THE POTENTIAL ECONOMIC GAINS FROM INCREASING PUBLIC LAW ENFORCEMENT AGAINST ILLEGAL PHOENIX ACTIVITY

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Illegal phoenix activity — the practice of liquidating or abandoning a company with the intention of avoiding its obligations and then continuing the same or a similar business via a new or related company — is estimated to cost the Australian economy up to $3.5 billion per year and appears to be increasingly prevalent. Yet public law enforcement agencies rarely take enforcement action against illegal phoenix activity. This article argues that, based on an analysis of the potential costs and benefits of increasing public law enforcement against illegal phoenix activity, enforcement should be increased, subject to periodic review. Empirical studies suggest that the aspects of enforcement that are most likely to produce general deterrence of wrongdoing are the perceived probability of apprehension (ie detection and commencement of enforcement action) and, to a lesser extent, the perceived probability of punishment (ie a sanction being imposed at the conclusion of enforcement action). As such, it is argued that enforcement agencies should increase the probability of apprehension and punishment and use the media more innovatively to heighten potential perpetrators' perceptions of such probability. Given the reportedly substantial and escalating costs of illegal phoenix activity, this increase in enforcement has the potential to be a high-return investment for the Australian economy.

I INTRODUCTION

> The Commission considers that rather than crafting new offences, improvements in the detection and enforcement of existing laws are likely to be the best option for creating a genuine disincentive for directors contemplating phoenix action.
>
> — Productivity Commission, 30 September 2015[1]

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1 Productivity Commission, *Business Set-Up, Transfer and Closure: Inquiry Report No 75, 30 September 2015* (2015) 425.

Illegal phoenix activity is widely regarded as a significant drain on the Australian economy. In 2009, the Australian Taxation Office ('ATO') estimated the cost of illegal phoenix activity and related practices at between $1 billion and $2.4 billion per year.[2] In 2018, PricewaterhouseCoopers ('PwC') estimated that the 'net effect (of losses, gains and the flow-on effects of both) to the Australian economy of potential illegal phoenix activity is $1.8 billion to $3.5 billion lost gross domestic product (GDP)'.[3] PwC estimates that the total direct cost to business, employees and government is between $2.85 billion to $5.13 billion annually.[4] In 2015, the Senate Economics References Committee concluded that 'illegal phoenix activity remains a significant issue not only in the construction industry, but throughout the economy'.[5] The Productivity Commission has similarly concluded that 'even conservative estimates suggest that [illegal phoenix activity] … is a significant issue'.[6] In May 2017, the Australian Government published a consultation paper on corporate misuse of the Fair Entitlements Guarantee ('FEG') scheme which concluded that 'the incidence of illegal phoenix company activity, and subsequent costs to the FEG scheme, is increasing'.[7] PwC's 2018 report concludes that '[s]uccessfully combating potential illegal phoenix activity in a cost-effective manner could provide a significant boost to the Australian economy'.[8]

'Phoenix activity' is not a behaviour that is formally defined or expressly prohibited in legislation or case law, in the sense that the term is used as part of a prohibition. Rather, it is an informal term used to describe a type of corporate process, whereby the people who control ('controllers') a company ('Oldco') cause it to become insolvent, or abandon it, and then they continue running the same or a related business through another company that they also control ('Newco'). Newco, despite the abbreviation 'new', may be a newly incorporated company or an existing company, and it may be a successor company (ie where Newco replaces Oldco) or a related company within a corporate group.

This process of phoenix activity involves the failed company not meeting all of its obligations, which may include debts owed to trade creditors, warranties, employee wages and entitlements, taxes, and financial penalties. Previous research has identified five categories of phoenix activity.[9] The first is 'legal phoenix', often referred to as 'business rescue', which results in a better outcome

2 ATO, 'Phoenix Practices Are on the Radar' (July 2009) *Targeting Tax Crime: A Whole-of-Government Approach* 16.

3 PwC et al, 'The Economic Impacts of Potential Illegal Phoenix Activity' (Report, June 2018) iii.

4 Ibid. Direct costs, unlike economy-wide impacts, do not take into account the gains and flow-on effects resulting from potential illegal phoenix activity, which explains why the estimated direct costs are higher than the economy-wide impacts.

5 Senate Economics References Committee, Parliament of Australia, *'I Just Want to Be Paid': Insolvency in the Australian Construction Industry* (2015) xix ('*'I Just Want to Be Paid'*').

6 Productivity Commission, above n 1, 423.

7 Australian Government, 'Reforms to Address Corporate Misuse of the Fair Entitlements Guarantee Scheme' (Consultation Paper, May 2017) 5 [3.3].

8 PwC et al, above n 3, iii.

9 Helen Anderson et al, 'Defining and Profiling Phoenix Activity' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, December 2014) 2 ('*Defining and Profiling Phoenix Activity Report*').

for creditors than letting the business come to an end.[10] The second is 'problematic phoenix', which is legal but involves incompetent corporate management and repeated resurrection of the business that is harmful to creditors.[11] Then there are three categories of 'illegal phoenix', depending on whether it involves an unpremeditated intention to defraud creditors arising from financial difficulties ('illegal type 1'),[12] an intention to defraud creditors as part of a premeditated business model ('illegal type 2'),[13] or a premeditated intention to defraud creditors accompanied by other illegal activity ('complex illegal').[14] This article does not address the regulation of legal and problematic phoenix activity. It is concerned with enforcement action taken against company controllers and accessories who have engaged in illegal phoenix activity. As discussed below, illegal phoenix activity amounts to a breach of directors' duties,[15] and advisers, including lawyers, may be involved in such contraventions as civil[16] or criminal[17] accessories.

There is a growing political consensus that more needs to be done to reduce the incidence of illegal phoenix activity and the significant economic loss that it causes. In response to a report from the Phoenix Taskforce,[18] the Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, announced on 28 September 2017 the release of a consultation paper entitled 'Combatting Illegal Phoenixing'.[19] She said that '[t]he Government is committed to helping the honest and diligent entrepreneurs who drive Australia's productivity, but we won't tolerate those who misuse the corporate framework for their own advantage'.[20]

The Australian Labor Party ('ALP') also supports stronger measures to combat illegal phoenix activity. On 24 May 2017, the ALP announced a new policy to protect employees and small businesses from illegal phoenix activity:

10 See ibid 8–10.

11 See ibid 11–12.

12 See ibid 15–16.

13 See ibid 24.

14 See ibid 27–8.

15 *Corporations Act 2001* (Cth) ss 180(1), 181(1), 182(1), 183(1) ('*Corporations Act*').

16 Their accessory liability is provided for in *Corporations Act* ss 181(2), 182(2), 183(2). For an example of a lawyer found to be an accessory to breaches of directors' duties as part of phoenix activity, see *Australian Securities and Investments Commission v Somerville* (2009) 77 NSWLR 110; *Australian Securities and Investments Commission v Somerville [No 2]* [2009] NSWSC 998 (24 September 2009), considered below at n 92 and accompanying text.

17 The directors' duties provisions that attract criminal liability also apply to persons who are subject to the extensions of criminal responsibility in pt 2.4 of the schedule of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*').

18 The Phoenix Taskforce comprises several government agencies, including the ATO, Australian Securities and Investments Commission ('ASIC'), Department of Employment (Cth), and the Fair Work Ombudsman ('FWO'), ostensibly providing a 'whole-of-government' approach to combatting illegal phoenix activity: see ATO, *Phoenix Taskforce* (2 July 2018) <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/>.

19 Kelly O'Dwyer, 'Consultation on Reforms to Address Illegal Phoenixing' (Media Release, 28 September 2017).

20 Ibid. The consultation paper followed the Minister's announcement on 12 September 2017: Kelly O'Dwyer, 'A Comprehensive Package of Reforms to Address Illegal Phoenixing' (Media Release, 12 September 2017).

> Today, Labor has announced a Shorten Labor Government will act to protect employees and small businesses from dodgy phoenix activity through a package of reforms.
>
> …
>
> The package will see employees and business owners benefit from new enforcement tools for the Australian Securities and Investments Commission, tightened laws protecting employee entitlements, and harsher penalties to deter and punish insidious phoenix activity.
>
> Currently it is easier to become a company director than open a bank account, yet the Government has barely raised a peep about phoenix activity.[21]

Despite the ALP's criticism of the government's alleged inaction, the release of the 'Combatting Illegal Phoenixing' consultation paper on 28 September 2017[22] indicates that there is bilateral support for taking stronger action against illegal phoenix activity. Both major political parties are evidently increasingly concerned about this problem.

Given the growing bipartisan commitment to reducing the economic loss caused by illegal phoenix activity, this article provides a timely examination of whether that loss could be reduced by increasing public law enforcement against company controllers and accessories who have engaged in such activity. The term 'public law enforcement' refers to enforcement actions taken by statutory agencies, including the Australian Securities and Investments Commission ('ASIC'), the ATO, the Fair Work Ombudsman ('FWO') and the Commonwealth Director of Public Prosecutions ('CDPP'), as opposed to private court proceedings brought by companies or external administrators for compensation or recovery of assets. This article complements the Senate Economics References Committee's inquiry into penalties for white collar crime, the final report of which was released on 23 March 2017,[23] as well as the ASIC Enforcement Review Taskforce's consultation on strengthening penalties for corporate and financial sector misconduct, announced on 23 October 2017.[24] Evidence given to the Senate Committee indicates that illegal phoenix activity is part of a broader problem of corporate and financial misconduct in Australia which is causing significant economic loss.[25] The Attorney-General's Department gave evidence that there had 'been

21 Andrew Leigh, 'Exposing Dodgy Directors' (Media Release, 24 May 2017).

22 O'Dwyer, above nn 19–20.

23 Senate Economics References Committee, Parliament of Australia, *'Lifting the Fear and Suppressing the Greed': Penalties for White-Collar Crime and Corporate and Financial Misconduct in Australia* (2017) ('*'Lifting the Fear and Suppressing the Greed'*').

24 Kelly O'Dwyer, 'ASIC Enforcement Review Taskforce Consults on Strengthening Penalties' (Media Release, 23 October 2017).

25 For example, the matter involving the Commonwealth Bank's alleged breaches of anti-money laundering and terrorism financing laws is the latest in a series of financial scandals in Australia: Peter Ryan, 'CBA Risks Massive Fines Over Anti-Money Laundering, Terrorism Financing Law Breaches', *ABC News* (online), 3 August 2017 <http://www.abc.net.au/news/2017-08-03/cba-risks-massive-fines-over-law-breaches/8770992>; Andrew Robertson, 'Commonwealth Bank: Will Senior Management at Last Be Held to Account?', *ABC News* (online), 3 August 2017 <http://www.abc.net.au/news/2017-08-03/commonwealth-bank-latest-scandal-might-be-the-one-that-hurts/8772390>; Paul Karp, 'Timeline: Banking Scandals in Australia since 2009', *The Guardian* (online) 29 April 2016 <https://www.theguardian.com/australia-news/ng-interactive/2016/apr/29/timeline-banking-scandals-in-australia-since-2009>.

over $1.2 billion in reported fraud against the Commonwealth from 2010–14 stemming from 391,831 incidents', while the Australian Federal Police advised that the total annual cost to the Australian economy from organised fraud is $6.3 billion.[26]

This article argues that increasing public law enforcement against illegal phoenix activity has the potential to generate significant economic gains for the Australian economy, as a result of the following factors: first, there is a substantial, costly and apparently increasing incidence of illegal phoenix activity (Part II(A)); second, there is currently a very low level of public law enforcement against such activity (Part II(B)); and third, there is a large body of empirical evidence that suggests that increasing enforcement against illegal behaviour — in particular, increasing the perceived probability of apprehension (ie detection and commencement of enforcement action) and, to a lesser extent, punishment — could produce general deterrence,[27] thereby potentially yielding savings that significantly outweigh the costs of such an increase (Part III). The proposed increase in enforcement involves three main elements: first, increasing the probability of apprehension (Part IV(A)); second, increasing the probability of punishment (Part IV(B)); and third, using the media to make these enforcement actions known to the public and, more broadly, to heighten potential perpetrators' perceptions of the probability of enforcement (Part IV(C)). Finally, there ought to be a periodic review process to ensure that the additional resources invested in increasing enforcement are allocated as efficiently as possible (Part IV(D)).

II THE CURRENT LEVEL OF ENFORCEMENT AGAINST ILLEGAL PHOENIX ACTIVITY

Previous research has shown that, due to a lack of available data, it is not possible to determine either the exact incidence of illegal phoenix activity, or the exact

26 Senate Economics References Committee, *'Lifting the Fear and Suppressing the Greed'*, above n 23, 4 [1.14]–[1.15] (citations omitted), quoting Attorney-General's Department, Submission No 52 to Senate Economics References Committee, *Penalties for White Collar Crime*, April 2016, 1, citing Australian Federal Police, Submission No 54 to Senate Economics References Committee, *Penalties for White Collar Crime*, April 2016, 3.

27 Note that general and specific deterrence are rationales relied upon by the judiciary in imposing penalties: *Australian Securities and Investments Commission v Newcrest Mining Ltd* (2014) 101 ACSR 46, 55–6 [59]–[60]; *Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd* [2014] FCA 1434 (24 December 2014) [37]; *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393 (19 December 2014) [83], and the authorities cited therein; *Make It Mine Finance Pty Ltd [No 2]* [2015] FCA 1255 (18 November 2015) [43], [112]–[113]; *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* (2016) 34 ACLC ¶16-009, [132]; *Registrar of Aboriginal and Torres Strait Islander Corporations v Monaghan [No 2]* [2016] FCA 1143 (20 September 2016) [265]; *Australian Securities and Investments Commission v Flugge [No 2]* (2017) 342 ALR 478, 488 [48], 499 [122], quoting *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80, 114 [125].

incidence of public law enforcement against illegal phoenix activity.[28] However, a number of sources suggest that, in approximate terms, there is a high incidence of illegal phoenix activity and a low incidence of public law enforcement, as discussed in Parts II(A) and II(B) respectively.

A *Incidence of Illegal Phoenix Activity*

The sources discussed in this part of the article suggest that there is a high incidence of illegal phoenix activity.

1 *Estimates of the Economic Cost of Illegal Phoenix Activity*

As noted earlier, in 2009 the ATO estimated the cost of illegal phoenix activity and related practices at between $1 billion and $2.4 billion per year,[29] while in 2018 PwC estimated the total economy-wide impacts of potential illegal phoenix activity at $1.8 billion to $3.5 billion per year.[30] There are methodological difficulties in determining the exact incidence and cost of illegal phoenix activity — as is evident from the imprecision of these estimates — but even the lowest estimate of $1 billion per year suggests that there is a high incidence of illegal phoenix activity. Furthermore, data from Treasury relating to the FEG scheme suggests that the incidence and cost of illegal phoenix activity are increasing.[31]

2 *Surveillance Statistics from ASIC and the ATO*

In 2015–16, 11 494 companies were identified by ASIC 'for the potential to conduct illegal phoenix activity'.[32] Surveillance data from the ATO also suggests a high potential incidence of illegal phoenix activity. According to evidence given to the Senate Economics References Committee's inquiry into insolvency in the Australian construction industry (2014–15), the ATO monitors, within the construction industry alone, '"about 20,000 groups … under the phoenix umbrella", of which approximately 2000 are "high risk and roughly 9,000 to 10,000 medium risk"'.[33] Presumably, the number of companies under phoenix-related ATO surveillance in *all* industries is significantly higher than the number in the construction industry alone; however, this information does not appear to be publicly available.

