

**Australian Government  
Treasury**

**MODERNISING BUSINESS REGISTERS**

**Submission by Professor Helen Anderson, Professor Ian Ramsay and Mr Jasper Hedges, Melbourne Law School, and Professor Michelle Welsh, Monash Business School, Monash University.**

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We thank the Treasury for this opportunity to make a submission in response to the discussion paper on modernising business registry services. We are a group of academics currently undertaking an Australian Research Council-funded project examining the regulation of illegal phoenix activity. Our aim is to devise ways in which this damaging behaviour can be most efficiently and effectively prevented and deterred, without damaging legitimate business activities to the detriment of the economy.

As well as a series of scholarly and professional publications, we have produced three major reports: *Defining and Profiling Phoenix Activity* (December 2014); *Quantifying Phoenix Activity: Incidence, Cost, Enforcement* (October 2015), and *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement* (February 2017). Please [click here](#) to access these reports.

## **Introduction**

The Government's objectives in modernising the existing business registry services overlap with the objectives of our project on phoenix activity, as untrustworthy or unreliable registry services make it easier for people to engage in illegal phoenix activity and escape detection. In this submission, we recommend a number of measures aimed at enhancing the detection of illegal phoenix activity which involve suggested improvements to the way in which business registers are designed, populated with data, and utilised. The following is a brief summary of these recommendations, which are discussed in greater depth in the body of the submission.

- **Recommendation 1:** Directors of companies should be required to obtain a director identification number after proving their identity with 100 points of identification.
- **Recommendation 2:** Additional data should be collected from prospective directors at the time of incorporation or appointment via a streamlined online system.
- **Recommendation 3:** Additional data should be collected via reports as to the affairs (RATA) of insolvent companies and external administrator (EXAD) reports.
- **Recommendation 4:** Regulators' website information and complaint mechanisms should be improved so as to facilitate collection of data from the public.
- **Recommendation 5:** There should be greater data sharing between regulators.
- **Recommendation 6:** ASIC's registry data should be more accessible to the public.
- **Recommendation 7:** ASIC's disqualified persons registers should be consolidated into a single user-friendly and free-of-charge register.
- **Recommendation 8:** The ATO should check ABN applicants against ASIC's disqualified persons register to ensure directors are not acting while disqualified.

## Background on phoenix activity

The concept of phoenix activity broadly centres on the idea of a corporate failure ('Oldco') and a second company ('Newco'), often newly incorporated, arising from the ashes of its failed predecessor where the second company's controllers and business are essentially the same. Phoenix activity can be legal as well as illegal. Legal phoenix activity covers situations where the previous controllers start another similar business, using a new company when their earlier company fails, usually in order to rescue its business. Illegal phoenix activity involves similar activities, but the intention is to exploit the corporate form to the detriment of unsecured creditors, including employees and tax authorities. The illegality is generally as a result of a breach of directors' duties in failing to act properly in respect of the failed company and its creditors.

### Recommendation 1: Require directors to obtain a Director Identification Number

All existing and new directors should be required to have a director identification number (DIN) that would allow ASIC and other regulators such as the ATO to track repeat players accurately. Repeat players 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 a false date of birth. At present, the registration of an Australian company simply requires the name, address, and date and place of birth of each proposed officeholder.<sup>1</sup> ASIC's incorporation form<sup>2</sup> does not ask for the prior corporate history of a new company's 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.

The limitations of the existing company registration requirements 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 for opening bank accounts and obtaining passports. Directors would then be allocated a unique DIN, which would enable tracking of company directors who have been involved in multiple corporate failures and who may be likely to engage in illegal phoenix activity. This would allow regulators to know that Frank Nadinic, Frane Nadinic and Frank Nadimic are the same person.<sup>3</sup>

Accurate identity information assists regulators in locating and monitoring those individuals against whom enforcement action might be taken.<sup>4</sup> 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. A unique DIN, on the other hand, clearly differentiates people and makes them easy to identify. A computer prompt could tell ASIC that a person's DIN has been used for the directorships of dozens of companies that the person is unlikely to be managing or supervising in compliance with their legal obligations.<sup>5</sup> The DIN would also assist other regulators to perform their functions better. For example, the

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<sup>1</sup> *Corporations Act 2001* (Cth) s 117(2) ('*Corporations Act*').

<sup>2</sup> ASIC, *Form 201: Application for Registration as an Australian Company* (11 December 2012, last updated 1 July 2014); *Corporations Act* s 117(4).

<sup>3</sup> This true example was cited in Senate Economics References Committee, Parliament of Australia, *'I just want to be paid': Insolvency in the Australian Construction Industry* (2015) [12.31] ('*Construction Insolvency Report*'). Mr Nadinic acknowledged registering 32 to 33 companies under these names.

<sup>4</sup> Productivity Commission, *Productivity Commission, Business Set-up, Transfer and Closure*, Report No 75 (2015) 423, 425 ('*Business Set-up Report*').

<sup>5</sup> For example, their duties as directors under *Corporations Act* pt 2D.1.

DIN could alert the ATO to potential wrongdoing where an elderly person with no assessable income is the director of numerous companies.<sup>6</sup> The advantages of a DIN are obvious for agencies such as the Australian Criminal Intelligence Commission and the Australian Federal Police, who are seeking to identify and monitor those associated with organised crime<sup>7</sup> and complex illegal phoenix activity.<sup>8</sup> The DIN would also be of benefit to businesses, as the additional transparency would assist in restoring fair competition and trust to the business sector.

The DIN should be widely circulated. For example, employees should be provided with the DIN of the directors running the employer company on commencement of employment, in the same way that they are provided with the National Employment Standards. Potential creditors should either be provided with the DINs of the company's directors on quotes or other paperwork, or they should be directed towards a company website that contains this information. A duty could be imposed on directors to keep it current.

It is important to note that our DIN recommendation is separate from the debate about revealing, or concealing, the director's home address and date of birth. It has been suggested that this facilitates identity theft.<sup>9</sup> We pass no opinion on whether the current process whereby directors' home addresses are available publicly if a fee is paid should be maintained or not. In that regard, we note that the Irish *Companies Act 2014* has changed address disclosure requirements to enable an officer in specified circumstances to request that their residential address not be shown on the register of companies.<sup>10</sup>

In the event that the recommendation of a DIN is adopted, it must be adequately resourced. ASIC is in favour of checking the identity of directors,<sup>11</sup> and broadly supported the idea before the Productivity Commission,<sup>12</sup> but it has reservations about the cost and logistics of implementation.<sup>13</sup> Some or all of the costs associated with the implementation of this recommendation could be ameliorated if the DIN were introduced as a user pays system. Directors registering for the DIN for the first time could be required to pay a one-off fee to cover or subsidise the cost of the service. The federal opposition has adopted the DIN as one

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<sup>6</sup> See, eg, Australian Broadcasting Corporation ('ABC'), 'Unwitting Clients Signed up as Directors to Failing Businesses', *7.30 Report*, 17 October 2016 (Dan Oakes). The Australian Taxation Office ('ATO') does obtain identity information from 'associates' – those seeking an Australian business number ('ABN') for a company – but this information is not linked to any other company that those associates own or control.

<sup>7</sup> See, eg, Australian Crime Commission, *Organised Crime in Australia* (May 2015) 8, 25–6, 65–6.

<sup>8</sup> In addition to combatting organised crime and illegal phoenix activity, the DIN would assist in disrupting other forms of financial and corporate misconduct, like the notorious series of alleged incidents involving Mr Philip Whiteman: see Dan Oakes and Sam Clark, *Melbourne Man Identified in Multi-Million Dollar Tax Evasion Investigation Still in Business* (7 February 2017) ABC News <<http://www.abc.net.au/news/2017-02-06/melbourne-man-linked-to-tax-avoidance-still-in-business/8244850>>.

<sup>9</sup> See the concerns of Governance Institute of Australia discussed in Productivity Commission, *Business Set-up Report*, above n 4, 428.

<sup>10</sup> *Companies Act 2014* (Ireland) s 150(11); *Companies Act 2014 (Section 150) (No. 2) Regulations 2015* (Ireland).

<sup>11</sup> ASIC, Submission No 32 to Senate Economics References Committee, *Inquiry into Corporate Tax Avoidance*, February 2015, 21. The Senate Economics References Committee agreed, recommending that 'people who propose to become directors of companies be required to provide evidence of their identity to the ASIC': Senate Economics References Committee, Parliament of Australia, *Corporate Tax Avoidance (Part I): You Cannot Tax What You Cannot See* (2015) recommendation 16, [6.75] ('*Corporate Tax Avoidance Report*').

<sup>12</sup> ASIC, Submission No DR 58 to Productivity Commission, *Inquiry into Business Set-up, Transfer and Closure*, July 2015, [55]–[59].

<sup>13</sup> *Ibid* [57].

of its policies and suggested a one-off \$50 fee to cover implementation.<sup>14</sup> The benefits of incorporation are so significant for business people that the relatively small cost of obtaining a DIN is highly unlikely to discourage any potential entrepreneurs from incorporating a company. If potential directors do not have the financial means to pay a small amount for a DIN, it is unlikely that they are in a position to embark on a new business.

A director's DIN, like a company's ACN, would be publicly available and searchable. That is the point of it. To ensure that wrongdoers do not steal someone else's DIN and utilise it for incorporating companies, it needs to be password protected. Any ASIC lodgement requiring the DIN should require the use of the password.

The proposal to introduce a 100-point identity check and DIN is an urgently needed reform. It would greatly enhance data gathering about directors and their failed companies by ASIC and this data could then be shared with other agencies with enforcement powers including the ATO and the Fair Work Ombudsman (FWO). Importantly it will ensure that illegal phoenix operators cannot escape detection by creating false identities. Our view is that this reform would substantially reduce illegal phoenix. This proposal has been supported widely, including by:

- the Australian Labor Party, which has adopted it as one of its policies;<sup>15</sup>
- the Productivity Commission inquiry into business set-up, transfer and closure;<sup>16</sup>
- the Productivity Commission inquiry into the workplace relations framework;<sup>17</sup>
- the Senate Economics References Committee inquiry into insolvency in the Australian construction industry;<sup>18</sup>
- the Senate Economics References Committee inquiry into corporate tax avoidance;<sup>19</sup>
- the Senate Economics References Committee inquiry into superannuation guarantee non-payment;<sup>20</sup>
- the Australian Restructuring, Insolvency and Turnaround Association (ARITA);<sup>21</sup>
- Governance Institute of Australia (GIA);<sup>22</sup>
- the Australian Institute of Company Directors (AICD);<sup>23</sup>
- the Australian Small Business and Family Enterprise Ombudsman;<sup>24</sup>
- the Australian Chamber of Commerce and Industry;<sup>25</sup> and
- Master Builders Australia.<sup>26</sup>

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<sup>14</sup> Adam Gartrell, 'Labor Targets Dodgy Company Directors with Crackdown on Phoenix Schemes', *The Sydney Morning Herald* (Sydney), 24 May 2017.

<sup>15</sup> The Hon Andrew Leigh MP, Shadow Assistant Treasurer, 'Exposing Dodgy Directors' (Media Release, 24 May 2017).

