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AT THE COALFACE OF CORPORATE INSOLVENCY AND PHOENIX ACTIVITY: A SURVEY OF ARITA AND AICM MEMBERS

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I INTRODUCTION

This research note presents the findings of surveys completed by members of the Australian Restructuring, Insolvency and Turnaround Association ('ARITA') and the Australian Institute of Credit Management ('AICM') on the topic of illegal phoenix activity and related issues. Broadly speaking, the term 'phoenix activity' refers to the idea of a successor company, which may be a newly incorporated company or an existing company in a corporate group, arising from the ashes of its failed predecessor where the successor company's controllers and business are essentially the same as those of the predecessor. In a typical phoenix activity scenario, the predecessor company's assets are transferred to the successor prior to the predecessor being placed into external administration or left dormant. There are legal and illegal forms of phoenix activity. Phoenix activity is legal where the controllers of the predecessor company use the successor in order to rescue the business of the predecessor. Phoenix activity is illegal where the controllers' intention is to shift their assets to avoid liabilities such as unsecured debts, employee entitlements, taxes, adverse court judgments and fines.[1]

Illegal phoenix activity is a significant social and economic problem in Australia. While the exact incidence of illegal phoenix activity is unknown, in 2009 the Australian Taxation Office ('ATO') estimated that phoenix activity and related practices cost the Australian economy between $1 billion and $2.4 billion each year.[2] In 2012 PricewaterhouseCoopers estimated the total cost to employees, business and government revenue at between $1.78

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1 For a detailed discussion of the various types of phoenix activity and corresponding case studies, see Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Hannah Withers, 'Defining and Profiling Phoenix Activity' (Melbourne Law School and Monash Business School, December 2014) <http://law.unimelb.edu.au/__data/assets/pdf_file/0003/1730703/Defining-and-Profiling-Phoenix-Activity_Melbourne-Law-School.pdf>; see also Helen Anderson, 'Profiling Phoenix Activity: A New Taxonomy' (2015) 33 *Company and Securities Law Journal* 133.

2 Australian Taxation Office, *Targeting Tax Crime: A Whole-of-Government Approach* (July 2009) 16 <https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/Targeting-Tax-Crime-magazine/Archive/Targeting-tax-crime--a-whole-of-government-approach---July-2009/>.

billion and $3.19 billion annually.[3] While there are a number of methodological difficulties associated with attempting to estimate the cost of illegal phoenix activity,[4] the estimates suggest that the cost is significant, ranging from approximately 0.06% to 0.19% of Australia's Gross Domestic Product.[5] In terms of the number of phoenix companies operating in Australia, the estimates range from 2,000 to 6,000.[6]

The scale of the illegal phoenix activity problem in Australia has recently been affirmed by reports of the Productivity Commission and Senate Economics References Committee in 2015. The Productivity Commission observes that 'even conservative estimates suggest that it is a significant issue'[7] and that it has 'considerable scope to undermine the confidence of creditors in the insolvency framework, and therefore hinder the efficient closure of business.'[8] The Senate Economics References Committee states that it is 'a significant issue not only in the construction industry, but throughout the economy'[9] and one that 'suggest[s] a significant culture of disregard for the law.'[10] The scale of the problem has also been recognised in a number of previous inquiries and reports.[11]

Despite illegal phoenix activity being the subject of significant legal and political scrutiny in Australia since at least 1994,[12] little has been done to empirically assess the views of those closest to the problem. The survey findings presented in this research note provide a novel insight into how the problem is perceived by the experts at the coalface of corporate insolvency and phoenix activity, namely, insolvency and credit professionals. ARITA is a professional association with over 2,000 members that represents those who specialise in the fields of restructuring, insolvency and turnaround, including accountants, lawyers, bankers, credit managers, academics and other professionals with an interest in insolvency and restructuring.[13] AICM is Australia's leading professional association for commercial and consumer credit management professionals, with over 2,300 members responsible for

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3 Pricewatershouse Coopers, *Phoenix Activity: Sizing the Problem and Matching Solutions* (June 2012) ii-iii, 2.

