

**Senate Economic References Committee
Penalties for White Collar Crime**

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A. Introduction

We thank the Senate Economic References Committee for this opportunity to make a submission to its inquiry into penalties for white-collar crime. We are a group of academics in the final year of a three year Australian Research Council-funded project examining the regulation of illegal phoenix activity. Our aim is to devise ways in which this damaging behaviour can be most efficiently and effectively prevented, interrupted and/or deterred, without damaging legitimate business activities to the detriment of the economy. Our most recent output is a major report entitled *Quantifying Phoenix Activity: Incidence, Cost, Enforcement* (2015).

Our submission will address the following specific parts of the terms of reference, namely:

The inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime, with particular reference to:

- the use and duration of banning orders.

Our research examines phoenix activity. This concept broadly centres on the idea of a corporate failure and a second company ('Newco'), often newly incorporated, arising from the ashes of its failed predecessor ('Oldco') where the second company's controllers and business are essentially the same. These are generally known as 'successor' companies. Phoenix activity can also arise within corporate groups where an already established subsidiary takes over the business of a related entity that has gone into liquidation.

In either case – successor companies or phoenix activity within corporate groups - assets may be transferred between the first and second companies, however this is not necessarily the case. In some instances, the first company only has employees, and their accruing entitlements and unremitted superannuation and Pay-As-You-Go withholding (PAYG(W)) instalments are left unpaid when the company is liquidated. Those employees may or may not find work with the second company within the group.

Phoenix activity can be entirely legal, especially if the worth of the failed company's assets is maintained and the employees keep their jobs and entitlements. This behaviour can be described as 'legal phoenix activity', or 'business rescue'. The behaviour becomes illegal where the intention of the company's controllers is to use the company's failure as a device to avoid paying Oldco's creditors (who may include the company's employees and revenue agencies) that which they otherwise would have received had the company's assets been properly dealt with. This behaviour may involve a contravention of one or more laws such as

the laws dealing with directors' duties or the provisions governing the fraudulent removal of company property and may give rise to criminal, civil and administrative penalties.

While our research does not directly address the Committee's terms of reference, it will be of interest to the Committee because it examines all available data on ASIC's use of banning orders as an enforcement mechanism for behaviour that could constitute illegal phoenix activity. The sections of our 2015 report that examine ASIC's use of banning orders, namely sections 4.1.1 and 4.2.1, are reproduced below. The full report can be viewed at the following URL: <<http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity>>.

4.1.1 ASIC

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

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

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

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

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

Identifying and deterring illegal phoenix activity: In July 2013, ASIC launched a new surveillance initiative aimed at deterring illegal phoenix activity, with a focus on failed companies in the construction, labour hire, transport, security and cleaning industries where there have been allegations of illegal phoenix activity.¹⁶⁷

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

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

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

- *Breaches of directors' duties under the Corporations Act.*
 1. S 180: the duty of care and diligence;
 2. S 181: the duties to act in the best interests of the company and for a proper purpose;
 3. S 182: the duty not to make improper use of their position;

¹⁶⁷ ASIC, Small business-illegal phoenix activity (2 February 2015) <<http://asic.gov.au/for-business/your-business/small-business/compliance-for-small-business/small-business-illegal-phoenix-activity/>>.

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

4. S 588G(2): the duty to prevent insolvent trading by the company. The incurring of a debt under s 588G includes the entry into an uncommercial transaction, as defined by s 588FB: s 588G(1A).

