Australian Institute of CREDIT MANAGEMENT

14 March 2019

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
CANBERRA ACT 2600
By email: economics.sen@aph.gov.au

Dear Mr Fitt,

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

Thank you for the opportunity to make a submission to this inquiry.

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[1]. 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.

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.

The AICM has been an active participant in seeking to address illegal phoenix activity including past submissions and active involvement in industry and government forums including the Director Identification Number reforms and appeared as a witness in the Senate Economics Legislative Committee's inquiry into Commonwealth Registers Bill 2019 and 4 related bills (including Director Identification Numbers) on 13 March 2019.

We have included our previous submission on this bill as an Annexure.

Key Points
While many of the amendments from the exposure draft version are welcomed, we note concern on the following points which are expanded in our previous submission

- **Advisor and Facilitators of Phoenix activity**
  The AICM remains concerned that section 588GAC Procuring creditor-defeating disposition, will be largely ineffective due to the requirement for the advisor/facilitator to have engaged in of pro-active/recruitment like activity.

  We recommend that an entity/person that does not actively recommend or convince a company to dispose of an asset but provides advice or facilitates the transaction with recklessness (Criminal offence) or reasonable knowledge (Civil penalty) so that a creditor defeating disposition would occur should also be captured within the provision.

- **Resigning Directors**
  The AICM recommends that the time frame for notification of resignation is reduced to ensure credit assessments made in this time are accurate and fully informed. As stated in our earlier submission:

[1] July 2018 "the economic impacts of illegal phoenix activity" report by PWC

"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 providied 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."

In reviewing submissions to this inquiry by Australian Restructuring Insolvency & Turnaround Association (ARITA) and Professor Helen Anderson, Melbourne Law School we support their submissions most notably:

- The most effective measure to combat illegal phoenix is a zero-tolerance stance taken by an adequately funded regulator.
- The objects now refer to phoenixing and the benefits this has on the ability to reset the culture around phoenixing.
- The amended definition of creditor defeating dispositions to include abandoned companies, is welcomed. However, the AICM holds some concern that the time frames still leave room for manipulation but expect that existing laws may be utilised in these instances and/or this provision reviewed in the near future.
- Improvements to the issue of assessing Market Value through the inclusion of "best price reasonably obtainable" and the presumption that a disposition was for less than market value if it is proved the company failed to retain financial records relating to the disposition.

Should you have any queries arising from our submission please contact myself on [redacted].

Yours scincerly

[redacted]

Nick Pilavidis
Chief Executive Officer
Australian Institute of Credit Management

Australian Institute of CREDIT MANAGEMENT

About AICM

The Australian Institute of Credit Management (AICM) represents the interests of over 2,500 credit professionals responsible for maximising the cash flow and minimising the bad debt risk of companies in a vast array of industries.

We have connected, represented and educated credit professionals to help them do their jobs better, advance their careers and achieve better outcomes for their businesses since 1937. We value integrity, credibility and camaraderie, are forward-thinking and progressive, and operate as a benchmark for the industry.

Our members work in business with revenues from $20 million upwaards including many of the ASX 100, government departments and multinational corporations in almost every industry.

Significant contcentrations of members are in the Construction, FMCG, Distribution, Proffessional Services, Wholesale and Consumer Credit sectors

Annexure A

28 September 2018 "Combating illeal phoenix activity

Australian Institute of CREDIT MANAGEMENT

Date 28 September 2018

[redacted]
Senior Adviser
Corporations Policy Unit
Consumer and Corporations Division
The Treasury
Level 5, 100 Market Street
SYDNEY 2000

By email: Phoenixing@treasury.gov.au

Dear [redacted]

Thank you for the opportunity to participate in the recent roundtable discussions and to formally provide our submission on the proposed reforms.

The AICM is uniquely positioned to contribute to these reforms considering our members see the impacts of the up to $3.1 billion in direct cost to unpaid trade creditors[1]. Despite seeking legislative action in other areas, our members have not called for more legislation to combat illegal phoenix activity preferring that existing laws and mechanisms are used to their fullest.