28 Helen Anderson et al, 'Quantifying Phoenix Activity: Incidence, Cost, Enforcement' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, October 2015) ('*Quantifying Phoenix Activity Report*'); Helen Anderson, Ian Ramsay and Michelle Welsh, 'Illegal Phoenix Activity: Quantifying Its Incidence and Cost' (2016) 24 *Insolvency Law Journal* 95.

29 ATO, above n 2, 16.

30 PwC et al, above n 3, iii.

31 See Australian Government, 'Reforms to Address Corporate Misuse of the Fair Entitlements Guarantee Scheme', above n 7, and accompanying text.

32 ASIC, 'Annual Report 2015–2016' (Annual Report, 14 October 2016) 22.

33 Senate Economics References Committee, *'I Just Want to Be Paid'*, above n 5, 69 [5.25] (citations omitted).

3 *Reports by the Productivity Commission and Senate Economics References Committee*

The proposition that there is a high incidence of illegal phoenix activity is supported by evidence given to the Productivity Commission's inquiry into business set-up, transfer and closure (2014–15) and the Senate Economics References Committee's inquiry into insolvency in the Australian construction industry (2014–15). The Productivity Commission's final report states:

> even conservative estimates suggest that [illegal phoenix activity] … is a significant issue. In terms of the number of phoenix companies, estimates range from between 2000 and 3000 engaging in phoenix activity through liquidation every year, with the lower bound likely to be the more reliable estimate, to an ATO estimate of a total of 6000 phoenix companies operating in Australia in 2011.[34]

The Senate Economics References Committee's final report indicates that illegal phoenix activity is a significant problem 'throughout the economy'.[35] The report states:

> the estimates of the cost of illegal phoenix activity … suggest a significant culture of disregard for the law. This view is reinforced by the anecdotal evidence received by the committee which indicates that phoenixing is considered by some in the industry as merely the way business is done in order to make a profit.[36]

4 *Surveys of Insolvency Practitioners and Credit Managers*

Surveys of members of the Australian Restructuring Insolvency and Turnaround Association ('ARITA')[37] and the Australian Institute of Credit Management ('AICM')[38] suggest that there is a high incidence of illegal phoenix activity. Thirty per cent of ARITA respondents said they 'often' encounter liquidations where they believe phoenix activity has occurred, and 51 per cent said they

34 Productivity Commission, above n 1, 423 (citations omitted).

35 Senate Economics References Committee, *'I Just Want to Be Paid'*, above n 5, xix.

36 Ibid 71 [5.33].

37 ARITA is a professional association with over 2000 members that represents those who specialise in the fields of restructuring, insolvency and turnaround, including accountants, lawyers, bankers, credit managers, academics and other professionals with an interest in insolvency and restructuring: ARITA, *About ARITA* (2016) <https://www.arita.com.au/ARITA/About_Us/ARITA/About_Us/About-Us.aspx>. The survey of ARITA members was conducted on Survey Monkey from 16 November 2015 to 14 December 2015. The survey was sent to 2155 members, 213 of whom completed the survey — a response rate of approximately 10 per cent. The questions were optional and the percentage of members who responded to each question ranged from 29 per cent to 100 per cent.

38 AICM is Australia's leading professional member body for commercial and consumer credit management professionals, with over 2300 members responsible for maximising the cash flow and minimising the bad debt risk of more than 1300 Australian companies, including 34 of the ASX100: AICM, *About AICM* <http://aicm.com.au/about-aicm/>. The survey of AICM members was conducted on Survey Monkey from 11 January 2016 to 15 February 2016. The survey was sent to just over 2300 members, 155 of whom completed the survey — a response rate of approximately 7 per cent. The questions were optional and the percentage of members who responded to each question ranged from 37 per cent to 100 per cent.

'sometimes' do.[39] A significant proportion of the phoenix activity encountered by the respondents involved suspected unlawful conduct. Twenty-four per cent of respondents said they 'always' allege a breach of civil obligations in an external administrator report ('EXAD report') where they believe phoenix activity has occurred, and 29 per cent said they 'often' do.[40] The AICM survey yielded similar results. Twenty-eight per cent of AICM respondents said they 'often' believe, and 33 per cent said they 'sometimes' believe, that phoenix activity has occurred in cases where directors are applying for credit and the respondents know the directors have been involved in other failed companies in the past.[41] In regard to the economic loss caused by phoenix activity, 27 per cent of ARITA respondents said the liquidation of a company involving phoenix activity 'always' results in zero returns to creditors, and 60 per cent said it 'often' does.[42]

5 *Reports of Misconduct from External Administrators*

ASIC receives a large number of EXAD reports that allege misconduct by company directors and officers, and these reports cite the legislative provisions which the external administrator believes have been contravened.[43] This data suggests that there is a high incidence of misconduct associated with insolvency, and insolvency is the primary method illegal phoenix operators use to avoid Oldco's obligations.[44] It is not possible to identify exactly how much of this alleged misconduct relates to illegal phoenix activity; as noted earlier, there is no specific prohibition using the expression 'phoenix activity' and therefore there is no legislative provision against which external administrators can expressly record their suspicion of 'phoenix'-related wrongdoing.[45] However, the legislative breaches most commonly reported are ones that would typically or often occur in the course of illegal phoenix activity. Thus, it is possible that a significant proportion of the alleged breaches relate to phoenix activity.

Every year since 2008–09, the most common alleged pre-appointment breaches of the *Corporations Act 2001* (Cth) ('*Corporations Act*') reported by external administrators, in order from most to least common, were: ss 588G(1)–(3) (duty to prevent insolvent trading); ss 286 and 344(1)–(2) (obligation to keep financial records); s 180 (duty of care and diligence); s 181 (duties to act in good faith in the best interests of the corporation and for a proper purpose); ss 182 and 183 (duties

39 Helen Anderson et al, 'At the Coalface of Corporate Insolvency and Phoenix Activity: A Survey of ARITA and AICM Members' (2016) 24 *Insolvency Law Journal* 209, 211.

40 Ibid.

41 Ibid 214.

42 Ibid 211.

43 *Corporations Act* s 533. See also below nn 46, 53–6 and accompanying text.

44 Another method is abandonment, discussed at Part II(A)(6).

45 For a discussion of whether there should be a specific legislative section prohibiting illegal phoenix activity, see Helen Anderson et al, 'Illegal Phoenix Activity: Is a "Phoenix Prohibition" the Solution?' (2017) 35 *Company and Securities Law Journal* 184.

not to use position or information improperly to gain an advantage for themselves or someone else or cause detriment to the corporation).[46]

The act of liquidating Oldco with the intention of avoiding its obligations clearly constitutes a lack of care and diligence,[47] a failure to act in good faith in the best interests of Oldco and for a proper purpose,[48] and an improper use of position or information to gain an advantage for themselves or someone else (ie Newco) and cause detriment to Oldco.[49] Where illegal phoenix activity involves a transfer of assets from Oldco to Newco for below market value or as a result of financial difficulty, this will often involve insolvent trading.[50] However, illegal phoenix activity does not necessarily involve insolvent trading,[51] where, for example, there is no transfer of assets. Oldco may be a labour hire company within a corporate group that has few or no assets of its own. Failure to keep financial records[52] is also likely to occur where phoenix operators are covering their tracks.

From 2008–09 to 2015–16, there were an average of 6474 EXAD reports per year that alleged misconduct, involving an average of 16 633 alleged breaches of the *Corporations Act*.[53] During this eight-year period, 74 per cent of all EXAD reports alleged misconduct (51 790 of 70 296), involving 133 065 alleged breaches of the *Corporations Act*.[54] The percentage of EXAD reports that alleged misconduct has increased each year, from 66 per cent in 2008–09 (5092 of 7733) to 82 per cent in 2015–16 (7797 of 9465), as shown in Figure 1 below.[55]

46 This data was sourced from the following reports: ASIC, 'Insolvency Statistics: External Administrators' Reports (July 2015 to June 2016)' (Report No 507, December 2016) 38; ASIC, 'Insolvency Statistics: External Administrators' Reports (July 2014 to June 2015)' (Report No 456, November 2015) 37; ASIC, 'Insolvency Statistics: External Administrators' Reports (July 2013 to June 2014)' (Report No 412, September 2014) 32; ASIC, 'Insolvency Statistics: External Administrators' Reports (July 2012 to June 2013)' (Report No 372, October 2013) 32; ASIC, 'Insolvency Statistics: External Administrators' Reports 1 July 2011–30 June 2012' (Report No 297, September 2012) 31; ASIC, 'Insolvency Statistics: External Administrators' Reports 1 July 2010–30 June 2011' (Report No 263, November 2011) 31; ASIC, 'Insolvency Statistics: External Administrators' Reports 1 July 2007–30 June 2010' (Report No 225, December 2010) 31, 67.

47 *Corporations Act* s 180.

48 Ibid s 181.

49 Ibid ss 182–3 respectively. See, eg, *Australian Securities and Investments Commission v Somerville* (2009) 77 NSWLR 110; *Australian Securities and Investments Commission v Somerville [No 2]* [2009] NSWSC 998 (24 September 2009).

50 See below nn 94–5 and accompanying text.

51 *Corporations Act* s 588G.

52 Ibid ss 286, 344.

53 This data was sourced from the following reports: ASIC, 'Insolvency Statistics: External Administrators' Reports (July 2015 to June 2016)', above n 46, 22 [41]; ASIC, 'Insolvency Statistics: External Administrators' Reports (July 2014 to June 2015)', above n 46, 19 [41]; ASIC, 'Insolvency Statistics: External Administrators' Reports (July 2013 to June 2014)', above n 46, 19 [40]; ASIC, 'Insolvency Statistics: External Administrators' Reports (July 2012 to June 2013)', above n 46, 19 [40]; ASIC, 'Insolvency Statistics: External Administrators' Reports 1 July 2011–30 June 2012', above n 46, 22 [43]; ASIC, 'Insolvency Statistics: External Administrators' Reports 1 July 2010–30 June 2011', above n 46, 22 [42]; ASIC, 'Insolvency Statistics: External Administrators' Reports 1 July 2007–30 June 2010', above n 46, 24 [38]–[39], 58 [114].

54 See above n 53.

55 Ibid.

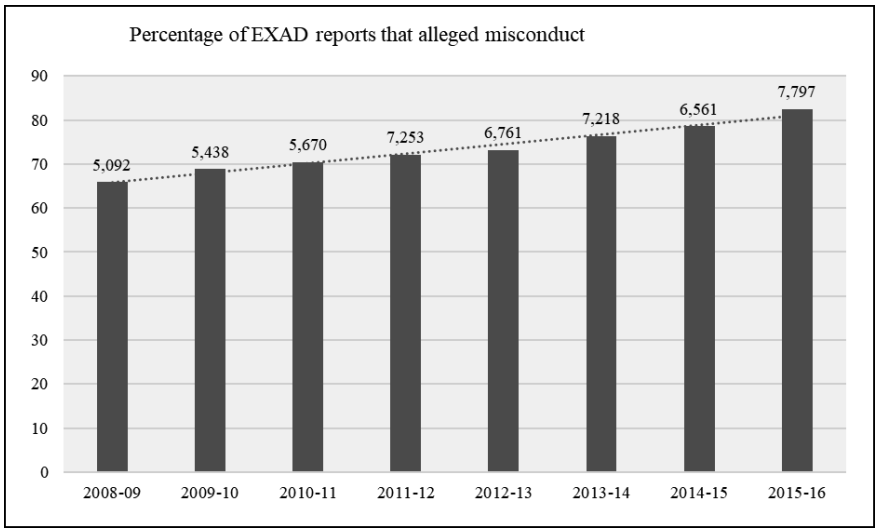

Figure 1: Percentage of EXAD reports that alleged misconduct (2008–09 to 2015–16)

In 2015–16, there were more EXAD reports that alleged misconduct (7797), involving more alleged breaches of the *Corporations Act* (20 625),[56] than in any previous year.

The sheer number of the allegations of misconduct, and the fact that the most commonly alleged forms of misconduct typically or often occur in the course of illegal phoenix activity, together suggest that illegal phoenix activity may form a significant component of the misconduct alleged in EXAD reports. This is likely confirmed by the estimates of the economic cost of illegal phoenix activity.

6 *Illegal Phoenix Activity via Abandonment of Companies — An Unknown Quantity*

Illegal phoenix operators may simply abandon Oldco, rather than causing it to be wound up and having their behaviour scrutinised by a liquidator. Where Oldco's liabilities are relatively small or there is a belief that the company has few assets, it may not be cost-effective for any one creditor to take action against Oldco to recoup what they are owed. Because abandoned companies escape liquidator scrutiny, it is unknown what proportion of these companies are abandoned for reasons of illegal phoenix activity. However, PwC's 2012 report on phoenix activity suggests that failing to take account of abandoned companies may result in 'significantly understat[ing] the impact of phoenix activity'.[57]

56 ASIC, 'Insolvency Statistics: External Administrators' Reports' (July 2015 to June 2016)', above n 46, 22 [41].

57 PwC and FWO, 'Phoenix Activity: Sizing the Problem and Matching Solutions' (Report, June 2012) 22.

Enforcement agencies have long been aware of the role that the abandonment of companies plays in illegal phoenix activity. In 1995 the Australian Securities Commission (ASIC's predecessor) estimated that 92 per cent of phoenix companies at the time were being deregistered under the ASC's s 574 program (the predecessor to s 601AB of the *Corporations Act*), '[e]ffectively … assisting Phoenix offenders to escape prosecution … and closing off the trail'.[58]

It appears that a large number of companies are abandoned. In 2014–15, 7044 companies entered liquidation.[59] This represented only 6.2 per cent of the 112 714[60] companies that were deregistered in that year.[61] Data obtained from ASIC[62] indicates 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 per cent,[63] 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. Many of these deregistered companies were likely abandoned, and a significant proportion of these companies could be Oldcos abandoned by illegal phoenix operators. While ASIC has had the power to order the winding up of abandoned companies since 2012,[64] it appears that by 12 September 2017, ASIC had used its power to wind up a total of only '95 companies that owed at least 287 employees more than $5 million in entitlements'.[65]

B *Incidence of Public Law Enforcement against Illegal Phoenix Activity*

The term 'public law enforcement' refers to enforcement actions taken by statutory agencies, including ASIC, the ATO, the FWO and the CDPP, as noted earlier. Public law enforcement is particularly important in the context of illegal phoenix activity because the nature of illegal phoenix activity — which leaves Oldco either insolvent or abandoned with few or no assets — means that there is rarely sufficient funding for companies or external administrators to pursue

58 Australian Securities Commission, 'Project One: Phoenix Activities and Insolvent Trading — Public Version' (Research Paper 95/01, 13 May 1996) 75.

59 ASIC, *Australian Insolvency Statistics — Series 1: Companies Entering External Administration, January 1999–February 2018* (April 2018), tbl 1.3 <http://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics>. This figure has been calculated by aggregating the annual figures for '[c]ourt wind-up' and '[c]reditors wind-up' in 2014–15.

60 ASIC, 'Annual Report 2014–2015' (Annual Report, 15 October 2015) 66.

61 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.

62 Email from Adrian Brown of ASIC to Helen Anderson, 18 March 2016.

63 Ibid.

64 *Corporations Act* s 489EA, as inserted by *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth) sch 1 item 1.