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

- *Other disqualifications under Part 2D.6 of the Act:*
 1. ASIC may apply to the court to have a director disqualified for up to 20 years where the person, within the last seven years, has been an officer of two or more corporations when they have failed and the court is satisfied that the manner in which the corporation was managed was wholly or partly responsible for the corporation failing and the disqualification is justified: s 206D;
 2. ASIC may also apply to the court for a disqualification order where a person has twice been a director of a corporation that has contravened the Act and each time has failed to take reasonable steps to prevent the contravention or where a person has twice contravened the Act while they were an officer of a body corporate: s 206E;
 3. ASIC may itself disqualify a person for up to five years if, within the past seven years, the person has been an officer of two or more corporations where adverse liquidator reports have been lodged with ASIC: s 206F.
- ASIC may wind up a dormant company under s 489EA where it becomes apparent that it is not carrying on business, evidenced, for example, by the non-return of ASIC forms or the non-payment of fees. ASIC may then appoint a liquidator to wind up the affairs of the company.
- A variety of criminal provisions, outlined at 4.3.2.

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

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

¹⁶⁹ *Corporations Act* s 1317G(1).

¹⁷⁰ *Corporations Act* s 1317H.

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

4.2.1. ASIC

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

4.2.1.1. DATA ON ASIC'S PROACTIVE PHOENIX SURVEILLANCE PROGRAMS

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

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

Additionally, the submission noted:

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

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

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

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

²²⁹ *Ibid*, 31.

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

4.2.1.2. DATA ON ASIC’S LIQUIDATOR ASSISTANCE PROGRAM

The ASIC-run LAP aims to ensure directors of companies that have entered EXAD ‘comply with their obligations to provide information to the liquidator or ASIC about the companies they manage’.²³¹ ASIC may choose to initiate court action against directors who do not meet these obligations. Every year ASIC receives approximately 1,200 to 1,500 requests from liquidators for assistance through this program.

Table 1 shows the amount of LAP requests for the financial years 2009-10 through to 2013-14, as well as the compliance levels and enforcement outcomes achieved as a result of these requests. The data indicates that there has been an increase in the compliance rate over this time frame, with a commensurate decrease in the numbers of directors prosecuted for breaches.²³² The compliance rate refers to how many directors complied with their obligations to provide books and accounts as a result of LAP intervention.

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

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

Source: ASIC

4.2.1.3. DATA ON ASIC ENFORCEMENT REQUIRING A COURT ORDER

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

ASIC’s media releases from 1 January 2004 to 31 December 2014 detail 19 separate occasions when ASIC applied for a declaration of contravention of civil penalty provisions alleging a breach of a director’s duty.²³⁶ A search of all Austlii caselaw databases for the same period revealed the same 19

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

²³¹ *Ibid*, 33.

²³² *Ibid*.

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

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

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

²³⁶ See Michelle Welsh, ‘Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia’ (2014) 42 (1) *Federal Law Review* 217 – 240; Michelle Welsh, ‘Civil Penalties and Responsive Regulation: the Gap Between Theory and Practice’ (2009) 33(3) *Melbourne University Law Review*

occasions. In only one of those applications did the facts giving rise to the alleged breach of duty amount to illegal phoenix activity. The Phoenix Research Team's search of ASIC's media releases and the Austlii database did not reveal any ASIC applications commenced between 1 January 2004 and 30 June 2014 alleging directors had engaged in insolvent trading pursuant to *Corporations Act* s 588G in circumstances that may have involved illegal phoenix activity.

A search for the term "206F AND corporations act" across all Austlii caselaw databases (for both state/territory and commonwealth cases) for the period 1 January 2004 to 31 December 2014 revealed a number of cases where a director was disqualified under s 206F or where ASIC was applying for such an order. When the AAT cases were removed from the results, analysis of the remaining cases revealed that two cases involved phoenix activity.²³⁷ One was the Federal Court trial of Desley Soong,²³⁸ a complex illegal phoenix activity case extensively analysed in the Phoenix Research Team's *Defining and Profiling Phoenix Activity* report at 2.2.5.2. The second case was heard in the Federal Magistrates Court and was based on a contravention of the *Workplace Relations Act 1996* (Cth). The case also featured in the Phoenix Research Team's search of ASIC's media releases.²³⁹ The judgment included the following summary of the illegal phoenix type 1 engaged in by the director Mr Zarfati:

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

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

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

908 – 933; Michelle Welsh, 'The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' (2009) 27 *Company and Securities Law Journal* 370 - 388.

