The Senate

Economics
Legislation Committee

Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 [Provisions]

March 2019

ISBN 978-1-76010-943-1

Printed by the Senate Printing Unit, Parliament House, Canberra.

Senate Economics Legislation Committee

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Chapter 1

Introduction

1.1 On 14 February 2019, the Senate referred the provisions of the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (the bill) to the Economics Legislation Committee (the committee) for inquiry and report by 26 March 2019.[1]

1.2 The bill seeks to amend the *Corporations Act 2001* (Corporations Act), the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and the *Taxation Administration Act 1953* (TAA) to combat illegal phoenix activity. The bill also seeks to make a number of consequential amendments, including minor amendments to ensure the government's already legislated insolvency reforms, which form part of the National Innovation and Science Agenda, operate as intended.[2]

1.3 The Senate Economics References Committee explored the significant issue of illegal phoenix activity in its 2015 inquiry into Insolvency in the Australian construction industry. The Explanatory Memorandum (EM) notes that a July 2018 report by PricewaterhouseCoopers, prepared for the Phoenix Taskforce, estimated the annual direct cost to businesses, employees and government as a result of potential illegal phoenix activity to be between $2.85 billion and $5.13 billion in 2015–16.[3]

1.4 The 2018–19 Budget announced a reform package to combat illegal phoenixing, stating:

> Illegal phoenixing involves the deliberate misuse of the corporate form. It affects all working Australians, including: customers who get scammed by not receiving their paid goods or services; small business and sole-trader creditors through lost payments; employees through lost wages and superannuation entitlements; and ultimately all Australian taxpayers through lost tax revenue. In addition, illegal phoenix operators gain an unfair advantage over their honest competitor businesses, which has a broader economic impact.[4]

1.5 The bill implements four of the measures in the reform package and contains four schedules:

- Schedule 1 seeks to introduce new phoenixing offences to prohibit creditor-defeating dispositions of company property, penalise those who engage in or facilitate such dispositions, and allow liquidators and the Australian Securities and Investments Commission (ASIC) to recover such property.

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1 *Journals of the Senate*, No. 140, 14 February 2019, p. 4667.

2 The Hon. Stuart Robert MP, Assistant Treasurer, *House of Representatives Hansard*, 13 February 2019, p. 1.

3 *Explanatory Memorandum*, p. 5.

4 Commonwealth of Australia, *Budget measures, Budget Paper 2, 2018–19*, 8 May 2018, p. 37.

- Schedule 2 seeks to ensure directors are held accountable for misconduct by preventing directors from improperly backdating resignations or ceasing to be a director when this would leave the company with no directors. This measure is intended to reduce the incidence of illegal phoenix activity and its effect on employees, creditors and government revenue.
- Schedule 3 seeks to allow the Commissioner of Taxation (Commissioner) to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances.
- Schedule 4 seeks to authorise the Commissioner to retain tax refunds where a taxpayer has failed to lodge a return or provide other information to the Commissioner that may affect the amount the Commissioner refunds. This measure is intended to ensure taxpayers satisfy their tax obligations and pay outstanding amounts of tax before being entitled to a tax refund.[5]

1.6 In his second reading speech, the Hon. Stuart Robert MP, Assistant Treasurer, stated that:

> This bill will give our regulators additional enforcement and regulatory tools to better detect and address illegal phoenix activity and to prosecute or penalise directors and others who facilitate this illegal activity, such as unscrupulous pre-insolvency advisers.[6]

Other measures to combat illegal phoenix activity

1.7 The reforms in the bill are intended to complement and build on the work of the government's Phoenix, Serious Financial Crime and Black Economy taskforces, and other announced reforms such as a Director Identification Number, a combined black economy and illegal phoenixing hotline, and reforms to address corporate misuse of the Fair Entitlements Guarantee and to tackle non-payment of the Superannuation Guarantee Charge.[7]

1.8 On 20 September 2018, the Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 was introduced in the House of Representatives. This bill seeks to implement the proposed reforms to the Fair Entitlements Guarantee. The bill is currently before the Senate.[8]

1.9 The 2018–19 Budget reform package to combat illegal phoenixing also included a measure to prevent related creditors facilitating illegal phoenix activity by unduly influencing voting at creditor's meetings in an external administration. This is implemented through the *Insolvency Practice Rules (Corporations) Amendment*

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5 *Explanatory Memorandum*, pp. 3–4.

6 The Hon. Stuart Robert MP, Assistant Treasurer, *House of Representatives Hansard*, 13 February 2019, p. 1.

7 Commonwealth of Australia, *Budget measures, Budget Paper 2, 2018–19*, 8 May 2018, p. 37.

8 Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6187%22 (accessed 22 March 2019).

(Restricting Related Creditor Voting Rights) Rules 2018, which commenced on 7 December 2018.[9]

1.10 The government announced in the 2018–19 Mid-Year Economic and Fiscal Outlook that it will provide an additional $8.7 million over four years from 2018–19 to increase funding for the Assetless Administration Fund (AAF).[10] The additional funding is intended to increase ASIC's ability to fund liquidators, who play a vital role in investigating and reporting illegal phoenix activity.[11]

1.11 On 13 February 2019, the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 was introduced into the House of Representatives. This legislation introduces Director Identification Numbers (DIN) as part of the Modernising Business Registers program to ensure that the DIN is integrated with other important registry data. Treasury noted that:

> This will provide greater insights to regulators, businesses and individuals on the identity of directors. Having all business registry data linked will help with risk profiling and help reduce illegal phoenixing.[12]

1.12 The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 was referred to the committee, along with the Commonwealth Registers Bill 2019 and two other related bills, for inquiry and report by 26 March 2018.[13]

Schedule 1—Phoenixing offences and property transfers to defeat creditors

1.13 Schedule 1 seeks to amend the Corporations Act to improve the mechanisms available to combat illegal phoenix activity, specifically creditor-defeating dispositions—transfers of company assets for less than market value (or the best price reasonably obtainable) that prevent, hinder or significantly delay creditors' access to the company's assets in liquidation.

1.14 The amendments introduce new criminal offences and civil penalty provisions for:

- company officers that fail to prevent the company from making creditor-defeating dispositions; and
- other persons that facilitate a company making a creditor-defeating disposition.

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9 *Explanatory Memorandum*, p. 7.

10 The AAF finances preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where it appears to ASIC that enforcement action may result from the investigation and report. A particular focus of the AAF is to curb fraudulent phoenix activity. Department of the Treasury, *Submission 16*, p. 3.

11 Department of the Treasury, *Submission 16*, p. 3.

12 Department of the Treasury, *Submission 16*, p. 3.

13 *Journals of the Senate*, No. 140, 14 February 2019, p. 4667.

1.15 These offences are subject to a number of important safe-guards to ensure the amendments do not affect legitimate businesses and commercial transactions. This includes maintaining the safe harbour for legitimate business restructures and respecting transactions made with creditor or court approval (as appropriate) under a deed of company arrangement or scheme of arrangement.

