



Via email: phoenix@treasury.gov.au

The General Manager
Business Tax Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Sir or Madam,

Action against fraudulent phoenix activity – Proposals paper November 2009

I refer to my earlier letter of 22 January 2010. I have pleasure in enclosing a further submission on the proposals paper "Action against fraudulent phoenix activity" issued in November 2009.

The attached submission has been prepared by the Taxation Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, it has not been considered by the Directors of the Law Council of Australia.

If you have any questions in relation to the submission, in the first instance please contact the Committee Chair, Dr Gerry Bean, on 03-9274 5000.

Finally, I take this opportunity to inform you that I anticipate that there will be one further submission on the proposals paper prepared by the Insolvency and Reconstruction Law Committee of the Business Law Section of the Law Council of Australia.

Yours faithfully,

Bill Grant
Secretary-General

10 February 2010
Enc.

THE TAXATION COMMITTEE OF THE BUSINESS LAW SECTION OF THE
LAW COUNCIL OF AUSTRALIA - RESPONSE
TO THE FEDERAL TREASURY'S DISCUSSION PAPER
PROPOSING A DRAFT OF POSSIBLE MEASURES TO COUNTER
FRAUDULENT PHOENIX ACTIVITY¹

OVERVIEW

The Taxation Committee of the Business Law Section of the Law Council of Australia ('the Committee') joins the Government and the Australian Taxation Office in condemning fraudulent phoenix activity of the type identified by the Assistant Treasurer in his Press Release (No. 090/2009).

However, that does not mean that the Committee agrees that the measures proposed in this Press Release and discussed in the accompanying Discussion Paper from Treasury are necessary.

To identify the targeted fraudulent arrangements, namely arrangements that have the effect of "*... avoiding the payment of tax liabilities, wages, superannuation and leave entitlements and other responsibilities, such as supplier accounts, through the deliberate liquidation of a company*", will call for a delicate differentiation of those liquidation cases where due to fraudulent activity a range of creditors is not fully paid from other liquidation cases where potentially the same range of creditors is not paid in full.

The circumstances that can lead to an insolvent company liquidation are many and varied.

At one end of the range is an inability to pay debts caused by ordinary vicissitudes of business and commercial life in respect of which the company and its directors and managers are taken completely by surprise and are not at fault. At the other end of the range is an inability to pay debts caused by a conscious design to avoid paying some, or all, creditors and using the liquidation process as a step to bring about that outcome.

Hallmarks of the offensive types of insolvent liquidation include unexplained dispersal of corporate assets and wealth to directors, managers and their associates, selectivity of payment of creditors, non-payment of liabilities to the ATO and non payment of liabilities to creditors unlikely to disrupt conduct of business in a new vehicle. In both an innocent and fraudulent case, it is possible that the business of the insolvent company may emerge in a new corporate entity. Clearly, that circumstance is not an appropriate benchmark against which the legitimacy of the insolvency ought to be measured.

¹ Announced by the Assistant Treasurer: Senator Nick Sherry by Media Release No. 090/2009 on 13 November 2009.

The Committee's view is that fraudulent activity deserves, and should attract, the full force of the law and those sanctions that are available under existing laws which include:

- prosecution pursuant to former s29D of the Commonwealth *Crimes Act 1914* - now set out in Division 135 of the Commonwealth *Criminal Code*;
- the well targeted existing offences of considerable seriousness under the *Crimes (Taxation Offences) Act 1980* (Cth);² and
- ss 184, 1331 and Schedule 3 Item 30 of the Corporations Act, which to the extent necessary could be clarified to ensure behaviours that adversely affect creditors, come within the scope of the section. In this regard the decision in *Jeffree v National Companies & Securities Commission*³ is an illustration of the sanctions that can be brought to bear in instances of transfer of business assets to another entity defeating creditor's rights.

Fraud has always been illegal and requires no new laws.

Fraud is actionable both civilly and criminally, and carries high maximum sentences. Further the concept of fraud is flexibly and sensitively defined at law, so as to allow relevant authorities to deal with particular behaviours and only those behaviours. As a result, the concept has not been an unwarranted burden on ordinary commerce. The fact that some concerted effort by prosecuting authorities is involved in securing a conviction for a serious offence, with serious penalties, is as it should be. This is not a negative, but is part of the way Australia has achieved a balanced legal system throughout its history.