65 ASIC, 'ASIC Winds Up 11 Abandoned Companies Owing More than $650,000 in Employee Entitlements' (Media Release, 17-310MR, 12 September 2017).

private court proceedings against illegal phoenix operators.[66] While liquidators can apply for funding from the Assetless Administration Fund ('AAF'),[67] to qualify for funding the liquidators must have obtained sufficient evidence to support the enforcement action[68] and undertaken detailed paperwork.[69] Liquidators must therefore do a substantial amount of preliminary work relying on their own funds or funding from creditors in order to apply for AAF funding. Furthermore, in the survey of members of ARITA discussed above in Part II(A)(4),[70] respondents indicated a very low level of satisfaction with the AAF, giving an average score ranging from 2.81 to 3.71 out of 10 in regard to the ease of the application process, the response time from ASIC, the outcomes of their applications, and the amount of funding provided in each case.[71] It is beyond the scope of this article to enter into a detailed discussion of the barriers to private enforcement action against illegal phoenix activity, except to point out that the hurdles to private enforcement highlight the importance of public enforcement in this area.[72]

While there is limited data available on the incidence of public law enforcement against illegal phoenix activity, as discussed in previous research,[73] the little data that is available, which is examined below, suggests that there is a low incidence of enforcement. Data on these public law enforcement actions was collected from the Australasian Legal Information Institute ('AustLII') case law database,[74] ASIC's media releases,[75] the FWO's litigation outcomes webpage,[76] the ATO website,[77] and ATO annual reports.[78]

66 See the discussion of funding of liquidators in Helen Anderson et al, 'Phoenix Activity: Recommendations on Detection, Disruption and Enforcement' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, February 2017) 81–4 ('*Recommendations on Phoenix Activity Report*'); Michelle Welsh and Helen Anderson, 'The Public Enforcement of Sanctions against Illegal Phoenix Activity: Scope, Rationale and Reform' (2016) 44 *Federal Law Review* 201, 208–11.

67 ASIC, *Regulatory Guide 109 — Assetless Administration Fund: Funding Criteria and Guidelines* (November 2012), 5 [109.3] <http://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/rg-109-assetless-administration-fund/> ('*Regulatory Guide 109*').

68 Ibid 15 [109.28]. Data has been requested from ASIC about the extent to which AAF funding has been paid for asset recovery in phoenix circumstances, but at the date of writing no response has been received.

69 The details are contained in the appendices to *Regulatory Guide 109*: ibid 37–50.

70 See above n 37 and accompanying text.

71 Anderson et al, 'At the Coalface of Corporate Insolvency and Phoenix Activity', above n 39, 212.

72 This issue has been examined at length in previous research: Anderson et al, *Recommendations on Phoenix Activity Report*, above n 66.

73 Anderson et al, *Quantifying Phoenix Activity Report*, above n 28.

74 AustLII, *Cases & Legislation* <http://www.austlii.edu.au/database-cases.html>.

75 ASIC, *Find a Media Release* (23 March 2016) <http://asic.gov.au/about-asic/media-centre/find-a-media-release/>.

76 FWO, *Litigation* <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation>.

77 ATO <https://www.ato.gov.au/>.

78 ATO, *Annual Report* (30 October 2017) <https://www.ato.gov.au/about-ato/access,-accountability-and-reporting/reporting-to-parliament/annual-report/>.

1 *Administrative Disqualification Orders by ASIC*

Where a company fails and the officers of the company have been officers of another failed company within the previous seven years, among other conditions, ASIC can make an order disqualifying those officers from managing corporations for up to five years under s 206F of the *Corporations Act*. It is not necessary for the officers to have engaged in any unlawful behaviour to be disqualified under s 206F. The purpose of s 206F is not to punish unlawful behaviour but to protect creditors and others who deal with corporations from directors who have a history of corporate failures.[79]

That the preconditions and purpose of s 206F orders do not relate to *illegality* might prompt some to question whether it is appropriate to classify such orders as action *taken against illegal* phoenix activity. On its face, s 206F has nothing to do with illegality because it does not require a breach of any specific provision.[80] However, it has been recognised by the judiciary and the Administrative Appeals Tribunal that orders disqualifying individuals from managing corporations, while primarily protective in purpose, have a punitive or adverse effect on the individuals who are subject to such orders.[81] Thus, where ASIC makes orders pursuant to s 206F in circumstances where the officers *have* engaged in unlawful behaviour, such orders *effectively* operate as a form of action taken against the officers for engaging in that unlawful behaviour and should be classified as such.

Comprehensive data on s 206F orders is not available to the public.[82] It is therefore not possible to determine the exact number of s 206F orders that involve illegal phoenix activity. From 1 January 2004 to 30 June 2014, ASIC published 32 media releases indicating that 51 people were disqualified under s 206F in circumstances involving problematic[83] or illegal phoenix activity.[84] This amounts to an average of about five orders reported in ASIC's media releases per year.

79 But see below n 81 and accompanying text.

80 See, eg, *Re May and Australian Securities and Investments Commission* (2013) 134 ALD 224, 229–30 [20].

81 See Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 16th ed, 2015) 104–5, 265–6; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129, 148–57 [41]–[59], 166 [87]; *Australian Securities and Investments Commission v Vizard* (2005) 145 FCR 57, 65 [35]; *Re Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602, 644–53 [152]–[180], 660 [200]; *Re Musumeci and Australian Securities and Investments Commission* (2009) 109 ALD 677, 690–5 [65]–[79]. There is a complex constitutional question as to whether the characterisation of ASIC's administrative disqualification and banning powers as 'punitive' renders such powers unconstitutional on the basis that this involves conferring judicial power on executive bodies in breach of the separation of powers doctrine, but it is commonly accepted that such orders nonetheless have a punitive effect: Marina Nehme, 'Latest Changes to the Banning Order Regime: Were the Amendments Really Needed?' (2013) 31 *Company and Securities Law Journal* 341, 347–9.

82 Anderson et al, *Recommendations on Phoenix Activity Report*, above n 66, 36.

83 See above nn 9–14 and accompanying text for an explanation of the distinction between 'problematic' and 'illegal' phoenix activity. It is not possible to identify how many of the 51 disqualification orders related to 'problematic' as distinct from 'illegal' phoenix activity due to the lack of detail contained in ASIC's media releases.

84 For further discussion of data on s 206F orders made in the context of phoenix activity, see Anderson et al, *Quantifying Phoenix Activity Report*, above n 28, 67–8.

However, previous research suggests that only about 50 per cent of s 206F orders are covered in ASIC's media releases.[85] Assuming that the number of unreported orders is similar to that of reported orders, the true number of s 206F orders involving problematic or illegal phoenix activity may be about 10 per year.

2 *Civil Penalty Proceedings for Breaches of Directors' Duties*

Illegal phoenix activity always involves breaches of directors' duties including, but not limited to, the duty of care and diligence, the duty of good faith, and the duty not to improperly use one's position or information.[86] The term 'directors' duties' is widely used in academic and professional literature to describe the duties set out in ss 180–4, 209, 191, 195 and 588G of the *Corporations Act*.[87] However, most of these duties apply not only to directors but also to 'officers', as defined in s 9, and some apply to employees.[88] The definition of 'director' is broad and includes both de facto and shadow directors.[89] Most of the duties also apply to civil and criminal accessories,[90] which would capture, for example, pre-insolvency advisers who advise company controllers to undertake illegal phoenix activity.[91]

Despite the broad reach of directors' duties, ASIC has only brought one civil penalty proceeding for breaches of directors' duties in the context of illegal phoenix activity since civil penalties were introduced for breaches of directors' duties in 1993.[92] The only orders imposed in this case against the lawyer, Mr Somerville, as an accessory to the directors' breaches of duty, were disqualification orders, despite the availability of both pecuniary penalties and compensation orders.[93]

85 Anderson et al, *Recommendations on Phoenix Activity Report*, above n 66, 36.

86 See above nn 47–52 and accompanying text.

87 Jasper Hedges et al, 'The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis' (2017) 40 *Melbourne University Law Review* 905, 920, citing Robert Austin, Harold Ford and Ian Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2005); Rosemary Teele Langford, *Directors' Duties: Principles and Application* (Federation Press, 2014).

88 The insolvent trading duty only applies to directors: *Corporations Act* s 588G(1).

89 Ibid s 9 (definition of 'director').

90 Civil accessory liability is found in ibid ss 181(2), 182(2), 183(2), which capture those 'involved in' the director's or officer's contravention, as defined by *Yorke v Lucas* (1985) 158 CLR 661. Accessory liability for a director's or officer's contravention of the s 184 offence arises under pt 2.4 of the *Criminal Code*. See further Hedges et al, above n 87, 916–19.

91 See Helen Anderson and Jasper Hedges, 'Catching Pre-Insolvency Advisors: The Hidden Culprits of Illegal Phoenix Activity' (2017) 35 *Company and Securities Law Journal* 486; Anderson et al, *Recommendations on Phoenix Activity Report*, above n 66, 108–13.

92 See *Australian Securities and Investments Commission v Somerville* (2009) 77 NSWLR 110; *Australian Securities and Investments Commission v Somerville [No 2]* [2009] NSWSC 998 (24 September 2009).

93 *Australian Securities and Investments Commission v Somerville [No 2]* [2009] NSWSC 998 (24 September 2009) [39]. Note that the ATO had earlier issued garnishee notices against the directors involved: *Australian Securities and Investments Commission v Somerville* (2009) 77 NSWLR 110, 119–20 [26].

3 *Civil Penalty Proceedings for Uncommercial Transactions*

From 2000, uncommercial transactions became actionable as insolvent trading.[94] An undervalued transfer of assets — which often occurs in the course of illegal phoenix activity — is an uncommercial transaction.[95] By deeming the transaction to be the incurring of a debt, the 2000 amendment enables ASIC to issue civil penalty proceedings alleging a contravention of the insolvent trading provisions. However, the authors were not able to locate any instances of ASIC using this mechanism to punish illegal phoenix operators between 2004 and 2014.

4 *Civil Remedy Proceedings for Non-Payment of Wages and Other Employee Entitlements*

Illegal phoenix activity frequently results in the non-payment of wages and other employee entitlements. In such situations, the FWO may be able to take action against illegal phoenix operators as accessories to Oldco's breach of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*').[96] These FWO proceedings are not brought on the basis of, or for the purpose of punishing, illegal phoenix activity as such. The basis of such proceedings is typically Oldco's failure to pay wages in contravention of a modern award under s 45 of the *Fair Work Act*, and the directors' liability arises from involvement in that contravention pursuant to s 550 of the Act. However, these proceedings effectively constitute another form of enforcement action against company controllers who have engaged in illegal phoenix activity.

Based on a review of the FWO's litigation outcomes webpages for the period 1 July 2010 to 30 June 2014,[97] the authors identified two cases in which a company appeared to have been placed into liquidation deliberately to avoid payment of wages and other entitlements.[98] There were a further four cases involving circumstances that were suggestive of such deliberate avoidance but no definitive

94 *Corporations Act* s 588G(1A), inserted by *Corporations Law Amendment (Employee Entitlements) Act 2000* (Cth) sch 1 item 3. See Explanatory Memorandum, Corporations Law Amendment (Employee Entitlements) Bill 2000 (Cth) 4 [10]: 'The inclusion of uncommercial transactions in section 588G(1A) has implications for the protection of employee entitlements, the prosecution of directors involved in "phoenix" activity and recovery actions by liquidators for the benefit of creditors generally.'

95 *Corporations Act* s 588FB.

96 *Fair Work Act* ss 45, 550, 545.

97 See FWO, *2010–2011 Litigation Outcomes* <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/2010-2011-litigation-outcomes>; FWO, *2011–2012 Litigation Outcomes* <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/2011-2012-litigation-outcomes>; FWO, *2012–2013 Litigation Outcomes* <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/2012-2013-litigation-outcomes>; FWO, *2013–2014 Litigation Outcomes* <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/2013-2014-litigation-outcomes>.

98 *Fair Work Ombudsman v Foure Mile Pty Ltd* [2013] FCCA 682 (28 June 2013) [19], [34]; *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174, 176–7 [1]–[3].

findings were made in this regard.[99] The FWO's litigation outcomes webpages are not a complete record of litigation brought by the FWO, but these figures nonetheless suggest that there is a relatively low level of FWO enforcement in response to circumstances involving potential illegal phoenix activity.

5 *Criminal Prosecutions under the* Corporations Act *and* Taxation Administration Act

Where illegal phoenix activity is carried out deliberately to evade Oldco's obligations to pay employee entitlements or taxes, the CDPP may be able to bring criminal proceedings under s 596AB of the *Corporations Act* or s 8Y of the *Taxation Administration Act 1953* (Cth) respectively. However, there appear to have been no prosecutions of phoenix operators under s 596AB and only one phoenix-related prosecution under s 8Y has been identified.[100]

6 *Other Enforcement Actions*

In addition to the above categories, the authors identified the following public enforcement actions that have been taken in circumstances involving or allegedly involving illegal phoenix activity: three winding up orders;[101] two criminal convictions for breaches of directors' duties;[102] two convictions for defrauding the Commonwealth,[103] and having been knowingly concerned in the defrauding of the Commonwealth;[104] one action to remove a liquidator on the basis of apprehended bias;[105] and two disciplinary actions to cancel[106] and suspend[107] the registration of liquidators.

The data discussed above suggests that there is a low incidence of public law enforcement against illegal phoenix activity. Based on available data, the only

99 *Fair Work Ombudsman v Happy Cabby Pty Ltd* [2013] FCCA 397 (26 July 2013) [3], [81]; *Fair Work Ombudsman v Francis* [2011] FMCA 1005 (19 December 2011) [31]; *Fair Work Ombudsman v Kingsford Carwash Pty Ltd [No 2]* [2012] FMCA 1210 (18 December 2012) [9], [23]–[25], [43]; *Fair Work Ombudsman v Humidifresh Industries Pty Ltd* [2012] FMCA 954 (18 September 2012) [21], [34].

100 *Gould v Federal Commissioner of Taxation* (1998) 157 ALR 632.

101 *Canadian Solar v ACN 138 535 832 Pty Ltd, Re ACN 138 535 832 Pty Ltd (Subject to a Deed of Company Arrangement)* [2014] FCA 783 (29 July 2014); *Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd* (2004) 9 VR 549; *Deputy Commissioner of Taxation v Woodings* (1995) 13 WAR 189.

102 *Jeffree v National Companies and Securities Commission* [1990] WAR 183; *R v Heilbronn* (1999) 150 FLR 43.

103 *R v Pearce* (2001) 48 ATR 390. See also the related matter of James Soong discussed in Adele Ferguson, 'The Phoenix Dilemma: How to Stop Rort Artists from Rising from the Ashes', *The Sydney Morning Herald* (online), 11 December 2010 <https://www.smh.com.au/business/the-phoenix-dilemma-how-to-stop-rort-artists-from-rising-from-the-ashes-20101210-18svy.html>.

104 *R v Walters* (2001) 49 ATR 373, affd [2002] NSWCCA 291 (25 July 2002). See also *R v Walters* [2001] NSWSC 786 (23 August 2001).

105 *Australian Securities and Investments Commission v Franklin* (2014) 223 FCR 204.