4 For a detailed analysis of the difficulties associated with estimating the cost of illegal phoenix activity, see Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Hannah Withers, 'Quantifying Phoenix Activity: Incidence, Cost, Enforcement' (Melbourne Law School and Monash Business School, October 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2677081>; see also Helen Anderson, Ian Ramsay and Michelle Welsh, 'Illegal Phoenix Activity: Quantifying Its Incidence and Cost' (2016) 24 *Insolvency Law Journal* 95.

5 See Australian Bureau of Statistics, *1345.0 – Key Economic Indicators, 2016* (23 August 2016) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/1345.0?opendocument?opendocument#from-banner=LN>.

6 Australian Government, Productivity Commission, *Business Set-up, Transfer and Closure: Productivity Commission Inquiry Report No. 75* (30 September 2015) 423 <http://www.pc.gov.au/inquiries/completed/business/report/business.pdf>.

7 Productivity Commission, n 6.

8 Productivity Commission, n 6, 28.

9 Senate Economics References Committee, Parliament of Australia, *Insolvency in the Australian Construction Industry* (2015) xix.

10 Senate Economics References Committee, n 9, 71 [5.33].

11 See Senate Economics References Committee, n 9, 63 [5.1]; Helen Anderson, Ian Ramsay and Michelle Welsh, n 4, 97-99; Helen Anderson et al, n 1, 3 [1.3].

12 Victorian Law Reform Commission, *Curbing the Phoenix Company: First Report on the Law Relating to Directors and Managers of Insolvent Corporations*, Report No 83 (1994).

13 Australian Restructuring, Insolvency & Turnaround Association, *About Us* <http://www.arita.com.au/about-us>.

maximising the cash flow and minimising the bad debt risk of more than 1,300 Australian companies, including 34 of the ASX100.[14]

II RESEARCH METHOD

The survey of ARITA members was conducted on Survey Monkey from 16 November 2015 to 14 December 2015. It contained 15 questions, including multiple choice and open-ended questions. The survey was sent to 2,155 members, 213 of whom completed the survey – a response rate of approximately 10%. The questions were optional and the number of responses to each question varied significantly, ranging from 29% to 100% of the 213 respondents. There was an enthusiastic response to the open-ended questions. In particular, an open-ended question on how to address the problem of phoenix activity attracted 105 written responses, many of which contained substantial detail.

The AICM survey process and format was largely modelled on the ARITA survey. It was conducted on Survey Monkey from 11 January 2016 to 15 February 2016 and contained 20 multiple choice and open-ended questions. The survey was sent to just over 2,300 members, 155 of whom completed the survey – a response rate of approximately 7%. The percentage of the 155 members who responded to each question ranged from 37% to 100%. Similar to the ARITA survey, there was a strong response to the open-ended questions, with the number of answers to such questions ranging from 58 to 99.

III RESEARCH FINDINGS

The questions in the ARITA and AICM surveys fell into four broad categories: demographic characteristics of the respondents and their firms; the incidence of circumstances that may increase the risk of illegal phoenix activity; the incidence and consequences of phoenix activity generally and phoenix activity that involves civil or criminal wrongdoing; and the regulation of phoenix activity, including suggestions for policy and law reform. The following part of the research note addresses each of these four categories in turn for both surveys.

A ARITA Survey

1 Respondent Demographics

Most of the respondents worked at firms in New South Wales, followed by Victoria, Queensland, Western Australia and South Australia. There were only a small number of respondents from national firms and firms in the ACT, Tasmania and the Northern Territory. The great majority of the respondents worked at city-based firms, with only about 10% working at suburban firms and a similar proportion at regional firms. The firms varied significantly in the size of their insolvency-related practices, with the number of professional staff working in the insolvency field ranging from 1 to 400. The respondents, about 45% of

[14] Australian Institute of Credit Management, *About AICM* <http://aicm.com.au/about-aicm/>.

whom were registered liquidators, had a significant level of experience, having worked in the insolvency field for an average of 16 years. Most of the insolvent companies that the respondents dealt with had liabilities between $250,000 and $1 million, followed by companies with liabilities greater than $1 million and then companies with liabilities less than $250,000.