The Committee submits that the main problem with phoenix activity is that regulating and prosecuting authorities have not routinely attacked phoenix -style fraudulent activity as fraud.

Moreover, there are well targeted existing offences of considerable seriousness under the existing *Crimes (Taxation Offences) Act 1980* which could be used to target phoenix activity, and would cover most taxes including: PAYG(withholding),⁴ Superannuation Guarantee,⁵

² See the article entitled: "Phoenix schemes – what is the solution" in the Tax Institute of Australia's (blue) Journal, Volume 44, No.6 December 2009 edition, at pp308-311,

³ [1990] WAR 183; [\(1989\) 15 ACLR 217](#); (1989) 7 ACLC 556

⁴ See the offences created by s5 & s7 for arrangements intended to secure that a company or trust will be unable to pay its 'income tax' and para (ga) of the definition of 'income tax' in s3(1), which withheld amounts which then have to be remitted to the Commissioner under Division 16 of Schedule 1 to the *Taxation Administration Act 1953*.

⁵ Part VII of the Act.

GST⁶ and FBT.⁷ And, finally, action could be taken under corporations law relating to directors duties.

In terms of prosecuting fraudulent phoenix activity, two matters need to be noted.

- It is not true that a conviction for defrauding the Commonwealth cannot be obtained for failure to remit withheld amounts. The NSW Court of Appeal held the opposite in *R v Iannelli* [2003] NSWCCA 1. The fact that the Court quashed the conviction, in that case, reflects the manner in which the case was prosecuted and the particular facts.⁸
- A case that has already had a dramatic impact amongst lawyers, was the case of *ASIC v Sommerville & Ors* [2009] NSWSC 934 where ASIC was successful in obtaining orders against a solicitor for aiding and abetting directors in breaches of their duties, by advising them to undertake an unacceptable phoenix style transfer of business (and also for helping them to implement it). This is an indicator of what could, and should, be done in this area.

If relevant agencies established a track record of regularly prosecuting phoenix activity under existing laws, then the Committee believes the problem would be much smaller and the case for a further erosion of civil and economic liberties would largely vanish. Few changes to the law would remain necessary.

Two initiatives do warrant further thought.

- A bond system for a company identified as a phoenix successor (Qtn 14) – but with safeguards, including: merits review for arm's length or market value successors is one matter further (careful) work is warranted.
- Similarly, the Commissioner should develop a voluntary system for employers to withhold and simultaneously remit electronically to the Commissioner.⁹

In summary the Committee's view is that existing sanctions, if pursued with an appropriate vigour, will adequately address the problem phoenix activity.

⁶ Part VIII of the Act.

⁷ Part IV of the Act.

⁸ There were two reasons why the directors conviction for defrauding the Commonwealth were overturned on appeal in this case. The first is that the prosecution was handled incompetently, in that the necessary element of using dishonest means was not argued, and the second was that there was little or no evidence of dishonest means on which to convict. This appeared to be low on the culpability scale and does not support any argument that more laws are needed to prosecute serious phoenix activity.

⁹ Perhaps using as a platform, the Superannuation Contribution Clearing House being developed for employers as a steam lined way of paying SG contributions to multiple funds, under the choice provisions of the SG Act.

THE 15 MATTERS SET OUT IN TREASURY'S CONSULTATION PAPER¹⁰

The 'Questions for Consultation' portion of Treasury's Consultation Paper has been extracted (question by question) below, with the Committee's response following each question.

Each response is to be read in the light of the Committee's view that existing sanctions, if pursued with an appropriate vigour, adequately address the problem.

Directors Penalty Notice Regime - automatic director liability after 3 months?

Question for Consultation

1. If amendments were made to the director penalty regime to effectively 'automate' director penalties, what period of time would it be reasonable for a director to avoid liability to ensure that legitimate directors who may be facing adverse economic conditions or business cycles are not unduly affected? Is three months a reasonable period?