106 See ASIC, 'ASIC Removes Liquidator from Industry' (Media Release, 14-160MR, 8 July 2014).

107 See ASIC, 'CALDB Suspends NSW Joint Liquidator for Six Months' (Media Release, 14-080MR, 16 April 2014).

enforcement actions that are taken against illegal phoenix activity with any regularity are administrative disqualification orders by ASIC under s 206F of the *Corporations Act*. Civil penalty and criminal court proceedings against illegal phoenix operators appear to be rare.[108]

In conclusion, there appears to be a high incidence of illegal phoenix activity but a low incidence of public law enforcement. This conclusion is particularly concerning given that, as discussed earlier, the asset-stripping nature of illegal phoenix activity means that there is rarely sufficient funding for companies and external administrators to pursue private court proceedings against illegal phoenix operators.[109] Private enforcement can[110] and does play a significant role in, for example, the enforcement of directors' duties generally,[111] but such enforcement is less likely to occur against illegal phoenix activity due to the lack of funding and other barriers discussed earlier in this part of the article.[112]

III WHETHER TO INCREASE ENFORCEMENT AGAINST ILLEGAL PHOENIX ACTIVITY

The question of whether to increase public law enforcement against illegal phoenix activity should be determined through a cost-benefit analysis.[113] The costs of increasing public law enforcement would include increased surveillance, investigation and litigation expenses. The main benefits that public law enforcement is commonly thought to provide are: retribution, incapacitation, restoration and reparation, rehabilitation, specific deterrence, and general deterrence.[114] These costs and benefits are discussed in further detail in Part III(A). It is not possible to do an *exact* cost-benefit analysis, as it is not known exactly how much increasing public law enforcement would cost, how much illegal phoenix activity costs, or how much illegal phoenix activity would be reduced if public law enforcement were increased. Nevertheless, it is important to do the best cost-benefit analysis possible given the significant amount of public money that would be required to increase in a meaningful way the incidence of enforcement.

108 For a discussion of possible reasons why successful criminal proceedings against illegal phoenix activity have been rare, see below nn 205–7 and accompanying text.

109 See above nn 66–72 and accompanying text.

110 The right to bring private enforcement action is expressly preserved by ss 179, 185 and 230 of the *Corporations Act*. ASIC also has the power to provide certain forms of assistance to private litigants under s 25(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*').

111 See Jenifer Varzaly, 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis' (2015) 16 *European Business Organization Law Review* 281, cited in Hedges et al, above n 87, 911 n 36.

112 See above nn 66–72 and accompanying text.

113 This approach is consistent with the objectives of ASIC stated in s 1(2)(a) of the *ASIC Act*: 'In performing its functions and exercising its powers, ASIC must strive to … maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy'.

114 See below nn 119–21.

This part of the article advances two arguments. In Part III(A), it is argued that the benefits of increasing public law enforcement against illegal phoenix activity would only be likely to outweigh the costs of doing so if increasing enforcement would produce general deterrence. The other ostensible benefits of increasing enforcement, for example, generating specific deterrence, are unlikely to be sufficient to do so. In Part III(B), it is argued that, although the empirical evidence on the effectiveness of general deterrence is mixed, there is sufficient justification to increase public law enforcement against illegal phoenix activity provided that this increase is subject to periodic review to ensure that the additional resources are allocated as efficiently as possible (Part IV(D)).

A *To Be Cost-Effective, an Increase in Enforcement Must Produce General Deterrence*

Public law enforcement against corporate wrongdoing involves significant costs. In 2016–17, ASIC's total operating expenditure was $392 million and it devoted about 70 per cent of its 'regulatory resources to surveillance and enforcement'.[115] It is not clear exactly what this equates to in monetary terms, as 'regulatory resources' could be referring to funds or personnel, among other things. It seems that ASIC does not keep track of the exact cost of enforcement actions, as it states in its 2014–15 annual report that it 'cannot currently specify the actual cost of criminal, civil and administrative actions individually'.[116] Similarly, the ATO and FWO do not appear to specify such expenditure in their publicly available reports. ASIC's 2015–16 annual report states that, of the $127.3 million in additional funding provided to ASIC by the government in response to recommendations from the ASIC Capability Review and Financial System Inquiry, ASIC allocated $57 million to increasing 'enforcement and surveillance activities with a focus on financial advice, responsible lending, life insurance and breach reporting', as well as $61.1 million to increasing 'data analytics capabilities, including updating … [ASIC's] data management system and increasing … [ASIC's] surveillance capabilities'.[117] These figures suggest that enforcement and surveillance costs are significant.

Increasing public law enforcement against illegal phoenix activity should be justified by a positive cost-benefit analysis.[118] The main benefits that public law enforcement is commonly thought to provide[119] are set out in Table 1 below. The judiciary takes these possible benefits into account when determining the

115 ASIC, 'Annual Report 2016–2017' (Annual Report, 5 October 2017) 4, 26.

116 ASIC, 'Annual Report 2014–2015', above n 60, 10. ASIC may recover its costs from successful litigation: ASIC, 'Annual Report 2015–2016', above n 32, 159–60; and ASIC has the power to recover its investigation expenses under s 91 of the *ASIC Act*.

117 ASIC, 'Annual Report 2015–2016', above n 32, 5.

118 See above n 113 and accompanying text.

119 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 83–96, 98–100.

appropriate penalties to impose.[120] While the terminology used in Table 1 is often associated with criminal law enforcement, one or a combination of these benefits typically provides the justification for all forms of public enforcement, including civil and administrative enforcement.[121]

Table 1: Judicially recognised benefits of public law enforcement

1	Retribution	Eg custodial sentences or financial penalties to punish the wrongdoer for engaging in illegal conduct
2	Incapacitation	Eg custodial sentences or disqualification orders to prevent the wrongdoer from engaging in further illegal conduct
3	Restoration and reparation	Eg financial compensation, apologies, and any other actions taken to satisfy the rights and needs of victims
4	Rehabilitation	Eg any form of enforcement action that achieves rehabilitation to reduce the chances of the wrongdoer engaging in further illegal conduct
5	Specific deterrence	Eg any form of enforcement action that deters the wrongdoer from engaging in further illegal conduct for fear of being subject to further enforcement action
6	General deterrence	Eg any form of enforcement action that deters *others* — not the wrongdoer — from engaging in illegal conduct for fear of being subject to enforcement action

However, it must be noted that most of these so-called 'benefits' can be questioned on theoretical grounds, despite being judicially recognised. The questionable aspects of general deterrence are addressed in Part III(B). It is not necessary to discuss the other benefits in detail, but, broadly speaking, retribution and incapacitation are often questioned on moral grounds, while rehabilitation and specific deterrence are often questioned on practical grounds. While enforcement can effectively deliver retribution and incapacitation, some question their moral value.[122] Conversely, while few would disagree that rehabilitation and specific deterrence are morally valuable, some question how effectively they can be delivered,[123] as they depend, unlike retribution and incapacitation, on the voluntary behaviour of the perpetrator.

Only if increasing enforcement produces *general* deterrence is it likely that the benefits of doing so will outweigh the costs. This is because the effects of the other

120 See, eg, *Australian Securities and Investments Commission v Vizard* (2005) 145 FCR 57, 64 [30]; see also the judgments referred to at above n 27. In the criminal context, see *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476–7; *Muldrock v The Queen* (2011) 244 CLR 120, 129 [20]; *R v Stunden* [2011] NSWCCA 8 (11 February 2011) [112]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 29 [4–1].

121 See the civil judgments referred to at above n 120; Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002) 104 [3.4]–[3.6]. See also George Gilligan et al, 'Penalties Regimes to Counter Corporate and Financial Wrongdoing in Australia — Views of Governance Professionals' (2017) 11 *Law and Financial Markets Review* 4, 5 nn 12–13 and accompanying text.

122 See Ashworth, above n 119, 90–1, 95–6.

123 On rehabilitation, see generally Francis T Cullen, 'Rehabilitation: Beyond Nothing Works' (2013) 42 *Crime and Justice* 299. On specific deterrence, see Donald Ritchie, 'Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence' (Report, Sentencing Advisory Council (Vic), April 2011) 18–22; ibid 85.

benefits are predominantly confined to the specific perpetrator, their victims, and their potential future victims. By contrast, general deterrence ostensibly reduces the probability of *all* potential perpetrators engaging in illegal phoenix activity. Thus, the other benefits have far less impact than general deterrence ostensibly has. Even if, hypothetically speaking, enforcement agencies managed to achieve all the other benefits in every case of illegal phoenix activity, this would not, in the absence of general deterrence, do anything to prevent new perpetrators from engaging in illegal phoenix activity. The reality, of course, is that enforcement agencies must be very selective in choosing cases to enforce due to limited resources, which means that the real impact of the other benefits is far more limited than this hypothetical scenario contemplates. As ASIC states on its webpage on illegal phoenix activity, '[w]hile ASIC does not take action in every instance of alleged misconduct, we will take action where it will likely result in greater market impact and benefit the public more broadly'.[124]

The broader potential impact of general deterrence may explain why the main enforcement agencies responsible for regulating illegal phoenix activity have come to regard general deterrence as the primary benefit of public law enforcement. ASIC's enforcement policy states:

> Enforcement action is one of several regulatory tools available to us. *We use enforcement to deter misconduct.* Other regulatory tools that we use are engagement with industry and stakeholders, surveillance, guidance, education, and policy advice. This document only discusses enforcement action.[125]

This passage suggests that ASIC regards deterrence as the primary benefit of public law enforcement, as none of the other benefits are mentioned. ASIC's submission to the Senate Economics References Committee's inquiry into penalties for white collar crime similarly emphasises general deterrence to the exclusion of the other benefits:

> Effective regulation depends on *achieving enforcement outcomes that act as a genuine deterrent to misconduct*. The public expects ASIC to take strong action against corporate wrongdoers. Effective enforcement is therefore critical for us in pursuing our strategic priorities of promoting investor and financial consumer trust and confidence and ensuring fair, orderly and transparent financial markets.[126]

The CDPP's submission to the aforementioned Senate Committee inquiry expressly confers primary status on general deterrence (although, as discussed in Part II(B), criminal actions against illegal phoenix activity have been rare):[127] 'there is now a very considerable body of appellate level case law which underscores the seriousness of white collar crime and its impacts on the community. That

124 ASIC, 'Illegal Phoenix Activity' (Information Sheet No 212, 8 March 2016).

125 ASIC, 'ASIC's Approach to Enforcement' (Information Sheet No 151, September 2013) 1 (emphasis added).

126 ASIC, Submission No 49 to Senate Economics References Committee, *Inquiry into Penalties for White Collar Crime*, April 2016, 3–4 [5] (emphasis added).

127 For a discussion of possible reasons why successful criminal proceedings against illegal phoenix activity have been rare, see below nn 205–7 and accompanying text.

case law also entrenches the principle that *"general deterrence" is the primary sentencing objective*'.[128]

The FWO's *Compliance and Enforcement Policy* explains that litigation is an essential enforcement action for three reasons: general deterrence; specific deterrence; and helping the community understand the law (which could be viewed as a subset of general deterrence).[129] The policy goes on to state: '[w]here a court determines that breaches have occurred, a range of outcomes are available to the court. We will ask the court for outcomes that balance *our aims of general and specific deterrence* with the issues relevant in a case'.[130] General deterrence also occupies a prominent position in international discourse on the benefits of corporate law enforcement. For example, the International Organization of Securities Commission's ('IOSCO') 2015 report, Credible Deterrence in the Enforcement of Securities Regulation, states that '[e]nforcement plays an important role in deterring misconduct and thereby promotes public confidence, consumer protection and market integrity'.[131]

These agencies are correct to emphasise the primary importance of general deterrence, given its broader potential impact. Although there is no exact data available on the costs of public law enforcement and illegal phoenix activity, it seems unlikely that the other possible benefits — retribution, incapacitation, restoration, rehabilitation, and specific deterrence — would be sufficient to outweigh the substantial costs involved in increasing enforcement. Thus, the question of whether it is justified to increase public law enforcement against illegal phoenix activity hinges on whether increasing such enforcement would produce general deterrence.

B *Evidence on Whether an Increase in Enforcement Would Produce General Deterrence*

The theory that posits that increasing public law enforcement *would* deter illegal phoenix activity is known as 'general deterrence' within criminology, or

128 CDPP, Submission No 53 to Senate Economics References Committee, *Inquiry into Penalties for White Collar Crime*, 13 April 2016, 3 (emphasis added) (citations omitted). The sentencing principles for *Corporations Act* offences are found in *Crimes Act 1914* (Cth) s 16A(2). While the expression 'general deterrence' is not listed in s 16A(2), that section does not provide an exhaustive list and the significance of general deterrence is recognised in case law: see *DPP (Vic) v Gianello* [2014] VCC 2015 (7 November 2014) [44], [79]; *R v Heath* [2015] NSWDC 282 (25 September 2015) [64]–[65]; *R v Pantano* (1990) 49 A Crim R 328, 330; *R v Zhu* [2013] NSWSC 127 (15 February 2013) [12]; *DPP (Cth) v Couper* (2013) 41 VR 128, 145 [99], 149 [118]; *R v Glynatsis* (2013) 230 A Crim R 99, 112 [70]; *R v Moylan* [2014] NSWSC 944 (25 July 2014) [57]; *R v Johnson* [2014] VSC 175 (17 April 2014) [87]; *R v Sigalla* [2017] NSWSC 52 (10 February 2017) [94].

129 FWO, *Compliance and Enforcement Policy* (August 2017) 26 <https://www.fairwork.gov.au/about-us/our-vision/compliance-and-enforcement-policy>.

130 Ibid (emphasis added).

131 Committee on Enforcement and Exchange of Information, IOSCO, 'Credible Deterrence in the Enforcement of Securities Regulation' (Report FR10/2015, June 2015) 6 [5].

'deterrence' within economics.[132] While general deterrence is often studied in the criminal law context, it is important to note that this theory is relevant to all forms of law enforcement. Any form of enforcement — whether criminal, civil, or administrative — arguably has the potential to produce general deterrence of the wrongdoing that it targets. To avoid doubt, this part of the article is concerned with the question of whether an increase in enforcement *in general* — not only criminal enforcement — would produce general deterrence of illegal phoenix activity.

According to general deterrence theory, enforcement deters others from engaging in wrongdoing provided that there is sufficient perceived probability (sometimes referred to as 'certainty'), speed (sometimes referred to as 'celerity', 'swiftness' or 'immediacy') and severity of enforcement.[133] In other words: if a person engages in wrongdoing, how likely is it that they will be subject to enforcement, and if they are subject to enforcement, how quickly will enforcement occur, and how severe will it be? The probability of enforcement involves two distinct aspects. First, there is the probability of being apprehended (ie detected and subjected to the commencement of enforcement action, such as being arrested, or, in civil or administrative matters, being served with initial documents). Second, there is the probability of being punished (ie of being subjected to some kind of sanction at the conclusion of enforcement action).[134]

The probability of being apprehended is almost certain to be higher than the probability of being punished, since not all apprehensions lead to punishment. For instance, a person might be arrested, but the case is taken no further because there is insufficient evidence to pursue a prosecution. It is also important to distinguish between actual enforcement practices and perceived ones.[135] General deterrence is a perceptual theory,[136] meaning that it is concerned with *perceived* probability, speed and severity of enforcement. This is because the theory aims to alter people's behaviour, which necessarily relies on altering their perceptions. Of

132 Daniel S Nagin, 'Deterrence: A Review of the Evidence by a Criminologist for Economists' (2013) 5 *Annual Review of Economics* 83, 84.

133 Ibid 85.

134 See Daniel S Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 *Crime and Justice* 199.

135 See Ray Paternoster and Ronet Bachman, 'Perceptual Deterrence Theory' in Francis T Cullen and Pamela Wilcox (eds), *The Oxford Handbook of Criminological Theory* (Oxford University Press, 2012) 649.

136 Raymond Paternoster, 'How Much Do We Really Know about Criminal Deterrence?' (2010) 100 *Journal of Criminal Law and Criminology* 765, 780.

course, perceived enforcement practices may be influenced by actual enforcement practices[137] so both aspects are important to keep in mind.