Our support of these reforms is predicated on the understanding that they are reforms that AISC and other members of the Phoenix Taskforce require to increase the amount of enforcement activity and that the government acknowledges that enforcement is needed to combat illegal phoenix activity.

The AICM supports the positions of ARITA that enhance the ability of registered liquidators to effectively pursue phoenix activity. Enabling liquidators to obtain a better outcome for creditors will benefit creditors by reducing the financial impacts of illegal phoenix activity and disincentivise the operators by reversing the current reality that there are little or no financial repercussions.

In AICM's view providing efficient mechanisms for liquidators to pursue illegal phoenix operators does not reduce the need for regulator's involvement in addressing this issue. Any laws designed to combat illegal phoenix activity will be ineffective if they are not supported by a firm and proactive stance by regulators. The laws must be enforced in as many instances as possible from the low value and low prospect of recovery matters through to the high value and systematic operators.

With or without these reforms the problem of illegal phoenix activity needs to be addressed through adequate funding for enforcement and the regular measurement of the effectiveness of strategy through an annual assessment of the financial impacts.

The perception that illegal phoenix activity is a victimless crime needs to be addressed. This can only be achieved through a tough stance on all activity including low value and first-time offenders.

[1] July 2018 "the economic impacts of illegal phoenix activity" report by PWC

Australian Institute of CREDIT MANAGEMENT

Additionally, our key points are:

- No Phoenixing offence included. A specific offence will significantly address the perceptions and cultural issues that fuel illegal phoenix activity.
- The related measures of Transparency of Tax Debts and Director Identification Numbers are a necessary complimentary protocol to ensure the effectiveness of the proposed measures to retain tax refunds and prevent back dating of registrations or abandonment of companies. Both measures would have significant impact on disrupting illegal phoenix activity.
- Consideration needs to be made of the high volume and low value transactions involved with phoenix activity. Much of our members' frustration with illegal phoenix activity stems from the fact that the costs of legal enforcement currently prevent ASIC and insolvency professionals pursuing many claims and when they are pursued no return is received due to the professional fees incurred. This is not only a frustration to creditors, but a reason why illegal phoenix activity flourishes.

Annexure A details our broader responses to the reforms and our earlier submission on Transparency of Tax Debts is provided in Annexure B.

Should you have any queries arising from our submission please contact myself or in my absence (between 22 October and 2 November) AICM National President James Neate can be contacted on [redacted]

Yours scinerely

[redacted]

Nick Pilavidis
Chief Executive Officer
Australian Institute of Credit Management

Australian Institute of CREDIT MANAGEMENT

Annexure A

1. Phoenixing offences and property transfers to defeat creditors

Voiding transactions that have the effect of defeating creditors is strongly supported as it clearly deters transactions that erode value in companies leaving creditors worse off.

1.1. Enforceability by insolvency practitioners

We are concerned that the costs of enforcement through the legal system will limit the effectiveness of these laws as only high value transactions against solvent entities will be commercially viable considering the phoenix operators are very likely to be aware of this strategic cost impediment.

While the streamlined process of initiating claims and onus of proof on the defendants may result in some return to creditors and act as a deterrent to phoenix operators, the cost dynamics of large claims, obviously limits the likelihood of real returns from any settlements.

To ensure the efficient use of the laws by practitioners we note:

- The requirements for requesting ASIC to issue a notice must be clear
- ASIC's process and timeframes for assessing requests must be efficient and clear
- Any ASIC fees need to be structured to ensure that low value and simple claims are not restricted, potentially fees are payable out of recovered funds and receive priority to unsecured creditors. Note: this should not be structured so that creditors are bearing the costs of unsuccessful claims.

1.2. Enforceability by ASIC

A tough stance on combatting illegal phoenix activity requires ASIC to be a regular and active enforcer at all levels of the activity. We are concerned that while these laws are likely to make the process more effective and efficient, significant hurdles will remain such as:

- The ability of AISC to obtain sufficient evidence due to the limited funding available to obtain this directly or via liquidators
- Even with sufficient evidence additional funding and a policy impetus is necessary to initiate and pursue actions to ensure there is a clear deterrent, especially low value transactions.