1.16 To protect creditors, these amendments make a number of refinements to the law to allow for the efficient recovery of assets and, where necessary, the provision of compensation. In particular, the amendments provide that:

- liquidators can seek to recover the assets or other consideration through the courts for the benefit of the company's creditors;
- ASIC can make orders to recover assets for the company's creditors; and
- liquidators—and in some cases creditors—can recover compensation from a company's officers and other persons responsible for a company making a creditor-defeating disposition.[14]

Schedule 2—Improving the accountability of resigning directors

1.17 Schedule 2 seeks to increase accountability of directors for misconduct by preventing directors from improperly backdating resignations or ceasing to be a director when this would leave the company with no directors.

1.18 Currently, under subsection 205B(5) of the Corporations Act, a company must notify ASIC within 28 days if a person is appointed as a director or stops being a director. The company's obligation to notify ASIC of a director's resignation may be satisfied by the resigning director notifying ASIC themselves.

1.19 The amendments in schedule 2 seek to prevent the backdating of resignation in breach of the 28-day rule in section 205B. Under the proposed new law, if a director's resignation is reported to ASIC more than 28 days after the purported resignation, the resignation takes effect from the day it is reported to ASIC.

1.20 The former director or the company may apply to ASIC or the Court to backdate a resignation that is lodged after the 28-day period. The applicant must satisfy ASIC or the Court (as appropriate) that the director did in fact resign on the purported date.

1.21 Schedule 2 also prevents the abandonment of companies by a resigning director or directors, leaving the company without a natural person's oversight.[15]

Schedule 3—GST estimates and director penalties

1.22 Schedule 3 to the bill seeks to extend the estimates and director penalty regimes to GST liabilities, including the Luxury Car Tax (LCT) and the Wine Equalisation Tax (WET), as these taxes are jointly administered with the GST.[16]

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14 *Explanatory Memorandum*, p. 12.

15 *Explanatory Memorandum*, pp. 42–44.

16 *Explanatory Memorandum*, p. 47.

The estimates regime

1.23 The current estimates regime (Division 268 in Schedule 1 to the TAA) enables the Commissioner to estimate unpaid amounts of PAYG withholding and superannuation guarantee charge, and to recover the amount of those estimates from taxpayers.

1.24 The estimates regime provides the Commissioner with a valuable compliance tool where a taxpayer has failed to report information. A taxpayer becomes liable to pay an estimate when the Commissioner provides a notice of the estimate (section 268-20).[17]

1.25 The amendments in schedule 3 seek to expand the of the estimates regime in Division 268 in schedule 1 to the TAA to allow the Commissioner to make estimates of an entity's net amount under the GST Act. Any estimate of a net amount will necessarily include any applicable LCT and WET. If the Commissioner makes an estimate of an entity's net amount, the entity is liable to pay the amount of the estimate to the Commissioner.[18]

Director penalties

1.26 The current director penalty regime (Division 269 in Schedule 1 to the TAA) makes directors of a company personally liable for specified taxation liabilities of the company in certain circumstances of non-payment by the company.

1.27 Under section 269-10, the current director penalty regime applies to a company's liabilities to pay to the Commissioner:

- PAYG withholding amounts;
- superannuation guarantee charges; and
- estimates of PAYG withholding liabilities and superannuation guarantee charges.[19]

1.28 Schedule 3 seeks to expand the scope of the director penalty regime in Division 269 in Schedule 1 to the TAA to allow the Commissioner to recover director penalties from company directors to collect outstanding GST liabilities, including LCT and WET liabilities, and estimates of those liabilities.[20]

Schedule 4—Retention of tax refunds

1.29 Schedule 4 authorises the Commissioner to retain tax refunds where a taxpayer has failed to lodge a return or provide other information to the Commissioner that may affect the amount the Commissioner refunds. This ensures taxpayers satisfy their tax obligations and pay outstanding amounts of tax before being entitled to a tax refund.

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17 *Explanatory Memorandum*, p. 47.

18 *Explanatory Memorandum*, p. 51

19 *Explanatory Memorandum*, p. 48.

20 *Explanatory Memorandum*, p. 54.

1.30 Currently, Part IIB of the TAA provides for the treatment of money that is paid to the Commissioner, or is held by, or is owing to the Commissioner, in relation to taxpayers' tax affairs. The provisions allow the Commissioner to apply money received against a taxpayer's tax debts and require the Commissioner to pay refunds in certain circumstances.

1.31 Schedule 4 seeks to extend the operation of section 8AAZLG of the TAA to authorise the Commissioner to retain refunds from a taxpayer that has failed to lodge a return or provide other information that may affect the amount the Commissioner refunds.

1.32 The EM states that the Commissioner will release guidance to support the administration of the discretion in the amendments and notes that 'the Government envisages the Commissioner will apply the new discretion in relation to taxpayers identified as a high-risk, including those engaging in illegal phoenix activity'.[21]

Consultation on the proposed measures

1.33 The bill is the final result of two treasury consultation processes.

1.34 Between 28 September 2017 and 27 October 2017 a consultation on a discussion paper was conducted. Fifty submissions were received.

1.35 Consultation on draft legislation was conducted between 16 August 2018 and 27 September 2018. Thirty-eight submissions were received. Consultation meetings were held in Sydney on 3 September 2018 and Melbourne on 5 September 2018.[22]

Financial impact

1.36 The EM states that the measures in schedules 1 and 2 will have no financial impact.[23] Schedule 4 is estimated to result in a small but unquantifiable gain to revenue over the forward estimates period.[24]

1.37 As at the 2018–19 Budget, the measures contained in schedule 3 are estimated to result in the following cost to budget over the forward estimates period:

Table 1: Financial impact of schedule 3—GST estimates and director penalties[25]

2018-19	***2019-20***	***2020-21***	***2021-22***
-	-5.0 million	-15.0 million	-20.0 million

21 *Explanatory Memorandum*, pp. 62–64.

22 Department of the Treasury, *Submission 16*, p. 3.

23 *Explanatory Memorandum*, p. 3.

24 *Explanatory Memorandum*, p. 4.

25 *Explanatory Memorandum*, p. 4.

1.38 The 2018–19 Budget stated:

> In fiscal balance terms, the cost to the budget of extending the Director Penalty Regime is estimated to be $40.0 million over the forward estimates, as existing GST debt is collected and paid to the States and Territories.[26]

Compatibility with Human Rights

1.39 The EM notes that the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[27]

1.40 Schedules 1 and 2 introduce strict liability offences. The EM notes that to the extent that the schedules 1 and 2 engage the rights under Article 14 of the *International Covenant on Civil and Political Rights*, it is compatible with human rights as the strict liability offence is appropriate because it:

- achieves the legitimate objective of protecting the general public from misconduct;
- is rationally connected to the objective by improving the likelihood of compliance with the regulatory regime; and
- imposes proportionate penalties for misconduct.[28]

Conduct of the inquiry

1.41 The committee advertised the inquiry on its website. It also wrote to relevant stakeholders and interested parties inviting written submissions by 14 March 2019. The committee received 20 submissions, which are listed at Appendix 1.

1.42 The committee would like to thanks all the individuals and organisations that participated in the inquiry.

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26 Commonwealth of Australia, *Budget measures, Budget Paper 2, 2018–19*, 8 May 2018, p. 37.

27 *Explanatory Memorandum*, Chapter 6.