Whether general deterrence 'works' is a complex question that tends to be oversimplified. On the one hand, many people and organisations — as indicated by the ASIC, ATO, FWO and IOSCO quotes in Part III(A) — appear to almost unquestioningly assume that it does work. On the other hand, some reject the theory entirely. For example, Bagaric gave evidence to the Senate Committee inquiry into penalties for white collar crime that general deterrence is an 'absolute myth'.[138] Neither position is correct, as Kennedy explains:

> deterrence effects are there to be found. The strong case — "deterrence does not work" — is clearly false. Deterrence effects are also, often, found to be absent. The weaker case — that deterrence does not work very well or does not work where we would particularly like it to, or is not worth the various costs of producing it — is still a live option.[139]

There are numerous empirical studies on general deterrence — hundreds, if not thousands. The bulk of these studies relate to the deterrence of street crime, rather than corporate or 'white collar' wrongdoing. However, there have also been several empirical studies in the latter category. It is clear from the empirical studies that the degree to which general deterrence works varies significantly depending on the particular circumstances, such as the dimension of enforcement (actual probability, speed, severity), the type of laws being enforced, the type of wrongdoer, the social and economic conditions, and so on.[140] To the authors' knowledge, there have not been any empirical studies that address general deterrence of public law enforcement against illegal phoenix activity in Australia. Thus, there is no evidence that increasing public law enforcement against illegal phoenix activity definitely would produce general deterrence.

However, there is evidence that enforcement produces some degree of general deterrence in certain circumstances, as discussed below in Parts III(B)(1) and III(B)(2), so it is reasonable to conclude that it is possible that increasing public

137 The extent of the correlation (if any) between actual and perceived enforcement practices, and the significance of such a correlation, is a complex matter that is hotly disputed among deterrence theorists: see Justin T Pickett and Sean Patrick Roche, 'Arrested Development: Misguided Directions in Deterrence Theory and Policy' (2016) 15 *Criminology and Public Policy* 727; Daniel S Nagin, '"What We've Got Here Is Failure to Communicate"' (2016) 15 *Criminology and Public Policy* 753; Gary Kleck, 'Objective Risks and Individual Perceptions of Those Risks' (2016) 15 *Criminology and Public Policy* 767; Greg Pogarsky and Thomas A Loughran, 'The Policy-to-Perceptions Link in Deterrence: Time to Retire the Clearance Rate' (2016) 15 *Criminology and Public Policy* 777; Steven Raphael, 'Optimal Policing, Crime, and Clearance Rates' (2016) 15 *Criminology and Public Policy* 791; Francis T Cullen and Travis C Pratt, 'Toward a Theory of Police Effects' (2016) 15 *Criminology and Public Policy* 799; Anthony A Braga and Robert Apel, 'And We Wonder Why Criminology Is Sometimes Considered Irrelevant in Real-World Policy Conversations' (2016) 15 *Criminology and Public Policy* 813; Justin T Pickett and Sean Patrick Roche, 'A Few Clarifying Comments on Pickett and Roche (2016)' (2016) 15 *Criminology and Public Policy* 831.

138 Senate Economics References Committee, *'Lifting the Fear and Suppressing the Greed'*, above n 23, 48–9 [4.17].

139 David M Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction* (Routledge, 2009) 12.

140 See below Parts III(B)(1) and III(B)(2) for further discussion.

law enforcement against illegal phoenix activity in Australia would produce general deterrence. It is contended that this possibility, along with the significant economic cost of illegal phoenix activity[141] and its apparently increasing incidence,[142] together justify increasing public law enforcement against illegal phoenix activity, provided this increase is subject to periodic review to ensure efficient allocation of resources.

So what is the evidence in support of general deterrence theory? The following parts of this article briefly canvass some of the key findings of empirical studies on general deterrence of corporate crime (Part III(B)(1)) and crime in general (Part III(B)(2)). This examination relies on meta-analyses of the individual studies, as the studies are numerous and it is beyond the scope of this article to analyse them individually. One limitation of relying on these meta-analyses is that they are predominantly focused on enforcement in the criminal law jurisdiction, which, as discussed in Part II(B), has not played a significant role in enforcement against illegal phoenix activity.[143] The legal jurisdiction in which enforcement takes place is one of a range of other factors, as noted above, that may influence the degree to which general deterrence works. In the absence of studies that specifically address enforcement against illegal phoenix activity in Australia, the most these meta-analyses show is that general deterrence works in *some* circumstances, and therefore that it is possible that it would work in the context of illegal phoenix activity in Australia.

1 *Meta-Analyses of Empirical Studies on General Deterrence of Corporate Crime*

In 2016, Schell-Busey et al published what appears to be the first comprehensive meta-analysis of empirical studies on the effectiveness of measures aimed at deterring corporate crime.[144] Schell-Busey et al located 265 studies that met their search criteria, but only 106 contained enough information to calculate effect sizes, resulting in 1083 unique effect sizes prior to aggregation.[145] This meta-analysis examined studies on the general deterrent effect of four types of intervention: 'law' (ie characteristics of, or changes in, law), 'punitive sanctions' (ie imposed or threatened civil, criminal or regulatory sanctions), 'regulatory policy' (ie monitoring activity, agency resources, shifts in regulatory policy), and 'multiple treatments' (ie combinations of interventions that were not and could not be separated in the particular original studies that made up the meta-

141 PwC et al, above n 3, iii.

142 Australian Government, 'Reforms to Address Corporate Misuse of the Fair Entitlements Guarantee Scheme', above n 7, 5 [3.3].

143 For a discussion of possible reasons why successful criminal proceedings against illegal phoenix activity have been rare, see below nn 205–7 and accompanying text.

144 Natalie Schell-Busey et al, 'What Works? A Systematic Review of Corporate Crime Deterrence' (2016) 15 *Criminology and Public Policy* 387.

145 Ibid 395.

analysis).[146] The studies were analysed for the degree of effect on both companies ('company-level') and individuals ('individual-level').[147]

In regard to 'punitive sanctions', the analysis by Schell-Busey et al concluded that there is not 'enough evidence to conclude that punitive sanctions have a deterrent effect on individual- or company-level offending'.[148] However, the results of the meta-analysis yielded some tentative conclusions in regard to other interventions. It found that 'regulatory policy' had a significant but inconsistent deterrent impact on companies,[149] and that 'multiple treatments' had a significant and consistent deterrent impact on both companies and individuals.[150] In relation to empirical studies involving 'multiple treatments', Schell-Busey et al found that '[n]o clear patterns emerge in the individual-level studies to provide specific policy recommendations',[151] but they tentatively concluded that 'a combination of regulatory monitoring, inspections, and enforcement can produce changes in company behaviour'.[152]

According to Schell-Busey et al, the following policy implications can be drawn from their meta-analysis:

> Our results suggest that regulatory policies that involve consistent inspections and include a cooperative or educational component aimed at the industry may have a substantial impact on corporate offending. However, a mixture of agency interventions will likely have the biggest impact on broadly defined corporate crime. The variety of offenders and behaviors included in corporate crime and its relative complexity likely necessitate multiple intervention strategies, which is similar to the 'pulling levers' approach developed to deter gang violence and the responsive regulation strategy advocated by Braithwaite (2011). However, given some of the shortcomings in the literature, we also recommend that scholars and practitioners more clearly and consistently define the phenomenon of 'corporate crime' and target evaluation research toward specific programs and interventions.[153]

It is important to emphasise the tentative nature of Schell-Busey et al's findings. The authors conclude that 'there is much work to be done before we can make solid and conclusive evidence-based policy recommendations'.[154]

146 Ibid 397–401.

147 Ibid 389, 396.

148 Ibid 397.

149 Ibid 387, 398–9.

150 Ibid 387, 399–401.

151 Ibid 407.

152 Ibid.

153 Ibid 387–8, citing John Braithwaite, 'The Essence of Responsive Regulation: Fasken Lecture' (2011) 44 *University of British Columbia Law Review* 475.

154 Ibid 410.

> Scholars need better data and consistent measures of corporate crime. We need to undertake more focused and high quality studies (particularly randomized experiments or quasi-experiments) focused on program-specific interventions (with replications). Until then, the answer to the question of what works, what doesn't, and what's promising in the area of corporate deterrence will remain elusive.

Despite the largely inconclusive findings of the Schell-Busey et al meta-analysis, if there is a hypothesis to emerge from the analysis in regards to enforcement, it is that general deterrence of corporate wrongdoing is most likely to occur where enforcement is accompanied by consistent 'monitoring' and 'inspections'. This outcome is consistent with the perceptual nature of general deterrence. It seems reasonable to suppose that front-end surveillance and investigative practices would play a role in generating perceptions of strong enforcement.

Although Schell-Busey et al's study appears to be the first comprehensive meta-analysis that addresses general deterrence of corporate crime, some meta-analyses on crime in general (which are discussed further in Part III(B)(2)) have examined general deterrence of certain corporate offences. For example, Pratt et al's 2006 meta-analysis concludes:

> the certainty of punishment estimates — one of the predictors specified by deterrence theory that garnered the most consistent support in our analysis — tends to do best when predicting 'white-collar' types of offenses (eg, fraud, tax violations, non-compliance with regulatory laws).[155]

Rupp's 2008 meta-analysis similarly concludes:

> results for tax evasion, drunk driving and fraud — and property crime in general — are more compatible with the deterrence hypothesis, those for homicide or assault are not. Results for the probability of punishment are also more in favor of the deterrence hypothesis than those based on the severity of punishment.[156]

These findings suggest that the types of wrongdoing often involved in illegal phoenix activity — such as tax and fraud related offences — may be more susceptible to general deterrence than other crimes. However, these findings ought to be viewed cautiously in light of Schell-Busey et al's more recent and comprehensive meta-analysis on general deterrence of corporate crime.

2 *Meta-Analyses of Empirical Studies on General Deterrence of Crime in General*

There are numerous empirical studies that examine general deterrence of crime in general, but these studies often yield mixed results. As Dölling et al explain in a 2009 meta-analysis of 700 empirical studies on general deterrence: 'It is supposed that threats of punishment deter potential criminals from committing crimes. The correctness of this theory is, however, questionable. Numerous empirical investigations have come to different results.'[157] Dölling et al conclude

155 Travis C Pratt et al, 'The Empirical Status of Deterrence Theory: A Meta-Analysis' in Francis T Cullen, John Paul Wright and Kristie R Blevins (eds), *Taking Stock: The Status of Criminological Theory* (Transaction Publishers, 2011) 367, 384.

156 Thomas Rupp, *Meta Analysis of Crime and Deterrence: A Comprehensive Review of the Literature* (PhD Thesis, Technische Universität Darmstadt, 2008) 190.

157 Dieter Dölling et al, 'Is Deterrence Effective? Results of a Meta-Analysis of Punishment' (2009) 15 *European Journal on Criminal Policy and Research* 201, 201.

that a 'differentiated' approach is required; that is, as noted above, an approach that studies how general deterrence operates in particular circumstances.[158]

Despite the mixed results of empirical studies on general deterrence of crime, there is one finding that receives relatively consistent support, which is that increasing the *probability* of enforcement produces general deterrence. Durlauf and Nagin's 2011 meta-analysis of empirical studies on the deterrent effect of imprisonment concludes that 'there is little evidence that increases in the severity of punishment yield strong marginal deterrent effects … By contrast there is very substantial evidence that increases in the certainty of punishment produce substantial deterrent effects'.[159]

Nagin's 2013 meta-analysis provides further support for this conclusion, emphasising that the probability of apprehension is the primary determinant of general deterrence: 'The evidence in support of the deterrent effect of the certainty of punishment is far more consistent than that for the severity of punishment. However, the evidence in support of certainty's effect pertains almost exclusively to apprehension probability.'[160]

In the Australian context, similar conclusions were reached in meta-analyses of the deterrent effect of imprisonment published by the Victorian Sentencing Advisory Council in 2011[161] and the NSW Bureau of Crime Statistics and Research in 2012.[162] Other extensive, albeit not comprehensive, reviews of the literature support the finding that the probability of enforcement produces some degree of general deterrence.[163]

158 Ibid.

159 Steven N Durlauf and Daniel S Nagin, 'The Deterrent Effect of Imprisonment' in Philip J Cook, Jens Ludwig and Justin McCrary (eds), *Controlling Crime: Strategies and Tradeoffs* (University of Chicago Press, 2011) 43, 43.

160 Nagin, 'Deterrence in the Twenty-First Century', above n 134, 199.

161 Ritchie, above n 123.

> [T]he research … indicates that increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence. … A consistent finding in deterrence research is that increases in the *certainty* of apprehension and punishment demonstrate a significant deterrent effect. Perceptions about the certainty of apprehension, for example, may counter the 'present bias' and reinforce the potential cost of committing crime. This result is qualified by the need for further research that separates deterrable from non-deterrable populations: at 2 (emphasis in original).

162 Wai-Yin Wan et al, 'The Effect of Arrest and Imprisonment on Crime' (Bulletin No 158, NSW Bureau of Crime and Statistics Research, February 2012). 'Increasing the risk of arrest or the risk of imprisonment reduces crime while increasing the length of prison sentences exerts no measurable effect at all. At first sight, increasing the risk of arrest appears to be more effective in reducing crime than increasing the risk of imprisonment.': at 15–16.

163 See, eg, Paternoster, above n 136, 818 (citations omitted):

> It is reasonable to believe that increasing the number of police officers on the street does deter some amount of crime, and increasing the risk of incarceration does as well. … [W]hile there may be disagreement about the magnitude, there does seem to be a modest inverse relationship between the perceived certainty of punishment and crime, but no real evidence of a deterrent effect for severity, and no real knowledge base about the celerity of punishment.

See also Thomas A Loughran, Ray Paternoster and Douglas B Weiss, 'Deterrence' in Alex R Piquero (ed), *The Handbook of Criminological Theory* (John Wiley & Sons, 2016) 50, 53.

In addition to the general finding that increases in the probability of enforcement, particularly the probability of apprehension, produce general deterrence, it is worth mentioning some factors that appear to influence the degree to which this occurs. First, according to Durlauf and Nagin's 2011 meta-analysis, the deterrent effect of an increase in the probability of apprehension is greatest when the existing probability of apprehension is either relatively small or large.[164] Chalfin and McCrary, in their 2017 review of economic literature on general deterrence, explain that '[a]s Durlauf and Nagin note, in a world in which the perceived probability of detection is very low, even small changes in that perceived probability can have correspondingly large effects, thus potentially rationalizing large behavioral responses to hot-spots policing and deterrence advertising'.[165]

Second, it appears that the effectiveness of probability of enforcement may be enhanced by the use of 'focused deterrence strategies'. Braga and Weisburd's 2012 meta-analysis on 'focused deterrence strategies' states that there is 'strong empirical evidence for the crime prevention effectiveness of focused deterrence strategies'.[166] However, they also caution that 'these strategies need to be subjected to more rigorous tests that generate more robust evidence on program impacts and … provide further insight into the crime control mechanisms at work in these programs'.[167] The concept of 'focused deterrence strategies' seems to be relatively loosely defined in the literature. The United States ('US') National Institute of Justice provides a helpful explanation of these strategies, which have been used by a number of law enforcement agencies in the US:[168]

> Focused deterrence strategies (also referred to as 'pulling levers' policing) are problem-oriented policing strategies that follow the core principles of deterrence theory. The strategies target specific criminal behavior committed by a small number of chronic offenders who are vulnerable to sanctions and punishment. Offenders are directly confronted and informed that continued criminal behavior will not be tolerated. Targeted offenders are also told how the criminal justice system (such as the police and prosecutors) will respond to continued criminal behavior; mainly that all potential sanctions, or levers, will be applied. The deterrence-based message is reinforced through crackdowns on offenders, or groups of offenders (such as gang members), who continue to commit crimes despite the warning. In addition to deterring violent behavior, the strategies also reward compliance and nonviolent behavior among targeted offenders by providing positive incentives, such as access to social services and job opportunities.[169]

164 Durlauf and Nagin, above n 159, 75.

165 Aaron Chalfin and Justin McCrary, 'Criminal Deterrence: A Review of the Literature' (2017) 55 *Journal of Economic Literature* 5, 39.