1.3. Transactions occurring within 12 months of appointment of an external administrator

While the 12 month time frame is sufficient to capture most relevant transactions we recommend that transactions outside this time frame should still be capable of being deemed void where they can be directly linked to the insolvency and were made with the consequence of reducing assets available to creditors.

Without this catch all it is highly likely that transactions will be manipulated so that external administrators are not appointed until the 12 months have lapsed.

1.4. Market Value

The AICM welcomes expansion on the method and criteria for determining if a transaction was at market value. We note this is a complex issue that has been addressed to a significant extent in other jurisdictions such as the United Kingdom.

1.5. New Offences Related to the advisor/facilitator of phoenixed company

The new offences require pro-active/recruitment like activity which may limit the effectiveness. Specifically, the use of procure, incite, induce or encourage is directed to the activity of proactively encouraging the activity which in many cases is likely to be hard to substantiate.

We recommend that an entity/person that does not actively recommend or convince a company to dispose of an asset but provides advice or facilitates the transaction with recklessness (Criminal offence) or reasonable knowledge (Civil penalty) that a creditor defeating disposition would occur, should also be captured.

We note that if any documentation of arrangements between facilitators and the entity/directors exists they would be structured so that they do not encourage the transaction and putting the onus for initiating the action on the Directors/company.

1.6. Proceedings by creditors for compensation

Some well-funded creditors with significant claims would welcome the ability for a creditor to bring proceedings however most creditors would (especially in low value claims) question why they are left to pursue illegal phoenix activity rather than ASIC or the liquidator who have the skills, knowledge and experience to pursue the claims. Further, there is an expectation that ASIC will act to combat illegal phoenix activity.

This is a clear example of why businesses affected by illegal phoenix activity believe so strongly that ASIC should be funded to combat this activity.

1.7. Interaction with Safe harbour defence

It is appropriate that the safe harbour defence also applies to these reforms however the current structure of the safe harbour, specifically the lack of a requirement to engage a regulated independent advisor, leaves illegal phoenix operators the ability to use this as a defence solely for the purpose of frustrating and inflating the costs of proceedings.

It is therefore relevant to note that strengthening the safe harbour in line with the various submissions including ours and ARITA would ensure it remains effective for legitimate restructures and is not abused by illegal phoenix operators.

2. Improving the accountability of resigning directors

AICM strongly advocates for improvements in the registration of companies and directors.

Company structures provide significant benefits to the directors and owners of businesses as risk is shifted to others such as creditors, primarily unsecured creditors. It is therefore reasonable that tight controls are connected with director registration.

The prevention of back dating and abandonment of companies is welcomed however this does not address the broader issues associated with phoenix activity such as sham directors which requires urgent action through implementation of a Director Identification Number.

2.1. 28 day notice period

Director information is fundamental to fully informed credit decisions, therefore any delays in updating director information leaves room for inacurrate credit decisions. When considering the importance of this information and the following factors, we maintain the 28 days is too long a period:

Australian Institute of CREDIT MANAGEMENT

- One of the Modernisation of ASIC registers goals is to provide ease of transacting with registers, in AICM's opinion this should include 24 hour online processes for providing notifications such as changes to directorships.

- A director resignation is generally something that is conducted with forethought, planning and often involves the formal structure of a board meeting. Therefore resignations conducted in the ordinary course of business would allow for notices to be provided almost immediately following the decision or action to resign.

- Directors are increasingly aware of personal liablities associated with directorships and therefore are unlikely to overlook deregistration and can be expected to take reasonable steps to ensure notice is provided to ASIC

- A director that has resigned appropriately and removes themselves from the business will be able to evidence this through the steps taken to resign and other factors, should the company secretary or others not lodge the ASIC notice.

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.