28 *Explanatory Memorandum*, pp. 71 and 72.

Chapter2

Views on the bill

2.1 This chapter summarises the views held by stakeholders on the package of reforms to address illegal phoenix activity. The chapter is intended to provide an indicative, though not exhaustive, account of the issues raised in submissions to the inquiry.

Support for the aims of the bill

2.2 For the most part, submitters supported the aims of the bill and the need to address illegal phoenix activity.

2.3 The Governance Institute supported the reforms in the bill to address illegal phoenix activity and commended the government's 'commitment to addressing the deficiencies in the current laws exploited by some company directors to obscure their role in company decisions, shift accountability to other directors and facilitate phoenixing activity'.[1]

2.4 The ACT Government supported the measures in the bill which would enable the Australian Government to do 'more to prevent directors associated with corporations with questionable practices from registering new corporations to carry on with their activities while avoiding their debts'.[2] In particular, it noted the limitations of the ACT's construction licencing laws, which were designed to help reduce illegal phoenixing and the effect of insolvencies on contractors. These limitations mean that the ACT Government does not have powers to prevent corporations from transferring assets to another corporation with the clear intention to carry on operating and avoid their regulatory responsibilities. It noted:

> Therefore, provisions such as those in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 relating to property transfers and creditor-defeating dispositions and voidable transactions, and provisions to improve the accountability of resigning directors are welcomed.[3]

2.5 The Housing Industry Association (HIA) supported a number of reforms within the bill that seek to respond to illegal phoenixing behaviour. However, it was concerned that some aspects of the bill amount to 'overcapture' and go well beyond the remit granted under the banner of targeting illegal phoenixing activity.[4]

2.6 Some submitters considered the measures in the bill did not go far enough.

2.7 The Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) noted that while it was not opposed to the bill, it did not 'go nearly far enough to

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1 Governance Institute, *Submission 5*, p. 1.

2 ACT Government, *Submission 2*, p. 1.

3 ACT Government, *Submission 2*, p. 2.

4 Housing Industry Association, *Submission 10*, p. 4.

address the anti-phoenixing behaviour which is rampant in the construction industries'.[5]

2.8 Maurice Blackburn supported the measures in the bill to 'deter and disturb the nature of illegal phoenix activity and provide appropriate punishments to those who are complicit or facilitate illegal phoenix activity'.[6] However, it was concerned that the bill does not go far enough to protect workers from illegal phoenix activity. It reminded the committee that those most at risk at falling victim to illegal phoenix activity are those engaged in the most precarious working arrangements. In particular:

> They are often migrant workers, students and women, and often those who hold the lowest status in the employment relationship. The protections that would be afforded through union membership are often ignored through fear that it may jeopardise their capacity to gain or retain work.
>
> Employees are significant victims of illegal phoenix activity because their unpaid wages, leave entitlements, payments in lieu of notice and redundancy payments are often sizeable debts of the failed company. Additionally, it is highly likely that where a company is deliberately liquidated, the defunct employees will commonly lose their employment.[7]

2.9 In order to protect employees, Maurice Blackburn submitted that the bill should be adjusted to require entities within a group structure to have a shared obligation to satisfy unpaid employee entitlements of any insolvent entity within the corporate group.[8]

2.10 Mendelsons Lawyers, a law firm focussed on debt recovery and insolvency in all Australian jurisdictions specialising in commercial debt collection, welcomed the proposed reforms but did not believe they went far enough to tackle opportunistic phoenixing. It explained:

> Our view is that overall, the legislation targets the systemic illegal phoenix activity that occurs on a larger scale. The smaller and more opportunistic types of phoenixing activity will, perhaps inadvertently, escape the ambit of the legislation. [emphasis in original]
>
> …
>
> The legislation does not immediately target the opportunistic behavior…Such actions do not have the obvious hallmarks of illegal phoenix activity that involves the stripping and transfer of assets from one entity to another and/or external administration, although they can cause great distress to creditors, particularly to [small to medium enterprises].[9]

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5 Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), *Submission 7*, p. 1.

6 Maurice Blackburn Lawyers, *Submission 9*, p. 3.

7 Maurice Blackburn Lawyers, *Submission 9*, p. 3.

8 Maurice Blackburn Lawyers, *Submission 9*, p. 2.

9 Mendelsons Lawyers Pty Ltd, *Submission 8*, p. 2.

Feedback on Treasury consultations

2.11 Many of the submitters to this inquiry have also provided feedback on previous consultations carried out by the Department of the Treasury (Treasury) on the measures in this bill as well as consultations relating to the introduction of Director Identifications Numbers (DIN). The committee notes that many of the submissions to this inquiry supported the introduction of DINs. As mentioned in the previous chapter, the DIN legislation is presently being examined as part of the committee's inquiry into the provisions of the Commonwealth Registers Bill 2019 and four related bills.

2.12 Treasury advised that a number of amendments have been made to the offence, civil penalty and asset recovery provisions in the bill to address certain stakeholder feedback. These amendments aim to strike the right balance between deterring and penalising asset stripping behaviours that are a key part of illegal phoenix activity, while minimising any impact on legitimate business rescue.[10]

2.13 Many submitters supported the amendments made in response to feedback from stakeholders. For example, Professor Helen Anderson from the Melbourne Law School, who had been involved in the previous Treasury consultations, noted that while a number of her concerns remained, she was pleased that a number of useful changes had been made following the exposure draft consultation, including:

> - A new s 588E(4A) regarding a failure to keep records, which is very common in illegal phoenixing cases.
> - A much improved definition of creditor defeating disposition, where the issue of market value is addressed.
> - The inclusion of provisions to deal with abandoned companies, not just those that have entered some form of external administration. Our research estimates that there are about 40,000 abandoned and subsequently deregistered companies a year, although ASIC has ceased to publish data on these for the past decade.[11]

2.14 The Law Council of Australia was also pleased that of some of its suggested improvements appeared to have been taken up in the final bill introduced to Parliament. It noted, however, that while it 'broadly supports the move to increase regulation of improper phoenix activity, several concerns remain about the wording of the proposed provisions'.[12]

2.15 Conversely, the Australian Manufacturing Workers' Union did not feel that the concerns it raised in the previous consultations had been addressed in the bill. In particular, it considered that the legislation must also ensure that directors cannot avoid penalties for breaches of occupational health and safety legislation through phoenixing. It submitted:

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10 Department of the Treasury, *Submission 16*, p. 3.

11 Professor Helen Anderson, *Submission 1*, p. 1.

12 Law Council of Australia, *Submission 6*, p. 1.

> While this legislation is an improvement over the status quo it remains an inadequate response to a significant problem faced by workers, governments and the community.[13]

2.16 The Electrical Trades union (ETU) considered it 'regrettable that the Government's proposed Bill does not address the matters contained in that submission'. It stated:

> Reforms to combat illegal phoenix activities must be broad, adequately resourced, appropriately funded and introduced in a way that ensures their provisions will be able to be accessed by industry participants.[14]

The need for specific legislation to combat illegal phoenixing activity

2.17 A number of submitters did not believe there was a need for new legislation to combat illegal phoenixing activity.

2.18 Professor Anderson questioned the necessity of introducing legislation to specifically address illegal phoenix activity as the Australian Securities and Investments Commission (ASIC) already has broad powers to prosecute such activity under the *Corporations Act 2001* (Corporations Act). For example, Professor Anderson noted section 182 of the Corporations Act already captures illegal phoenix activity.[15] This section states:

> (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
>
> (a) gain an advantage for themselves or someone else; or
>
> (b) cause detriment to the corporation.