Consultation Response

The Directors Penalty Notice (DPN) regime should not be one of the main planks of anti-phoenix measures. The Committee strongly opposes an extension of the DPN regime.

For fraudsters the system is an inappropriate or inadequate measure and for innocent persons the system is already harsh.

This DPN regime should be made *more reasonable* for innocent persons by extending the time for responding to a DPN to 40 days, and by restricting its application to persons who were directors at the time of not remitting the relevant amounts (rather than extending the same harsh regime to subsequently appointed directors).

Also the deemed service regime is unfair when linked to the short 14 day notice period. And finally, the defences should be made more realistic to include a director having done all he or she reasonably could, to respond in one of the four permitted ways to the DPN (rather than the defences being limited to those who have done all they could to remit the amounts on time).

The idea of automatic liability for directors after the debt for the unremitted amount has been outstanding for a certain period (say 3 months) is an interesting idea, but only because 3 months looks better than the deadly 14 day notice period at present. All in all, this is too great an incursion into the limited liability principle, and is putting taxes into a special category (where directors have to personally underwrite their payment). This was rejected years ago when Crown priority was abolished.

¹⁰ The following questions were set out in the Discussion Paper issued by Treasury to support the Assistant Treasurer's announcement.

Such a measure is not warranted by the seriousness of fraudulent phoenix activity, as that kind of behaviour is already actionable, as the Committee has said. The seriousness of such behaviour is not a legitimate excuse to water down limited liability, or give the Crown back a defacto priority over a large swathE of its liabilities.

Question for Consultation

2. If this 'automated' approach were taken with the director penalty regime, would there be a continuing role for the director penalty notice?

Consultation Response

The Committee has already said that a regime that makes directors liable for a company's debts is already such a significant departure from the rationale for having limited liability companies. Likewise, the Committee has already said that this regime should not be stripped of actual attention by ATO officers, and turned into a purely mechanical incursion into the limited liability principle.

There is nothing wrong with having offences that take time and attention to prosecute, if they cut across other important civil liberties or economic principles.

Also, there are other factors that militate against a mechanistic extension of liability to directors. For instance, liability amongst directors under this regime is joint and several. For many people to be simultaneously liable to duplicate and triplicate debts, without deliberate action by the responsible human beings, is a great multiplying of these debts across individuals and the community.

Another way of looking at the same issue, is that the current intervention of the ATO in the DPN regime, does work some justice. There can be shades of innocence that fall short of establishing a defence, which the ATO can in fact recognise, when they decide to whom they will issue the notice that activates directors' liability. For instance, the ATO might not issue a notice to a now- divorced wife with few assets, who did not have an active role as a director (even though that is not adequate to make out a defence). At the same time, the ATO might go ahead with issuing the notice to the divorced husband who is now running a successor business.

Question for Consultation

3. If the law were amended to 'automate' director liabilities, should any additional limitations on the operation of the regime be imposed? Notably:

a) Does the period of time in which a director is not held liable for a penalty (three months is suggested), along with the existing

defences, ensure the right balance between providing an incentive for directors to cause their company to comply with their obligations and not imposing penalties in inappropriate circumstances?

Consultation Response

The right balance is to retain notices and then relax the regime further, as the Committee has suggested.

Further, this suggestion to automatically make directors liable, would result in even more companies being put into insolvent administration, at just the time when there is a wider debate in commercial circles (prompted by the Global Financial Crisis) as to whether Australia's insolvency laws need reforming for too readily sinking companies that might be able to be restructured so as to survive (if the Committee had a process like 'Chapter 11' bankruptcy protection in the USA).

This is one example of a concerning 'disconnect' between wider commercial and tax agendas in this country.

Another example is the recent review into directors' duties to see if they were too onerous and whether they should be revised, to avoid an exodus of competent and well intentioned directors from the sector.

Unfortunately, when tax practitioners suggested this review should be widened to include the DPN regime, the response was that this was a review of corporations law only. And now the Committee even finds this paper suggesting directors' duties be made even more relentless and harsh.