2.2. Director application to court for back dating

We recommend a requirement for ASIC to be notified of requests to the court for two reasons:

- Ensure ASIC are able to join the proceedings and provide reasons for not back dating i.e. evidence of phoenix activity.
- Allow ASIC to update the directors registration as under question, this is very important for credit providers who heavily rely on company files for decision making. Without this information credit providers will not be making decisions with all relevant facts to hand.

3. GST estimates and director penalties

We support these reforms fully but as they only increase liabilities and extend the current DPN regime the effectiveness of these measures is likely to be minimal unless there are repercussions of non-payment.

A significant reason phoenix operators are able to avoid repercussions for non-payment of ATO liabilities is that there is no record of the non-payment against the phoenixed company. This means creditors of the new company will not be alerted to the related corporate history and provide credit to the new entity without full understanding of the potential risks.

The transparency of tax debts measure must be enacted to close this gap, and address other systemic issues affecting fully informed credit decisions and providing a level playing field for business that do meet their tax obligations. We have attached the AICM, ARITA and AFIA joint submission for your reference.

Australian Institute of
CREDIT MANAGEMENT

Retention of tax refunds

We support the ability of the Commissioner to retain refunds to a taxpayer that have outstanding lodgements or obligations to the Commissioner.

The cashflow implications to business that legitimately rely on these cashflows needs to be central to the drafting and administrative guidelines.

Restricting Related Creditor Voting Rights

The AICM is supportive of restricting related creditor voting rights to the consideration paid. However, the effectiveness to combat sophisticated Phoenixing operations is likely to be limited by manipulation such as alleged debts being incurred by related parties prior to the external administration.

Voiding all related creditor voting rights in the absence of books and records is an alternative worthy of further consideration. Whilst still open to manipulation, this restriction may result in better compliance with this requirement generally and need not impact genuine related creditors who would still be eligible to participate in any distributions or apply to the courts to validate their voting rights.

Annexure B

Australian Institute of
CREDIT MANAGEMENT

9 February 2018

By email: Businesstaxdebt@treasury.gov.au

Transparency of Business Tax Debts

This joint submission is made on behalf of the Australian Finance Industry Association (**AFIA**), the Australian Institute of Credit Management (**AICM**) and the Australian Restructuring Insolvency and Turnaround Association (**ARITA**), collectively referred to as the **Professional Bodies**.

The Professional Bodies consider the Bill is an important initiative by the Government to ensure creditors and prospective creditors can verify the financial integrity of organisations that they are doing business with. It will help to stem the use of the ATO as a non-consenting "lender of last resort" and to level the playing field for those who are doing the right thing (no unfair advantage to non-payers). It also will help providers of credit and trade credit, in particular small businesses, get a fair insight into who they are extending credit to. This should ultimately protect more businesses from unwittingly being dragged into insolvency.

The Professional Bodies consider that the transparency of business tax debts measure has the potential to support the Government's policy objectives to:

- "increase the availability of credit", "putting the customer at the centre" and "empowering customers with a good credit history … to demand a better deal on [their] interest rates, or shop around, armed with [their] data" (**Comprehensive Credit Reporting**);[1] and
- to "reduce the unfair advantage obtained by businesses that do not pay overdue tax debts, and encourage businesses to engage with the ATO to manage their tax debt (**Business Tax Debt Transparency**)."[2]

The Professional Bodies therefore welcome the opportunity to comment on the Exposure Draft of the *Treasury Laws Amendment (Tax Transparency) Bill 2018* (**The Bill**) and related documents.

However, the Professional Bodies share a significant common concern that the Bill, as currently drafted, will be largely ineffective in achieving its intended Business Tax Debt Transparency purpose and will detract from the Government's Comprehensive Credit Reporting purpose. This is because the Bill contains a provision which allows a debtor's credit history to be retrospectively cleansed in relation to business tax debts,[3] thereby undermining the transparency and policy purpose of the measure.