166 Anthony A Braga and David L Weisburd, 'The Effects of Focused Deterrence Strategies on Crime: A Systematic Review and Meta-Analysis of the Empirical Evidence' (2012) 49 *Journal of Research in Crime and Delinquency* 323, 349.

167 Anthony A Braga and David L Weisburd, 'Must We Settle for Less Rigorous Evaluations in Large Area-Based Crime Prevention Programs? Lessons from a Campbell Review of Focused Deterrence' (2014) 10 *Journal of Experimental Criminology* 573, 574 (citations omitted).

168 See below n 216.

169 US National Institute of Justice, *Practice Profile: Focused Deterrence Strategies*, CrimeSolutions.gov <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=11>.

These additional factors suggest that it may be possible to increase public law enforcement against illegal phoenix activity in a way that delivers more 'bang for the buck' (ie more general deterrence from less investment of resources). The current level of enforcement against illegal phoenix activity is very low, meaning that even small increases in the probability of enforcement may have large general deterrent effects, and focused deterrence is one way of making small increases in enforcement that has a relatively good evidence base. Illegal phoenix activity is a candidate for focused deterrence because it attracts 'chronic offenders'[170] — due to its current profitability and invisibility — and such offenders are vulnerable to a wide range of sanctions.[171] In their 2016 meta-analysis on general deterrence of corporate crime, Schell-Busey et al suggest a 'multiple interventions' approach which they liken to focused deterrence, indicating the potential transferability of this approach to the corporate sphere.[172] Of course, not all aspects of this approach would be relevant to the illegal phoenix activity context and its effectiveness in that context would need to be tested, but it may serve as a useful working hypothesis for corporate law enforcement agencies.

In conclusion, the meta-analyses discussed above show that increasing the apprehension and punishment of illegal phoenix operators has the potential to produce general deterrence. Some of the findings suggest that illegal phoenix activity may be particularly susceptible to general deterrence due to the currently low level of enforcement and the white-collar nature of the wrongdoing. The limitations of relying on these meta-analyses, including that they focus predominantly on enforcement within the criminal law jurisdiction, were discussed earlier. Nevertheless, these analyses constitute the best aggregate evidence available on the question of whether general deterrence 'works'. The possibility of achieving general deterrence of illegal phoenix activity, combined with the significant economic cost of such activity[173] and its apparently increasing incidence,[174] justify increasing public law enforcement against illegal phoenix activity, subject to periodic review to ensure efficient allocation of resources. The next part of this article explains in more specific terms what this increase ought to involve.

170 See, eg, the allegations discussed in Neil Chenoweth and David Marin-Guzman, 'ATO Tax Fraud: Behind a $191m Gen Y Crime Wave', *Australian Financial Review* (online), 3 July 2017 <http://www.afr.com/news/policy/tax/ato-tax-fraud-behind-a-191m-gen-y-crime-wave-20170630-gx1xjg>; Dan Oakes and Sam Clark, 'Staggering Number of Alleged Crimes in Massive Tax Scam', *ABC News* (online), 16 June 2017 <http://www.abc.net.au/news/2017-06-15/documents-lay-bare-staggering-number-of-alleged-crimes-in-scam/8620756>.

171 See Anderson et al, *Defining and Profiling Phoenix Activity Report*, above n 9, 10–13, 16–17, 24–5, 28.

172 Schell-Busey et al, above n 144, 387–8.

173 PwC et al, above n 3, iii.

174 Australian Government, 'Reforms to Address Corporate Misuse of the Fair Entitlements Guarantee Scheme', above n 7, 5 [3.3].

IV HOW TO INCREASE ENFORCEMENT AGAINST ILLEGAL PHOENIX ACTIVITY

The most consistent finding arising from the meta-analyses discussed in Part III(B) is that the perceived probability of apprehension and, to a lesser extent, the perceived probability of punishment, have some degree of general deterrent effect. By contrast, empirical studies suggest that the perceived speed and severity of enforcement produce little or no general deterrence. Therefore, the overarching aim of the proposed increase in enforcement should be to heighten potential illegal phoenix operators' perceptions of the probability of apprehension and, to a lesser extent, their perceptions of the probability of punishment.

There are three main elements involved in achieving this aim. First, enforcement agencies should increase the probability of apprehension. Second, they should increase the probability of punishment. Third, they should use the media to make these enforcement actions known to the public and, more broadly, to heighten potential perpetrators' perceptions of the probability of enforcement. This part of the article discusses each of these elements in turn, followed by a brief discussion of factors that ought to be considered as part of the suggested periodic review process. More weight is given to the first element than the second, as the empirical studies indicate that the perceived probability of apprehension is a more important factor in producing general deterrence.[175]

A *Increase the Probability of Apprehension*

The data on the incidence of illegal phoenix activity and public law enforcement discussed in Part II indicates that there is currently a very low probability of apprehension (ie detection and commencement of enforcement action). This must be remedied in order to reduce the incidence of illegal phoenix activity. For enforcement agencies to be able to apprehend company controllers or accessories involved in illegal phoenix activity, there are, broadly speaking, three processes that need to be implemented. First, enforcement agencies need to collect information about individuals and companies suspected of involvement in illegal phoenix activity and enter it into their databases. Second, they need to be able to search their databases to check whether company controllers have past or current associations with individuals or companies suspected of involvement in illegal phoenix activity. Third, they need to make active use of these information collection and search processes to commence enforcement action against illegal phoenix operators and accessories.

1 *Collecting Information*

There are three main sources from which enforcement agencies could collect information about people or companies suspected of involvement in illegal

175 See above nn 159–63 and accompanying text.

phoenix activity: external administrators, in particular liquidators;[176] creditors (trade creditors and employees); and other institutions and agencies (including superannuation funds and trade unions). Currently, there are several impediments that hinder collection of such information from these sources.

(a) Liquidators

Illegal phoenix activity often involves the liquidation of Oldco. Liquidators are therefore a potentially valuable source of information on illegal phoenix activity.[177] However, there are currently a number of impediments that prevent the free flow of information from company directors to liquidators, and also from liquidators to ASIC. The following is a brief summary of those impediments and some suggested solutions.

First, liquidators are required to pay ASIC to obtain documents relating to the company and its directors in order to perform their statutory obligation to report director misconduct to ASIC.[178] Instead, ASIC should provide this information free-of-charge to liquidators in the form of a 'report as to affairs' ('RATA')[179] that is pre-populated with all relevant information from the ASIC registry. This information would then be supplemented by the company's directors.

Second, the RATA does not require directors to provide information on existing and previous associations with other solvent and insolvent companies, or on significant asset transfers by the company prior to insolvency[180] — information that is important for identifying illegal phoenix activity. Directors should be required to fill in any gaps in their pre-populated corporate history and provide details of significant asset transfers within 12 months prior to insolvency.

Third, company directors face very lenient penalties if they fail to comply with the RATA process[181] or fail to provide the company's books and records to liquidators.[182] The maximum fines are 25 penalty units (currently $5250) and 50 penalty units (currently $10 500) respectively; however, research by the Australian Institute of Criminology indicates that the average fine is only about $1000.[183] These maximum penalties should be substantially increased to ensure that information about the company that may indicate illegal phoenix activity is not concealed by its directors.

Fourth, EXAD reports to ASIC completed by liquidators[184] are electronically processed 'tick box' reports that do not include a question about whether illegal

176 *Corporations Act* s 533.

177 Ibid.

178 Ibid.

179 See ibid s 475.

180 See ibid.

181 Ibid s 475, sch 3 item 130.

182 Ibid s 530A, sch 3 item 134.

183 Peter Keenan, 'Convictions for Summary Insolvency Offences Committed by Company Directors' (Report No 30, Australian Institute of Criminology, February 2013) 4–6.

184 *Corporations Act* s 533.

phoenix activity is suspected.[185] The EXAD report form should be amended to enable liquidators to indicate to ASIC: whether illegal phoenix activity is suspected; whether pre-insolvency advisers were involved in the insolvency; and the specific details of any alleged illegal phoenix activity.

(b) Creditors (Trade Creditors and Employees)

People and companies who are owed money by Oldco have a significant interest in ensuring that illegal phoenix activity is detected by enforcement agencies.[186] This means that creditors are potentially a valuable source of information on illegal phoenix activity.[187] They also provide a source of information that cannot be provided by liquidators, which is information in relation to illegal phoenix activity that occurs via the *abandonment* of Oldco, rather than the liquidation of Oldco. If abandoned companies owe debts to creditors, creditors may complain to enforcement agencies about those debts.

There are two main impediments to creditors lodging complaints about illegal phoenix activity. The first is that the websites of ASIC, the ATO and the FWO all contain different information on illegal phoenix activity.[188] In order for a creditor to indicate to an enforcement agency that they are owed a debt that arises from illegal phoenix activity, they must understand at least the basics of what illegal phoenix activity involves. To facilitate creditors' understanding of the issues, enforcement agencies ought to collaborate to present clear, consistent information on their websites, ideally in a common format or via a unique website dedicated to illegal phoenix activity.

The second impediment to creditors lodging complaints about illegal phoenix activity is that the mechanics of making the complaint are not straightforward. For example, the ASIC and FWO websites do not have a specific complaint mechanism that deals with illegal phoenix activity. ASIC's *Illegal Phoenix Activity* webpage directs readers to its general *How to Complain* webpage, which does not have a specific function for reporting illegal phoenix activity.[189] Similarly, the FWO's *Anonymous Report* webpage has a dropdown list of issues that can be reported,

185 See Anderson et al, 'Illegal Phoenix Activity: Is a "Phoenix Prohibition" the Solution?' above n 45 and accompanying text.

186 Note the existence of whistleblower protections under *Corporations Act* pt 9.4AAA. These laws are in the process of being reformed: Treasury Laws Amendment (Whistleblowers) Bill 2017; Kelly O'Dwyer, 'Consultation on Whistleblowers Bill 2017' (Media Release, 23 October 2017).

187 Note also ASIC's power to provide a transcript of an examination of a person under *ASIC Act* div 2 to a private litigant in certain limited circumstances: *ASIC Act* s 25(1).

188 See ASIC, *Illegal Phoenix Activity* (19 July 2018) <http://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/>; ATO, *Illegal Phoenix Activity* (24 July 2018) <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/>; FWO, *Fair Work Ombudsman Releases New Research Into Phoenixing* (4 July 2012) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2012-media-releases/july-2012/20120704-phoenixing-report>.

189 ASIC, *Illegal Phoenix Activity*, above n 188; ASIC, *Contact Us — How to Complain* (21 March 2018) <http://asic.gov.au/about-asic/contact-us/how-to-complain/>.

but this list does not include illegal phoenix activity.[190] Like the ATO,[191] ASIC and the FWO ought to provide clear instructions on how to report illegal phoenix activity and have a specific function that enables creditors to do so.

(c) Other Institutions and Agencies (Including Superannuation Funds and Trade Unions)

While liquidators and creditors are the individuals most likely to directly witness and report illegal phoenix activity, it is equally important that information is shared between the institutions and agencies that may become aware of it. For example, if superannuation funds become aware of unpaid superannuation which may result from illegal phoenix activity, they should promptly report these unpaid amounts to ASIC and the ATO to assist in early detection. Similarly, if employees who are represented by trade unions complain to their unions about unpaid wages which they suspect may involve illegal phoenix activity, unions should take an active role in reporting these issues to ASIC, the ATO and the FWO.

It is also critical that enforcement agencies share information about illegal phoenix activity among themselves. This involves two aspects. First, they ought to share information about allegations reported by liquidators, creditors, superannuation funds and trade unions. Second, they ought to share the data and search facilities discussed below in Part IV(A)(2), enabling each agency to draw upon a common database to detect illegal phoenix activity. It is important for the ATO and the FWO, not only ASIC, to be able to investigate the corporate histories of directors to determine whether there is a pattern of repeated illegal phoenix activity. Each enforcement agency needs to take an active role in detecting illegal phoenix activity and sharing that information with other enforcement agencies that have jurisdiction to take enforcement action.[192]

To the extent that the sharing of information between institutions and agencies recommended above is inhibited by confidentiality and privacy laws, such laws ought to be reviewed with a view to allowing greater information flow between the relevant institutions and agencies. As recommended by the Senate Economics References Committee inquiry into insolvency in the Australian construction industry, 'consideration [should] 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'.[193] In this regard, the wide powers of disclosure under s 718 of the *Fair Work Act* could serve as a model for broadened powers of disclosure more generally.

190 FWO, *Anonymous Report* <https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/anonymous-report>.

191 ATO, *Illegal Phoenix Activity*, above n 188.

192 ASIC is expressly permitted to make disclosures of information to the ATO: *ASIC Act* s 127(2A)(g).

193 Senate Economics References Committee, *'I Just Want to Be Paid'*, above n 5, 82 [5.84].

2 *Searching Information*

After enforcement agencies have collected information about suspected illegal phoenix activity and entered it into their databases, they need to be able to search their databases reliably and efficiently to check whether companies or directors have past or current associations with people or companies suspected of involvement in illegal phoenix activity.[194] Currently, there are three major obstacles that hinder this process.

The first is the falsification of the identity of a potential director. Variation in identities may also occur as a result of errors, such as misspelled names or outdated addresses. At present, the registration of an Australian company simply requires the name, address, and date and place of birth of each proposed officeholder,[195] without the need for supporting information.[196] This can be overcome by a requirement of proof of identity and the issuance of a unique and password-protected Director Identification Number ('DIN'). The Australian Government has recently committed to the implementation of a DIN.[197]

Second, information about directors and companies is not consolidated into user-friendly profile pages. There should be a single consolidated profile for each DIN-holder, which lists all the companies with which they are or have been associated.[198] There should also be a corresponding profile for each Australian Company Number ('ACN') holder. Each DIN profile should list all associated ACN profiles, and each ACN profile should list all associated DIN profiles. It should be possible to click into associated DIN or ACN profiles via hyperlinks. Similarly, all the documents relating to each DIN and ACN profile should be available via hyperlinks and free-of-charge.[199] This would result in each DIN and ACN profile becoming a 'one-stop-shop' for all information relating to the particular director or company. A simple search for a DIN or an ACN would bring up the relevant profile as the top hit on the list.

Third, information on suspected illegal phoenix activity is not consolidated into a user-friendly database or linked to related data in enforcement agencies' databases. There should be a single consolidated 'alleged illegal phoenix activity database' and each allegation should be linked to any associated DIN and ACN profiles, enabling enforcement agencies to click through to the associated

194 Note ASIC's statutory objectives regarding the information it gathers in *ASIC Act* s 1(2): 'receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it': at s 1(2)(e); and 'ensure that information is available as soon as practicable for access by the public': at s 1(2)(f).

195 *Corporations Act* s 117(2).