Question for Consultation

3. If the law were amended to 'automate' director liabilities, should any additional limitations on the operation of the regime be imposed? Notably:

a) ...

b) Is there a need for additional defences to the regime, modeled on those in the Corporations Law relating to insolvent trading? What undesirable consequence would such a defence seek to avoid?

Consultation Response

Yes, the DPN regime does need the defences revised so that they are of some realistic and practical application (even without automating its operation).

One member who practices in this area reports that he has *never* seen a client be able to avail themselves of the defences *as they stand*. This is because the relevant defences (of being ill, or doing all they

reasonably could)¹¹ only apply to the time when the amount should have been remitted, and not later when the notice is received. For instance, a director who did all he could, to have his company put into administration on receiving the DPN, cannot escape liability if he is out-voted by his fellow directors, who refuse to put the company into administration.

Question for Consultation

3. If the law were amended to 'automate' director liabilities, should any additional limitations on the operation of the regime be imposed? Notably:

- a) ...
- b) ...
- c) Should the period of time in which the ATO has to recover the penalty be limited, for instance, to four years (consistent with the usual amendment period for companies)?

Consultation Response

Yes, there is merit in having a limitation period for recovery of debts against directors (and it certainly should not be longer than the limitation period that applies for recovering the debt from the company).

Directors Penalty Notice Regime – expand to SG and other taxes?

Question for Consultation

4. Should the director penalty notice regime be expanded to include an additional range of payments, taxes and duties? For instance, should it be expanded to include Superannuation Guarantee amounts, the company's own income tax and/or indirect taxes such as GST and excise?

Consultation Response

There is a case for expanding the DPN regime to Superannuation Guarantee amounts, as these amounts are for all practical purposes employees current entitlements in the same manner as PAYG taxes withheld are current entitlements.

That said, there are differences between the two systems. It is possible that the rationale for making directors responsible for the company's remittance obligation is that the obligation to remit does not depend on construing a tax statute. Rather, the company has already chosen to withhold the amount from gross salary or wages, and having

¹¹ s202AOJ of the *Income Tax Assessment Act 1936* ('ITAA36')

done so, there is automatically an obligation to remit the amount withheld.

Superannuation Guarantee obligations, however, depend on often difficult definitions of who is an 'employee' (especially when contractors are involved) and it can involve equally difficult definitions of what 'salary' the charge will be based on (eg. what is 'ordinary time earnings').

It is not clear that directors should be made the retrospective guarantors of these vagaries in a company's imposts (even though they are intended to benefit innocent third parties).

Moreover, the Committee is not sure whether the suggestion to widen the DPN regime to SG amounts has been made without having regard to the fact that the *Crimes (Taxation Offences) Act 1980* already covers arrangements that are intended to make a company or trustee unable to pay its SG liabilities.¹² That this Act *already covers* schemes to deliberately make companies and trustees unable to pay SG liabilities ought to be the end of this suggestion.

Question for Consultation

5. If the director penalty notice regime were expanded to cover a range of liabilities, should the estimation regime in Division 8 of Part VI of the ITAA 1936 be similarly amended?

Consultation Response

If the DPN regime were to be expanded to include SG liabilities, then the estimate regime could be similarly expanded (but not more). It is the Committee's submission, however, that it should not be expanded.

Promoter Penalty Regime – expand to include fraudulent phoenix activity

Question for Consultation

6. Should the promotion of fraudulent phoenix behaviour be made subject to the promoter penalty regime?

Consultation Response

The Committee's position is that "fraudulent phoenix behaviour" is already illegal because it is fraudulent – both for the purposes of criminal prosecution and civil recovery, and probably from at least as wide a range of persons as the Promoter Penalty regime would cover. Also reparation orders could be made against persons convicted of

¹² Part VII of the Act.

other offences¹³ under s21B of the Commonwealth *Crimes Act 1914* (as noted under heading 4.2.5 of the Consultation Document).

So, the Committee's position is that utilising the existing law on illegality is the appropriate method of dealing with fraudulent behaviour.