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

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

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

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

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

Phoenix Activity report at 2.2.3.2. *Somerville* also featured in the search undertaken of ASIC media releases.²⁴²

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

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

4.2.1.4. DATA ON ASIC ADMINISTRATIVE ENFORCEMENT

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

It is difficult to ascertain precisely the total number of director disqualifications under s 206F of the *Corporations Act*. The Phoenix Research Team searched ASIC’s annual reports for each year between 1 January 2008 and 30 June 2014. These are referred to interchangeably by ASIC as “bannings” and “disqualifications”. In some years it is clear that ASIC disqualified the directors under s 206F but the language used is not consistent between annual reports so accurate data could not be collated. As a result, the Phoenix Research Team contacted ASIC to obtain this s 206F information, which is presented in [Table 2](#).

Table 2 ASIC Director Disqualifications under s 206F 1 July 2008 - 30 June 2014

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

Source: Data directly supplied by ASIC

However, it is not possible to say how many of the directors disqualified by ASIC under s 206F will have engaged in illegal phoenix activity. The most that can be claimed from an examination of the

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

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

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

data in [Table 2](#) is that a percentage of those directors may have been disqualified because they engaged in illegal phoenix activity.

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

The Phoenix Research Team found the media releases to be a valuable source of qualitative information about the disqualifications that involve phoenix activity. However, the Phoenix Research Team’s media release search covers a longer period than the data supplied directly by ASIC in [Table 2](#), and it is recognised that not all of the disqualifications during the period covered by the ASIC s 206F data (2008 to 2014) were necessarily reported via ASIC media releases during that period. Therefore the s 206F data in [Table 2](#) and the media release data in [Table 3](#) are not comparable.

During the period 1 January 2004 to 30 June 2014, 32 media releases reported that 51 directors were disqualified in circumstances involving problematic or illegal phoenix activity. There were 165 companies involved in these 51 disqualifications. The maximum period of disqualification that ASIC can impose is five years. The media releases provided information on the duration of the disqualification for 50 of the 51 directors. [Table 3](#) breaks this information down. It appears from the table that ASIC prefers to disqualify for periods towards the maximum allowed.

Table 3 Length of director disqualification under s 206F as reported in ASIC media releases 1 January 2004 - 30 June 2014

| Length of disqualification (years) | Number of directors |
|---|----------------------------|
| 1 | 2 |
| 1.5 | 1 (overturned on appeal) |
| 2 | 4 |
| 2.5 | 0 |
| 3 | 10 |
| 3.5 | 0 |
| 4 | 18* |

| | |
|---------------|-----------|
| 4.5 | 1 |
| 5 | 14 |
| Not mentioned | 1 |
| Total | 51 |

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

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

4.2.1.4.1 THE ASSETLESS ADMINISTRATION FUND AND SECTION 206F

ASIC has had the Assetless Administration Fund ('AAF') at its disposal since it was launched on 23 February 2006,²⁴⁵ with funds provided by the government to finance insolvency practitioners in their work on behalf of companies with few or no assets. The aim of the fund is to overcome the inability of liquidators to make proper investigations due to financial constraints.²⁴⁶

There is a cap, currently \$7,500, or \$8,250 once GST is included, on the amount of funding provided.²⁴⁷ Approval for funding over \$7,500 may be given only where ASIC considers the extent and nature of the work proposed to be undertaken is necessary and justifies the additional cost; and ASIC and the liquidator come to an agreement on the amount of funding.²⁴⁸ AAF funding is only available for investigations where director disqualification proceedings by ASIC may be appropriate, or where court proceedings for serious misconduct pursuant to the *Corporations Act* may be warranted.²⁴⁹

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

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

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

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

²⁴⁷ *Ibid*, RG109.41.

²⁴⁸ *Ibid*, RG 109.42.

