The construction industry is particularly prone to illegal phoenix activity.AAP/Paul Miller

To stamp out illegal phoenix activity, directors should be required to have identification numbers. And, if they've had many corporate failures, they should be classed in a new probationary category, our research shows .

These are a few of several measures we have designed to detect and pre-emptively disrupt those bent on using company liquidation or deregistration to avoid payment of debts – before they do harm.

When it comes to stamping out such illegal phoenix activity in Australia, a primary focus on prosecuting those who have done the wrong thing has not been successful .

What is phoenix activity?

A wide spectrum of phoenix activities can occur when a company fails and another entity takes over its business activities. These range from genuine business rescues to complex illegal behaviour.

Many existing laws can be used against wrongdoers and "serial inept entrepreneurs". But the behaviour nevertheless continues, particularly in the construction industry .

Exactly how often it occurs or how much it costs remains unclear . Previous estimates have put the cost to Australia's economy
in the billions
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What needs to happen to stamp it out

Better detection of phoenix activity is needed. Gathering and sharing information are key to

achieving this.

All directors should have director identification numbers that link to all their present and previous directorships. By requiring prospective directors to quote their numbers when incorporating a new company, the Australian Securities and Investments Commission (ASIC) would be instantly provided with a comprehensive picture of the company and its management. This would lead to increased scrutiny.

This information should be shared with other regulators that are tackling harmful phoenix activity, including the Australian Taxation Office and the Fair Work Ombudsman.

ASIC should supply liquidators – free of charge – with all relevant data about a failed company. This information would be collated using the director identification number at the start of a liquidation. This lets liquidators make better use of their time and limited resources.

Liquidators' reports to ASIC about misconduct before and during liquidation also need an overhaul so that meaningful information can be gathered and shared. At present, the "tick-box" reports don't even ask about phoenix activity or the possible involvement of pre-insolvency advisers, who are believed to be a growing scourge in this area.

The public needs to be armed with information to protect themselves in their dealings with companies. ASIC's registers should provide more detailed information, in more accessible formats, and without charge.

This is not going to dampen enthusiasm for creating businesses. On the contrary, businesspeople told us that identifying and getting rid of shonky operators would help legitimate businesses to compete fairly.

Disruption is a more achievable objective than prevention. To achieve this, a probationary category – "restricted directorships" – should be automatically imposed on directors after they've had five corporate failures within ten years.

These directors would then be restricted in the number of companies they could manage and their names would be publicly available on a register. These directors would be subject to increased regulatory scrutiny and reporting requirements. The ATO would have the discretion to deny their companies an Australian Business Number where appropriate to do so.

Director penalty notices , which currently only capture withholding taxes and unremitted superannuation, should be extended to cover unpaid GST. Avoiding payment of GST by liquidating a company, after earlier claiming input tax credits, makes phoenix activity appealing. This is particularly the case in the building and construction sector.

Enforcement remains the foundation upon which detection and disruption measures are built. Liquidators need their role clarified. If the government considers them vital gatekeepers in detection and enforcement, their current statutory obligation – simply to report, not to investigate – must be amended. And proper funding must be provided to back them up.

Regulators must prioritise enforcement of the laws currently available to them to combat harmful phoenix activity. These include powers to disqualify directors and prosecute them for breaches of directors' duties. Pre-insolvency advisers who help with illegal phoenix activity must also be prosecuted for their role as accessories to the directors' wrongdoing.

Meaningful penalties and the court's ability to strip the new company of the benefits of phoenix activity are also critical. A personal penalty of a few thousand dollars – or even as low as a few hundred dollars, which is what some directors are fined for failing to assist and provide information to liquidators – is well worth enduring for your company to avoid debts running into the hundreds of thousands or millions.

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Ian Ramsay receives funding from the Australian Research Council.

Jasper Hedges receives funding from the Australian Research Council.

Michelle Welsh receives funding from the Australian Research Council.

Read more http://theconversation.com/heres-what-must-be-done-to-detect-disrupt-and-deter-phoenix-activity-in-australia-73367