Further, the Promoter Penalty legislation does not lend itself to an easy or obvious extension in this direction. The existing concept around which the Promoter Penalty provisions are based is a "tax exploitation scheme" which revolves around an unsupportable reduction in tax liability. This is quite different from deliberately setting out not to pay an *unreduced* liability. Therefore, extending Promoter Penalty legislation to phoenix activity is not a ready or straight-forward 'bolt on' option. A fresh and carefully worked definition would have to be developed, and the Committee does wonder whether the right definition would look different from the existing definitions of fraud (and in fact it might be less flexible than the current definitions of fraud).

Further, the Promoter Penalty regime has its controversial elements (largely because it too should have been dealt with under existing fraud laws, and when it was drafted). The only new power the Commissioner might have needed was a specific power to stop the promotion of tax-exploitation schemes as they were being promoted. The ambit of this legislation in practice needs to be allowed to settle down. It would not be helpful to have further controversy visited on it by another set of provisions grafted onto it, at this stage.

General Anti-Avoidance Provision – expand to include fraudulent phoenix activity

Question for Consultation

7. Should the taxation law include anti-avoidance provisions that give the Commissioner the ability to trace the benefit derived from fraudulent phoenix activity to individuals and entities other than the liquidated company?

Consultation Response

The proposal to expand general anti-avoidance provisions to include fraudulent phoenix activity, suffers the same basic problem that the equivalent Promoter Penalty proposal had – namely that the core concepts differ and there is little real overlap or synergy.

Again, the Committee's general anti-avoidance provision (Part IVA of the *Income Tax Assessment Act 1936* or '**ITAA36**') is based around obtaining a 'tax benefit' - being a reduction in the tax liability - and then the provision authorises that benefit to be reversed.

¹³ Including under the *Crimes (Taxation Offences) Act 1980*, and perhaps the *Corporations Act 2001*, as noted.

This differs from a scheme to simply avoid ever paying an *unreduced* liability.

And likewise, it is not obvious what ‘benefit’ might be reversed in a phoenix scheme. The insolvent company that cannot pay its debts does not have a benefit, or if it does, it cannot be reversed because it cannot pay. The new company that buys the insolvent company’s business at market value has no benefit – its tax liabilities will start anew and might be paid in full.

A system that allows identification of a benefit at the Commissioner’s discretion is unsatisfactory – particularly in circumstances where a liability for corporate taxes is to be shifted to another entity because the entity liable no longer has the wherewithal to pay.

It should be remembered, that fraud at law¹⁴ already covers fraudulent phoenix activities. An additional law (particularly one with conceptual difficulties at its core) is not needed.

Measures to remove fraudulent phoenix directors – after their first insolvency

Question for Consultation

8. Would it be appropriate to remove the requirement that a director has managed two or more failed corporations before ASIC can disqualify a director?

Consultation Response

The Committee doubts that the proposal is for ASIC no longer to have the power to disqualify directors if they have managed two or more companies that have been liquidated and returned less than 50 cents in the \$1 to creditors.¹⁵ That already provides valuable practical discipline in the management of companies and should not be ended.

The issue is whether directors could be disqualified earlier – for instance after their first company goes into liquidation and there is evidence of fraudulent phoenix activity. That can of course be done under other sections – but not without court action.¹⁶

So the real issue is whether the Court should be side-stepped, to allow ASIC alone to disqualify a director, after only one company has failed?

¹⁴ And so does the *Crimes (Taxation Offences) Act 1980*.

¹⁵ It appears under s206F of the *Corporations Act 2001* (‘**Corps Act**’) though this section doesn’t say anything about 50 cents in the \$1 - which may be a rule of thumb applied in practice, as the basis for ASIC forming the view that the “disqualification is justified” under s206F(1)(c)??

¹⁶ See for instance the power of the Court to disqualify a director, on application by ASIC, if the Court is satisfied that the “manner in which the corporation was managed was wholly or partly responsible for [it] failing; and the disqualification is justified” under s206D of the *Corps Act*.

On balance the Committee's view is that it should not be. The Court process is an important safeguard in the balance struck by the existing legal system.

Indeed, if a fraudulent Phoenix director were to be prosecuted for fraud, then on conviction he would automatically be disqualified as a director - without further court intervention (under s206B of the Corps Act). The same goes for conviction under the *Crimes (Taxation Offences) Act 1980*.