²⁴⁹ *Ibid*, RG109.26

²⁵⁰ *Ibid*, RG109.4.

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

According to a 2009 ASIC oversight hearing:

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

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

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

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

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

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

Table 4 sets out the total number of disqualifications under s 206F per year for the financial years 2009-10 to 2013-14 and compares this data with the number of disqualifications funded through the

²⁵¹ ASIC REP 412, above n **Error! Bookmark not defined.**, 32.

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

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

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

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

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

²⁵⁸ *Ibid.*, 233.

AAF. The data was obtained from ASIC’s April 2015 submission to the Senate Inquiry into Insolvency in the Australian Construction Industry.

Table 4 Director disqualifications under s206F and AAF funded director disqualifications 1 July 2009 - 30 June 2014²⁵⁹

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

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

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

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

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

ASIC received 462 banning (EX02) applications, 121 ‘Matters other than section 206F – Director banning’ (EX03) applications – a record number – and 32 winding-up activities. ASIC paid and committed \$2.8 million to liquidators during 2013–14. Funded reports assisted in approximately 76% of director bannings for 2013–14, an increase of 18% on 2012–13.²⁶³

4.2.1.4.2. AAT REVIEWS OF SECTION 206F DISQUALIFICATIONS

ASIC’s decision to disqualify a director is subject to review by the AAT pursuant to s 1317B(1) of the *Corporations Act*. Section 27 of the *Administrative Appeals Tribunal Act 1975* (Cth) allows a person whose interests have been affected by the decision to apply to the Tribunal for the review of the decision. While the number of appeals dealing with phoenix activity is small (six cases only), this data

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

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

²⁶¹ Compare this with the data for the same period in Table 4, which indicates that 73.68% of bannings *under s 206F* were funded by the AAF. This higher number is to be expected, since s 206F targets directors associated with multiple insolvencies where liquidators have lodged reports indicating an inability to pay company debts.

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

²⁶³ *Ibid*, 165.

is important because unlike the s 206F disqualifications that are not appealed, AAT appeal decisions provide a greater level of detail about the nature of the behaviour.

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

In analysing these cases, the following points were observed:

- The director disqualified in the sole legal phoenixing case identified in the search had his original disqualification of 18 months overturned on appeal.
- The director’s disqualification in the one problematic phoenix matter that was covered in two separate AAT appeals was increased from three to five years.
- Disqualifications for the three illegal type 1 cases were all affirmed by the AAT (one disqualification of two years,²⁶⁷ and two disqualifications of five years²⁶⁸).
- In all of the matters bar one, the companies involved were proprietary limited companies.²⁶⁹ The exception was the legal phoenix case, which concerned two companies: one proprietary and the other an unlisted public company.²⁷⁰
- The smallest number of companies in an individual case was two²⁷¹ and the largest was approximately 70.²⁷²
- Of the five matters, the sole problematic phoenix matter²⁷³ and two of the illegal type 1 cases²⁷⁴ mentioned that insolvent trading had taken place.
- The problematic phoenix matter²⁷⁵ and all three illegal type 1 cases²⁷⁶ involved directors’ duties breaches.
- Two illegal type 1 cases mentioned that the director/s involved breached the statutory requirement to provide the liquidators with the company’s books of account.²⁷⁷

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

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

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

²⁶⁷ *Boyle*, above n 266.

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

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

²⁷⁰ *Andrews*, above n 264.

²⁷¹ *Ibid.*

²⁷² *Quinlivan 1 and 2*, above n 265.

²⁷³ *Ibid.*

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

²⁷⁵ *Quinlivan 1 and 2*, above n 265.

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

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

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

²⁷⁸ *Boyle*, above n 266.

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

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

²⁸¹ *Guss*, above n 266

²⁸² *Quinlivan 1 and 2*, above n 265.

²⁸³ *Grossman*, above n 266;

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

²⁸⁵ *Quinlivan 1 and 2*, above n 265.