196 ASIC, *Form 201: Application for Registration as an Australian Company* (29 September 2017) <http://download.asic.gov.au/media/4569565/201_20171211.pdf>; *Corporations Act* s 117(4).

197 O'Dwyer, 'A Comprehensive Package of Reforms to Address Illegal Phoenixing', above n 20.

198 This suggestion is based on the United Kingdom's system for searching information on companies and directors: see Companies House (UK), *Search the Register* <https://beta.companieshouse.gov.uk/>.

199 The Australian Government's practice of charging fees for ASIC registry information is arguably at odds with its own policies on open government data: see Anderson et al, *Recommendations on Phoenix Activity Report*, above n 66, 37.

profiles via hyperlinks. Allegations should also be flagged on the DIN and ACN profiles themselves. However, the 'alleged illegal phoenix activity database' and corresponding flags on DIN and ACN profiles should *not* be visible to the public, as they are not proven allegations and could damage the reputation of innocent directors or companies.

The identity verification, DIN and data linking processes described above would not only assist enforcement agencies to locate information within their own databases, but they would enable liquidators, creditors, employee institutions and other agencies to do background checks on directors. Like a company's ACN and Australian Business Number ('ABN'), the DIN should be visible to the public via company documentation, websites and ACN profiles. This would make it easier for these various entities to investigate and report suspected illegal phoenix activity to enforcement agencies. Thus, these processes serve a dual role of enabling efficient information searching but also further facilitating the collection of information.

3 *Using Information*

The information collection and search processes recommended above can only be effective in increasing the apprehension of illegal phoenix operators and accessories if these processes *are used* to commence enforcement action. It is concerning that ASIC only takes further action in relation to a small percentage of allegations of director misconduct in EXAD reports.[200] One possible reason for this lack of action may be that an insufficient number of ASIC personnel are allocated to surveillance of small businesses. According to ASIC's 2015–16 annual report, only six 'surveillance resources' (which appears to mean full time equivalent ('FTE') personnel)[201] were allocated to surveillance of '11,494 companies identified for the potential to conduct illegal phoenix activity'.[202] This figure increased to nine 'surveillance resources' in 2016–17,[203] but this is still an inadequate level of surveillance for such a large number of companies. The lack of action in response to EXAD reports must be remedied to reduce the incidence of illegal phoenix activity.

Enforcement agencies should also take a more active role in detecting and commencing enforcement action against illegal phoenix activity that occurs via the abandonment of Oldco, rather than liquidation.[204] Abandoned companies are not subject to the scrutiny of external administrators, and enforcement agencies should not rely solely on complaints from creditors who are owed money by abandoned companies. Before deregistering a company, ASIC should check the

200 Compare the large number of reports of misconduct in EXAD reports, discussed in Part II(A)(5), with the scarcity of enforcement actions discussed in Part II(B).

201 This term appears to refer to estimated FTE staff allocated to surveillance of particular regulated populations: see ASIC, 'Annual Report 2016–2017', above n 115, 23 n 1.

202 ASIC, 'Annual Report 2015–2016', above n 32, 22.

203 ASIC, 'Annual Report 2016–2017', above n 115, 22.

204 See *Corporations Act* s 489EA, as inserted by *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth) sch 1 item 1 and accompanying text at above n 64.

ACN profile of the company, the DIN profiles of the directors and the 'alleged illegal phoenix activity database' recommended above to ensure that there are no concerns regarding the company or its directors being involved in illegal phoenix activity. Ideally, ASIC should also notify other agencies about the proposed deregistration to enable them to check their databases for any outstanding liabilities.

B *Increase the Probability of Punishment*

As discussed in Part II(B), the available data indicates that the current incidence of punishment appears to be very low relative to the prevalence of illegal phoenix activity. There are a number of possible reasons for the lack of successful criminal prosecutions in the phoenix context,[205] including the difficulty of proving the elements of the relevant offences, particularly fault elements,[206] to a 'beyond reasonable doubt' standard of proof.[207] However, this does not explain the low rate of administrative disqualifications by ASIC (estimated at an average of 10 per year) and the almost complete absence of civil penalty proceedings for breaches of directors' duties and uncommercial transactions.[208] The lack of fault elements and lower 'balance of probabilities' standard of proof make civil penalty proceedings somewhat easier than criminal prosecutions from an evidentiary perspective.[209] Administrative disqualifications by ASIC do not require proof on the balance of probabilities; instead, the findings of fact 'must be based on material that is

205 Court actions of any sort against illegal phoenix activity are rare (see above Part II(B)), so the lack of criminal actions could be attributable to a lack of court actions in general. However, there are a number of factors specific to the criminal mode of enforcement that may compound this general lack of enforcement. First, ASIC may view criminal actions as a last resort to be used in the most serious cases. ASIC's enforcement policy states that '[w]e pursue substantial criminal remedies for the most serious misconduct — for example, misconduct that has a widespread negative impact on investors or creditors': ASIC, 'ASIC's Approach to Enforcement', above n 125, 5. This approach would be consistent with the pyramidal approach to enforcement recommended by responsive regulation theorists: see, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). However, there is some evidence that suggests that, although ASIC ostensibly takes an approach to enforcement that is informed by responsive regulation theory, ASIC's actual enforcement practices do not conform with a pyramidal approach to enforcement: Hedges et al, above n 87. Second, the prosecution may have difficulty proving the fault and physical elements of *Corporations Act* offences to the criminal standard of proof beyond reasonable doubt: *Criminal Code* s 13.2. Third, there are heightened evidential and procedural protections for the accused in criminal proceedings (presumption of innocence, right to silence, self-incrimination, and penalty privilege): cf *Corporations Act* ss 1317L, 1332. Fourth, criminal proceedings may involve more cost and delay due to factors such as the requirement for a jury trial whereas a judge alone decides issues of fact and law in civil penalty cases. See generally *Australian Securities and Investments Commission v Whitebox Trading Pty Ltd* (2017) 251 FCR 488.

206 *Criminal Code* s 3, div 5. The fault elements of criminal offences under the *Corporations Act* are discussed in *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, 316–17 [553]–[556]; *Gore v Australian Securities and Investments Commission* (2017) 341 ALR 189, 191–2 [3], 225 [159], 241–2 [244]; *Australian Securities and Investments Commission v Whitebox Trading Pty Ltd* (2017) 251 FCR 448, 450–1 [8], 451 [11], 452 [15], 460–1 [42]–[44], 461 [46], 461–2 [48]–[49], 465 [60]–[61], 466 [63]–[64], 468 [67], 469 [72]–[73].

207 *Criminal Code* s 13.2(1).

208 See above Part II(B) for further discussion.

209 See *Corporations Act* s 1322 for the civil standard of proof; at s 1317L for the evidential and procedural rules in civil penalty proceedings.

relevant, credible and probative'.[210] Thus, it seems that there are not any legislative or evidentiary impediments that would preclude increasing rates of administrative and civil punishment.[211] The apprehension-related processes recommended in Part IV(A) would increase the amount of evidence available to enforcement agencies, potentially also enabling more frequent criminal punishment of illegal phoenix operators.

The question is: what form should the proposed increase in punishment take? It is suggested that enforcement agencies should increase enforcement (which will ideally lead to punishment, if successful) in a manner similar to the 'focused deterrence strategies' discussed in Part III(B). As discussed, this approach has produced promising results in other areas of law and Schell-Busey et al's 2016 meta-analysis concluded that a similar approach may be effective in deterring corporate crime.[212] Schell-Busey et al's finding that 'a combination of regulatory monitoring, inspections, and enforcement can produce changes in company behaviour'[213] suggests that the focused deterrence approach — which involves direct confrontations, close surveillance and escalating enforcement against chronic and vulnerable offenders[214] — may be a worthwhile avenue to explore with regard to public law enforcement against illegal phoenix activity. Ideally the offenders would be high profile operators[215] so as to generate as much media coverage as possible, remembering that the primary aim of enforcement is increasing potential perpetrators' *perceptions* of the probability of apprehension and punishment.

A number of agencies in the US have implemented focused deterrence strategies and there is ongoing research into their effectiveness.[216] Of course, the approach used in the US to counter violent and drug related crime would need to be adapted

210 ASIC, 'Hearings Practice Manual' (Regulatory Guide No 8, March 2002) 7. See *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555, 560 [8], 578–9 [91]–[93], 580 [97], 585 [115]–[116], 586–7 [120]–[122]; *Re Coshott and Australian Securities and Investments Commission* [2014] AATA 677, [24]; *Tarrant v Australian Securities and Investments Commission* (2015) 317 ALR 328, 359 [121].

211 ASIC is bound by the rules of natural justice or procedural fairness: *ASIC Act* s 59(2)(c). However, ASIC is not bound by the rules of evidence at its administrative hearings: at s 59(2)(a).

212 Schell-Busey et al, above n 144, 387–8.

213 Ibid 407.

214 See US National Institute of Justice, above n 169 and accompanying text.

215 See, eg, the allegations discussed in Chenoweth and Marin-Guzman, above n 170; Oakes and Clark, above n 170.

216 See, eg, Robin S Engel, Marie Skubak Tillyer and Nicholas Corsaro, 'Reducing Gang Violence Using Focused Deterrence: Evaluating the Cincinnati Initiative to Reduce Violence (CIRV)' (2013) 30 *Justice Quarterly* 403; Marie Skubak Tillyer, Robin S Engel and Brian Lovins, 'Beyond Boston: Applying Theory to Understand and Address Sustainability Issues in Focused Deterrence Initiatives for Violence Reduction' (2012) 58 *Crime & Delinquency* 973; Anthony A Braga, Robert Apel and Brandon C Welsh, 'The Spillover Effects of Focused Deterrence on Gang Violence' (2013) 37 *Evaluation Review* 314; Nicholas Corsaro and Robin S Engel, 'Most Challenging of Contexts: Assessing the Impact of Focused Deterrence on Serious Violence in New Orleans' (2015) 14 *Criminology & Public Policy* 471; Kenneth C Land, 'Something That Works in Violent Crime Control: Let the Focused Deterrence and Pulling Levers Programs Roll with Eternal Vigilance' (2015) 14 *Criminology & Public Policy* 515; Anthony A Braga, David M Hureau and Andrew V Papachristos, 'Deterring Gang-Involved Gun Violence: Measuring the Impact of Boston's Operation Ceasefire on Street Gang Behavior' (2014) 30 *Journal of Quantitative Criminology* 113.

to the particular circumstances of illegal phoenix activity in Australia, but at least it would provide a framework as a starting point from which to develop an approach to enforcement against illegal phoenix activity that has some form of evidence base. ASIC's professed approach to enforcement against illegal phoenix activity already acknowledges the importance of selecting targets strategically to achieve 'greater market impact and benefit the public more broadly'.[217] Focused deterrence may be able to assist ASIC in achieving this goal.

C *Use the Media to Publicly Report Actions and Heighten Perceptions of Enforcement*

The main purpose of increasing the *actual* apprehension and punishment of *particular* illegal phoenix operators is to publicise these actual enforcement practices to increase *all* potential illegal phoenix operators' *perceived* probability of enforcement, in order to ultimately produce general deterrence. Thus, using the media to make the increase in actual enforcement practices known to potential illegal phoenix operators is a critical element of the proposed increase in public law enforcement. To demonstrate the point in conjectural mathematical terms, one might say that carrying out the enforcement action consumes 90 per cent of the costs and achieves 10 per cent of the general deterrent effect, while the final critical element of communicating the action to potential illegal phoenix operators consumes 10 per cent of the costs and achieves 90 per cent of the general deterrent effect. To skip the media element, or to do a token job of it, is likely to render the whole enforcement process cost-ineffective.

There are, of course, laws and practices that limit the ability of enforcement agencies to publicise enforcement actions, as ASIC recognises in its enforcement policy: 'We will always assert the right to make an enforcement outcome public, *unless the law requires otherwise*. We will not agree to keep enforcement outcomes secret. This is important for regulatory transparency and effective deterrence.'[218] For example, enforcement agencies should not publicise prior administrative or civil enforcement actions if doing so would jeopardise subsequent criminal trials as a result of, inter alia, premature disclosures, pre-trial interference with witnesses, and effect on jurors.[219] Similarly, prior administrative enforcement actions that result in adverse publicity could influence subsequent civil penalty proceedings, as any reputational implications will be taken into account in determining

217 ASIC, *Illegal Phoenix Activity*, above n 188.

218 ASIC, 'ASIC's Approach to Enforcement', above n 125, 4 (emphasis added).

219 See *Dwyer v National Companies and Securities Commission* (1988) 13 ACLR 716, 724–5; *Murphy v The Queen* (1989) 167 CLR 94, 99; *R v Adler* (2005) 52 ACSR 154, 156 [11]. See generally *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487, 494–5 [25], 504 [59]; *YFFM and Australian Securities and Investments Commission* [2009] AATA 489, [47]–[53].

the penalties that are imposed.[220] The ability to publicise administrative disqualification orders under s 206F of the *Corporations Act* may likewise be constrained where there is an appeal underway to the Administrative Appeals Tribunal or Federal Court of Australia.[221] However, as discussed below, it seems that enforcement agencies could still do much more to publicise enforcement actions, even within the bounds of these legal and practical limitations.

Enforcement agencies do report some enforcement practices in annual reports, enforcement reports, and media releases, but this publicity is limited both quantitatively and qualitatively. As discussed in Part II(B)(1), disqualification orders by ASIC under s 206F of the *Corporations Act* are the only enforcement actions that are taken in the context of illegal phoenix activity with any regularity.[222] Yet there is minimal exploitation of these enforcement actions for general deterrence purposes. Only about 50 per cent of s 206F orders are reported in ASIC's media releases, and, of those that are reported in media releases, many appear as just one or two paragraphs in a media release reporting on other matters.[223] ASIC's annual reports include the overall number of people who were removed or disqualified from managing companies but usually do not provide any other information.[224] The statistics in ASIC's enforcement reports do not even differentiate disqualification orders under s 206F from other forms of administrative action.[225] ASIC publishes a 'banned and disqualified persons dataset' on *data.gov.au*, but this dataset does not indicate the type of misconduct

220 See *Australian Securities and Investments Commission v Healey [No 2]* (2011) 284 ALR 734, 755 [116], 757–8 [124], 765–6 [177]; *Gillfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460, 517–18 [242]–[243]; *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* (2013) 93 ACSR 421, 487–8 [255]–[256], 488 [259], 490–1 [269].

221 In relation to the Administrative Appeals Tribunal, see: *Administrative Appeals Tribunal Act 1975* (Cth) s 35; *Re ABCD and Federal Commissioner of Taxation* (2008) 50 AAR 287, 326–34 [137]–[161]; *Re XQZT and Australian Securities and Investments Commission* [2009] AATA 669 (4 September 2009) [49]–[51]; *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130, 148–9 [75]–[76]; *Catena v Australian Securities and Investments Commission* [2010] FCA 598 (4 June 2010) [24]; *Re Klusman and Australian Securities and Investments Commission* (2010) 117 ALD 617, 619–20 [11]; *Re Opus Capital Ltd and Australian Securities and Investments Commission* (2010) 117 ALD 608, 614 [24]; *Re Nguyen and Australian Securities and Investments Commission* (2011) 127 ALD 105, 111–12 [32]; *Re Liu and Australian Securities and Investments Commission* (2013) 60 AAR 5, 12 [43]; *Mclean and Australian Securities and Investments Commission* [2016] AATA 22 (22 January 2016) [33]. In relation to the Federal Court of Australia, see: *Federal Court of Australia Act 1976* (Cth) pt VAA; *Oreb v Australian Securities and Investments Commission* (2016) 247 FCR 316; *Catena v Australian Securities and Investments Commission* [2010] FCA 598 (4 June 2010) [22]–[24]; *Re JTMJ and Australian Securities and Investments Commission* (2010) 115 ALD 682, 689–90 [16]–[18]; *Applicant Y v Australian Prudential Regulation Authority* [2005] FCAFC 222 (28 October 2005) [14]–[15].

