¹³⁷ ASIC has not brought any cases under s 596AB in relation to deliberate arrangements to deprive employees of their entitlements. This is understandable given the section's inherent difficulties and ASIC's limited resources for enforcement. Both ASIC and the FWO support reform to s 596AB to make this section effective,¹³⁸ and this is arguably the 'low hanging fruit' that should be dealt with by the government immediately without further argument. The amendment would replace the present requirement of proof of subjective intent with an objective test. This would require directors to show that they had taken all reasonable steps to prevent the company from entering into agreements or transactions that avoid the company meeting its employee entitlements. It would be enforceable via the civil penalty regime of the Corporations Act, consistent with the directors' duties under that Act.¹³⁹

There are other reforms that a more ambitious government could consider. Where an individual who had been associated with a certain number of previous failed companies seeks

¹³¹ Above n 21.

¹³² Ibid at 5.

¹³³ Ibid.

¹³⁴ Note the making, for the first time, of an order garnisheeing the wages of a director for an unpaid penalty: *Fair Work Ombudsman v Sona Peaks Pty Ltd (No 3)* [2016] FCCA 615. In *Fair Work Ombudsman v James Nelson Pty Ltd* [2016] FCCA 531, the penalty against the director was paid to the Commonwealth, not the company's employees, but an order was made restraining the director from being concerned in conduct in respect of employees employed in the textile industry that contravenes the FW Act. Note also that any pecuniary penalty payable by a director under the FW Act is not provable in bankruptcy: *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193 at [47]–[50].

¹³⁵ See H Anderson, 'Corporate Insolvency and the Protection of Lost Employee Entitlements: Issues in Enforcement' (2013) 26 *AJLL* 75 at 100. See also T Middleton, 'Banning, Disqualification and Licensing Powers: ACCC, APRA, ASIC and the ATO – Regulatory Overlap, Penalty Privilege and Law Reform' (2015) 33 *C&SLJ* at 555–6, 569.

¹³⁶ Company Directors Disqualification Act 1986 (UK) s 16(2).

¹³⁷ See note 15.

¹³⁸ See ASIC, *Productivity Commission: Review of Barriers to Business Entries and Exits in the Australian Economy*, February 2015, at p. 143; ASIC, *Productivity Commission Inquiry into Business Set up, Transfer and Closure: ASIC's Supplementary Submission*, July 2015, at 17–18; FWO Submission, above n 20 at 6.

¹³⁹ Anderson, 'Corporate Insolvency', above n 135 at 99.

to be appointed a director of a further company, a security bond of a meaningful amount could be sought by ASIC. If the person is unable to pay the bond but wanted to proceed nonetheless, they could be subject to a reverse onus, such that a further failure is considered to be a breach of one of their duties as a director unless they prove otherwise. This would act as a useful deterrent against phoenixing by serial wrongdoers. This sort of disincentive towards phoenix activity is particularly beneficial to employees who are unlikely to investigate the previous corporate history of the people who are employing them.

Heavier penalties as a deterrent against phoenix activity are also worth considering. Under the FW Act, an individual is only subject to a fine of one fifth the size of a company for a civil remedy breach.¹⁴⁰ This makes it beneficial for directors of employer companies to liquidate that entity and face the penalty as an accessory to the company's non-payment as a necessary expense in shedding those employee entitlements.¹⁴¹ The added advantage here is that unremitted taxes are also shed because the act of liquidating the company removes the ATO's means of imposing personal liability via a director penalty notice.¹⁴² A significant fine on the accessory could make them think twice about doing this, although no fine would be as effective as an order of compensation against the accessory for the amount of the unpaid entitlements.¹⁴³

When it comes to dormant companies, there is no reason why their employees should be treated less favourably than those of a liquidated company. It makes no sense for ASIC to undergo the expense of liquidating dormant companies, simply for the purpose of enabling their employees to have access to FEG,¹⁴⁴ when the government could just amend the FEG rules to cover these employees.¹⁴⁵

Finally, a more substantial step would be to create a regulator to deal only with insolvencies. This is the situation in the United Kingdom where Companies House¹⁴⁶ deals with company paperwork in general but the Insolvency Service¹⁴⁷ provides services, including investigation and enforcement, for those affected by business failure, whether personal or corporate. Such a 'one stop shop', which would also subsume the work of the bankruptcy regulator, the Australian Financial Security Authority (AFSA), is worth considering in Australia given the apparent gaps between the regulators in Australia from which an employee might seek help. It would also overcome current difficulties with information sharing and cross-agency co-operation.

Better funding

¹⁴⁰ FW Act s 546(2) and (3)(c).

¹⁴¹ However, note here *Fair Work Ombudsman v Konsulteq* [2015] FCCA 182, where a director who incorporated two companies as 'alter egos ... as a shield for his own conduct' (at [33]) was ordered, pursuant to Order 9, to pay the penalties imposed upon the two companies in the event that they defaulted within the time period specified for them to pay.

¹⁴² TAA Sch 1, s 269-15(2)(c).

¹⁴³ The FW Act allows the court to order that a penalty be paid to the employee rather than into consolidated revenue: s 545(3).

¹⁴⁴ ASIC, *Regulatory Guide 242, ASIC's Power to Wind Up Abandoned Companies*, January 2013, at RG 242.8.

¹⁴⁵ Above n 9.

¹⁴⁶ Companies House is an executive agency, sponsored by the Department for Business, Innovation & Skills. See <https://www.gov.uk/government/organisations/companies-house> (accessed 3 October 2016).

¹⁴⁷ See United Kingdom, Insolvency Service, *About Us* at <<https://www.gov.uk/government/organisations/insolvency-service/about>>(accessed 3 October 2016).