2 Illegal Phoenix Activity Risk Factors

The responses suggested a relatively high incidence of circumstances that may increase the risk of illegal phoenix activity. Seventy-seven percent of respondents said that directors of failed companies 'often' have inadequate business skills, while 45% said that directors of companies in liquidation 'often' have been directors of other failed companies in the past. One respondent commented, 'It is time that directors be required to have some rudimentary training. Why is it easier to become a director than getting a driver's licence?' Similarly, another respondent remarked that 'The problem … comes down to poor management of companies – should directors have to have certain qualifications or pass certain tests to enable them to become a director? Should it be treated as a profession like accounting or law?' Forty-five percent of respondents 'agreed', and 24% 'strongly agreed', that directors or managers of failed companies tended to display little regard for the company's creditors. The responses also indicated that it is not unusual for failing companies to seek advice from a pre-insolvency practitioner or debt restructurer, with 53% of respondents saying that they 'sometimes' encounter, and 23% saying they 'often' encounter, liquidations where the company has sought such advice. While none of these factors is necessarily a cause of illegal phoenix activity, together they show a notable pattern of poor management skills, repetitive failures, disregard for creditors, and debt restructuring prior to insolvency, among companies that have been placed into external administration. These results raise policy questions, which have been previously debated, about what can be done to improve the front-end regulation of phoenix activity, such as competency requirements for directors, restrictions on individuals incorporating companies where they have been involved in multiple corporate failures that have left unpaid creditors, improved protection of creditors, and tighter regulation of the pre-insolvency advice market.

3 Incidence and Consequences of Phoenix Activity

Thirty percent of respondents said that they 'often' encounter liquidations where they believe that phoenix activity has occurred, and 51% said that they 'sometimes' encounter such liquidations. In situations where the respondents believed that phoenix activity had occurred, 24% of respondents 'always' alleged a breach of civil obligations in an external administration ('EXAD') report, 29% 'often' alleged, and 23% 'sometimes' alleged such a breach. Taken together, these results are of significant concern, as they suggest that, not only is the rate of phoenix activity relatively high, but it is often accompanied by alleged civil wrongdoing. The incidence of alleged criminal activity was lower but still significant, with 9% of respondents saying that they 'often' allege criminal activity in an EXAD report, and 33% saying they 'sometimes' allege such activity, in situations where they believe that phoenix activity has occurred.

In respect of the consequences of phoenix activity, 27% of respondents said that liquidation of a company involving phoenix activity "always" results in zero returns to creditors, while

60% said that this “often” occurs. However, it is important to make a distinction between the consequences of liquidation involving phoenix activity and the consequences of liquidation generally. Respondents were asked the same question in regard to liquidation generally. While only 3% of respondents said that liquidation of a company “always” results in zero returns to creditors, 90% of respondents said that liquidations “often” result in zero returns to creditors. These results suggest that it is more likely than not that creditors will receive zero returns in all liquidation situations, whether or not there is phoenix activity, but phoenix activity has the effect of increasing the probability of receiving zero returns (27% “always”, rather than 3% “always”).

4 Regulation of Illegal Phoenix Activity

Respondents were asked a range of questions in relation to the adequacy of regulatory measures relevant to illegal phoenix activity and suggestions for law and policy reform. One area of significant concern among the respondents was insufficient regulation of the pre-insolvency advice market. Fifty-five percent of respondents ‘strongly agreed’ that pre-insolvency practitioners/debt restructurers should be forced to be part of a professional association, and 54% ‘strongly disagreed’ that they are sufficiently regulated by the Australian Securities and Investments Commission (‘ASIC’). Forty-one percent of respondents ‘strongly agreed’, and 28% ‘agreed’, that pre-insolvency practitioners/debt restructurers should be subject to the same legal duties as external administrators. Forty-one percent of respondents ‘strongly agreed’, and 40% ‘agreed’, that pre-insolvency practitioners/debt restructurers should not be allowed to advertise their services to the public without safeguards against improper advice being put in place. The issue of pre-insolvency advice was raised several times in written comments. According to one respondent, ‘There is now an abundance of pre-insolvency advisors who are not subject to any regulations assisting and advising directors to undertake phoenix activity and how to defeat creditors.’