<sup>16</sup> Productivity Commission, *Business Set-up Report*, above n 4, 423, recommendation 15.6.

<sup>17</sup> Productivity Commission, *Workplace Relations Framework*, Report No 76 (2015) vol 1, 48, vol 2, 915, 938.

<sup>18</sup> Senate Economics References Committee, *Construction Insolvency Report*, above n 3, recommendation 36.

<sup>19</sup> Senate Economics References Committee, *Corporate Tax Avoidance Report*, above n 11, recommendation 16.

<sup>20</sup> Senate Economics References Committee, Parliament of Australia, *Superbad – Wage Theft and Non-Compliance of the Superannuation Guarantee* (2017) recommendation 20.

<sup>21</sup> Australian Restructuring Insolvency and Turnaround Association, *Policy Positions of the Australian Restructuring Insolvency and Turnaround Association* (February 2015) policy 15-05.

<sup>22</sup> Governance Institute of Australia, 'Identification Numbers Will Make It Easier to Track Directors' (Media Release, MR/2015/13, 10 July 2015).

<sup>23</sup> Senator Katy Gallagher, 'Who Supports Labor's Plan for a Director Identification Number, to Crack Down on Phoenix Companies?' (Media Release, 25 May 2017).

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

The DIN also has significant support from insolvency, credit and governance professionals:

- we conducted a survey of members of ARITA in which 57% of respondents ‘strongly agreed’, and 33% ‘agreed’, that a DIN should be introduced (n = 148);<sup>27</sup>
- we conducted a survey of members of the Australian Institute of Credit Management (AICM) in which 73% of respondents ‘strongly agreed’, and 23% ‘agreed’, that a DIN should be introduced (n = 120);<sup>28</sup>
- a survey conducted by the Australian Institute of Company Directors (AICD) found that 67% of AICD members supported the proposal that directors be allocated a unique DIN (n = 225).<sup>29</sup>

**Recommendation 1: Require directors to obtain a Director Identification Number**

- Directors of companies should be required to obtain a director identification number (DIN) after proving their identity with 100 points of identification.
- At the time of annual reviews or annual returns for existing companies, directors should be required to quote their DIN.
- In relation to previously deregistered companies, directors should be required to provide information about these companies as part of the process of obtaining a DIN.
- A penalty should apply for omitted or incorrect information.
- The DIN should be password protected for directors’ interactions with regulators.
- Like a company’s ACN and ABN, the DIN should be visible to the public, and, in particular, prospective employees and creditors, via the company’s documentation or website, to enable searches of the director’s prior corporate history.
- Directors should be subject to a duty to keep company documentation and websites current regarding their DIN.
- A small charge should be levied on prospective directors applying for a DIN to help defray the cost of implementing the system.

**Recommendation 2: Collect additional data upon incorporation or appointment**

To be effective, DIN information needs to be connected to companies being newly incorporated, existing companies already managed by the director, and deregistered companies with which the director has been associated. The DIN, used as part of the company registration process, would provide significantly more information to ASIC and other regulators than the present paper form does. An online application system, completed by the applicant, is the most efficient. The United Kingdom is moving to an online system.<sup>30</sup> Directors with existing and previous directorships would cite their DIN and the incorporation application form would pre-populate with those details. Directors of existing companies should be required to provide their DIN as part of the completion of the annual review process<sup>31</sup> or annual reporting.<sup>32</sup> Information about associations with previously deregistered

<sup>27</sup> Survey on file with authors.

<sup>28</sup> Survey on file with authors.

<sup>29</sup> Australian Institute of Company Directors, Submission to Productivity Commission, *Draft Report: Inquiry into Business Set-up, Transfer and Closure in Australia*, 3 July 2015, 9.

<sup>30</sup> In the UK, the *Small Business, Enterprise and Employment Act 2015* (UK) required the Secretary of State to provide, by 31 May 2017, a streamlined incorporations process, which can be completed online on a single occasion: s 15.

<sup>31</sup> *Corporations Act* ch 2N.

<sup>32</sup> *Ibid* ch 2M.

companies could be required from directors as part of the process of obtaining DINs.<sup>33</sup> A penalty for false statements would apply, as it does to all other documents lodged with ASIC.<sup>34</sup>

The aim here is to equip ASIC with information about prospective directors, allowing the regulator to take appropriate action which may include placing them on a watch list or identifying that they are disqualified from managing corporations. An equally important aim is to alert the would-be director to the fact that ASIC has this information at its fingertips. They, and their previous corporate histories, are not invisible. Directors would be required to supply any missing information, and if this is false, they may be prosecuted.<sup>35</sup> All of this director and incorporation information would add to the intelligence that ASIC could share with other government agencies.

At present, to register a company, a prospective director must either complete Form 201 and mail it to ASIC with appropriate payment, or must transact through a business service provider who uses software to deal directly with ASIC.<sup>36</sup> This may involve the purchase of an aged 'shelf' company that the business service provider has already registered. Our suggestion that the prospective director complete the online form themselves, or with the assistance of someone else, would eliminate the need for the purchase of already-incorporated companies from shelf company providers.

In our opinion, this is a good thing. In the past, when incorporation involved weeks of delay while forms were being processed, it made sense to be able to acquire an existing company immediately. However, those days have passed, as a company can now be created online within an hour. We question why aged shelf companies continue to be used. According to Australian Resident Director and Corporate Services,

Buying a shelf company provides a number of advantages over newly incorporated companies, making them an attractive solution for many clients. These advantages include:

- Increased Business Partner Confidence – older shelf companies project a greater sense of confidence to potential business partners or clients who feel more comfortable dealing with an established company.
- Access to Restricted Services – Some licensed services require a company to be in business for a certain length of time in an applicable industry in order to be eligible.
- Improved Credit Options – Banks or financial service providers sometimes hesitate to open bank accounts, provide merchant facilities, or offer credit to new companies. Buying an aged shelf company can rectify this and provide enhanced credit opportunities, allowing for increased borrowing power.
- Favourable for Immigration Purposes – Used and aged companies are of far greater advantage for Australian immigration purposes, which sometimes require a company to have been in business for several years.

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<sup>33</sup> For example, directors could be asked: 'Have you ever been a director or other officer of a company that has been deregistered either with or without being liquidated? If so, please provide the registered company name (if applicable) and Australian Company Number (ACN) of every company of which you have been a director or other officer that has been deregistered either with or without being liquidated.'

<sup>34</sup> *Corporations Act* s 1308(2).

<sup>35</sup> *Corporations Act* s 1308(2), sch 3 item 335.

<sup>36</sup> See ASIC, *Steps to Register a Company* <<http://asic.gov.au/for-business/registering-a-company/steps-to-register-a-company/>>.

- Contract Tendering Eligibility – some jurisdictions have strict requirements for tendering, requiring companies to be in business for a period of time before they can be eligible to bid on a contract.<sup>37</sup>

We question the terminology used above, such as companies being ‘in business for a period of time’ or ‘an established company’, when the companies themselves are quoted as ‘never traded’.<sup>38</sup> Shelf companies are also used in other jurisdictions, and for the same sorts of purposes, such as ‘[t]o create an appearance of corporate longevity, which may boost investor or consumer confidence.’<sup>39</sup>

In addition to questioning the utility of aged shelf companies, we also have concerns that they may make it more difficult for regulators to use data analytics to identify companies that are engaged in, or at risk of engaging in, illegal phoenix activity. In cases of cyclical phoenix activity – i.e. where Oldcos are repeatedly liquidated or abandoned to shed debts as part of an ongoing ‘business model’ – the Oldcos will not usually have a long incorporation age. If a shorter incorporation age is used as one of the parameters for searching regulator databases for ‘at risk’ companies, aged shelf companies may not be captured by the search. A savvy phoenix operator could use shelf companies of varying ages to create the impression that each company that fails is an established, independent company that has failed due to unforeseen circumstances, rather than as part of a deliberate pattern of fraudulent behaviour. While the introduction of a DIN would go a long way toward identifying this kind of systematic abuse of the corporate form, we think that aged shelf companies pose an unnecessary risk of making it easier to engage in illegal phoenix activity.

Some would-be company directors might feel more comfortable with some assistance from a business services provider in incorporating a company. Where a business services provider is used, the director should still be required to acquire and provide their DIN. Where an existing trading company is purchased, the DIN would be required to be stated on the ‘notification of change to directors’ form.<sup>40</sup> However, we think that the government should review the desirability of business service providers selling aged shelf companies, as it is unclear whether they continue to serve any beneficial policy objective and we are concerned that they may increase the risk of systematic illegal phoenix activity by thwarting regulators’ data analytics.

### **Recommendation 2: Collect additional data upon incorporation or appointment**

- The process of incorporation should be online with the prospective directors quoting their DINs.
- The DIN should be quoted for changes of directorship within existing companies.
- While the DIN should enable the application form for registration as an Australian

<sup>37</sup> Australian Resident Director and Corporate Services, *Australian Pre-registered Company* <<https://www.ardcs.com.au/corporate-services/australian-shelf-company/>>. See also ABN Australia, *Aged Shelf Companies* <<https://www.abnaustralia.com.au/services/aged-shelf-companies.html?ref=dga>>: ‘Sometimes the incorporation age is a consideration for presenting longevity.’

<sup>38</sup> Australian Resident Director and Corporate Services, *ibid*.

<sup>39</sup> Formacompany Worldwide Incorporations, *Advantages of a Shelf Company* <<http://www.formacompany.com/en/advantages-of-shelf-company.php>>. See also Hero Ventures, *Old Ready Made Shelf Companies List – Previously Registered* <<http://www.readycompanies.com/ShelfCompanies.htm>>; Coddan, *Buy a Shelf Company (Off-The-Shelf Company) from Coddan* <<https://www.coddan.co.uk/ready-made-off-the-shelf-companies/>>.

<sup>40</sup> ASIC, *Form 490: Notification of Change to Directors of a Registered Body* (17 January 2011, last updated 1 July 2014); *Corporations Act* s 601CV(1)(c).

company to pre-populate with previous incorporation history, directors should be required to supply missing information.

- The government should review the desirability of business service providers selling aged shelf companies.

### **Recommendation 3: Collect additional data via RATAs and EXAD reports**

#### *Reports as to Affairs (RATAs)*

Early in a liquidation, the liquidator asks the directors to provide books and records,<sup>41</sup> and to supply a RATA. These two requests are designed to provide the liquidator with the information needed to begin the liquidation.

The RATA asks about the company's assets and liabilities and assists the external administrator in gathering in the company's property and paying off its creditors. At present, the RATA is a very limited document.<sup>42</sup> It does not ask any questions about previous company failures with which the director has been associated. This is a missed opportunity for the liquidator to become aware of facts which might encourage further investigation and an application to the Assetless Administration Fund.<sup>43</sup> It also does not ask about whether the director is currently managing any other existing company. This may alert the liquidator to illegal phoenix activity if the director is involved with the company to which Oldco's assets have been sold.