The Professional Bodies are united in strongly recommending that the Bill be amended to ensure that business tax debt information remains on credit files for a relevant historic period and is not removed from the record following subsequent engagement with the Australian Taxation Office (**ATO**).[4] The Professional Bodies understand that other representative bodies with expertise in retail credit such as The Australian Retail Credit Association (**ARCA**) share this view.

---

[1] The Treasurer, The Hon. Scott Morrison, Speech to FinTech Australia Collab/Collide Summit, 2 November 2017.
[2] Minister for Revenue and Financial Services, The Hon. Kelly O'Dwyer, Media Release, Transparency of business tax debts, 11 January 2018.
[3] Draft Section 355-72(4), *Taxation Administration Act 1953*.
[4] For example in the case of personal information section 20W *Privacy Act 1988* requires credit reporting bureaus to delete information from credit information files within one month of the "maximum permissible period", which is ordinarily five years.

The Professional Bodies

AFIA represents the interests of over 100 financiers, credit providers and industry participants, including credit reporting bureaus. AICM represents the interests of over 2,500 credit professionals responsible for maximising the cash flow and minimising the bad debt risk of companies in a vast array of industries. ARITA represents the interests of over 2,000 insolvency professionals, including approximately 84% of registered liquidators.

Recommendation and reasons

The Professional Bodies recommend the Bill be amended to:

(i) modify the provision to restrict the Commissioner's discretion to notify a credit reporting bureau that a particular taxpayer no longer falls within the class of entities whose tax debt information can be disclosed to circumstances where the initial listing was listed in error; and

(ii) insert a provision which allows the Commissioner to update a credit reporting bureau that a particular taxpayer has:

- paid the business tax debt in full;
- paid a reduced amount in relation to the business tax debt under a settlement with the ATO or a Tribunal or Court order, with the balance expunged;
- had the business tax debt expunged in full under a settlement with the ATO or a Tribunal or Court order;
- is currently paying the tax debt via a repayment arrangement; and/or
- has disputed the tax debt and it is currently subject to a formal dispute/review process.

The Professional Bodies recommend these amendments to the Bill be made for the following specific reasons:

1. ***Removal is contrary to industry practice.*** Current practice is for information to be retained for a relevant historic period, be updated on settlement, payment arrangement or dispute and only removed if reported in error.

2. ***The information remains highly relevant to credit decisions.*** Accurate credit decisions require knowledge of multiple data points. Knowing that a business tax debt was reported and subsequently settled, a payment arrangement entered into or dispute lodged is vital to mitigate and manage risks.

3. ***Removal is contrary to other jurisdictions e.g. New Zealand.*** Not removing information reported to credit reporting bureaus (**CRB**s) prior to the end of the relevant historic period is common industry practice in many countries. Specifically, a similar measure implemented by the New Zealand government in 2017 does not remove the tax debt information once reported.

4. ***Not a sufficient deterrent to those intentionally avoiding tax obligations and continuing to obtain credit.*** The removal of information is a significant loop hole that will be manipulated by those seeking to avoid their obligations and put credit providers at risk. This includes illegal phoenix operators.

5. ***Removal does not encourage early engagement.*** As information will be removed from credit files on subsequent engagement, businesses are not incentivised to engage with the ATO prior to the listing. Recalcitrant businesses will continue to use the ATO as a source of term finance and choose when to engage if they require a clear credit report.

6. ***Potential for erroneous information affecting credit assessments.*** As credit providers will not know if information was removed due to an error or extenuating circumstances, a negative assumption is likely, thus assuming the debt is still owed and adversely impacting credit assessments.

7. ***Contrary to the open banking and mandatory credit reporting initiatives.*** Key to enabling customers with a good credit history, particularly small businesses, to demand a better deal is comprehensive data. If data contained on credit files is selectively cleansed, other than by removal of information included in error, this will undermine the purpose of these other two important government reforms. In simple terms, potential borrowers who are good and bad credit risks will be assessed the same with respect to potential ATO business tax debt.

8. ***Not providing a stimulus to businesses that have fully complied with their obligations.*** The measure has the potential to allow credit providers to assume a positive bias and compliance with obligations where tax debt information is not present on credit reports. This stimulus will not result if information is removed as proposed.

