

11 April 2012

Senate Economics Legislation Committee  
SG.64  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Email: economics.sen@aph.gov.au

Dear Senate Economics Legislation Committee,

### **Corporations Amendment (Phoenixing and Other Measures) Bill 2012**

The Australian Institute of Company Directors welcomes the opportunity to provide comments to assist the Senate Economics Legislation Committee's review of the Corporations Amendment (Phoenixing and Other Measures) Bill 2012. We previously lodged a submission with Federal Treasury on 24 January 2012 in regard to the Exposure Draft of the Bill.<sup>1</sup>

The Australian Institute of Company Directors is the second largest member-based director association worldwide, with over 30,000 individual members from a wide range of corporations: publicly-listed companies, private companies, not-for-profit organisations, charities, and government and semi-government bodies. As the principal professional body representing a diverse membership of directors, we offer world class education services and provide a broad-based director perspective to current director issues in the policy debate.

#### **1. Summary**

In summary, the Australian Institute of Company Directors comments are as follows:

- (a) The Australian Institute of Company Directors supports *effective* efforts to reduce fraudulent phoenix activity<sup>2</sup>
- (b) However, we have concerns about draft legislation being said to target fraudulent phoenix activity when the draft legislation is not limited to instances where fraudulent phoenix activity is suspected.

---

<sup>1</sup> Available at: <http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Submissions/2012/Exposure-Draft-Corporations-Amendment-Phoenixing-and-Other-Measures-Bill-2012>

<sup>2</sup> See for example: Submission to House Economics Standing Committee on Economics on *Tax Laws Amendment 2011 (No. 8 Measures Bill)* (26 October 2011); Submission to Treasury in response to *Options Paper: A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners* (29 July 2011) and Submission to Treasury: *Treasury Proposals Paper, Action against fraudulent phoenix activity* (22 December 2009) available at [www.companydirectors.com.au](http://www.companydirectors.com.au)

- (c) ASIC's increased powers in the Bill are not confined to circumstances where fraudulent phoenix activity is suspected and apply more broadly. If the purpose of particular amendments is to address phoenix behaviour then ASIC's power should be triggered *only* when phoenix behaviour is suspected and the legislation should unequivocally reflect this purpose.
- (d) To confine ASIC's powers to instances where phoenix activity is suspected, a definition of 'fraudulent phoenix activity' should be included in the Bill.

**2. ASIC's increased powers in the Bill to target phoenix activity are not confined to circumstances where phoenix activity is suspected**

The Government's recent efforts to combat fraudulent phoenix activity have included:

- proposed changes to the director penalty regime originally included in the Tax Laws Amendment (2011 Measures No. 8 ) Bill 2011;
- the introduction of the Corporations Amendment (Phoenixing and Other Measures) Bill 2012 into parliament; and
- the release of the exposure draft of the Corporations Amendment (Similar Names) Bill 2012.

We share the Government's view that fraudulent phoenix activity is an abuse of the corporate form and the privilege of limited liability and therefore we agree in principle with efforts made to curtail this behaviour. However, we are eager to ensure that measures adopted to curtail the activities of those involved in fraudulent phoenix activity, do not unnecessarily increase the compliance burden for the vast majority of Australia's directors who govern their companies with integrity.

The Corporations Act is too often amended in a piecemeal fashion and these amendments provide another example of this practice. We are increasingly concerned that ongoing minor amendments to the Corporations Act (which avoid the need for a regulatory impact statement to be prepared) have a greater potential to create adverse regulatory outcomes, than if a holistic review of a particular part of the Act or the wider regime were undertaken. Continually making amendments to the Corporations Act, as has occurred over recent years, without regard to the legislative regime as a whole also leads to error and the need for consequential amendments. This imposes a significant cost on the community.

Importantly, we note that although the measures in these Bills have been described as targeting phoenix activity, no attempt has been made in any of the Bills to define 'fraudulent phoenix activity.' We have previously stated that this definition must incorporate a dishonest intention on the part of the directors to defraud or deceive creditors.

We are firmly of the view that if new legislation is being introduced to target a specific problem, then the legislation must clearly define the issue sought to be addressed and specifically regulate that problem. Rather than do this, the recent approach to address fraudulent phoenix activity has been to draft broad provisions which impose liability or give extensive powers to the regulators, followed by the insertion of limited exceptions for those inadvertently caught within the provisions. This approach is universally considered poor drafting practice.

The Bill now the subject of the Senate Economics Legislation Committee's review, forms one part of the Government's recent initiatives. Despite the title of the Bill being "Phoenixing and Other Measures", the provisions marked as providing mechanisms to address possible fraudulent phoenix activity are not in fact limited to circumstances where fraudulent phoenix activity is suspected.

For example, pursuant to section 601AH of the Corporations Act ASIC has the power to "reinstate the registration of a company if it satisfied that the company should not have been deregistered", the Bill then provides that ASIC may order the winding up a company if "ASIC has reinstated the registration of the company under subsection 601AH(1) in the last 6 months" and "ASIC has reason to believe that making the order is in the public interest."<sup>3</sup> These provisions apply regardless of whether fraudulent phoenix activity is suspected and give ASIC broad powers to reinstate companies and then order a winding up regardless of whether the company has previously been deregistered appropriately.

Given that phoenix activity is often characterised as "the deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities"<sup>4</sup> we anticipate that ASIC will be more likely to use its winding up powers to investigate uncommercial transactions and deal with abandoned companies rather than to resolve issues relating to phoenix activity (where operators commonly put their companies into liquidation).

While we have no objection to protecting workers entitlements in abandoned companies or ASIC actively seeking to curtail phoenix activity using its existing powers, we caution the legislature against increasing ASIC's power to 'target phoenix activity' when the powers are not confined to suspected instances of phoenix activity and apply much more broadly. If the purpose of particular amendments is to address phoenix behaviour then ASIC's power should be triggered *only* when phoenix behaviour is suspected and the legislation should unequivocally reflect this purpose.

If instead, the Bill is primarily designed to confer broad powers on ASIC or to address other related issues, then the Bill should be the subject of analysis, scrutiny and debate on the real reason for legislative change and should not be referred to as a "phoenixing" measure.

Yours Sincerely,

John H C Colvin  
CEO & Managing Director

---

<sup>3</sup> See 489EA(3) of the Bill.

<sup>4</sup> See for example, the "Action against fraudulent phoenix activity" Proposals Paper November 2009 at 1.