If the DIN measure is implemented, the RATA process should be revamped as follows. Upon accepting the liquidation engagement, the liquidator would notify ASIC. ASIC would then provide the liquidator with a pre-populated RATA that already contains information about the director and their previous and existing directorships. This measure would substantially increase the information available to liquidators, and it has the potential to improve the performance of their duties and reduce their costs.

Providing liquidators with this information, and giving it to them for free, is vital. Because liquidators have professional obligations of independence,<sup>44</sup> they are not familiar with the prior corporate history of the directors who engage them to wind up their insolvent companies. At present, liquidators winding up a phoenix company must pay ASIC<sup>45</sup> 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 as possible, at

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<sup>41</sup> *Corporations Act* s 530A(1).

<sup>42</sup> See Explanatory Memorandum, *Insolvency Law Reform Bill 2015* (Cth) [9.335], [9.345]–[9.347], [9.350].

<sup>43</sup> The Assetless Administration Fund ('AAF') is administered by ASIC. With funds provided by the government, it finances insolvency practitioners in their work on behalf of companies with few or no assets. The aim of the fund is to overcome the inability of liquidators to make proper investigations due to financial constraints. 'A particular focus of the AA Fund is to curb fraudulent or illegal phoenix activity': ASIC, *Regulatory Guide 109: Assetless Administration Fund – Funding Criteria and Guidelines* (November 2012) [109.6].

<sup>44</sup> Australian Restructuring Insolvency and Turnaround Association, *ARITA Code of Professional Practice* (3<sup>rd</sup> ed, 2014) ch 6.

<sup>45</sup> Under s 4 of the *Corporations (Fees) Act 2001* (Cth), the definition of 'chargeable matter' includes: '(c) the inspection or search of a register kept by, or a document in the custody of, ASIC ...'; and '(d) the making available by ASIC ... of information (whether in the form of a document or otherwise).' The fee charged does not need to bear any relationship to the cost of providing the service: s 6(2).

the commencement of the engagement, to ensure that the liquidators can perform their gatekeeper roles efficiently and effectively.

After receiving the pre-populated RATA, the directors would then be obliged to provide additional information relating to the present company and its demise, and to fill in any information gaps relating to previous company failures. As at present, the form would ask for details of assets and liabilities, but a revised form would also ask for details of significant asset transfers by the insolvent company within the past 12 months, which can sometimes be an indicator of illegal phoenix activity.

We strongly support liquidators being given whatever additional information would assist them in detecting phoenix activity so that they or ASIC may take action where appropriate. This valuable opportunity to obtain data from directors of failed companies should be utilised more fully.

### *External Administrator (EXAD) Reports*

Improved reporting by external administrators at the conclusion of their engagements has the potential to significantly improve the quality and quantity of information about illegal phoenix activity which is available to ASIC and to other regulators. Expanded external administrator reports also make it clear to the failed companies' directors and administrators that ASIC will be armed with the information to take action in appropriate circumstances.

The *Corporations Act* requires liquidators to report a number of matters to ASIC.<sup>46</sup> A central part of this reporting relates to misconduct by those managing companies before and during external administrations. External administrators notify ASIC whether they suspect the conduct breaches civil penalty or criminal laws and whether they hold documentary evidence to support their claims.

At present, external administrators' statutory reports (EXAD reports) are 'tick box' reports,<sup>47</sup> processed by computers. They do not include a question about whether phoenix activity is suspected. This should be remedied. This suggestion was expressly endorsed by the Senate Economics References Committee's (SERC) Construction Insolvency Report in 2015.<sup>48</sup> The SERC, considering ASIC's performance in 2014, also recommended a system by which external administrators could indicate to ASIC which reports required 'the most urgent attention and investigation'<sup>49</sup> but this recommendation was simply 'noted' by the government, with the claim that ASIC 'has worked, and continues to work' on this.<sup>50</sup> We

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<sup>46</sup> This reporting is done in compliance with ASIC, *Regulatory Guide 16: External Administrators – Reporting and Lodging* (July 2008) ('ASIC Regulatory Guide 16').

<sup>47</sup> Ibid. The form completed by the external administrator is ASIC, *Form EX01: Schedule B of Regulatory Guide 16 – Report to ASIC under s422, s438D or s533 of the Corporations Act 2001 or for Statistical Purposes* (13 January 2016).

<sup>48</sup> Senate Economics References Committee, *Construction Insolvency Report*, above n 3, recommendation 11, [5.34]: 'The committee recommends that ASIC, in consultation with ARITA, work out a method whereby external administrators can indicate clearly in their statutory reports whether they suspect phoenix activity has occurred. For example, to serve as a red flag to ASIC, include a box in the reporting form that external administrators would tick if they suspected phoenix activity.'

<sup>49</sup> Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014) recommendation 17, [15.66] ('Performance of ASIC Report').

<sup>50</sup> Australian Government, *Australian Government Response to the Senate Economics References Committee Report: Performance of the Australian Securities and Investments Commission* (October 2014) 9.

believe this deserves immediate attention, as the SERC's report outlined 10 pages of complaints about ASIC's response to reports of misconduct<sup>51</sup> following which the committee stated that it 'received many other complaints [about ASIC] that are too numerous to detail here.'<sup>52</sup>

The EXAD reports should also provide some space in which ASIC can be advised of the specific details of phoenix activity and any other relevant information about the company and its directors.<sup>53</sup> Clearly, this would necessitate a move away from the automated processing<sup>54</sup> of the reports of misconduct that sees 89% '[a]nalysed and assessed for no further action' and only 11% followed with an automated request for a '[s]upplementary report'.<sup>55</sup>

These reforms would be easy to implement with online reporting. For example, where a box had been ticked to indicate that phoenix activity<sup>56</sup> was suspected, an additional box could appear inviting the external administrator to make comments.

Online reporting now takes place in the United Kingdom. Online reporting for external administrators commenced in 2016 and the online form expands depending upon the boxes ticked by the external administrator. From 6 April 2016, insolvency practitioners and official receivers must submit director conduct reports to the Insolvency Service (via the online reporting service) within three months from the date of appointment. The report must describe any conduct which may assist the Insolvency Service in deciding whether it is in the public interest to apply for the making of a disqualification order against a director.<sup>57</sup>

ASIC could use the collated EXAD data to build profiles of directors who may warrant further action. Identified via their DINs, ASIC's database could collate the numbers of failed companies with which each director was associated. This detailed collection of information enhances the likelihood of successful enforcement action by ASIC and other regulators.

Given there is growing concern about the involvement of pre-insolvency advisors in illegal phoenix activity, it also makes sense for external administrators to be able to tick a box to indicate that the company's directors had previously received advice from a pre-insolvency advisor. This would enable regulators to start to build an evidence-based understanding of the scale and workings of the pre-insolvency advice industry, which is currently unknown.<sup>58</sup> The

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<sup>51</sup> Senate Economics References Committee, *Performance of ASIC Report*, above n 49, 227–36.

<sup>52</sup> *Ibid* [15.38].

<sup>53</sup> See *ASIC Regulatory Guide 16*, above n 46. In December 2014, Form EX01 was changed to ask for additional information where insolvent trading was alleged. No amendment was made with respect to phoenix activity.

<sup>54</sup> Australian National Audit Office, *ASIC's Processes for Receiving and Referring for Investigation Statutory Reports of Suspected Breaches of the Corporations Act 2001*, Audit Report No 18 (2006–07) [2.7]–[2.12].

<sup>55</sup> ASIC, *Annual Report 2015-2016* (14 October 2016), 95. See also Australian National Audit Office, *ibid*, [3.1]–[3.13]. It appears the situation has not changed since 2007: see Senate Economics References Committee, *Performance of ASIC Report*, above n 49, [15.60]–[15.63].

<sup>56</sup> Although definitions of 'phoenix activity' vary to some extent, we think that most external administrators would be familiar with the broad concept of phoenix activity. However, if ASIC were to receive a significant number of EXAD reports indicating a lack of understanding about the mechanics of phoenix activity, it may need to consider providing a basic definition of 'phoenix activity' in EXAD reports.

<sup>57</sup> Section 107 of the *Small Business Enterprise and Employment Act 2015* (UK) inserted a new section 7A into the *Company Directors Disqualification Act 1986* (UK).

<sup>58</sup> According to the ATO's national director on phoenix enforcement, Michael Seddon: 'When it comes to pre-insolvency advisors, they are just an unknown for us. They're unregulated and they're unseen until we actually become the victim of it. Our common ways of actually running into these people are really through

first step in being able to better regulate pre-insolvency advisors' involvement in phoenix activity is to obtain accurate empirical data about the industry.

**Recommendation 3: Collect additional data via RATAs and EXAD reports**

- ASIC should supply pre-populated RATA documents to liquidators containing information held by ASIC.
- There should be no cost to liquidators for the information contained in the pre-populated document.
- The RATA form should be amended to require additional information about:
  - the directors;
  - previous company failures with which the directors have been associated; and
  - significant asset transfers by the insolvent company within the past 12 months.
- EXAD Reports should be amended to include:
  - a question about whether phoenix activity was suspected;
  - a question about the involvement of pre-insolvency advisors;
  - 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
  - a method by which external administrators could indicate to ASIC which reports required 'the most urgent attention and investigation'.

**Recommendation 4: Facilitate collection of data via complaints from the public**

The general public – victims of phoenix activity or otherwise – are a valuable source of information for regulators and other government agencies. Regulator websites need to contain better information about illegal phoenix activity and about complaint mechanisms so that fuller intelligence can be obtained from the public. Ideally a common format for regulator webpages containing consistent information and complaint mechanisms should be adopted, so that the person receives the same information regardless of where they begin their search. This would be a useful outcome of the Interagency Phoenix Forum (IAPF), hosted by the ATO.<sup>59</sup> As an extra benefit, well-prepared regulator websites can play an educative role for both potential phoenix victims and for those who might be tempted to engage in illegal phoenix activity.

The regulators that deal with illegal phoenix activity, such as ASIC, the ATO, and the FWO, have a range of approaches to receiving reports of misconduct. In May 2016, the Fair Work Ombudsman, Natalie James, announced that an 'Anonymous Report' function had been added to the FWO website.<sup>60</sup> The site allows those who suspect misconduct such as the exploitation of workers to alert the FWO via an online form. At the date of writing, the site does not list 'phoenix activity' as one of the issues that can be reported. The FWO should do

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liquidators, registered tax agents and their clients. Going forward, it would be far more effective if we were able to deal with this particular industry at a known population level': ARITA, 'Pre-insolvency Advisors Behaving Badly: The Profession's View' (2016) 28(3) *Australian Restructuring, Insolvency & Turnaround Association Journal* 15, 16.

<sup>59</sup> The Inter-agency Phoenix Forum ('IAPF') members are listed at ATO, *Membership* <<https://www.ato.gov.au/general/the-fight-against-tax-crime/in-detail/inter-agency-phoenix-forum/inter-agency-phoenix-forum/?page=3#Membership>>. At the time of writing, other members were still to be added to the list shown on the website. They are the Australian Border Force, Australian Business Register, Department of Human Services and Safe Work Australia.

<sup>60</sup> See FWO, 'Help Us Keep Workplaces Fair' (Media Release, 27 May 2016).

so, and include a message that the person making the report should address their complaint to ASIC. The Anonymous Report does do this with unfair dismissal (with a referral to the Fair Work Commission) and with taxation and superannuation (with a referral to the ATO).