9. ***Potential to incentivise payment to the ATO to the detriment of other creditors.*** A business may prioritise payment to the ATO to cleanse its credit record, in an attempt to be able to continue a business that is in a financially distressed position.

10. ***Continues information asymmetry between the ATO and other creditors or potential creditors which allows phoenix operators to proceed unfettered.*** By removing important information from a business' credit record, we again return to the situation where only the ATO holds information that would be relevant and important to any creditor or potential creditor of a business, thus enabling phoenix operators.

These reasons are further explained in the Appendix. The Professional Bodies welcome the opportunity to discuss this proposed matter in more detail.

Yours sincerely

Helen Gordon
Chief Executive Officer – AFIA

Nick Pilavidis
Chief Executive Officer – AICM

John Winter
Chief Executive Officer - ARITA

Transparency of Business Tax Debts – Appendix

1. Removal is contrary to industry practice.

1.1 Currently default information can only be removed after being listed with a CRB prior to the end of a relevant historic period if the information was listed in error. When a bad debt is later paid or a repayment arrangement entered into, this is recorded against the default listing and retained for the relevant historic period. The original default listing is not removed until the end of the relevant historic period. This position is firmly upheld by the CRB's and supported by the credit industry at large for the following reasons.

1.2 *A prior default is a strong indicator of future credit issues such as defaults, insolvency and slow payment.* Information on payment defaults even when paid in full, allows credit providers to provide credit with the benefit of a full assessment of relevant information. This information is weighted appropriately based on the age and value of the prior default. Where the underlying obligation has been satisfied, AICM members will not automatically decline credit obligations but are likely to prudently conduct a more in-depth analysis to ensure there are no systemic and continuing issues associated with the business.

1.3 *Maintains integrity of the system.* Users of the system rely on the information to make business decisions and those decisions should be consistent. If valid information is removed, a credit decision made one day could be dramatically different to a decision made the following day in the absence of that data. Additionally, it may not be possible for a decision to be verified retrospectively by ordering a new report.

1.4 *Listings are updated rather than removed.* CRB's and industry rely on the status of listings to be updated once payment is made in full or settled. This enables the information to be weighted appropriately according to the credit providers risk tolerance and other factors.

1.5 *Reduces consumer harm by Credit Repairers.* Credit repairers that charge customers significant fees promising to clear valid defaults are frustrated by the industry's strong stance on maintaining valid listings.

1.6 We note from discussions with several CRAs that information about defaults and credit enquiries is generally retained on a business' record for five years

2. The information remains highly relevant to credit decisions.

2.1 The action taken to rectify the underlying default through payment does not negate the elevated potential risk of this entity. At the simplest level this is an indicator of the character of the entity which can be quantified by the increased incidence of businesses with payment defaults subsequently entering formal insolvency.

2.2 A listing that occurred due to cashflow/insolvency issues and was subsequently paid is extremely important to maintain. This could be deemed a near-miss insolvency. However, insolvency professionals report that a near miss insolvency is often a result of fundamental business flaws and subsequent actual insolvency is likely. Credit providers need to be afforded the opportunity to make a full and detailed assessment of that risk, taking into account relevant historic data that significantly impacts their financing decision.

2.3 When a listing status is updated this informs credit decisions in various ways, for example using the definition of engagement:

(a) Default paid in full

By maintaining the listing with a status noting the obligation has been satisfied, credit providers are alerted to a prior payment default and able to weigh the information against their risk appetite and other relevant factors.

For example:

(i) Recent payment

A business with low margins and tolerance to credit risk may choose to only supply this entity on "cash with order" terms. However, a more risk tolerant business may happily provide standard terms after obtaining other positive information such as average payment times (from the CRB's) or financial reports (from the applicant) alternatively the supplier may more tightly enforce the standard payment terms.

(ii) Payment made several years ago

Many credit providers will be likely to provide credit in these circumstances, in the absence of any other adverse information, and will have the opportunity to mitigate any additional risk through terms or close monitoring.