2.19 While it broadly supported the proposed reforms to combat illegal phoenix activity, Chartered Accountants Australia and New Zealand (CAANZ) considered that this outcome 'could have been achieved via amendments to existing laws rather than new, highly complex legislation'.[16]

2.20 The Australian Institute of Company Directors (AICD) supported the intent of the bill, however:

> Overall, our view remains (as expressed in prior consultations) that more proactive policing and enforcement of existing law—including breaches of directors' duties, where penalties have substantially increased—is critical to combatting the scourge of illegal phoenixing.
>
> Accordingly, we continue to encourage the prioritisation of enforcement of relevant laws, and adequate resourcing of ASIC to facilitate this, ahead of complex and potentially duplicative new provisions in legislation.[17]

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13 Australian Manufacturing Workers' Union, *Submission 4*, p. 1.

14 Electrical Trades Union, *Submission 19*, p. 1.

15 Professor Helen Anderson, *Submission 1*, p. 2.

16 Chartered Accountants Australia and New Zealand, *Submission 17*, p. 2.

17 Australian Institute of Company Directors, *Submission 11*, p. 1.

2.21 The Australian Institute of Credit Management (AICM) supported the measures to address illegal phoenixing but considered the focus should be on enforcing existing laws:

> The Australian Institute of Credit Management (AICM) is very supportive of measures that seek to disrupt illegal phoenixing considering our members see the impacts of up to $3.1 billion in direct cost to unpaid trade creditors. However, our members have not called for more legislation to combat illegal phoenix activity preferring instead that existing laws and mechanisms are used to their fullest.[18]

2.22 The Uniting Church in Australia, Synod of Victoria and Tasmania (the Synod) noted that other stakeholders had questioned the need for further legislation. However, in its view:

> …despite these comments the measures are worth implementing as they will make illegal phoenixing harder, which will probably deter some people from engaging in such activity.[19]

2.23 Treasury informed the committee that the bill will give regulators additional enforcement and regulatory tools to better detect and disrupt illegal phoenix activity and to prosecute or penalise directors and others who engage in or facilitate this illegal activity. It stated:

> Illegal phoenix activity is becoming increasingly sophisticated and difficult to detect and prosecute under existing legal frameworks. It is evident that our current laws and regulatory framework have not been successful in deterring this illegal activity, which is viewed as cheap and easy by those who engage in this conduct.[20]

Schedule 1—Phoenixing offences and property transfers to defeat creditors

2.24 Schedule 1 seeks to amend the Corporations Act to improve the mechanisms available to combat illegal phoenix activity, specifically creditor-defeating dispositions—transfers of company assets for less than market value (or the best price reasonably obtainable) that prevent, hinder or significantly delay creditors' access to the company's assets in liquidation.[21]

2.25 HIA supported the proposed provision including moves that extend culpability to advisors and those facilitating illegal behaviour. It noted:

> A 'creditor-defeating disposition' captures the transfer of company assets that prevents, hinders or significantly delays creditors access to the company's assets on liquidation. Such transactions may be a voidable transaction recoverable by the liquidator on application to ASIC or the Court.

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18 Australian Institute of Credit Management, *Submission 15*, p. 1.

19 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 14*, p. 2.

20 Department of the Treasury, *Submission 16*, p. 1.

21 *Explanatory Memorandum*, p. 12.

> Those involved, including those that facilitate 'creditor-defeating disposition' transactions, may be subject to criminal charges, civil penalties and compensation orders.[22]

2.26 HIA stated:

> While the introduction of criminal charges and civil penalties accompany such activities is welcomed the approach is not novel or one that strikes at the heart of problem.[23]

2.27 HIA expressed some concern that the approach largely mirrors, and potentially overlaps with, existing legislation.[24] Similarly, AICD submitted that it was 'not convinced that a new legislative mechanism to recover property in circumstances where a company has sought to avoid creditors is necessary, given the existing provisions in the *Corporations Act 2001 (Cth)*'.[25]

2.28 Professor Anderson reiterated objections raised in previous consultations with regard to legislation against creditor defeating dispositions:

> Attacking illegal phoenix activity through legislation against creditor defeating dispositions will simply encourage the devious to accrue debts through an assetless company and hold assets in another company.[26]

2.29 In the Synod's view, the reforms in schedule 1 'are a small step forward in dealing with phoenixing'. However, it raised concern that the provisions could be defeated by a person who plans far enough ahead with a phoenix activity:

> For example, they can avoid the provisions as long as the creditor-defeating disposition is made 12 months before the company enters into external administration. Further, businesses and individuals that advise on how to phoenix and get away with it will undoubtedly [develop] methods to advise clients on how to defeat the measures contained in schedule 1.[27]

Comments on amendments to the exposure draft in schedule 1

2.30 Submitters were broadly supportive of the amendments to the exposure draft legislation. This section outlines some of the comments made by submitters.

Inclusion of the term phoenixing in the object

2.31 Proposed section 588GAA—Object of this Subdivision was amended following the exposure draft consultation. Treasury advised that the exposure draft did not include the term 'phoenix' or 'phoenixing' as the term 'phoenixing' does not have a precise legal definition. Treasury explained that the section had been amended in

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22 Housing Industry Association, *Submission 10*, pp. 6–7.

23 Housing Industry Association, *Submission 10*, pp. 6–7.

24 Housing Industry Association, *Submission 10*, pp. 6–7.

25 Australian Institute of Company Directors, *Submission 11*, p. 2.

26 Professor Helen Anderson, *Submission 1*, p. 1.

27 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 14*, pp. 1–2.

response to 'strong stakeholder feedback that using explicit language referring to phoenixing will maximise the deterrence effect of the new provisions'. As such:

> …the final Bill includes an objects clause which sets out the object of the new Subdivision B for the offence and civil penalty provisions, which refers to deterring the practice of disposing of assets as part of activity sometimes called phoenixing'.[28]

2.32 Proposed section 588GAA states:

> The object of this Subdivision is to deter the practice (which may form part of the activity sometimes called phoenixing) of disposing of a company's assets to avoid the company's obligations to its 6 creditors.