The ATO has a direct phoenix complaint mechanism<sup>61</sup> – an email to phoenix@ato.gov.au – but ASIC does not. In response to an emailed request to ASIC ‘How do I complain about phoenix activity?’, we were directed to ASIC’s ‘How to Complain’ site<sup>62</sup> and ‘illegal phoenix activity’ site.<sup>63</sup> On this latter site, which contains 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)

Contact 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

Report your concerns to ASIC. Information on how to report your concerns is available on the [ASIC website](#).

We tried this. This ASIC website link is the general ‘How to Complain’ link, noted above.

In relation to the ASIC website,<sup>64</sup> the pro-active advice to those who might consider doing business with a possible phoenix operator is unhelpful. It recommends asking the company a series of questions then verifying that information using ASIC Business Checks, an app available for use on smartphones and tablets. The app states:

The information in this App provides some general steps that you can take to reduce the risks of being swindled by unreliable operators and fly-by-night businesses. While the information provides general guidance, you should be mindful that it cannot protect you in all your business interactions.

As a consumer or small business owner, you need to ensure that your interests are protected when you deal with other businesses. There are five steps that may help you do this:

1. Ask questions about the company, business and people that you are dealing with [e.g. do you know the company name and Australian Company Number (ACN); the business name and Australian Business Number (ABN)]?
2. Verify information about the company, business and people you are dealing with by checking ASIC’s registers.
3. Seek help from ASIC if you need more information or from a professional business adviser (e.g. an accountant or a lawyer) if you are still unsure about the company, business or people you are dealing with.

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<sup>61</sup> We note the ATO’s revamped illegal phoenix activity webpage, released 30 January 2017, which provides valuable information about what the ATO has to offer and what other regulators may do to assist.

<sup>62</sup> ASIC, *Contact Us – How to Complain* <<http://asic.gov.au/about-asic/contact-us/how-to-complain>>.

<sup>63</sup> ASIC, *Illegal Phoenix Activity* <<http://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/>>.

<sup>64</sup> Note that the Senate Committee inquiry into the performance of ASIC in 2014 recommended a number of improvements to the ASIC website: Senate Economics References Committee, *Performance of ASIC Report*, above n 49, recommendation 40, [22.38]. The government agreed with this recommendation: Australian Government, above n 50, 20. ASIC has made some general improvements to its website in response to this recommendation. However, there is still significant scope to improve the ASIC website information and complaint mechanisms relating to phoenix activity.

4. Monitor the documents lodged by companies by signing up to ASIC's free Company Alert service.
5. Report suspected misconduct to ASIC if you believe that the directors or the company may be acting unlawfully. You can contact us on 1300 300 630 or lodge a complaint online.

We take issue with a number of these points. Public searches of ACNs and ABNs say nothing about a company's financial viability or the people behind the company, and provide no reassurance against 'unreliable operators and fly-by-night businesses'. Checking ASIC registers only reveals information that has been supplied to ASIC by the directors and officers of this company; it does not 'verify' anything about the company or its business, nor does it say anything about the past corporate history of its directors. An attempt by us to 'seek help from ASIC' – ASIC's number three point above – about a specific company led to a recommendation to purchase various documents available from the ASIC registry, and no other help was offered. The Company Alert service lets you know when a document has been lodged, which may be too late to avoid becoming embroiled in a phoenix situation.

It is pleasing to see ASIC invite business people to make a complaint about phoenix activity but elsewhere on the 'illegal phoenix activity' webpage,<sup>65</sup> it cautions:

We rely on liquidators to provide us with reports about illegal (e.g. fraudulent) phoenix activity. Therefore, if you are concerned about such conduct, the best course of action is to contact the liquidator where one has been appointed ...

Generally, we do not act on behalf of individuals to help them recover lost money, including money lost through illegal phoenix activity. You should seek advice about your own remedies.

ASIC needs to present a consistent and correct message, or else it risks 'over-promising and under-delivering'. Given ASIC's role as the corporate regulator, it should provide a straight-forward mechanism for those making the complaints about companies and their directors.

**Recommendation 4: Facilitate collection of data via complaints from the public**

- To improve the detection of phoenix activity, there should be a clear and consistent message across regulator websites about what phoenix activity is, how to report suspected phoenix activity, what avenues of redress are available to victims, and how to obtain further advice.
- As a task of the Interagency Phoenix Forum, regulators should endeavour to devise a common format for their phoenix information and complaint webpages.
- The FWO should add phoenix activity as an issue that can be reported on its Anonymous Report webpage.
- Complaint mechanisms should be straightforward, such as the ATO's direct phoenix email address.
- ASIC should revise its phoenix information and complaint webpages to ensure that they are accurate and user-friendly.

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<sup>65</sup> ASIC, above n 63.

## Recommendation 5: Increase data sharing between regulators

There needs to be fuller sharing of information amongst regulators. This applies both to suspicions of offences being committed and to raw data that allows regulators to detect instances of illegal phoenix activity. The United Kingdom government, in passing the *Small Business, Enterprise and Employment Act 2015* (UK) claims it will facilitate better ‘working between regulators by removing legislative barriers which restrict the use which may be made of information and reports provided by other regulators in deciding whether or not to bring disqualification proceedings’ and ‘joining-up and more efficient working between financial regulators resulting in more effective interventions’.<sup>66</sup>

In Australia, the general public may have a ‘Big Brother’ view of government in terms of the sharing of information, but the contrary is true in the context of illegal phoenix activity. Some limits on information sharing are attributable to legislative restrictions stemming from specific Acts as well as general privacy laws<sup>67</sup> but the fact remains that information is not shared amongst regulators as fully and effectively as the law currently allows. Experienced phoenix operators and their advisors are likely to realise that if their wrongdoing is relatively small scale and unobtrusive, it will probably go undetected.

Improvements must be made to the sharing of raw data amongst regulators. At present, the ATO and the FWO refer suspected phoenix operators to ASIC for action, which may not happen due to ASIC’s resourcing and enforcement priorities. These organisations should receive more and better information from ASIC so that they can do their own detection work and utilise their own regulatory tools.

For example, at present, if the FWO receives a report that an employer has been underpaying its workers, it can conduct an ASIC search to discover the name of its directors so that it can bring an accessory action against them.<sup>68</sup> But it cannot discover that the directors have done a similar thing with the previous 15 liquidated entities that they controlled because it cannot search for their names on anything other than the listing of disqualified directors. Accessing prior corporate histories would allow the FWO to decide how strongly to pursue the case and whether, for example, it should proceed to court or accept a settlement. In turn, the FWO could use information about phoenix activity in a referral to ASIC that the directors may have breached their duties as a director by deliberately liquidating companies to avoid large fines against them.<sup>69</sup>

Generally speaking, it is permissible in Australia for government agencies to share information with other agencies. The widest powers are under the *Fair Work Act* where

The Fair Work Ombudsman may disclose, or authorise the disclosure of, the information if the Fair Work Ombudsman reasonably believes:

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<sup>66</sup> UK Department for Business, Innovation & Skills, *Small Business, Enterprise and Employment Act: Directors’ Disqualification and Creditor Compensation Fact Sheet* (2015) 2–3 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/417337/bis-15-264-SBEE-Act-directors-disqualifications-fact-sheet.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417337/bis-15-264-SBEE-Act-directors-disqualifications-fact-sheet.pdf)>.

<sup>67</sup> Privacy is discussed further at Recommendation 6.

<sup>68</sup> *Fair Work Act 2009* (Cth) s 550 (*‘Fair Work Act’*).

<sup>69</sup> Illegal phoenix activity goes beyond the non-payment of debts such as taxation obligations and employee entitlements. It can be done to avoid a fine or contractual obligation: see, eg, Nick Toscano, ‘Supermarket Recycling Business Liquidated to Escape \$800,000 Worker Death Fine’, *The Sydney Morning Herald* (Sydney), 23 July 2016.

- (a) that it is necessary or appropriate to do so in the course of performing functions, or exercising powers, under this Act; or
- (b) that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.<sup>70</sup>

ASIC's power of disclosure is more cautiously expressed. Section 127(1)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth) deals with information 'given to it in confidence in or in connection with the performance of its functions or the exercise of its powers under the corporations legislation.' The section provides that 'the disclosure of information as required or permitted by a law of the Commonwealth or a prescribed law of a State or internal Territory is taken to be authorised use and disclosure of the information.'<sup>71</sup> In addition, s 127(4) provides that

[w]here the Chairperson is satisfied that particular information ... (b) will enable or assist the government, or an agency, of a State or Territory to perform a function or exercise a power; ... the disclosure of the information to the agency, government, officer or body by a person whom the Chairperson authorises for the purpose is taken to be authorised use and disclosure of the information.<sup>72</sup>

In February 2017, the Treasury Laws Amendment (2017 Measures No 1) Bill 2017 was introduced to the House of Representatives. One of its provisions<sup>73</sup> amended the *Australian Securities and Investments Commission Act 2001* (Cth) to allow ASIC to more readily share confidential information with the Commissioner of Taxation.<sup>74</sup> We supported this amendment when the Bill was released for public comment.<sup>75</sup>

The ATO's powers of disclosure are outlined in the *Taxation Administration Act 1953* (Cth), where it may disclose information to a variety of other agencies including ASIC in specified circumstances.<sup>76</sup> When these powers were inserted in 2010, the preceding explanatory memorandum expressly acknowledged that '[i]nformation held by the ATO may be invaluable for ASIC in pursuing action against directors who may repeatedly be engaged in fraudulent phoenix activity.'<sup>77</sup> It appears that secondary disclosure – passing on received information to a third agency – is permissible under some legislation with sufficiently senior sign-off.<sup>78</sup>

<sup>70</sup> *Fair Work Act* s 718(2). The sources of the information are also widely defined: s 718(1).

<sup>71</sup> *Australian Securities and Investments Commission Act 2001* (Cth) s 127(2) ('ASIC Act').

<sup>72</sup> *Ibid* s 127(4)(b).

<sup>73</sup> Treasury Laws Amendment (2017 Measures No 1) Bill 2017 (Cth) sch 2 s 1.

<sup>74</sup> The amendment adds '(g) the Commissioner of Taxation' to s 127(2A) of the *ASIC Act*.

<sup>75</sup> Helen Anderson, Ian Ramsay and Michelle Welsh, Submission to Treasury (Cth), *ASIC-ATO Information Sharing: Exposure Draft*, December 2016.

<sup>76</sup> *Taxation Administration Act 1953* (Cth) sch 1, s 355-65 ('*Taxation Administration Act*'). According to the Explanatory Memorandum to the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010 (Cth), the aim of the Bill was to consolidate and standardise privacy provisions that had previously been spread over many pieces of legislation. While '[t]he key principle of the new framework is the protection of taxpayer information ... [d]isclosures of information are, however, permitted in instances where privacy concerns are outweighed by the public benefit of those disclosures': at 3.

<sup>77</sup> Explanatory Memorandum, Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010 (Cth) [5.55].