Another area of concern among respondents was the resourcing, competence and responsiveness of ASIC. Thirty-four percent of respondents ‘strongly disagreed’, and 42% ‘disagreed’, that ASIC is sufficiently resourced, while 9% ‘strongly disagreed’, and 32% ‘disagreed’, that ASIC is competent. On the issue of funding, one respondent commented:

> It is important not [to] discourage entrepreneurs from having a go and starting their own business. What needs to be actively discouraged is directors that take advantage of the current law for their benefit. The solution is always funding to investigate director misconduct. ASIC is underfunded, and as a result a culture of abuse of the system has developed. Until this changes, and whilst the prospect of criminal punishment is low, there is little that will discourage directors from entering into phoenix activity.

Fifty-one percent of respondents said that, where they have reported director misconduct in an EXAD report, ASIC ‘rarely’ responds that it will conduct an investigation or suggests applying for funding under the Assetless Administration Fund (‘AAF’), while 11% of respondents said that ASIC ‘never’ does so. Respondents showed a low level of satisfaction with all facets of the AAF, giving an average score ranging from 2.81 to 3.71 out of 10 in regard to the ease of the application process, the response time from ASIC, the outcomes of their applications, and the amount of funding provided in each case.

In respect of funding of investigations, respondents also showed dissatisfaction with the response from taxation authorities. Fifty percent of respondents said that, where the ATO is a creditor, it has 'never' agreed to fund an investigation, while 26% of respondents said that it has 'rarely' done so. Similarly, 51% of respondents said that, where the state revenue office is a creditor, it has 'never' agreed to fund an investigation, while 14% of respondents said that this has 'rarely' occurred.

Another area in which respondents felt strongly that the conduct of investigations could be improved was liquidators' ability to access relevant information. Sixty percent of respondents 'strongly agreed', and 27% 'agreed', that ASIC should provide liquidators with information it holds about directors of failed companies at the start of a liquidation involving those directors. Sixty-eight percent of respondents 'strongly agreed', and 23% 'agreed', that ASIC should allow liquidators free use of its registers to enhance the quality of their investigations for the purpose of reporting to ASIC under ASIC's *Regulatory Guide 16: External Administrators – Reporting and Lodging*.[15] One respondent observed that it would be '[p]otentially beneficial for government agencies (ATO/ASIC/AFSA/SRO) to share more data with insolvency practitioners to assist with the IP's investigations.'

In addition to the more general regulatory issues canvassed above, a number of potential policy reforms specific to the issues of repeated company failures and phoenix activity were put to the respondents. There was strong support for these policy reforms among the respondents. Fifty-seven percent of respondents 'strongly agreed', and 33% agreed, that all company directors should be issued with a Director Identification Number enabling ASIC and the ATO to track directors of multiple failed companies.[16] One respondent made the following suggestion in regard to vetting of directors prior to incorporation of a new company:

> ASIC database should be able to crosscheck ATO's database against the new company's director at the time of the company's registration (failed companies, unpaid entitlement, unpaid tax, similarities to the registered address or the director's address in case the new company is in the spouse's name). If the person is known to the ATO and there is any

[15] Australian Securities and Investments Commission, *Regulatory Guide 16: External Administrators – Reporting and Lodging* (July 2008) <http://download.asic.gov.au/media/1237317/rg16.pdf>.