In the end, society pays for all business failure; the only question is how directly it will pay. Business failure is a necessary consequence of a capitalist marketplace and its costs cannot entirely be avoided. However, what should be attempted is proper deterrence of an abuse of the corporate form and a minimisation of loss for those innocent parties directly in the path of deliberate phoenix activity.

As noted above, unpaid employees of liquidated and bankrupt businesses receive advances from FEG but employees of dormant companies do not. The latter may be forced more quickly onto unemployment benefits and may socialise their losses by defaulting on their own debts. Unremitted superannuation means increased reliance on the aged pension. It is therefore incorrect to imagine that FEG represents the total cost of unpaid employee entitlements to the government and therefore to taxpayers. Even if FEG were funded by a levy on businesses rather than by taxpayers directly, businesses would pass on those costs to customers with a very similar outcome. A business levy would also add costs and complexity because of the need to enforce levy payments and make arrangements for those employees where the levy had not been paid.

Enforcement costs are also socialised, whether that enforcement is carried out by liquidators, ASIC or another agency. As private professionals, liquidators must cover their costs and earn a respectable income. Liquidators can be paid from a number of sources: from specific funding provided by ASIC¹⁴⁸ or the Department of Employment,¹⁴⁹ subsidised by taxpayers generally, or from the assets of the failed company, meaning less money for its creditors; or from cross-subsidisation from profitable liquidation engagements, meaning less money for *their* creditors. Unpaid trade creditors, like unpaid employees, pass on their losses to society via their own defaults on debts and by expensing bad debts for tax purposes.

Funding for enforcement should be decided on the basis of who can investigate and prosecute wrongdoers in deliberate company failures most efficiently and effectively. If liquidators are the best placed to do so, they should be properly funded. There should not be a tug-of-war between ASIC and liquidators about whose responsibility enforcement is or who should pay for it. If the government chooses not to trust private profession liquidators to do this, especially in small liquidations, it should consider establishing a ‘small business government liquidator’, similar to the Official Assignee in New Zealand.¹⁵⁰ This model is also followed in Australia for bankruptcies where there is no registered trustee appointed.¹⁵¹ A small business government liquidator could play an important role in bringing enforcement actions on behalf of dormant companies, noted above, where no liquidator has been appointed. This could deter directors from abandoning their companies, after stripping assets to make a liquidation unlikely, if they know that their behaviour would be subject to the scrutiny of a government agency with power to bring action against them.

¹⁴⁸ The Assetless Administration Fund (‘AAF’) is administered by ASIC. With funds provided by the government, it finances insolvency practitioners in their work on behalf of companies with few or no assets. The aim of the fund is to overcome the inability of liquidators to make proper investigations due to financial constraints. ‘A particular focus of the AA Fund is to curb fraudulent or illegal phoenix activity’: ASIC, *Regulatory Guide 109, Assetless Administration Fund: Funding Criteria and Guidelines*, November 2012 at RG 109.6.

¹⁴⁹ The FEG Recovery Programme, above n 55 and accompanying text.

¹⁵⁰ New Zealand Insolvency and Trustee Service, *Liquidation: Frequently Asked Questions* at http://www.insolvency.govt.nz/cms/financial-trouble/business-debt/company-liquidation/liquidation-frequently-asked-questions/multipagedocument_all_pages (accessed 3 October 2016).

¹⁵¹ See AFSA, *Official Trustee in Bankruptcy* at <<https://www.afsa.gov.au/practitioner/trustees/official-trustee-in-bankruptcy>>(accessed 3 October 2016).

V Conclusion

Those who make laws and set up structures dealing with phoenix activity have a different perspective to those who have their rights determined by those laws and structures. To ensure that employees are treated as fairly as the government intends, it is vital to consider the phoenix landscape from the employee point of view.

This article has sought to provide the background to the policy and regulatory environment in which phoenix activity exists. Phoenix activity may be detected by its victim, a trade union, an external administrator, or one or more government agencies. The detection may come about because of non-payment of wages or taxes. It may be reported to ASIC directly or via an intermediary. The information may show that an offence involving a deliberate intention to avoid the payment of debts has occurred or it may reveal a completely lawful business rescue. The truth about the nature of the company's actions may only be properly determined once information in different locations is aggregated. This complex reality should shape the government's approach to protecting employees from the effects of phoenix activity. It could also help the government to achieve more from its detection and enforcement expenditures. The government concluded a capability review of ASIC in 2015.¹⁵² Unfortunately, the review made few references to, and no recommendations on, ASIC's work in relation to insolvent companies.

This article has considered a range of options that can directly or indirectly assist employees faced with the possibility of losing their entitlements because of phoenix activity. Greater transparency about a company's affairs and its directors and officers helps to deter those tempted to engage in phoenix activity. This transparency comes through better external administrator reporting, more information sharing amongst regulators, and proper identification of directors. Where deterrence is not effective, improvements to enforcement are called for. These include wider powers for the FWO, reform of the ineffective s 596AB, a possible reverse onus of proof for repeat players unwilling to pay a security bond, and heavier penalties for those caught offending.

A single agency dealing with employees adversely affected by insolvency, regardless of the circumstances, may be the optimal solution but in practical terms is unlikely given the apparent objectives and demonstrated caution or timidity of governments discussed above. At the very least, this article hopes to have raised an awareness of the complexity of the phoenix landscape to make it clear what needs to be done and what might be holding that back.

¹⁵² Australian Government, *Fit For the Future: A Capability Review of the Australian Securities and Investments Commission – A Report to Government*, Australian Government, Canberra, December 2015.