<sup>78</sup> See, eg, *Taxation Administration Act 1997* (Vic) s 94, which allows further disclosure of information obtained from a tax officer where it is for the purpose of the enforcement of a law or protecting the public revenue and the Commissioner consents to the disclosure. Primary disclosure is permitted under s 92(1) of that Act where it is made to an 'authorised recipient' listed in s 92(1)(e). Section 92(1)(e) lists several government agencies, including the Victorian Legal Services Board and the Victorian Legal Services Commissioner: ss 92(1)(e)(vii)–(viii).

Nonetheless, we understand from our discussions with many of those involved in phoenix enforcement that information – confidential or otherwise – does not flow amongst agencies as freely as it might. This issue was raised by the Cole Royal Commission in 2003.<sup>79</sup> It is possible that government agencies adopt a risk-averse approach to sharing information to avoid possible breaches of confidentiality rules.<sup>80</sup> Many agencies with an interest in phoenix activity are members of the IAPF.<sup>81</sup> The Phoenix Taskforce is now a prescribed taskforce,<sup>82</sup> although the membership of the IAPF and the Phoenix Taskforce differ slightly.<sup>83</sup> Taskforce status allows the exchange of tax information within the forum.<sup>84</sup> However, according to the ATO, taskforce status does not permit tax information to be passed on by recipient agencies to others within the forum, or for the ATO to receive information from other agencies.<sup>85</sup> This apparent lack of co-operation led the 2015 SERC Construction Insolvency Report to make a formal recommendation that ‘consideration be given to amending confidentiality requirements in statutory frameworks of agencies participating in the Phoenix Taskforce to permit dissemination of relevant information to the ATO.’<sup>86</sup> The Coalition Senators’ Additional Comments at the end of that report also noted that:

As these agencies are characterised by a diversity of aims, powers and responsibilities, any changes to the operation of the Taskforce, including the changes to confidentiality requirements outlined in Recommendation 12, would need to be considered by all the relevant agencies and would take time to resolve.<sup>87</sup>

It is possible that Treasury’s Bill in late 2016 to allow ASIC to release confidential information to the ATO without the Chairperson’s authorisation is in response to the SERC recommendation.<sup>88</sup> It would be highly beneficial to the detection of illegal phoenix activity if this sort of legislative amendment could be made more widely.

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<sup>79</sup> Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report: Reform – National Issues Part 2* (February 2003), recommendation 105.

<sup>80</sup> See Australian Law Reform Commission (‘ALRC’), *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) [15.54]: ‘...agency culture can prevent information from being disclosed in situations where disclosure would be lawful and appropriate.’ The ALRC went on to quote a 2008 Independent Review Panel examining the *Freedom of Information Act 1992* (Qld): ‘Inherent at an organisational level, the urgency of the everyday imperatives in modern government can pull the public sector’s information culture towards information protection in the interests of issues management, at the expense of the important but less urgent information goals for transparency in government.’

<sup>81</sup> See ATO, above n 59.

<sup>82</sup> *Taxation Administration Act* sch 1 s 355-70(12): ‘The regulations [*Taxation Administration Regulations 1976* (Cth)] 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* (Cth) contains a current list of prescribed taskforces, including the ‘Phoenix Taskforce’.

<sup>83</sup> See ATO, above n 59; ATO, *Phoenix Taskforce* <<https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/?=redirected>>.

<sup>84</sup> *Taxation Administration Act* sch 1 s 355-70(1) item 4, inserted by the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* (Cth) sch 1 item 1. The ATO makes the information available to the Taskforce, and member agencies can access that information from the Taskforce. The information can only be used for prescribed taskforce purposes.

<sup>85</sup> Senate Economics References Committee, *Construction Insolvency Report*, above n 3, [5.64].

<sup>86</sup> *Ibid*, recommendation 12, [5.84].

<sup>87</sup> *Ibid* 197.

<sup>88</sup> Another possible reason for the proposed amendment is recommendation 15 of the Senate Economics References Committee’s *Corporate Tax Avoidance Report*, above n 11, which calls for s 127 of the *ASIC Act* to ‘be amended to allow ASIC to share information with the ATO without having to notify the affected person’: at [6.74].

The Phoenix Watchlist, managed by the Registrar of the Australian Business Register (ABR), was established, following an allocation in the May 2013 federal budget, as ‘a register of known or suspected phoenix operators’.<sup>89</sup> There was little publicly available information about the watchlist and it appeared to be receiving information only from the ATO.<sup>90</sup> We understand that the phoenix watchlist has not proved to be successful and was to be replaced in 2015 with a ‘serial insolvency alert’.<sup>91</sup> However, we have no details about this program or whether it has been implemented.

The ABR could be a useful platform for information sharing between government agencies. The ABR has two portals – ABN Lookup, which is available to the public, and ABR Explorer, which is available to authorised government agencies.<sup>92</sup> The latter is relevant to the present discussion. At present, it allows specified agencies, upon agreeing to various privacy constraints, to access ABR non-public data. This includes the names and addresses of representatives and associates of ABN holders. But even this information is of limited utility because it does not extend to the prior corporate history of those people. This is the crux of illegal phoenix activity – either it is done repeatedly by someone who lacks the ability to make each business a success, or it is done deliberately to shed corporate debts. Prior corporate history is vital information.

If the recommendations about a DIN and improvements to EXAD reporting were adopted,<sup>93</sup> ASIC would be in possession of large amounts of highly valuable information. ASIC should be allowed to contribute that information to the ABR Explorer, and that information should then be available to other permitted agencies who can take protective or enforcement action. For example, the ATO could implement pro-active measures, such as surveillance or asking for a security bond where it is highly likely that taxes will remain unpaid. The Department of Employment would benefit in knowing whether they should fund a liquidator to recover from errant directors the Fair Entitlements Guarantee (FEG) payments made to their companies.<sup>94</sup>

ASIC currently provides the ABR with information about companies entering external administration or being deregistered for a variety of reasons, including failure to pay fees.<sup>95</sup> This prompts the ABR to cancel the company’s ABN. One innovation that would not require any new legislation would be for the ABR, if it discovered that the people associated with a cancelled ABN were seeking a new ABN, to alert ASIC and other agencies to this activity

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<sup>89</sup> Senate Economics References Committee, *Construction Insolvency Report*, above n 3, [5.69]. A phoenix watchlist was first recommended in Australian Securities Commission, ‘Project One: Phoenix Activities and Insolvent Trading – Public Version’ (Research Paper 95/01, 13 May 1996) recommendation 16, 81–2.

<sup>90</sup> In its April 2015 submission to the Senate Economics References Committee’s *Construction Insolvency inquiry*, 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 Senate Economics References Committee, *Inquiry into Insolvency in the Australian Construction Industry*, 17 April 2015, [79]. No other submissions by regulators indicated that any intelligence had been provided to the Watchlist, nor have we been able to identify any other publicly available information to that effect.

<sup>91</sup> See ATO, *ABR Advisory Board Minutes – May 2015* (28 July 2016).

<sup>92</sup> Australian Business Register, *ABR Explorer* <<https://abr.gov.au/General-information/Fact-sheets/ABR-Explorer/>>.

<sup>93</sup> This would necessitate privacy safeguards and protection for the external administrators against defamation. External administrators enjoy qualified privilege in providing reports of misconduct to ASIC. This protects them from actions for defamation in the absence of malice: *Corporations Act* ss 89, 426, 442E, 535. This is also noted in *ASIC Regulatory Guide 16*, above n 46, [16.59].

<sup>94</sup> See Department of Employment (Cth), *FEG Recovery Program* <<https://www.employment.gov.au/feg-recovery-programme>>.

<sup>95</sup> See *Corporations Act* s 601AB.

under the rubric of the ABR Explorer. This would not involve an implication of wrongdoing but simply adds to the useful intelligence held by ASIC that can guide their surveillance and enforcement activities.

It may also indicate to ASIC that prior companies have been abandoned. This generally involves failure to return documents to ASIC or pay fees. We highlight the issue of abandoned companies here because:

- they may be the locus of wrongdoing that needs the proper attention of a regulator or external administrator;
- abandoned companies may have victims who lack access to the usual means of redress;
- the legislative reforms of 2012, as discussed below, have proven to be inadequate to tackle the problem; and
- these companies may continue to operate to the detriment of many.

Some solvent companies may be abandoned after paying out all their debts and not be liquidated, for example by those who are entering retirement. This could be because of ignorance or to avoid the cost of the winding up process. However, we believe that abandoned companies can also facilitate illegal phoenix activity that is likely to go undetected because they are not the subject of much regulatory scrutiny.

In 2014-15, 7,044<sup>96</sup> companies entered liquidation. This represented only 6.2% of the 112,714<sup>97</sup> companies that were deregistered in that year.<sup>98</sup> ASIC has informed us<sup>99</sup> that of the remaining companies, 42,059 were deregistered at ASIC's instigation under s 601AB of the *Corporations Act*. Of these, about 89.4%,<sup>100</sup> or 37,600 companies, are believed to have been wound up pursuant to s 601AB(1) for failure to respond to a return of particulars, lodge documents and carry on a business or pursuant to s 601AB(1A) for failure to pay fees. In 2015-2016, there were a total of 123,050 deregistered companies,<sup>101</sup> but we do not have the abandoned company figure for that year.

Since 2012, ASIC has had the power to wind up abandoned companies so that their employees can access the FEG<sup>102</sup> but in 2014-15 ASIC used its powers to appoint liquidators to just 31 companies.<sup>103</sup>

A problem with abandoned companies is that they are not subject to the scrutiny of a liquidator. Because there may be unpaid taxes and unpaid employee entitlements by these

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<sup>96</sup> See ASIC, *Australian Insolvency Statistics: Series 1 – Companies Entering External Administration, January 1999–November 2016*, Table 1.3 <<http://download.asic.gov.au/media/4127067/asic-insolvency-statistics-series-1-published-january-2017.pdf>>. This figure has been calculated by aggregating the annual figures for '[c]ourt wind-up' and '[c]reditors wind-up' in 2014-15.

<sup>97</sup> ASIC, *Annual Report 2014-2015* (15 October 2015) 66.

<sup>98</sup> 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.

<sup>99</sup> Email from Adrian Brown of ASIC to Helen Anderson, 18 March 2016.

<sup>100</sup> *Ibid.*

<sup>101</sup> ASIC, *Annual Report 2015-2016* (14 October 2016) 86.

<sup>102</sup> *Corporations Act* s 489EA, inserted by *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth) sch 1 item 1.

<sup>103</sup> ASIC, 'ASIC Winds Up 12 Abandoned Companies that Owed More than \$335,000 in Employee Entitlements' (Media Release, 15-164MR, 30 June 2015).

abandoned companies, ASIC should ensure that information about the companies *and* their directors is shared with other regulators prior to the company being deregistered.

Under s 601AB(3) of the *Corporations Act*, if ASIC decides to deregister a company it must not only give notice of the proposed deregistration to the company and its directors, it must also publish notice of the proposed deregistration at least two months before it occurs. When publishing notice of the deregistration ASIC provides the name of the company and its ACN.<sup>104</sup> However, the notice does not contain the details of the company's directors. Information about the directors of a company can be important in the context of illegal phoenix activity where individuals may be a director of more than one company.