(b) Under Dispute

It is extremely important to ensure the information is available for a full credit assessment while the dispute is being resolved. This information not only allows assessment of the risk including the potential impact of this liability but ensures it is brought to the attention of the credit provider. The fact the listing is being disputed can be factored into the decision.

(c) Repayment arrangement entered

While a business may enter an agreement to repay by instalments it is very relevant to a credit assessment to include the extra cash outflow obligations above that of normal operations in credit assessments. Further it is common for many repayment arrangements to fail.

3. Removal is contrary to other jurisdictions e.g. New Zealand.

3.1 AICM colleagues in New Zealand have advised that the implementation of similar legislation allows for tax debt disclosures to remain on file for a relevant historic period which is in-line with current industry practice in New Zealand.

3.2 Further, these colleagues and NZ Inland Revenue (**NZIRD**) officials have advised that by retaining the listing, the warning letters issued by the NZIRD have been highly effective with the vast proportion of tax debtors subsequently engaging with the NZIRD and a very small proportion resulting in a listing with the credit reporting bodies.

3.2 The Professional Bodies hope that similar outcomes can be achieved in Australia. The best likelihood of this being achieved is if the Bill only allows for the removing of listings if listed in error.

4. Not a sufficient deterrent to those intentionally avoiding tax obligations and continuing to obtaining credit.

4.1 If tax information is removed there is a significant risk this will be manipulated by those subject to the measure. See the below example which illustrates this point.

Example

After receiving an application a credit provider obtains a credit report showing a tax debt has been listed. This will trigger further investigation that may determine that the business is technically insolvent and potentially conducting illegal phoenix activity. The business then enters a repayment arrangement with the ATO and the tax debt information is removed from the credit report. The next day the business again applies for credit but with a different provider. In the absence of this vital information, credit could be provided. As soon as credit has been received the business defaults on the repayment arrangement. The company is later wound up (potentially by the ATO as a result of receiving an alert of phoenix activity following the initial assessment) leaving the credit provider with a significant debt and impacting their profitability and viability.

5. Removal does not encourage early engagement.

5.1 If the Professional Bodies recommendation is adopted it is expected the vast proportion of businesses that receive a warning letter from the ATO will engage to avoid the listing with CRB's. Conceptually there will be two main groups of recipients which receive warning letters:

(a) *Those businesses that intend to meet their obligations but currently are not able to.* While this group may be well intentioned, the fact that they have not met their tax obligations for more than 90 days indicates that the business is actually insolvent, and the responsible controllers need to take appropriate action (such as engaging with the ATO or entering an insolvency process). It is expected these businesses will attempt to engage with the ATO.

If a listing is to be removed on subsequent engagement these businesses may continue to hold onto unrealistic hopes for recovery and not engage with the ATO immediately but only when and/if their hopes materialise and/or they are applying for finance and require a clear credit file. Due to the delayed engagement, these businesses are likely to have a greater tax obligation to repay which increases the risk to potential creditors who may have provided credit unaware of the additional cash flow strain on an already vulnerable business.

(b) *Those that have no intention to meet their obligations.* A business which has no intention of meeting its tax obligations will be encouraged to engage with the ATO to avoid a listing that will impact their ability to continue operations.

If the listing is to be removed on subsequent engagement it is likely these businesses will ignore warnings and will only engage with the ATO when they intend to apply for credit or otherwise require a clear credit report. Clearly this is not in the

interest of the public or other businesses that are meeting their obligations or credit providers that could be exposed to higher risk should the removal be manipulated.

eous information effecting credit assessments.

as proposed there are numerous situations where unintended consequences will arise due to the fact the information is highly relevant to credit providers, namely:

(a) Credit providers as part of their current processes record incidences of defaults via alerts provided by CRBs on their customer base. This information is stored on systems and customer files to guide future decisions around collections activity and new credit requests. Credit providers will be likely to retain this record even when/if alerted to the removal as they are unable to determine if the removal is due to an error listing, payment in full, a repayment arrangement or a dispute being lodged.