222 See above Part II(B)(1) for an explanation of why s 206F orders are classified as enforcement actions 'against illegal' phoenix activity, even though the purpose of such orders is not punitive and it is not necessary for company officers to have engaged in unlawful behaviour to be subject to such orders.

223 Jasper Hedges, George Gilligan and Ian Ramsay, 'Banning Orders: An Empirical Analysis of the Dominant Mode of Corporate Law Enforcement in Australia' (2017) 39 *Sydney Law Review* 501, 509–10, 533.

224 See ASIC, *ASIC Annual Reports* (21 February 2018) <http://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/>.

225 See ASIC, *ASIC Enforcement Outcomes* (9 August 2018) <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/>.

that resulted in the banning and disqualification orders.[226] Only those looking for information on phoenix related s 206F orders are likely to find it, and even they will struggle.

At a minimum, enforcement agencies should systematically report all enforcement actions against illegal phoenix operators using every media avenue available to them, including, but not limited to, media releases, annual reports, enforcement reports, and social media (subject to the legal limitations discussed above). Where individual cases are reported in media releases and via social media, the reports should at least include: the identity of the perpetrator and associated companies, including ACN and DIN;[227] a description of the unlawful conduct; the particular laws contravened and the number of contraventions, including specific legislative section numbers; and the consequences of the enforcement action, including the type and magnitude of any sanctions imposed. Where statistics on enforcement actions are reported in annual reports and enforcement reports, they should at least include: the number of enforcement actions; the legislative section numbers; the types and average magnitudes of sanctions imposed; and demographic data about the industries and occupations of the perpetrators. With regard to both individual case reports and statistics, the phoenix activity context of the enforcement action needs to be made explicit. Because there is no legislative provision that specifically prohibits illegal phoenix activity, it is not sufficient to simply identify the legislative provisions that have been contravened. The factual context of illegal phoenix activity needs to be expressly described and identified.

It is important to emphasise the potential value of social media in enhancing the general deterrent effect of increased public law enforcement against illegal phoenix activity. Enforcement agencies should not confine their enforcement reporting practices to the traditional avenues of media releases, annual reports and enforcement reports. Social media is increasingly becoming the avenue via which many people receive information about current affairs, and it has the potential to significantly increase public awareness of enforcement. There is not currently any data available on the extent to which enforcement agencies use social media to report their enforcement practices. However, there is some general data on social media use in enforcement agencies' annual reports. The 2015–16 reports suggest

226 Australian Government, *ASIC — Banned and Disqualified Persons Dataset* (2 November 2017) data.gov.au, <https://data.gov.au/dataset/asic-banned-disqualified-per>.

227 See above Part IV(A)(2).

that the FWO is more active on social media than ASIC or the ATO,[228] although ASIC's use of social media is increasing rapidly.[229] While it is unlikely that much of this social media output relates to enforcement, the agencies' increasing use of social media at least shows the potential that such media has to be a powerful tool for communicating enforcement activity to the public.

Reporting increased public law enforcement against illegal phoenix activity is the minimum that enforcement agencies should be doing to create the perception that there is a significant probability of apprehension and punishment. There are additional ways to heighten perceptions of enforcement apart from reporting actual enforcement events. This is a point that seems to be often overlooked in the policy debate about the adequacy of corporate law enforcement in Australia. The debate revolves around the size of the penalties and the rate of enforcement.[230] Few stop to think about ways to increase the perceived probability of apprehension and punishment that do not rely on reporting actual enforcement practices. Yet this technique is common in other areas of law; for example, television advertisements aimed at increasing the perceived probability of apprehension and punishment for speeding and drink driving, which threaten viewers with the prospect of apprehension but do not report either individual cases or statistics about enforcement practices.

The methods of heightening perceptions of enforcement that do not rely upon reporting actual enforcement events might be termed 'enforcement advertising', or 'deterrence advertising', as Chalfin and McCrary put it.[231] Given the

228 FWO, 'Annual Report 2015–16' (Annual Report, 28 September 2016) 14:

> We issued more than 1060 tweets, over 220 Facebook posts and seven videos. We responded to more than 1500 enquires through Facebook and Twitter, and had over 4200 new Twitter and 13 290 new Facebook followers. Our tweets were seen almost three million times and Facebook posts more than 4.4 million times. On LinkedIn we had more than 5300 followers and people viewed our YouTube videos more than 133 130 times. Our PACT promotional video was watched in its entirety by 16.63% of people who saw it online — over three times the Australian Government benchmark of 5%. Accompanying campaign content, including social media posts and digital advertising, was seen over 1.9 million times.

ASIC, 'Annual Report 2015–2016', above n 32, 85: 'ASIC uses Facebook, Twitter and YouTube social media channels to engage with customers online. In 2015–16, our ASIC Connect Facebook followers increased to 6,436 (an increase of 33% from 2014–15) and our ASIC Connect Twitter followers increased to 13,167 (a 25% increase from 2014–15).' Commissioner of Taxation, 'Annual Report 2015–16' (Annual Report, ATO, October 2016): 'We also used marketing campaigns, including social media, to encourage people to keep track of their superannuation': at 20. 'In 2015–16, we implemented a number of initiatives to make better use of digital channels, such as using social media (including Facebook, Twitter and LinkedIn) for messages about fringe benefits tax lodgement, and continuing to improve the format of the Division 7A calculator on the *ATO app*': at 28.

229 See ASIC, 'Annual Report 2015–2016', above n 32, 85; ASIC, 'Annual Report 2016–2017', above n 115, 57, 84.

230 See, eg, Senate Economics References Committee, *'Lifting the Fear and Suppressing the Greed'*, above n 23; ASIC, 'Penalties for Corporate Wrongdoing' (Report No 387, March 2014); Financial System Inquiry Committee, *Financial System Inquiry: Final Report* (2014) 250–3; Australian Government, 'ASIC Enforcement Review: Strengthening Penalties for Corporate and Financial Sector Misconduct' (Positions Paper No 7, October 2017).

231 Chalfin and McCrary, above n 165, 39.

apparent success of advertising in a range of other regulatory areas,[232] it is worth enforcement agencies exploring the cost-effectiveness of advertising techniques to combat illegal phoenix activity. This could take the form of general public advertising, or advertising that is targeted at particular industries where illegal phoenix activity is thought to be particularly prevalent, like the construction industry.[233] Both social media and traditional media could play a role in enforcement advertising. Social media would be an inexpensive method of warning potential victims and perpetrators of the damaging consequences of illegal phoenix activity, creating a pervasive perception that this is an issue on the radar of enforcement agencies. ASIC, the ATO and the FWO spent a relatively small amount of money on advertising in 2015–16: $1 845 456,[234] $2 049 818,[235] and $231 359[236] respectively. These figures suggest that it would be feasible to increase 'enforcement advertising' in conjunction with increasing reporting of actual enforcement practices. According to the ATO's annual reports, it spent $77 759 in 2014–15, and $37 318 in 2015–16,[237] on 'fraudulent phoenix' advertising campaigns; however, no further details are provided as to what those campaigns involved. 'Enforcement advertising' has the potential to be an efficient method of maximising the deterrent effect of increased enforcement.

D *Review the Increase in Enforcement to Ensure Efficient Allocation of Resources*

In Parts IV(A), IV(B) and IV(C), this article discussed the ways in which enforcement agencies should increase public law enforcement against illegal phoenix activity to maximise the chance of producing general deterrence; namely, increasing the actual probability of apprehension and punishment, and using the media to publicly report such actions and more broadly heighten perceptions of enforcement. However, there is no guarantee that such measures will result in a significant increase in general deterrence. As discussed earlier, there are no empirical studies on the general deterrence of illegal phoenix activity in Australia, and meta-analyses of other empirical studies on general deterrence yield mixed results and emphasise the need for differentiated studies that take into account the particular circumstances in question. Thus, this article proposes that such measures be subject to periodic review to ensure that the additional resources invested in enforcement against illegal phoenix activity are allocated as efficiently as possible.

232 For example, regulatory bodies such as WorkSafe (Vic) and the Transport Accident Commission (Vic) regularly advertise on television: *WorkSafe Victoria*, YoutubeAU <https://www.youtube.com/user/worksafevictoria>; *TAC Victoria*, YoutubeAU <https://www.youtube.com/user/TACVictoria>.

233 Helen Anderson, 'Is Illegal Phoenix Activity Rife among Construction Companies?', *The Conversation* (online), 12 June 2015 <http://theconversation.com/is-illegal-phoenix-activity-rife-among-construction-companies-43111>.

234 Data sourced from ASIC, 'Annual Report 2015–2016', above n 32, 191.

235 Data sourced from Commissioner of Taxation, above n 228, 120–1.

236 Data sourced from FWO, 'Annual Report 2015–16', above n 228, 33.

237 Data sourced from Commissioner of Taxation, above n 228, 120.

Each enforcement agency will have different processes for reviewing the effectiveness of its enforcement practices and determining the most efficient allocation of its resources among a wide range of competing priorities. Ideally, however, the review process would involve an attempt to measure, at least approximately, the costs of increasing public law enforcement in the ways described in Parts IV(A), IV(B) and IV(C), and the benefits of any correlated reduction in illegal phoenix activity.

The first of these steps is relatively straightforward; it would simply involve enforcement agencies measuring how much money they spend on increasing enforcement against illegal phoenix activity, *and* how much they spend on measuring whether the increase has been cost-effective. Of course, actions taken by enforcement agencies, like any significant institutional actions, are likely to have several flow-on economic consequences. To the extent that such actions influence the economic circumstances and behaviour of potential illegal phoenix operators, in turn they are likely to influence the economic circumstances and behaviour of those with whom such operators do business. However, it is not suggested that enforcement agencies should attempt this kind of detailed economic analysis in regard to assessing the costs of increasing enforcement against illegal phoenix activity. The costs of conducting such a complex analysis may substantially increase the overall cost of the proposed increase in enforcement, undermining the very purpose of the increase, which is to deliver a cost-effective outcome. Instead, agencies should attempt to approximate the economic costs, and the main economic cost would be the money they spend on increasing the frequency of enforcement actions against illegal phoenix operators.

The second step — measuring the benefits of the proposed increase in public law enforcement against illegal phoenix activity — would be more resource-intensive than measuring the costs. As noted in Part II(A), there is currently no data available on the exact incidence of illegal phoenix activity. There are several sources of information that suggest that there is, in approximate terms, a high incidence, but more specific information is needed to measure increases or decreases in illegal phoenix activity.[238] This means that enforcement agencies would need to begin to collect and collate data that indicates, at least roughly, the incidence of illegal phoenix activity over time. In Part IV(A) above, it was argued that ASIC and the government should implement a number of reforms to improve ASIC's ability to collect this information from liquidators, creditors, employee associations and other agencies. As a corollary of these proposed reforms, ASIC would be able to record how many allegations it receives to form a picture of the approximate incidence of illegal phoenix activity. Of course, this could never be anything other than approximate, as not all incidents would be the subject of allegations, and not all alleged incidents would in fact be illegal phoenix activity. However, this data should at least enable a rough assessment of whether illegal phoenix activity is rising or falling and whether more or less resources ought to be allocated to public law enforcement against it.

238 See above Part II(A) for further discussion.

V CONCLUSION

This article has argued that increasing public law enforcement against illegal phoenix activity has the potential to yield significant economic gains. The available data suggests that there is a high incidence of illegal phoenix activity, yet a low level of public law enforcement against such activity. To be cost-effective, an increase in public law enforcement against illegal phoenix activity would need to produce general deterrence, as the other benefits of increasing enforcement are unlikely to be sufficient to outweigh the costs of doing so. While there is no definitive evidence that increasing enforcement would produce general deterrence, the evidence indicates that such an outcome is possible. Given the significant economic cost of illegal phoenix activity and its apparently increasing incidence, the possibility of general deterrence is sufficient to justify, on a cost-benefit basis, increasing enforcement against illegal phoenix activity, provided that the increase is subject to periodic review to ensure efficient allocation of resources.

Empirical studies indicate that the aspects of enforcement that are most likely to produce general deterrence are the perceived probability of apprehension and, to a lesser extent, the perceived probability of punishment. The proposed increase in enforcement should therefore involve three main elements. First, enforcement agencies should increase the probability of apprehension. Second, they should increase the probability of punishment. These elements would involve significantly reforming the processes for the detection of illegal phoenix activity, including the introduction of a DIN, and increasing the frequency of enforcement actions using a 'focused deterrence' framework. Third, agencies should engage in innovative use of the media to make these enforcement actions known to the public and, more broadly, to heighten potential illegal phoenix operators' perceptions of the probability of enforcement. This would involve systematic reporting of enforcement practices via multiple avenues — including media releases, annual reports, enforcement reports, and social media — as well as 'enforcement advertising' via social and traditional media.

The increase in public law enforcement against illegal phoenix activity proposed in this article is a significant undertaking; it would involve the investment of substantial resources. However, there are compelling financial reasons for the Australian Government and enforcement agencies to take stronger action against illegal phoenix activity. In 1995, the Victorian Law Reform Committee, in its report *Curbing the Phoenix Company*, concluded that '[t]he problem of the phoenix company is common and perhaps endemic' and '[i]t should not be ignored'.[239] Despite this warning, illegal phoenix activity has not received the attention it deserves over the following two decades, and estimates suggest that this neglect has resulted in billions of dollars of economic loss. The government itself is a major victim of illegal phoenix activity, as it is estimated to result in $1660

239 Victorian Law Reform Committee, *Curbing the Phoenix Company: Second Report on the Law Relating to Directors and Managers of Insolvent Corporations*, Report No 43 (1995) 52 [4.9].

million in unpaid taxes and compliance costs per year.[240] From the perspective of the government's fiscal responsibility,[241] it is important to invest in the reduction of illegal phoenix activity. The potential revenue gains from increasing public law enforcement against illegal phoenix activity were highlighted by the Cole Royal Commission in 2003:

> There has been significant incidence of fraudulent phoenix company activity in the building and construction industry. Since 1998 the Australian Taxation Office has raised at least $110 million in taxes and penalties from the detection of fraudulent phoenix company activity in the building and construction industry. For every $1 spent by the Australian Taxation Office on the detection of phoenix company activity in the period 1 July 2001 to 30 June 2002 $8 in revenue was raised.[242]

If the government and enforcement agencies do not take stronger action to reduce illegal phoenix activity, there is no doubt that this will be an ongoing and substantial cost for the Australian economy. There would be significant short-term costs involved in implementing and periodically reviewing the increase in public law enforcement proposed in this article, but it has the potential to be a high-return investment for the government and economy.

240 PwC et al, above n 3, iii.

241 See Liberal Party of Australia, *The Coalition's Policy for a Stronger Economy and Balanced Budget* (June 2016) <https://www.liberal.org.au/coalitions-policy-stronger-economy-and-balanced-budget>; Australian Labor Party, *Labor's Fiscal Plan* <https://cdn.austra2lianlabor.com.au/documents/Labors_Fiscal_Plan.pdf>.

242 Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report: Reform — National Issues Part 2* (2003) 164.