Accordingly, in addition to publishing the notice required under s 601AB(3), ASIC should notify other members of the Phoenix Taskforce of the names of a company's directors prior to ASIC deregistering the company. This allows these other members of the Taskforce to check their own databases to ascertain if there are any matters of concern, for example, outstanding debts, that would mean that deregistration should not proceed.

The risk that insufficient oversight of the deregistration process may be facilitating illegal phoenix activity was identified more than 20 years ago in the ASC's 1995 research paper into phoenix activities and insolvent trading:

Importantly it would appear that approximately 92% of Phoenix companies are deregistered under the ASC's section 574 program [the predecessor to s 601AB of the *Corporations Act*].

Effectively the ASC is unintentionally assisting Phoenix offenders to escape prosecution and detection by deregistering the company and closing off the trail. This is particularly the case in circumstances where debts may be many, but small and no creditor action is taken to place the company under administration.

A review of the objectives and goals of the s 574 program should be undertaken ... Some of the areas covered in this review of the s 574 program could include:

- should the ASC require a certificate from all directors before deregistering a company that no creditor has been left unpaid?
- what impact would this have upon the important database cleaning functions of the s 574 program?

While it was not within the scope of this research to examine the operation of the s 574 program we provide recommendations as follows:

Recommendation 13: That a detailed examination of the s 574 program's objective and outcomes be undertaken with a view to addressing Phoenix activity.<sup>105</sup>

Despite this problem having been identified in 1995, there is still a significant risk that deregistration of Oldcos may be effectively 'writing off' debts to creditors and employees on a large scale, as a result of the lack of scrutiny of abandoned companies.

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<sup>104</sup> See ASIC, *Insolvency Notices* <<http://asic.gov.au/regulatory-resources/insolvency/insolvency-notices/>>.

<sup>105</sup> Australian Securities Commission, above n 89, 75.

The matter of Leigh Alan Jorgensen<sup>106</sup> provides a good example of the importance of regulators sharing information about the deregistration of companies. On 19 June 2015, the Federal Circuit Court ordered that a company of which Mr Jorgensen was the sole director and shareholder, ACN 156 455 828 Pty Ltd (trading as ‘Trek North Tours’), pay a pecuniary penalty in the sum of \$55,000 to the Commonwealth for failure to pay employee entitlements under the *Fair Work Act*.<sup>107</sup> ASIC alleges that in February 2016 Mr Jorgensen lodged a Form 6010 with ASIC to voluntarily deregister ACN 156 455 828 Pty Ltd in which he allegedly falsely and misleadingly claimed the company had no outstanding liabilities. Mr Jorgensen has been charged with contravening s 1308(2) of the *Corporations Act* and was due to appear in the Cairns Magistrates Court on 21 March 2017. ASIC was able to take action against Mr Jorgensen because of a tip-off from the FWO about the outstanding penalty ordered against ACN 156 455 828 Pty Ltd.<sup>108</sup> This should happen as a matter of course. ASIC should notify other regulators of directors applying for deregistration and other regulators should check their databases for any outstanding liabilities. If there are outstanding liabilities, the matter should be referred immediately to the appropriate regulator for enforcement action.

It is time to review the wider dissemination of the data that might identify illegal phoenix activity. A review should reveal whether new law is needed or simply more and better attempts by regulatory agencies to use the information exchange powers that they already have. The Draft Report of the Productivity Commission’s inquiry into data availability and its use does not appear to contain anything relevant to the detection of illegal phoenix activity.<sup>109</sup>

#### **Recommendation 5: Increase data sharing between regulators**

- The recommendation of the 2015 SERC Construction Insolvency Report 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’ should be implemented, and these amendments should be extended so that information can be given to other agencies via the Australian Business Register.
- The disclosure laws under the *Fair Work Act* should be considered as a possible template for information disclosure generally.
- The ABR should be directed to alert ASIC and other agencies, via the ABR Explorer, if it discovers that the people associated with a cancelled ABN are seeking a new ABN.
- Prior to deregistering a company, ASIC should notify other members of the Phoenix Taskforce of the name and ACN of the company *and* the names and DINs of its directors. Upon notification, the other members of the Phoenix Taskforce should search their databases to check whether the company or its directors have outstanding liabilities and, if so, refer the matter for enforcement action.

<sup>106</sup> ASIC, ‘Former Company Director Charged with Making False or Misleading Statements’ (Media Release, 17-023MR, 6 February 2017).

<sup>107</sup> *Fair Work Ombudsman v Trek North Tours (No 2)* [2015] FCCA 1801. The Federal Circuit Court also ordered, *inter alia*, that Jorgensen pay a pecuniary penalty in the sum of \$12,000 to the Commonwealth on the basis that he was involved in the company’s contraventions pursuant to s 550(1) of the *Fair Work Act*.

<sup>108</sup> ASIC, above n 106.

<sup>109</sup> Productivity Commission, *Data Availability and Use: Draft Report* (2016). Its terms of reference are broad enough to encompass the matters raised in Chapter 1 of this report: at v–vii.

## Recommendation 6: Make ASIC’s registry data more accessible to the public

An ounce of prevention is worth a pound of cure, so the saying goes. Potential victims of illegal phoenix activity can avoid being hurt by equipping themselves with information. This has the capacity to reduce the demand for later enforcement action by regulators. The abuse of the corporate form through phoenix activity is able to exist partly because of its ability to masquerade as a legitimate business rescue. The more information that is in the hands of creditors and employees before the event, the more likely it is that illegal phoenix activity will lose its appeal.<sup>110</sup>

Currently, illegal phoenix activity is simply too easy and too profitable for many offenders to resist, since it is unlikely that anyone will ‘join the dots’. Creditors have little chance of detecting directors’ history of repeated phoenix activity from publicly available records about the company they are presently dealing with. There is limited information available without charge on ASIC’s databases. Even if company documents are bought, a search of its documents does not reveal the past corporate history of its directors or other company officers.

We are not the only ones calling for ASIC information to be widely available. The Senate Economics References Committee looking at ASIC’s performance in 2014 recommended that ASIC ‘promote “informed participation” in the market by making information more accessible and presented in an informative way.’<sup>111</sup> The lack of easily locatable information about directors’ prior corporate history cannot be justified as ‘red-tape reduction’. The information is already there. It simply needs to be collated from existing document lodgements and made available by ASIC. Nor is the information confidential. It is already in the public domain, and with enough searching and paying for documents, a creditor would be able to locate it. Indeed, credit reporting agencies can piece the information together if creditors are prepared to pay for it, and larger suppliers commonly use their services for this purpose.

The parties who lack access to information but for whom information is crucial for self-protection are independent contractors and other small unsecured trade creditors for whom paid credit searching may not be economical. Because these parties are unable to enforce their debts directly once the company enters liquidation,<sup>112</sup> any recovery they receive is at the lowest rank of unsecured creditor. This typically is less than 11 cents in the dollar.<sup>113</sup> These parties need information *before* any contract is entered into<sup>114</sup> so that a decision can be made whether to do business with this company at all and if so, what price to charge. Once again,

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<sup>110</sup> For example, the Senate Economics References Committee noted that ‘information is critical in inhibiting illegal phoenix activity and in preventing small-scale insolvencies turning into larger collapses’: Senate Economics References Committee, *Construction Insolvency Report*, above n 3, [12.15].

<sup>111</sup> Senate Economics References Committee, *Performance of ASIC Report*, above n 49, recommendation 39, [22.28].

<sup>112</sup> *Corporations Act* s 471B.

<sup>113</sup> ASIC, *Report 507: Insolvency Statistics – External Administrators’ Reports (July 2015 to June 2016)* (December 2016): ‘[i]n 97% of cases, the dividend estimate was less than 11 cents in the dollar’: at 7. This was also the case in 2014–15 and 2013–14.

<sup>114</sup> ASIC does allow interested parties to register under their Company Alert system, which sends a message when a specified company lodges various documents, including those relating to changes of director and external administration: see ASIC, *Alerts* <<http://asic.gov.au/online-services/alerts/>>. However, the person seeking the information must still pay to obtain the document. In addition, the alert expires annually unless renewed.

this lack of information was highlighted by the 2015 SERC Construction Insolvency Report, and their first recommendation was that

ASIC conduct a review of administrators' and liquidators' reporting requirements and the range and extent of information it requires to be reported and, where necessary, make changes that will ensure the regulator is able to fully inform itself, the Parliament and the public with complete, relevant and up-to-date data on insolvencies.<sup>115</sup>

This was followed up with recommendations about 'early warning to industry participants about repeat and concerning insolvent practices'<sup>116</sup> and 'that regulators increase engagement efforts with industry participants aimed at increasing and enhancing information flows.'<sup>117</sup> Of particular importance is their recommendation 'that ASIC and Australian Financial Security Authority company records be available online *without payment of a fee*.'<sup>118</sup>

The Australian Government has abandoned its plans to privatise the ASIC registry. However, it is important not to equate the decision to abandon the privatisation of the ASIC registry with a decision to make ASIC information free-of-charge. Indeed, the fact that the decision to abandon privatisation was made on financial grounds<sup>119</sup> raises a question about whether the government would be willing to forego the significant revenue generated from ASIC registry fees.<sup>120</sup> ASIC and the government need to take the next step of providing free-of-charge access to information in the ASIC registry, for the reasons set out below.

First, providing free-of-charge access to ASIC registry information appears to be required by the government's policy for 'Better and More Accessible Digital Services',<sup>121</sup> including its Public Data Policy.<sup>122</sup> The government's *Public Data Policy Statement* provides that Australian Government entities will 'where possible, make data available with free, easy to use, high quality and reliable Application Programming Interfaces' and 'only charge for specialised data services and, where possible, publish the resulting data open by default.'<sup>123</sup> As CPA Australia CEO Alex Malley observed, privatisation of the ASIC registry 'has always been in conflict with the government's own open data policy which commits to release non-sensitive data as open by default.'<sup>124</sup>

Second, making corporate registry information available free-of-charge is consistent with the approach being taken to this issue overseas. Mr Malley remarked in response to the government's decision to abandon its plans to privatise the ASIC Registry, '[t]he challenge ahead is that registry information that is free in other comparable jurisdictions like the USA,

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<sup>115</sup> Senate Economics References Committee, *Construction Insolvency Report*, above n 3, recommendation 1, [2.62].

<sup>116</sup> *Ibid* recommendation 4, [2.65].

<sup>117</sup> *Ibid* recommendation 14, [5.86].

<sup>118</sup> *Ibid* recommendation 39, [12.41] (emphasis added).

<sup>119</sup> See Lucy Battersby, 'Government Abandons Plans to Outsource ASIC Registry', *The Sydney Morning Herald* (Sydney), 19 December 2016.

<sup>120</sup> ASIC, *Annual Report 2015-2016* (14 October 2016), 26: '[i]n 2015–16, ASIC raised \$876 million for the Commonwealth in fees and charges, an increase of 6.4% from 2014–15. The increase in revenue is driven by continued net company growth coupled with fee indexation.'