2.33 Submitters were broadly supportive of this amendment. AICM welcomed the reference to phoenixing in the objects clause noting 'the benefits this has on the ability to reset the culture around phoenixing'.[29]

2.34 The Australian Restructuring Insolvency and Turnaround Association (ARITA) supported the inclusion of the term phoenixing:

> ARITA is pleased to see the creation of an actual 'phoenixing' offence by the incorporation of the term 'phoenixing' in the objects of the new 'Subdivision B—Duties to prevent creditor-defeating dispositions'. We had previously raised concerns that the absence of this would hinder any effective communication strategy that may actually drive cultural change to call out and mitigate this behaviour.[30]

2.35 However, Professor Anderson expressed some reservations, stating:

> While I understand the desire of honest professionals to have the word 'phoenixing' used in this legislation so they can point their clients to it, there is huge scope for illegal phoenix activity without creditor defeating dispositions. Will the 'object' statement mislead people into believing that the only kind of phoenix activity that is against the law involves creditor defeating dispositions? [31]

2.36 HIA maintained that an express definition of illegal phoenixing activity is needed.[32]

Presumption of insolvency where a company failed to keep records

2.37 Proposed section 588E applies a presumption of insolvency where a company has failed to keep or maintain financial records in accordance with section 286. This presumption is necessary to ensure that company officers engaging in illegal phoenix activity cannot avoid the voiding of transactions by committing further breaches of the

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28 Department of the Treasury, *Submission 16*, p. 5.

29 Australian Institute of Credit Management, *Submission 15*, p. 2.

30 Australian Restructuring Insolvency and Turnaround Association, *Submission 3*, p. 4.

31 Professor Helen Anderson, *Submission 1*, p. 2.

32 Housing Industry Association, *Submission 10*, pp. 6–7.

law to obscure a company's financial position. This presumption applies to voidable transactions generally.[33]

2.38 Treasury noted that the final bill includes an additional rebuttable presumption that a disposal is not for market value or the best price reasonably obtainable in the circumstances where the company did not maintain adequate records relating to the disposition.[34]

2.39 The Synod strongly supported proposed section 588E [35]

2.40 The Association of Independent Insolvency Practitioners (AIIP) supported the bill and noted in particular that the presumption that the creditor-defeating dispositions is not for market value where the company has inadequate records is helpful.[36]

Abandoned companies

2.41 In the exposure draft bill, it was an element of the offences and civil penalty provisions that the creditor-defeating transfer of property was made at a prohibited time, being either:

(a) when the company is insolvent or becomes insolvent as a result of the transfer; or

(b) the transfer is made within 12 months prior to the company being placed in external administration and the appointment of the external administrator was a direct or indirect result of the disposition.[37]

2.42 Treasury advised that under the final bill, a further element was added. A creditor defeating disposition is also prohibited if it is made within the 12 months prior to the company ceasing to carry on business altogether and that ceasing is a direct or indirect result of the disposition.[38] Treasury explained:

> This will help address the common situation where directors involved in phoenix activity strip a company's assets and abandon the company without taking steps to appoint an administrator or a liquidator to wind-up the company. It may be easier in some instances to establish that a company ceased to carry on business altogether shortly after a disposition took place than to establish insolvency. This addresses stakeholder feedback that the Exposure Draft Bill should do more to combat this common phoenixing strategy of leaving behind a 'zombie company' with no directors.[39]

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33 *Explanatory Memorandum*, p. 9.

34 Department of the Treasury, *Submission 16*, p. 4.

35 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 14*, p. 2.

36 Association of Independent Insolvency Practitioners, *Submission 20*, p. 1.

37 Department of the Treasury, *Submission 16*, pp. 5–6.

38 Department of the Treasury, *Submission 16*, p. 6.

39 Department of the Treasury, *Submission 16*, p. 6.

2.43 AICM welcomed amendments to the exposure draft, including the amended definition of creditor defeating dispositions to include abandoned companies.[40]

2.44 The Governance Institute supported the abandonment prevention provisions. However, it advised that further consideration should be given to a carve-out for unusual circumstances, such as 'when a fellow director becomes disqualified by becoming bankrupt, of unsound mind or dies'.[41]

Good faith defence for initial purchasers

2.45 Under the exposure draft bill, there was no good faith defence for initial purchasers. Subsequent purchasers had a defence where they could establish both market value and good faith (i.e. that they did not know the original transaction was voidable). Under the final bill, a subsequent purchaser has a general good faith defence (i.e. that they did not know the original transaction was voidable) and, consistent with moving the market value test to become an element of the action, no longer needs to establish market value consideration.[42]

2.46 The Law Council of Australia supported the amendments to the exposure draft:

> The new wording of subsection 588FG(8) resolves the [Law Council of Australia's] earlier concern about good faith restructuring efforts being caught which had arisen in connection with the exposure draft.
>
> The [Law Council of Australia] also commends the clarity which has been added to proposed subsection 588FG(9) since the circulation of the exposure draft.[43]

Schedule 2—Improving the accountability of resigning directors

2.47 Schedule 2 seeks to increase accountability of directors for misconduct by preventing directors from improperly backdating resignations or ceasing to be a director when this would leave the company with no directors.[44]

2.48 Condon Associates, a specialist Firm of Forensic, Insolvency and Turnaround Practitioners, supported the measure, noting:

> We believe that this is a significant improvement over the current system as the date of a director's resignation can be easily backdated to a date that the director believes is more suitable. It is also appropriate that should a director believe they have resigned but not lodged with ASIC that an appropriate Court, or other body can alter the date of registration where the facts genuinely warrant an earlier change. There will, of course, need to be

40 Australian Institute of Credit Management, *Submission 15*, p. 1.

41 Governance Institute, *Submission 5*, p. 3.

42 Department of the Treasury, *Submission 16*, p. 7.

43 Law Council of Australia, *Submission 6*, p. 2.

44 *Explanatory Memorandum*, p. 7.

> some guidance so that these applications are not simply without proper foundation nor merely rubberstamped.[45]

2.49 CAANZ supported the measure to prevent directors from backdating their resignation, further and recommended, that 'the 28 day lodgement period be reduced to a period consistent with other legislation'.[46]

2.50 CAANZ submitted that the provision preventing sole director from resigning should be extended:

> We support the provisions to prevent a sole director resigning from a company. We note, however, that similar situations could exist if the number of directors of a company falls below the minimum specified in the company constitution. We therefore recommend that this provision is extended to apply to these circumstances.[47]

2.51 AICM recommended that the timeframe for notification of resignation is reduced to ensure credit assessments made in this time are accurate and fully informed:

> Considering the 28 days presents risks to credit providers and is not required to protect directors who don't intend to manipulate the registration process, the AICM prefers that notice is required immediately and liability remains until notice is provided to ASIC. A defence should be available where it can be shown the deregistration was actioned within a reasonable time such as the Director actioning resignation themselves within 28 days of resigning after being aware the company had not done so immediately. A director that did not make reasonable steps to ensure notice of resignation was provided to ASIC would not be eligible for the defence.[48]

2.52 The Governance Institute expressed concern that the measures to prevent directors from backdating resignations may be too broad, and consideration should be given to tailoring the amendments so that they only apply to situations which the government is seeking to cover—that is, directors who backdate their resignations to avoid liability for insolvent trading or to facilitate phoenixing activity. It explained:

> Governance Institute does not condone breaches of the Corporations Act. The requirement to notify appointments and resignations of directors in a timely manner is underlined by the penalty provisions attaching to the section. However, we are aware of the realities of administering company records and understand that mistakes occur which lead to failures to notify appointments and resignations within the 28 day time period.
>
> The proposed amendments to the Corporations Act will have the effect that notices of resignation of directors that are lodged outside the 28 day statutory period, due to an administrative or human error and with no