[16] The introduction of a Director Identification Number was first proposed by us in the following journal article: Helen Anderson, "An Ounce of Prevention: Practical Ways to Hinder Phoenix Activity" (2013) 25 *Australian Insolvency Journal* 16. This idea builds on an earlier recommendation by the Victorian Law Reform Committee to introduce a unique identity number aimed at preventing disqualified persons from managing companies: see Victorian Law Reform Committee, n 13, 25–7. The authors put the idea of a Director Identification Number to the Productivity Commission's *Inquiry into Business Set-up, Transfer and Closure*: see Helen Anderson, Ian Ramsay, Ann O'Connell and Michelle Welsh, Submission No 1 to Productivity Commission, *Inquiry into Business Set-up, Transfer and Closure* (11 February 2015), 4-5 <http://law.unimelb.edu.au/__data/assets/pdf_file/0006/1730715/Productivity-Commission-Submission-Final-Feb-15.pdf>; see also Helen Anderson, Ian Ramsay, Ann O'Connell and Michelle Welsh, Submission DR67 – Further Submission to the Productivity Commission on the Director Identity Number, *Inquiry into Business Set-up, Transfer and Closure* (13 July 2015) <http://law.unimelb.edu.au/__data/assets/pdf_file/0006/1730706/MLS-Productivity-Commission-third-submission-13-07-15.pdf>. The proposal was supported by the Productivity Commission, which formally recommended the introduction of a Director Identification Number in its final report: see Productivity Commission, n 7, Recommendation 15.6. It was later endorsed by the Senate Economics References Committee in its Inquiry into Insolvency in the Australian Construction Industry: Senate Economics References Committee, n 10, Recommendations 36 and 37.

> connection to the failed companies, ASIC should delay approval and go through a due verification process.

As another respondent observed, any identification and data matching system that is implemented must be able to cope with individuals who work as shadow directors through related parties.

Forty-nine percent of respondents 'strongly agreed', and 39% 'agreed', that directors of multiple failed companies should be prohibited from managing another company unless they can prove that they are capable of doing so. A number of respondents suggested disqualification of directors after a certain number of failed companies, with one respondent commenting that 'A DIN should be introduced and automatic disqualification after being a director of 3 failed companies.'

Forty-six percent of respondents 'strongly agreed', and 38% 'agreed', that ASIC should add a tick box to EXAD reports so liquidators can indicate whether they believe that breaches of civil or criminal obligations have occurred in the context of phoenix activity. One respondent made the following suggestion in regard to reporting of director misconduct:

> ASIC could consider an offence referral model similar to AFSA, as the current system (via EX01) is relatively restricted via the use of a standardised form. This may assist the free transmission of information between practitioners and the Regulator, and better allow monitoring, consideration and enforcement of offences (both generally, and more specifically in relation to phoenix activity).

B AICM Survey

1 Respondent Demographics

Most of the respondents worked at businesses that were national, followed by businesses in NSW, Queensland, Victoria, Western Australia and South Australia. There were only a small number of respondents from the Northern Territory, the ACT and Tasmania. Most of the respondents worked at city-based businesses, followed by suburban and then regional locations. Fifty-nine percent of the respondents worked at large businesses with over 200 employees, followed by medium-sized businesses with 20 to 199 employees (25%) and then small businesses with 1 to 19 employees (16%). The respondents' businesses were predominantly in the manufacturing (30%) and wholesale trade (23%) industries, followed by retail trade (10%), professional, scientific and technical services (10%), financial and insurance services (10%), construction (8%), transport, postal and warehousing (7%), among a number of other industries. The respondents had a significant level of experience, having been credit professionals for an average of 23 years. The bad debts owing to the respondents' employers were mostly under $250,000 (63%), followed by debts greater than $250,000 but less than $1 million (19%) and then debts greater than $1 million (18%). For 72% of the respondents' businesses, the bad debts represented less than 1% of annual turnover, followed by 1% to 2% (16% of businesses), 2% to 4% (7% of businesses) and greater than 4% of annual turnover (5% of businesses).

2 Illegal Phoenix Activity Risk Factors

The responses followed a similar pattern to the ARITA survey, indicating a significant incidence of circumstances that may increase the risk of illegal phoenix activity, although this pattern was, on the whole, less pronounced among the AICM respondents. Forty-one percent of respondents said that directors of failed companies 'often' have inadequate business skills, while 31% said they 'sometimes' have inadequate skills. One respondent observed that 'There is … no prerequisite to incorporating a company and commencing business. No formal qualifications are necessary hence many directors are doomed to fail purely due to a lack of knowledge and business acumen.'