<sup>121</sup> The Liberal Party of Australia, *The Coalition's Policy for Better and More Accessible Digital Services* (June 2016).

<sup>122</sup> Department of the Prime Minister and Cabinet (Cth), *Public Data Policy* <<https://www.dpmc.gov.au/public-data/public-data-policy>>.

<sup>123</sup> Australian Government, *Australian Government Public Data Policy Statement* (7 December 2015).

<sup>124</sup> Battersby, above n 119.

UK and New Zealand is expensive and difficult to access here. That's something that needs to be addressed.<sup>125</sup> Increased transparency in Australia would follow the trend set in European Union countries<sup>126</sup> and the UK.<sup>127</sup> According to UK Secretary of State for Business, Innovation and Skills, the Rt Hon Dr Vince Cable,

[t]he government firmly believes that the best way to maximise the value to the UK economy of the information which Companies House holds, is for it to be available as open data. By making its data freely available and free of charge, Companies House is making the UK a more transparent, efficient and effective place to do business.<sup>128</sup>

UK Companies House still charges small fees to access certain more detailed documents about companies, such as £1 for a 'company record' or 'mortgage statement'.<sup>129</sup> However, a large amount of basic information is now free-of-charge via a user friendly-search engine,<sup>130</sup> including: an overview of the company and its status; its filing history with hyperlinks to the corresponding PDF documents; a list of active and resigned officeholders; and insolvency information, among other details. It is possible to search for either a company or an officer and then click into the company or officer to determine which officers are associated with which companies and vice versa. Importantly, the register indicates whether officers are disqualified and provides basic details of the disqualification.

France has recently announced the introduction of an online, publicly accessible, register of trusts containing information about the trust and its trustees, settlors and beneficiaries.<sup>131</sup> Providing transparency about trusts is intended to end 'use of shell companies for tax evasion, money laundering and financing illicit activities.'<sup>132</sup>

Third, there is now a mounting body of evidence indicating that open data adds significant value to the economy. Lateral Economics estimates the potential value of open data (including government, research, private and business data) to the Australian economy at up to \$64 billion per annum,<sup>133</sup> while PwC estimates that data-driven innovation added an estimated \$67 billion in new value to the Australian economy in 2013, leaving another \$48 billion in unrealised potential value.<sup>134</sup> PwC concludes that '[g]overnment should prioritise the provision of open data as a key input for the Australian economy and provide senior

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<sup>125</sup> Ibid.

<sup>126</sup> See European Union, *Insolvency Registers* <[https://e-justice.europa.eu/content\\_insolvency\\_registers-110-en.do](https://e-justice.europa.eu/content_insolvency_registers-110-en.do)>: 'The information and documents you can find in these registers [national insolvency registers] should be *available for free*.'

<sup>127</sup> See UK Companies House, 'Launch of the New Companies House Public Beta Service' (News Story, 22 June 2015): '[i]n line with the government's commitment to free data, Companies House is pleased to announce that all public digital data held on the UK register of companies is now accessible free of charge, on its new public beta search service. This provides access to over 170 million digital records on companies and directors including financial accounts, company filings and details on directors and secretaries throughout the life of the company.'

<sup>128</sup> UK Department for Business, Innovation & Skills, 'Free Companies House Data to Boost UK Economy' (Press Release, 15 July 2014).

<sup>129</sup> For information on UK Companies House's services and fees, see: UK Companies House, *About Our Services* <<https://www.gov.uk/government/organisations/companies-house/about/about-our-services>>.

<sup>130</sup> See UK Companies House, *Search the Register* <<https://beta.companieshouse.gov.uk/>>.

<sup>131</sup> Decree No 2016-567 of 10 May 2016 (France) JO, 11 May 2016, 0109.

<sup>132</sup> Press release of the Finance and Public Accounts Ministry of 11 May 2016, cited in Kramer Levin Naftalis & Frankel LLP, *Creation in France of a Public Register of Trusts* (20 May 2016).

<sup>133</sup> See Lateral Economics, *Open for Business: How Open Data Can Help Achieve the G20 Growth Target* (June 2014) 32.

<sup>134</sup> See PricewaterhouseCoopers, *Deciding with Data: How Data-Driven Innovation is Fuelling Australia's Economic Growth* (September 2014) 1.

political leadership to “get on with it” in order to support wider innovation by other players.’<sup>135</sup> The World Bank notes that ‘[w]hile sources differ in their precise estimates of the economic potential of Open Data, all are agreed that it is potentially very large’ and ‘governments should consider how to use their Open Data to enhance economic growth, and should put in place strategies to promote and support the use of data in this way.’<sup>136</sup>

A report by the Australian Bureau of Communications Research in February 2016, which estimates the value of Open Government Data to the Australian economy at up to \$25 billion per year, concluded that ‘[w]hile there is little consensus on the magnitude of the economic benefits of open government data sets, it is apparent that they provide substantial current and potential net benefits to the economy and society.’<sup>137</sup> The Bureau consulted with the Securities Industry Research Centre of Asia-Pacific (‘SIRCA’) in the process of preparing the report, which made the following comment in regard to ASIC’s data provision practices:

SIRCA believes ASIC’s current model of data provision is limiting innovation; information is only provided on the title of a document with a pay-per-view model for access. There is a significant information asymmetry here—only the holders of data know what is there, while the users don’t have the full picture. With limited information, the opportunities for innovation are not fully understood, and hence the potential business case for opening the data is limited. Fully readable and searchable data would be preferred, noting that similar institutions overseas do provide this service for free to encourage financial system innovation.<sup>138</sup>

While there are many good reasons for providing better access to corporate registry information, confidentiality restrictions may prevent the disclosure of some information. ASIC’s Regulatory Guide 103 ‘Confidentiality and Release of Information’<sup>139</sup> outlines the practices it has adopted in relation to disclosure of information based on its reading of the High Court’s decision in *Johns v Australian Securities Commission*.<sup>140</sup> However, we note that Regulatory Guide 103 has not been updated for over 20 years. As a preliminary step towards wider availability of free information, we recommend that ASIC review and clarify its ability to disclose information about companies and their directors and update its regulatory guidance accordingly.

Any initiatives to publicise information about company directors must also comply with the provisions of the *Privacy Act 1988* (Cth) which was amended in 2012.<sup>141</sup> The Act only covers the information of individuals, not companies, and as far as the individuals are concerned, identity verification is not covered by the *Privacy Act*.<sup>142</sup> The Australian Privacy Principles, which form part of the Act,<sup>143</sup> do allow an organisation to adopt a government related

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<sup>135</sup> Ibid.

<sup>136</sup> The World Bank, *Open Data for Economic Growth* (25 June 2014) [45].

<sup>137</sup> Bureau of Communications Research, Department of Communications and the Arts (Cth), *Open Government Data and Why It Matters Now* (February 2016) 33.

<sup>138</sup> Ibid.

<sup>139</sup> ASIC, *Regulatory Guide 103: Confidentiality and Release of Information* (issued 27 November 1995, updated 26 February 1996) 2.

<sup>140</sup> (1993) 178 CLR 408. This case concerned the disclosure to a Royal Commission of information obtained via a private examination by an ASC officer, which was later revealed in the Royal Commission’s publicly available transcripts.

<sup>141</sup> *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

<sup>142</sup> See David Francis, ‘Summary of the Impact of the Amendments to the Privacy Act’ (2014) 21(5) *Credit Management in Australia* 8, 8.

<sup>143</sup> *Privacy Act 1988* (Cth) sch 1.

identifier of an individual as its own identifier if to do so is authorised by an Australian law or a court or tribunal order.<sup>144</sup> Information about prior corporate histories of directors would be covered by the *Privacy Act* and must comply with both Australian Privacy Principles, as well as the credit reporting provisions<sup>145</sup> of the Act where that information is publicly disseminated by credit reporting agencies.

However, exemptions from provisions of the *Privacy Act* can be obtained, and there should be further exploration of what might be possible here in relation to corporate history information.

**Recommendation 6: Make ASIC’s registry data more accessible to the public**

- Australia should follow the lead set in the United Kingdom and some European countries by allowing free searches of lodged company and director information.
- ASIC should review and clarify its ability to disclose information about companies and their directors and update its regulatory guidance accordingly.
- Where necessary, exemptions should be made to the *Privacy Act* to allow easy searching and location of directors’ corporate histories.

**Recommendation 7: Improve the accessibility of ASIC’s disqualified persons register**

There should be easy and free public access to information about people who have been disqualified from managing corporations. At present, it is difficult for creditors, employees and taxation authorities to check whether company managers are or have been disqualified by ASIC or the courts and on what grounds. If this information were more easily accessible, it would enable these parties to better protect themselves against company managers who have shown a tendency to engage in illegal phoenix activity or other forms of corporate and financial wrongdoing. Here, we recommend establishing a free-of-charge, easily searchable online register that facilitates access to information on disqualified directors.

Currently, there are two ways to obtain information on whether a person has been disqualified from managing corporations, provided the name of the person is known, rather than just the name of the company or companies with which they are affiliated. One way is to search for the person’s name in ASIC’s ‘Banned & Disqualified’ registers on the ASIC Connect website.<sup>146</sup> The other way is to search for the person’s name in ASIC’s ‘Banned and Disqualified Persons Dataset’ on data.gov.au.<sup>147</sup> These sources provide information on the duration of the disqualification period and the address of the disqualified person. From the ASIC Connect website, it is also usually possible to purchase a copy of the banning documents, which start at \$19 for an uncertified copy or \$38 for a certified copy.

Typically, the banning documents comprise a single page that states the legislative provision pursuant to which the order was made (e.g. ss 206F, 206C of the *Corporations Act*) and the duration of the disqualification period. However, it is not usually possible to access documents indicating the reasons for which the disqualification order was made. For instance,

<sup>144</sup> Ibid s 20L(2), sch 1, Australian Privacy Principle 9.

<sup>145</sup> Ibid pt IIIA.

<sup>146</sup> ASIC, *Search* *ASIC* *Registers*  
<[https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?\\_adf.ctrl-state=2amkytjdm\\_4](https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?_adf.ctrl-state=2amkytjdm_4)>.

<sup>147</sup> Australian Government, *data.gov.au, ASIC Banned and Disqualified Persons Dataset*  
<<https://data.gov.au/dataset/asic-banned-disqualified-per>>.

it is not possible to ascertain whether a disqualification order pursuant to s 206F was made partly because of the director's involvement in suspected unlawful activity, or whether it was made only on the basis of involvement in failed companies. This information is sometimes available via ASIC's media releases, although our research indicates that only about 50% of orders made under s 206F are covered in media releases.<sup>148</sup>

If creditors, employees or taxation authorities are seeking to check the people managing a company and they only know the name of the company, rather than the names of the individual managers, the names of the managers can be ascertained by searching for the company name in ASIC's 'Organisation & Business Names Register'<sup>149</sup> and then purchasing a company extract for \$9 to identify the officeholders of the company.<sup>150</sup> As explained above, the name of each officeholder can then be searched in ASIC's 'Banned & Disqualified' registers or the 'Banned and Disqualified Persons Dataset' on data.gov.au.