45 Condon Associates, *Submission 13*, p. 4.

46 Chartered Accountants Australia and New Zealand, *Submission 17*, p. 2.

47 Chartered Accountants Australia and New Zealand, *Submission 17*, p. 2.

48 Australian Institute of Credit Management, *Submission 15*, p. 2.

> intention of facilitating phoenixing activity, will be captured by the new provisions. This may give rise to unintended consequences.[49]

2.53 The Law Council of Australia supported the measures relating to director resignations, noting that they 'should deal with community concerns relating to directors backdating resignations to avoid liability'. It noted it is better than the current system, even though the measures will not address the 'current problems of directors appointing straw directors with little or no assets to replace them, it is better than the current system'.[50]

Schedule 3—GST estimates and director penalties

2.54 Schedule 3 to the bill seeks to extend the estimates and director penalty regimes to GST liabilities, including the Luxury Car Tax (LCT) and the Wine Equalisation Tax (WET), as these taxes are jointly administered with the GST.[51]

2.55 Condon Associates considered the introduction of liability for directors for GST, WET, and Luxury Car Tax to be a reasonable measure as long as:

> …proper steps are taken to make directors aware that their entity has been perceived to have arrived at a point where these amounts may be an issue for them personally. This will properly deal with situations where certain a director or directors are potentially misleading other parties.[52]

2.56 AICM fully supported the measures in schedule 3, while noting that the 'effectiveness of these measures is likely to be minimal unless there are repercussions of non-payment'.[53]

2.57 CAANZ informed that committee that many of its members, but not all, supported the extension of director penalty notices to cover GST. It noted that the industries where phoenix operators are prevalent often generate significant GST liabilities. However, CAANZ did not support the introduction of new powers for the ATO to estimate GST liabilities as, in its view:

- No justification has been provided for not using the existing default assessment provisions; and
- The dispute process regarding GST estimates leaves taxpayers open to penalties that are more severe than those under the existing tax law.[54]

2.58 HIA was opposed to the extension of the director penalty regime to GST liabilities, stating:

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49 Governance Institute, *Submission 5*, p. 2.

50 Law Council of Australia, *Submission 6*, p. 3.

51 *Explanatory Memorandum*, p. 47.

52 Condon Associates, *Submission 13*, p. 5.

53 Australian Institute of Credit Management, *Submission 15*, [p. 5].

54 Chartered Accountants Australia and New Zealand, *Submission 17*, p. 3.

> As a strict liability offence the provisions go well beyond the remit of capturing illegal phoenix activity. The measure will apply indiscriminately and will penalise individuals with no intent to avoid the payment of GST by engaging in illegal phoenixing activity.[55]

2.59 AICD did not support schedule 3, and recommended more targeted solutions. It stated:

> The AICD does not support enabling the ATO to make directors personally liable for any outstanding GST liabilities through the director penalty regime. In our view, it is inappropriate, without a compelling justification, to expand personal liability for all directors rather than targeting those criminals and companies engaged in misconduct.
>
> The Bill would effectively impose a new and significant risk of personal liability on every director in Australia, including directors of not-for-profits, small business owners and entrepreneurs. This would run counter to the policy objective of targeting the limited cohort of individuals who abuse the corporate form to avoid paying their GST liabilities.[56]

Schedule 4—Retention of tax refunds

2.60 Schedule 4 authorises the Commissioner of Taxation (Commissioner) to retain tax refunds where a taxpayer has failed to lodge a return or provide other information to the Commissioner that may affect the amount the Commissioner refunds. This ensures taxpayers satisfy their tax obligations and pay outstanding amounts of tax before being entitled to a tax refund.[57]

2.61 AICM supported the proposal to a give the Commissioner the ability to retain refunds to a taxpayer that have outstanding lodgements or obligations to the Commissioner. As noted in the Explanatory Memorandum (EM), the Commissioner will release guidance to support the administration of the discretion in the amendments and notes that 'the Government envisages the Commissioner will apply the new discretion in relation to taxpayers identified as a high-risk, including those engaging in illegal phoenix activity'.[58] AICM suggested that the 'cashflow implications to business that legitimately rely on these cashflows needs to be central to the drafting and administrative guidelines'.[59]

2.62 HIA supported measures that:

> …seek to address conduct that allows businesses to take advantage of administrative processes that enable the receipt of refunds quickly, but

55 Housing Industry Association, *Submission 10*, p. 7.

56 Australian Institute of Company Directors, *Submission 11*, p. 5.

57 *Explanatory Memorandum*, p. 62.

58 *Explanatory Memorandum*, p. 64.

59 Australian Institute of Credit Management, *Submission 15*, p. 2.

> delay or avoid the lodgement of returns expected to result in liability and then engage in illegal phoenixing behaviour leaving amounts outstanding.[60]

2.63 However, it was concerned that the proposed measures in schedule 4 should be confined to those entities at a high risk of engaging in illegal phoenixing activity. HIA noted that the EM indicated that guidance will be issued on the use of the discretion, However it believed that the power and its application should be set out in the legislation, adding clarity and certainty.[61]

Role of the regulators

2.64 Submitters highlighted the important role of the regulator in enforcing new measures proposed in the bill.

2.65 AICM considered that 'the most effective measure to combat illegal phoenix activity is a zero-tolerance stance taken by an adequately funded regulator'.[62] AICM specified that:

> In AICM's view the new laws to pursue illegal phoenix operators would not reduce the need for regulators involvement in addressing this issue. Any laws designed to combat illegal phoenix activity will be ineffective if they are not supported by a tough stance by regulators. The laws must be enforced in as many instances as possible from the low value and low prospect of recovery through to the high value and systemic operators.[63]

2.66 The ETU expressed concern about the effects of government funding cuts to ASIC, stating:

> Reforms to combat illegal phoenix activities must be broad, adequately resourced, appropriately funded and introduced in a way that ensures their provisions will be able to be accessed by industry participants.[64]

2.67 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) argued that, in order for the regulators to properly protect small business victims of illegal phoenixing, they need to provide 'clear avenues to report suspected illegal phoenixing'; and take 'timely action to investigate and redress impacts of illegal phoenixing'.[65]

2.68 The Synod raised similar concerns:

> In terms of the provisions to allow ASIC to intervene to protect the interests of legitimate creditors, again this increased power will be meaningless unless ASIC has both the resources and the will to use the power.[66]

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60 Housing Industry Association, *Submission 10*, p. 8.

61 Housing Industry Association, *Submission 10*, p. 9.

62 Australian Institute of Credit Management, *Submission 15*, p. 2.

63 Australian Institute of Credit Management, *Submission 15*, p. 1.

64 Electrical Trades Union, *Submission 19*, p. 1.

65 Australian Small Business and Family Enterprise Ombudsman, *Submission 18*, p. 1.

66 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 14*, p. 2.