Nineteen percent of respondents indicated that they 'rarely' know, and 45% that they 'sometimes' know, whether directors who are the subject of credit checks have been involved in other failed companies in the past.[17] In regard to situations where the respondents do have such knowledge, 18% of respondents said that directors undergoing credit checks have 'often' been involved in other failed companies in the past, while 43% said they have 'sometimes' been involved in failed companies. Fifty-three percent of respondents 'strongly agreed', and 37% 'agreed', that directors or managers of failed companies tended to display little regard for the company's creditors. This is a stronger response than the ARITA survey, which may reflect the particular perspective from which credit managers are viewing the problem; that is, from the creditor's perspective. As one respondent remarked, '[d]irectors of phoenix companies have little regard for trading ethically. In general they are arrogant and believe they are above the law.' Seventeen percent of respondents indicated that they 'often' encounter, and 32% said they 'sometimes' encounter, the work of a pre-insolvency practitioner or debt restructurer. These results, like the results from the ARITA survey, indicate a pattern of poor management skills, repetitive failures, disregard for creditors, and debt restructuring prior to insolvency, which, while none of these factors is individually indicative of illegal phoenix activity, jointly contribute to an environment in which illegal phoenix activity is more at risk of occurring.

3 Incidence and Consequences of Phoenix Activity

Unlike the members of ARITA, who practice in the insolvency field, members of AICM are credit managers who represent particular creditors and are therefore not as closely involved with the external administration of failed companies. As such, questions were not put to the AICM members as to allegations of civil or criminal wrongdoing in EXAD reports and the overall returns to creditors from liquidations. This knowledge would not typically be available to credit managers who represent particular creditors. However, the AICM members were asked how often they believe phoenix activity has occurred. Twenty-eight percent of respondents believed that phoenix activity had 'often' occurred, while 33% believed that it had 'sometimes' occurred, in circumstances where the respondents had knowledge of the prior histories of the directors of the failed companies. There were many written responses describing repeated encounters with illegal phoenix companies.

4 Regulation of Illegal Phoenix Activity

Respondents were asked a range of questions in relation to the adequacy of regulatory measures relevant to illegal phoenix activity and suggestions for law and policy reform.

[17] See Part B.4 of this research note for further discussion of the limited information available to credit managers for the purposes of assessing the creditworthiness of company directors.

Similar to the ARITA members, the AICM members had concerns regarding the resourcing and competence of ASIC, along with the information made available to liquidators and credit rating agencies by ASIC. Twenty-six percent of respondents 'strongly disagreed', and 37% 'disagreed', that ASIC is sufficiently resourced, while 8% 'strongly disagreed', and 29% 'disagreed', that ASIC is competent. As one respondent commented, 'There needs to be some sort of funding arrangement/funding support to enable ASIC to prosecute the worst cases of phoenix activity.'

Fifty-eight percent of respondents 'strongly agreed', and 37% 'agreed', that ASIC should allow liquidators free use of its registers to enhance the quality of their investigations for the purpose of reporting to ASIC at the end of the liquidation. There was particularly strong support for the idea that ASIC ought to provide additional information to credit rating agencies, which again may reflect that AICM members are viewing the issues from the perspective of creditors that are unlikely to receive returns in circumstances of liquidation (as the ARITA survey results showed). Sixty-five percent of respondents 'strongly agreed', and 30% 'agreed' that ASIC should allow credit rating agencies access to information supplied by liquidators to enhance the quality of advice they can provide to their customers.

Following on from the point about ASIC providing additional information to credit rating agencies, the respondents also strongly supported the idea of the ATO providing additional information regarding unpaid tax by commercial entities. Sixty-nine percent of respondents 'strongly agreed', and 26% 'agreed', that having the ATO list all unpaid tax by commercial entities (companies, trusts, partnerships, and sole traders) would significantly enhance their decision-making as to whether to approve or decline credit applications. One respondent observed that such a measure would be 'extremely useful', commenting that 'Tax debt is present in all insolvencies and would be a highly effective warning sign when it starts to accrue.' Similarly, another respondent commented that 'Most insolvencies we are seeing are from unpaid ATO debts, there are no warning signs prior to receiving notice that an Insolvency Practitioner has been appointed.'

Respondents were asked what other types of information they would like to be able to access that is not currently available to them, which elicited 94 responses. The responses, some examples of which are presented below, suggest that credit managers are dissatisfied with the level of information available to them for the purposes of assessing the creditworthiness of company directors and protecting themselves against illegal phoenix activity:

- Information concerning tax liabilities from not just the ATO but also State revenue offices.