The above processes are time-consuming and expensive. While ASIC's publishing of the 'Banned and Disqualified Persons Dataset' on data.gov.au in 2016 was a step in the right direction, there is significant scope for improvement. The dataset, which is an Excel spreadsheet, is not easy to locate or user-friendly. The spreadsheet is not available on ASIC's website, which instead redirects readers to ASIC's datasets on data.gov.au.<sup>151</sup> Once the document has been located, there are a number of obstacles to interpreting its content, including: a lack of plain language headings; broadly categorised types of bans that are only briefly explained in an accompanying 'Help File';<sup>152</sup> the use of a blank end date to indicate permanent bans, rather than any express label to that effect; and thousands of duplicate entries as a result of bans being entered under different names and addresses (the introduction of a DIN would greatly assist in reducing this duplication of registry data).

Limited information, and that being available only at a cost, is at odds with ASIC's stated commitment to transparency and open data.<sup>153</sup> It is also inconsistent with the government's Public Data Policy, which provides that fees can only be charged for 'specialised data services'.<sup>154</sup> The government's *Information Sheet on Charging for Data Services* suggests that 'specialised data services' only include data provision services that require tailored processes or infrastructure in order to provide specific types of data.<sup>155</sup> This does not appear to be the case with regard to ASIC's management disqualification orders, which are already uploaded to ASIC's online registers and available to download as soon as the fees are paid.

To give effect to the government's *Public Data Policy Statement* and ASIC's commitment to transparency and open data, free-of-charge access to detailed information on persons

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<sup>148</sup> We found that 398 of the 801 management disqualification orders made between 1 January 2001 and 31 December 2015 were covered in ASIC's media releases.

<sup>149</sup> ASIC, above n 146.

<sup>150</sup> ASIC, *Fees and Examples of Paid Products* <[https://connectonline.asic.gov.au/OPH/HelpLandingPages/TH\\_PurchasingSearchItems/SCH\\_TH\\_FEES\\_PAID\\_PRODUCTS](https://connectonline.asic.gov.au/OPH/HelpLandingPages/TH_PurchasingSearchItems/SCH_TH_FEES_PAID_PRODUCTS)>.

<sup>151</sup> See ASIC, *Data.gov.au* <<http://asic.gov.au/online-services/search-asics-registers/datagovau/>>.

<sup>152</sup> See ASIC, *Banned and Disqualified Persons Dataset: Help File* (16 June 2016) <<https://data.gov.au/dataset/asic-banned-disqualified-per/resource/ff65011c-12fa-4d1a-817d-2601deaacae>>.

<sup>153</sup> ASIC, *Public Comment on ASIC's Regulatory Activities* <<http://asic.gov.au/about-asic/asic-investigations-and-enforcement/public-comment-on-asics-regulatory-activities/>>; ASIC, above n 151: '[w]e are committed to promoting open data and all the advantages that it brings.'

<sup>154</sup> Australian Government, above n 123.

<sup>155</sup> See Department of Finance (Cth), *Information Sheet: Charging for Data Services* (24 December 2015).

disqualified from managing corporations ought to be made readily available to the public. This should be in the form of an online, free-of-charge register of disqualified directors that can be browsed and searched using key terms. It should contain hyperlinks to the orders and reasons for the orders where applicable, redacted for confidentiality reasons if necessary, similar to the register that already exists for enforceable undertakings<sup>156</sup> but with the addition of a search engine function. Importantly, the register ought to link the name of the disqualified individual and the name of corporate entities with which they are and were relevantly affiliated, to enable users to search the register either by individual name or company name. The linking of the individuals with the companies with which they are connected would be facilitated by the recommendations to establish a DIN and to collect more data on directors' corporate histories at the time of incorporation or appointment.

In terms of an existing model for an improved register of disqualified directors, much can be learned from the approach taken to disqualification in the UK, which is helpfully described in the UK Insolvency Service's information sheet, *Unfit Conduct: Our Disqualification and Restrictions Search Facilities*.<sup>157</sup> The UK has two registers, one maintained by the Insolvency Service<sup>158</sup> and one by Companies House,<sup>159</sup> which together provide the following information in regard to disqualifications: name; date of birth; address; company names; company numbers; start and end date; legislative section; and misconduct. The Insolvency Service register provides a more detailed account of the disqualification, including, importantly, a written summary of the conduct that resulted in the disqualification. This detailed summary of the disqualification is accessible for three months, after which it is necessary to refer to the Companies House register, which provides more basic information for the complete duration of the disqualification period. Both registers have relatively user-friendly interfaces and the Gov.UK website provides clear and helpful guidance on how to search the registers.<sup>160</sup> Our view is that it is preferable for detailed information relating to the disqualification order to remain on the register indefinitely (not only for three months or the duration of the ban) but the UK model is otherwise very informative.

In addition to people who have been disqualified from managing corporations by ASIC or the courts, the government should consider how people who are automatically disqualified from managing corporations under s 206B of the *Corporations Act* could be included in the proposed register. For this to be possible, ASIC would need to be aware of the identities of people who are disqualified under s 206B, which would require a high degree of cooperation and data sharing between ASIC and other law enforcement bodies. The reason for this is that s 206B is very broad in its application. It applies to any person who has been convicted of one or more of the following categories of offences within the prescribed time periods:

- If the conviction is on indictment, a domestic or foreign offence that: concerns the making, or participation in making, of decisions that affect the whole or a substantial

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<sup>156</sup> ASIC, *Enforceable Undertakings Register* <<http://asic.gov.au/online-services/search-asics-registers/additional-searches/enforceable-undertakings-register/>>.

<sup>157</sup> UK Insolvency Service, *Unfit Conduct: Our Disqualification and Restrictions Search Facilities* (December 2016).

<sup>158</sup> UK Insolvency Service, *Director Disqualification Outcomes: Summary of Results* <<https://www.insolvencydirect.bis.gov.uk/IESdatabase/viewdirectorssummary-new.asp>>.

<sup>159</sup> UK Companies House, *Register of Disqualifications* <<https://beta.companieshouse.gov.uk/register-of-disqualifications/A>>.

<sup>160</sup> UK Companies House, *Company Director Disqualification* <<https://www.gov.uk/company-director-disqualification>>; UK Companies House, *Search for Disqualified Company Directors* <<https://www.gov.uk/search-the-register-of-disqualified-company-directors>>.

part of the business of the corporation; or concerns an act that has the capacity to affect significantly the corporation's financial standing.<sup>161</sup>

- An offence that is a contravention of the *Corporations Act* and is punishable by imprisonment for a period greater than 12 months.<sup>162</sup>
- Any domestic or foreign offence that involves dishonesty and is punishable by imprisonment for at least three months.<sup>163</sup>
- Any foreign offence that is punishable by imprisonment for a period greater than 12 months.<sup>164</sup>

There may be many thousands of people in Australia who have been convicted of one of the above categories of offences in a range of different courts, both domestic and foreign. Somehow, ASIC would need to be able to access information about these convictions from the relevant law enforcement bodies. While this is a significant information sharing challenge, it is important that the government consider ways to monitor compliance with s 206B, as it is otherwise an unenforceable legislative provision and likely to be ineffective. Those who have engaged in criminal conduct falling into one of the above categories are arguably at a higher risk of engaging in illegal phoenix activity and other forms of corporate wrongdoing, so it is important that they do not manage corporations in breach of s 206B.

#### **Recommendation 7: Improve the accessibility of ASIC's register of disqualified persons**

- ASIC should establish a register of directors who are disqualified that:
  - is online and available via the ASIC website with a user-friendly interface;
  - is entirely free-of-charge to view and download linked documents;
  - can be both browsed and searched using key terms via a search engine function;
  - contains hyperlinks to the disqualification orders *and* the reasons for the orders (in the case of non-automatic disqualification);
  - provides the name and ACN of all companies of which the disqualified person is or has been an officer; and
  - subject to feasibility considerations, includes people who are automatically disqualified from managing corporations under s 206B of the *Corporations Act*.

#### **Recommendation 8: Check ABN applicants against ASIC's disqualified persons register**

The ATO has the capacity to deny the granting of an ABN to individuals where they do not believe the individual is carrying on an enterprise, but currently, the ATO does not have the ability to deny an ABN to a registered company.<sup>165</sup> In other words, even if the ATO has grave suspicions about the individuals controlling a company, it must still grant that company an ABN. This is the case whether those individuals are running one or 100 companies, or whether they have a lengthy history of illegal phoenix activity. We recommend that the ATO be given the power to refuse to grant an ABN to companies which list a person disqualified from managing corporations as an associate.

<sup>161</sup> *Corporations Act* s 206B(1)(a).

<sup>162</sup> *Ibid* s 206B(1)(b)(i).

<sup>163</sup> *Ibid* s 206B(1)(b)(ii).

<sup>164</sup> *Ibid* s 206B(1)(c).

<sup>165</sup> See Australian Business Register, *ABN Entitlement* <<https://abr.gov.au/For-Business,-Super-funds---Charities/Applying-for-an-ABN/ABN-entitlement/>>.

The ATO should check whether any of the associates of the company applying for the ABN are disqualified from managing corporations on ASIC's 'banned and disqualified' registers.<sup>166</sup> The ABN application requires 'associate details',<sup>167</sup> including the name, date of birth, position held and tax file number ('TFN') of all Australian resident directors. At present, the ATO does consult ASIC regarding ABN applications but only to check the validity of the ACN. It does not check whether any associates of the company are persons disqualified from managing corporations.

Where the ATO discovers that the associate of a company is a person disqualified from managing corporations, not only should it consider whether it is appropriate to deny the company an ABN, it should report to ASIC that the associate in question may be attempting to manage corporations whilst disqualified in breach of s 206A of the *Corporations Act*.

**Recommendation 8: Check ABN applicants against ASIC's disqualified persons register**

- On receipt of an application for an ABN, the ATO should check with ASIC whether the company's associates are persons disqualified from managing corporations.
- The ATO should have the power to refuse to grant an ABN to a company which lists a disqualified person as an associate.
- The ATO should report to ASIC where it has uncovered disqualified persons attempting to be involved in the management of a company so that ASIC may commence a prosecution under s 206A.

## Conclusion

This submission has set out a number of recommendations aimed at enhancing the detection of illegal phoenix activity which involve suggested improvements to the way in which business registers are designed, populated with data, and utilised. For further information on these and other related recommendations, please see our project's final report: [Phoenix Activity: Recommendations on Detection, Disruption and Enforcement \(February 2017\)](#). We would be happy to assist Treasury further in relation to any of these recommendations.

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<sup>166</sup> See Australian Government, data.gov.au, *ASIC Banned and Disqualified Persons Dataset* <<https://data.gov.au/dataset/asic-banned-disqualified-per>>; ASIC, *Search ASIC Registers* <[https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?\\_adf.ctrl-state=15mgsebwp0\\_4](https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?_adf.ctrl-state=15mgsebwp0_4)>.

<sup>167</sup> Australian Business Register, *Associates' Details* <<https://abr.gov.au/For-Business,-Super-funds---Charities/Applying-for-an-ABN/What-you-need-for-your-ABN-application/Associates-details/>>.