2.69 The CFMEU also raised the matter of ASIC's resourcing:

> ASIC's ongoing failure to bring prosecutions under the current anti-phoenixing laws remains a matter of significant concern. It continues to embolden unscrupulous operators to operate with virtual impunity.
>
> ASIC needs to take a more active and prominent enforcement role, including by running high-profile prosecutions and publicising them extensively. In the absence of concerted, well-funded enforcement activity, our concern is that the draft laws will be significantly undermined, or rendered entirely nugatory.[67]

2.70 AIIP submitted that the new provisions will likely have little impact unless ASIC has adequate funding for creditor-defeating disposition matters. AIIP also recommended that ASIC should make early funding available to liquidators and submitted that ASIC should establish simple criteria to enable insolvency practitioners to submit funding applications more easily. It noted that:

> Many Liquidators are disengaged with the existing ASIC Assetless Administration Fund because the processes to submit funding applications are time consuming and applications often get rejected.[68]

Education for directors

2.71 CAANZ noted that the bill is quite complex and expressed concern that small business directors may find it particularly difficult to understand. As such, CAANZ noted the need for the provision of additional resources for regulators to provide education to new directors, stating:

> Clearly, recent policy initiatives have added substantially to the duties and responsibilities on directors.
>
> We are concerned that this is occurring in an environment where ASIC and other regulators are being challenged to 'get tough' on suspect companies and their directors. We think it is therefore incumbent on both government and relevant regulators to devote additional resources to the education of directors, particularly those associated with start-up entities.[69]

2.72 Maurice Blackburn considered that the bill should recognise the importance of screening and education for company directors in understanding the consequences of phoenix activity. Indeed, legislating for better screening of company directors, and compulsory business education is a valid means to combatting illegal phoenix activity.[70]

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67 Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), *Submission 7*, [p. 4].

68 Association of Independent Insolvency Practitioners, *Submission 20*, p. 1.

69 Chartered Accountants Australia and New Zealand, *Submission 17*, p. 3.

70 Maurice Blackburn Lawyers, *Submission 9*, pp. 2–3.

Need for a review

2.73 The ASBFEO recommended that the measures in the bill be reviewed after one year of operation. In its view, a review should focus in particular on the 'effectiveness in terms of reduction of illegal phoenixing and, where there still is phoenixing, redress to victims'.[71]

2.74 ARITA noted that the proposed reforms are part of a tranche of reforms aimed at combating illegal phoenix activity. ARITA expressed concern that the bill relies on the additional reforms, including the implementation of a DIN, transparency of tax debt procedures and measures to protect the payment of employee entitlements, including payment of superannuation guarantee amounts and reliance on the Fair Entitlements Guarantee. As such, it submitted that all of the pending reforms to combat illegal phoenix activity should be combined and considered as part of a wholistic review.[72]

Committee view

2.75 The committee understands that illegal phoenix activity is becoming increasingly sophisticated and difficult to detect and prosecute under existing legal frameworks. The committee believes the package of reforms contained in the bill will give regulators additional enforcement and regulatory tools to better detect and disrupt illegal phoenix activity and to prosecute or penalise directors and others who engage in or facilitate this illegal activity. Though the committee cautions that the regulators' ability to pursue and prosecute effectively is closely linked to the right amount of resourcing being made available to the regulator to effectively perform its work.

2.76 The committee is cognisant that there are always new ways to 'game' new rules. Nevertheless, the committee believes the bill has found the right balance between competing considerations—minimising unintended impacts on legitimate business and the need to give regulators effective tools to deter and take action against illegal phoenix activity. However, the committee is concerned that, as drafted, the scope of a 'creditor defeating disposition' and the circumstances under which such transactions are voidable may not capture the entire range of dispositions that are not legitimate commercial transactions. Consequently, this may have an unintended consequence of limiting the ability of regulators and liquidators to fully combat some illegal phoenixing activities. In addition, the committee notes stakeholders' views regarding the effectiveness of penalties against directors and questions whether they will be effective without serious repercussions for infringements.

2.77 The committee supports the government's announcement that it will also provide an additional $8.7 million over four years from the 2018–19 financial year to increase funding for the Assetless Administration Fund. The committee expects that this additional funding will increase ASIC's ability to fund liquidators who play a vital role in investigating and reporting illegal phoenix activity.

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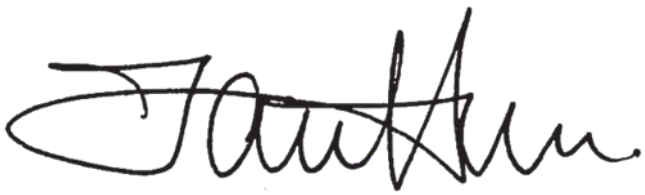
71 Australian Small Business and Family Enterprise Ombudsman, *Submission 18*, p. 1.

72 Australian Restructuring Insolvency and Turnaround Association, *Submission 3*, p. 5.

Recommendation 1

2.78 The committee recommends that the bill be passed.



Senator Jane Hume
Chair

Additional Comments from Labor Senators

1.1 While not opposing this legislation, Labor Senators believe that the bill should not be debated in the short time remaining in this term of the Parliament in order to provide time to improve the legislation. Labor Senators believe that further consultation about stakeholder concerns is necessary and that details of this legislation might need to be explored through the Senate Estimates process in April 2019.

1.2 The primary concern is that the Government is focusing on new legislative amendments and offences when the primary focus should be on amending and enforcing existing legislation.

1.3 The second concern is that this legislation does not seem to anticipate logical manoeuvrings from unscrupulous actors that could be reasonably expected if this legislation were to pass.

1.4 In contrast to the Government's lacklustre approach, Labor has a clear policy platform when it comes to anti-phoenixing. This platform includes the Tradie Pay Guarantee, a new requirement for large Commonwealth construction projects that would see project bank accounts established that use cascading statutory trusts and a seven million dollar Tradie Litigation Fund, a fund designed to give the Australian Securities and Investments Commission (ASIC) the ability to run more difficult court cases without draining the corporate watchdog's resources.

Stakeholder views that amendment and enforcement of existing legislation, rather than new legislative amendments, should be the priority for action

1.5 Professor Helen Anderson in her submission again put forward views that ASIC already has powers to prosecute illegal phoenix activity and questioned the need for further legislative amendments:

> It is for ASIC to prosecute illegal phoenix activity through its existing Corporations Act powers, and there are already plenty.
>
> For example, look at s 182: (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
>
> (a) gain an advantage for themselves or someone else; or
>
> (b) cause detriment to the corporation.
>
> Does that not capture illegal phoenix activity, in all its different manifestations, perfectly?
>
> And how about insolvent trading actions against directors under s 588G(1), which, since 2000, has included uncommercial transactions under s 588FB precisely to capture illegal phoenix activity:
>
> (1) A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
>
> (a) the benefits (if any) to the company of entering into the transaction; and

(b) the detriment to the company of entering into the transaction; and

(c) the respective benefits to other parties to the transaction of entering into it; and

(d) any other relevant matter.