- Whether companies are meeting their statutory obligations – BAS, payroll tax, superannuation etc.

- Liquidators reports to ASIC where we are a creditor. Details of outstanding tax (non disputed arrears) for companies and people who are company directors. Directors of failed companies where liquidators have recommended further investigation be made by ASIC or offences have been committed, whether it is pursued or not.

- A free registry of all directors who have had failed businesses.

- A free list of companies that a director is involved with in all capacities.

- Repeat offenders should be published and agencies have access to this information.

- It is often difficult to determine family connections – even when a director has been banned (either by ASIC or by virtue of bankruptcy) and has installed a spouse, child or other family member as a proxy director … Access to ASIC database information on directorships (i.e. to identify related entities) in a more cost-effective manner [would be useful].

- Some kind of indicators that could flag potential Phoenix activity. Currently, there are no defaults listed UNTIL a party/parties lodge a default. This is often too little too late.

In regard to suggested policy reforms to more specifically address repeated company failures and phoenix activity, the AICM members were even more emphatic in their support of these proposals than the ARITA members. Seventy-three percent of respondents 'strongly agreed', and 23% 'agreed', that all company directors should be issued with a Director Identification Number enabling ASIC and the ATO to track directors of multiple failed companies. One respondent commented that the:

> suggestion about a director identification number is excellent, however it should potentially go further and use tax file numbers when registering a company or an ABN – this will make it much harder to get around the system. There should also be consequences for former directors who have a history of doing this who nominate a front person as the director but actually run the company in the background. It should also be better publicised – name and shame.

Even more strikingly, 80% percent of respondents 'strongly agreed', and 16% 'agreed', that directors of multiple failed companies should be prohibited from managing another company unless they prove that they are competent to do so. This issue was raised in several written comments. These results suggest very high levels of dissatisfaction with how company directors are currently vetted and monitored.

IV CONCLUSION

The survey results presented in this research note paint a very concerning picture in regard to the presence of factors that increase the risk of illegal phoenix activity, the common occurrence of illegal phoenix activity and devastating consequences for creditors, and the inadequacy of current mechanisms for regulating this major social and economic problem. Whereas behaviour like illegal phoenix activity should be rare, or uncommon at best, the perspectives of those at the coalface of corporate insolvency suggest that illegal phoenix activity is commonplace. Almost a third of ARITA respondents believed that phoenix activity 'often' occurs in circumstances of liquidation, while over half of respondents 'often' or 'always' alleged a breach of civil obligations in an EXAD report in respect of liquidations where they believed phoenix activity had occurred.

The seemingly high rates of illegal phoenix activity are perhaps not surprising given the presence of various risk factors and the inadequacy of regulatory measures to prevent and regulate such activity. The results show that it is common for directors to be involved in repeated corporate failures and to seek the advice of pre-insolvency practitioners and debt restructures prior to insolvency. These factors, paired with significant concern regarding the managerial skills of such directors and the regard they hold for creditors, provide fertile ground for budding phoenix operators. The respondents also showed a moderate to very high level of dissatisfaction regarding almost every facet of regulatory measures relevant to curbing illegal phoenix activity, including: the regulation of the pre-insolvency and debt restructuring industry; the resourcing and competence of ASIC and its willingness to investigate allegations of wrongdoing; the funding of liquidator investigations by ASIC and taxation authorities; the provision of sufficient information by ASIC and the ATO to enable liquidators to carry out thorough investigations and credit managers to make appropriate approval decisions; and the lack of measures to specifically address repeated corporate failures and illegal phoenix activity, such as a Director Identification Number, competency requirements for directors who have been involved with multiple failed companies, and procedures that allow liquidators to formally allege illegal phoenix activity in EXAD reports. The end consequence of these repeated corporate (and regulatory) failures is stark, with 87% of ARITA respondents indicating that creditors 'always' or 'often' receive zero returns in liquidations involving phoenix activity. These survey results show that, from the perspective of those closest to the problem, it is a very significant problem that urgently needs to be addressed by regulators and government.