(b) Credit providers in industries with a high incidence of phoenix activity may seek protection from businesses attempting to manipulate the removal of defaults by proactively and potentially collaboratively storing information of tax defaulters.

(c) Un-regulated parties may establish services to provide lists of entities with prior tax default information.

(d) Credit repairers may take advantage of the removal following engagement and market their services to these entities, charging high fees that do not aid restoring solvency or clearing the underlying tax obligation.

6.2 The concern with these behaviours is that there will be no way to know if the removal was due to an error or exceptional circumstances. In the absence of clarity, a negative assumption is likely thus assuming the debt is still owed. This will mean that the impact of errors will be magnified and prolonged potentially indefinitely as there will be no expiry dates in these circumstances.

7. Contrary to open banking and mandatory positive credit reporting initiatives.

7.1 The Professional Bodies are supportive of the government's intentions and actions to improve the data available to enable accurate and responsible credit decisions. This will help customers with a good credit history, particularly small businesses, to demand a better deal.

7.2 This measure has the potential to positively contribute to the credit data available; however, removal of the information lessens access to relevant historic data critical to ensuring accurate credit assessments.

8. Not providing a stimulus to businesses that have fully complied with their obligations.

8.1 Once fully implemented this measure has the potential of a stimulus by reversing the current negative bias. A stimulus affect may be achieved as a result of more generous trade credit terms being extended, alleviating significant pressure on small and medium businesses, reducing reliance on traditional finance as well as supporting growth.

8.2 Currently a negative bias is held due to the lack of publicly available data to assess credit worthiness of small to medium sized businesses. Therefore, many credit providers assume all SME's are relatively high risk and provide restrictive credit terms and less flexibility with compliance to terms.

8.3 The proposal to remove the information will effectively eliminate any stimulus potential of the measure, as credit providers will not be able to conclude that the business has met its tax obligations but continue, as the default position, to assume all SMEs potentially have had an ATO debt.

8.4 It is in fact possible that a business has experienced multiple cashflow/insolvency issues and this will continue to be hidden and a false picture presented of low risk. Effectively, the situation we see today that results in significant losses to businesses of all sizes during insolvency.

9. Potential to incentivise payment to the ATO to the detriment of other creditors

9.1 If implemented as intended, a business may prioritise payment to the ATO in order to cleanse its credit record and prolong the trading of a business in financial distress. This is problematic for a number of reasons:

(a) poorly informed credit decisions as is discussed above;

(b) allows financial distressed businesses to continue to trade and obtain credit without dealing with the underlying problem;

(c) deferral of payment to other creditors, particularly small businesses, that may not have the power (either due to resource or knowledge constraints) to report non-payment;

(d) it returns Australia to a position where the ATO is treated preferentially to other unsecured creditors – even though a decision was made by the government in 1993 to remove the ATO's priority position in corporate insolvencies; and

(e) exposes the ATO to greater risk of recovery of preferential payments in a subsequent liquidation. Payments after listing, where there is a clear incentive to the business to pay the ATO in priority to its other creditors, are more likely to be recoverable.

9.2 The incentive is removed, and the ATO treated with the same priority as other credit providers if the credit record is retained and updated.

10. Continues information asymmetry between the ATO and other creditors or potential creditors which allows phoenix operators to proceed unfettered.

10.1 Currently the ATO holds information about business credit worthiness that no other creditor or potential creditor can access. This results in a raft of issues relating to the ongoing provision of credit or provision of new credit, where an informed person would not make such a decision. It also allows for phoenix operators to proceed unfettered as the common creditor in most phoenix situations is the ATO and this information goes unreported.

10.2 The failure by the ATO to report, or as intended – report and then remove, valuable information about a business' credit worthiness continues this information asymmetry.

10.3 The government is working on solutions to the phoenixing issue[1]. The recording, and importantly, maintenance of information is one of the key parts of the solution to combating this problem.

[1] Reforms to address illegal phoenix activity consultation paper, The Treasury, September 2017