



14 March, 2019

Senate Standing Committees on Economics
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Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

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Dear Sir/Madam,

Thank you for the opportunity to make comment on the exposure draft of the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 [Provisions].

Maurice Blackburn has been a keen contributor to the discussions leading up to the drafting of the bill. We have been pleased to present case studies¹, drawn from our client base, which clearly demonstrate the impacts of phoenix activity on workers and their families.

We are pleased that the drafters have incorporated measures to deter and disturb the nature of illegal phoenix activity and provide appropriate punishments to those who are complicit or facilitate illegal phoenix activity. Maurice Blackburn agrees with the proposal that contraventions of the provisions should attract both criminal and civil penalties.

We welcome also the initiative to grant ASIC powers to make administrative orders to recover property which is the subject of a voidable creditor defeating disposition.

In order to detect and police illegal phoenix activity, Maurice Blackburn believes that ASIC should be granted even wider powers to fund investigations or recovery actions against directors or other persons who have been found to have engaged in misconduct.

We remind the Committee of the importance of ensuring that ASIC is appropriately resourced to fulfil this expanded role.

There are, however, two core areas where we believe the bill falls short, in its attempts to keep workers – especially those from the most marginalised communities – safe from illegal phoenix activity.

¹ See Maurice Blackburn's submission to the Treasury consultation: Reforms to combat illegal phoenix activity – Draft Legislation: <https://static.treasury.gov.au/uploads/sites/1/2019/02/t313204-Maurice-Blackburn-Lawyers.pdf> (p.4)

i. Illegal Phoenix Activity Within Corporate Groups

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.

For example, it would include considerations relating to:

- the extent of the benefit received by the solvent entity and
- the extent to which the solvent entity was involved in the management of the insolvent entity.

Maurice Blackburn also believes that Fair Entitlements Guarantee should be enabled to recover benefits it has paid to employees of an insolvent group member from other solvent members of that corporate group.

With such a reform, entities in a group structure would have a shared obligation to meet the unpaid employee entitlements of their related entity. This model could be premised on the current franchisor responsibility laws. Pursuant to recent legislative changes a franchisor can be held responsible for their franchisees' conduct including paying outstanding entitlements to franchisee's employers.

Maurice Blackburn submits 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.

ii. Director Capability and Suitability.

Maurice Blackburn is disappointed that the bill does not seem to recognise the importance of screening and education for company directors in understanding the consequences of phoenix activity.

Maurice Blackburn agrees with laws that shift accountability for the wrongdoings of corporations onto directors. We believe, however, that the bill should also ensure better business practices and mandate enhanced screening and rudimentary training for directors.

We understand the onerous nature of the responsibilities on directors. We are keen to ensure that directors are equipped to handle these pressures.

In a recent study by researchers of Melbourne and Monash Universities, a survey was taken from members of Australian Restructuring Insolvency & Turnaround Association (ARITA)² and Australian Institute of Credit Management (AICM)³ from November 2015 to February 2016 regarding phoenix activity⁴.

The research results were confronting suggesting that 77 percent of respondents considered that directors of companies in liquidation 'often' have been involved as directors of other failed companies.

Maurice Blackburn believes that the bill should be more explicit in requiring improvements to the front-end regulation of phoenix companies, including the setting of clear competency requirements of directors and the tightening of regulations on entry.

The application form to set up an Australian business does not require the prior corporate history of its proposed directors or any supporting evidence about the identity of the proposed directors (which can result in nominating a deceased person as a director or even an entirely fictitious character).

While there are little to no barriers to incorporating a company there are significant harmful effects on workers and creditors in the event that a business collapses. This concern is compounded when a business person with poor business skills fails to learn from their previous corporate failures or experiences or in circumstances where they are very easily able to set up another company.

Maurice Blackburn considers that legislating for better screening of company directors, and compulsory business education is a valid means to combatting illegal phoenix activity.

Maurice Blackburn reminds the Committee that those most at risk of falling victim to illegal phoenix activity are often from the most vulnerable workers, engaged in the most precarious working arrangements. 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.

² ARITA is a professional association with over 2,400 members that represents those who specialise in the fields of restructuring, insolvency and turnaround. Around 84% of registered liquidators and 87% of registered trustees are members of ARITA. They represent firms of all sizes, from small business practices through to multi-national firms. Refer https://www.arita.com.au/ARITA/About_Us/ARITA/About_Us/About-Us.aspx?hkey=ff7b83c4-fc70-4eb8-9001-08420d81582e.

³ AICM is Australia's leading professional association for commercial and consumer credit management professionals, responsible for maximising the cash flow and minimising the bad debt risk of more than 1,300 Australian companies, including 34 of the ASX100. Refer <http://aicm.com.au/about-aicm/>

⁴ *At the Coalface of corporate insolvency and phoenix activity: A survey of ARITA and CCIM Members 2016*

Please do not hesitate to contact me via [REDACTED] or on [REDACTED] if we can further assist with Treasury's important work in this regard.

Yours faithfully,

A large black rectangular redaction box covering the signature of the sender.

Giri Sivaraman
Principal
Employment & Industrial
Maurice Blackburn