Do we really need more legislation?[1]

1.6 The Australian Restructuring Insolvency and Turnaround Association expressed concerns about the lack of enforcement actions and pointed out existing provisions:

> Existing legislation contains a number of tools which already address illegal activity (e.g. s 182, s 184, s 588FB and s 588G, each of which include liability options for criminal contravention). These mechanisms (and others) are being used by ASIC to address illegal phoenix behaviour, however, there is not sufficient focus on enforcement actions to have a deterrent effect on those who engage in this activity.[2]

1.7 The Australian Institute of Company Directors indicated it still supported enforcement of relevant laws over new provisions in legislation:

> Overall, our view remains (as expressed in prior consultations) that more proactive policing and enforcement of existing law—including breaches of directors' duties, where penalties have substantially increased—is critical to combatting the scourge of illegal phoenixing.
>
> Accordingly, we continue to encourage the prioritisation of enforcement of relevant laws, and adequate resourcing of ASIC to facilitate this, ahead of complex and potentially duplicative new provisions in legislation.[3]

1.8 Chartered Accountants Australia and New Zealand also expressed its view that illegal phoenixing activity could have been better addressed via amendments to existing law rather than new legislation:

> Overall, we support reforms to combat illegal phoenix activity, however we consider that this could have been achieved via amendments to existing laws rather than new, highly complex legislation.[4]

1.9 The Australian Council of Trade Unions (ACTU) expressed concern that this legislation might be a mask for a failure to take real action:

> Whilst the proposed amendments may make ASIC's task in prosecuting illegal phoenixing behaviour easier, they will be of little value without a significant increase in ASIC's resources and willingness to deploy them forcefully. Worse, Government's moves to put 'tougher penalties on the

1 Professor Helen Anderson, *Submission 1*, p. 2.

2 Australian Restructuring Insolvency & Turnaround Association, *Submission 3*, p. 2.

3 Australian Institute of Company Directors, *Submission 11*, p. 1.

4 Chartered Accountants Australia and New Zealand, *Submission 17*, p. 1.

> books' could be used to mask the failure to take real action to address the problem, whilst maintaining the appearance of progress.[5]

1.10 The Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) also expressed concern that without timely implementation of Director Identification Numbers (DINs), the effectiveness of this legislation would be very limited:

> The CFMEU is not opposed to the measures designed to improve the accountability of resigning directors, including by making them personally liable for their company's GST liabilities, and allowing the ATO to retain tax refunds. However, again, the measures in the Bill are insufficient and there are a number of additional matters which would improve and facilitate the measures in the Bill as well as address the underlying issues arising from the actions of unscrupulous directors.
>
> …
>
> Without DIN, we are concerned that the measures in the Bill would be rendered inoperable.[6]

1.11 On the matter of DINs, the Senate Economics Legislation Committee is inquiring into another suite of bills that would enact DINs alongside business registry modernisation, and received evidence from ARITA that implementation of DINs could take years:

> Senator KETTER: And you do actually mention:
>
> *A greater understanding of the timetable for implementation is necessary as the DIN regime is now included in this MBR process …*
>
> You say:
>
> *It will be unfortunate if implementation of DINs is delayed by difficulties in implementation of technical aspects of the MBR program.*
>
> Mr Winter: It's very true, and the reason is that we have heard estimates that the rollout of the MBR piece could be three to five years.[7]

The legislation might have a limited beneficial effect due to logical responses from unscrupulous directors

1.12 As stated by Professor Anderson, there are logical responses from unscrupulous directors that might mitigate the effectiveness of this legislation:

> Attacking illegal phoenix activity through legislation against creditor defeating dispositions will simply encourage the devious to accrue debts through an assetless company and hold assets in another company.[8]

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5 Australian Council of Trade Unions, *Submission 12*, pp. 3–4.

6 Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), *Submission 7*, p. 6.

7 Senate Economics Legislation Committee, Commonwealth Registers Bill 2019 and 4 related bills, *Committee Hansard*, 13 March 2019, p. 21.

8 Professor Helen Anderson, *Submission 1*, p. 1.

1.13 The ACTU expressed concerns about assetless companies with relation to occupational health and safety fines and penalties:

> An issue not yet addressed by the Bill is the role of phoenixing in undermining the occupational workplace, health and safety ('OH&S') regime. Whilst industrial accidents and deaths are disturbingly common, prosecutions are difficult to secure and unfortunately, it is relatively common and all too easy for companies to avoid paying fines for OH&S breaches through phoenixing. In a number of cases under the Occupational Health and Safety Act 2004 (Vic), for example, the defendant company has been liquidated at the point of sentencing. In this scenario, the corporate entity liable to pay the fine is invariably asset-stripped and forced into liquidation whilst the business may continue under the guise of another entity, which, due to the operation of the current corporations law, is unable to be pursued for the penalties by OH&S regulators or workers/ unions.[9]

1.14 Maurice Blackburn expressed concern about corporate groups as well:

> Maurice Blackburn believes that the bill does not go far enough in addressing phoenix activity that takes place within corporate groups.
>
> Corporate phoenix activity occurs where a subsidiary of a parent company holds no assets within the corporate group, however incurs substantial liabilities by way of wages, superannuation contributions etc. The debt-laden subsidiary goes into liquidation and quarantines its debt from the corporate group. This enables another subsidiary to then engage in business activity similar in nature to the insolvent entity absent any debt.
>
> Employees of defunct entities are significant victims as they may or may not be rehired or transferred to another company within the corporate group and are unable to enforce their rights to entitlements against the solvent corporate structure.
>
> This is especially important in circumstances where the related entities have benefited from the work performed from workers of the insolvent entity. In this way, contributions orders should be sought from the Court and applied against solvent group members. In adopting this model, considerations and concessions would need to be made regarding the degree of contributions from each solvent group member.[10]

1.15 The Uniting Church in Australia, Synod of Victoria and Tasmania expressed other concerns about logical responses from unscrupulous directors:

> The reforms in schedule 1 are a small step forward in dealing with phoenixing. However, the provisions can be defeated by a person who plans far enough ahead with a phoenix activity. For example, they can avoid the provisions as long as the creditor-defeating disposition is made 12 months before the company enters into external administration. Further, businesses and individuals that advise on how to phoenix and get away with it will

9 Australian Council of Trade Unions, *Submission 12,* p. 7.

10 Maurice Blackburn Lawyers, *Submission 9,* p. 2

> undoubtedly [develop] methods to advise clients on how to defeat the measures contained in schedule 1.[11]

Conclusion

1.16 Given the considerable concerns raised by stakeholders and limited time, Labor Senators believe that the bill should not be debated in the remaining time in this Parliament. Labor Senators encourage the Government to continue consultation with stakeholders and find ways to improve the legislation and enforcement approaches.

Senator Chris Ketter
Deputy Chair

Senator Jenny McAllister
Senator for New South Wales

11 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 14*, p. 2

Appendix 1
Submissions

1 Professor Helen Anderson
2 ACT Government
3 Australian Restructuring Insolvency & Turnaround Association
4 Australian Manufacturing Workers' Union
5 Governance Institute of Australia
6 Law Council of Australia
7 Construction, Forestry, Maritime, Mining and Energy Union (CFMEU)
8 Mendelsons Lawyers Pty Ltd
9 Maurice Blackburn Lawyers
10 Housing Industry Association
11 Australian Institute of Company Directors
12 Australian Council of Trade Unions
13 Condon Associates
14 Uniting Church in Australia, Synod of Victoria and Tasmania
15 Australian Institute of Credit Management
16 Department of the Treasury
17 Chartered Accountants Australia and New Zealand
18 Australian Small Business and Family Enterprise Ombudsman
19 Electrical Trades Union
20 Association of Independent Insolvency Practitioners
21 Confidential