It appears to the Committee that there are already many ways to get a truly fraudulent director disqualified, and that proposals aimed at those who are less than fraudulent, or proposals to simply save regulators time are not meritorious, when the considerable downside to citizens and the nation's commercial fabric are considered.

The Commissioner of Taxation (in addition to ASIC) could be added as a party who could bring an action before the court for a disqualification of a director under s206D and s206E of the Corporations Act.

Whilst not dismissing the importance of appropriate disqualifications, it should be remembered that this is 'shutting the door after the horse has bolted' and the truly fraudulent can sidestep disqualification by appointing 'shadow' or 'puppet' directors who can afford to be disqualified,¹⁷ or the director will be prepared to flee Australia to avoid prosecution under existing laws.¹⁸

If the initiative were to be taken up, safeguards would be needed. ASIC could be given power to issue show cause notices after the first insolvency and if not satisfied that it was innocent in the required sense having regard to factors such as the cause of the insolvency, the creditors who were not paid, the recipients of company assets and wealth and the like.

Re-criminalise the failure to remit amounts withheld under the PAYG regime?

Question for Consultation

9. Should an offence for the non-remittance of PAYG(W) amounts be reintroduced into the taxation law?

Consultation Response

Re-criminalising a company's failure to remit amounts withheld under the PAYG system, is a matter to which the Committee would be prepared to give careful consideration (together with the access it

¹⁷ See the discussion under heading 4.2.8 in the Discussion Paper.

¹⁸ See the example under heading 1.1.2 of the Discussion Paper.

gives to reparation orders¹⁹ against directors, via deemed director offences,²⁰ unless they can make out relevant offences).

But this requires careful re-evaluation as the decision to de-criminalise non-remittance was not made idly and the reasons for it deserve to be revisited.

When the range of fraud and *Crimes (Taxation Offences) Act* offences are considered, and also the reparation powers which they activate – it is probably best to rely on existing laws and to allow the previous rationale for decriminalising the failure to remit, to continue undisturbed.

Criminalise failure to pay SG liabilities?

Question for Consultation

10. Should a similar offence provision be created in relation to non-compliance with SG obligations?

Consultation Response

An offence for not paying SG obligations is a proposal that is difficult to evaluate.

There is something to be said for it falling the same way as failing to remit amounts withheld under the PAYG regime. As noted earlier these amounts are even more important to the employees, as their superannuation benefits are dependant on the amount being paid.

Deny PAYG(w) credits from directors of companies who don't remit amounts withheld from salaries (to the extent of the deficiency)?

Question for Consultation

11. Is the denial of PAYG withholding credits to directors by the ATO an appropriate mechanism to deal with fraudulent phoenix behaviour? Should it extend to all directors and close relatives of the director (provided that the Commissioner is given discretion to allow PAYG(W) credits where it is appropriate to do so)?

Consultation Response

Consideration could be given to denying directors credits on their own salary etc. if their company has not remitted amounts sufficient to cover their credits – but it would be complicated allocating part payments between directors and others. On balance the Committee doubts that the complication arising from the step required to make this work, and make it fair, are worth the cost.

¹⁹ Under s21B of the *Crimes Act 1914* (Cwth)

²⁰ Under s8Y of the *Taxation Administration Act 1953* ('TAA').

This is a 'rats and mice' disincentive, which will have little impact on the serious phoenix activity. And it could affect innocent directors too.

Restrict use of similar name by successor company – directors of new company liable for debts of old company?

Question for Consultation

12. Would a restriction on the use of a similar name or trading style be an effective mechanism in curbing fraudulent phoenix activity?

Consultation Response

On balance, the Committee doubts that such a limitation would be sufficiently effective to be worth the risks to the innocent.

Some of the most serious phoenix activity seems to involve labour hire subsidiaries in groups. The labour-hire company could be called anything without impeding the effectiveness of the next company. And so the similar name restriction will not impede such people at all.

Further, directors should not be made liable for simply trading in a similar name as a previously failed company. The sale could be completely arm's length and non-fraudulent, in which event the restriction on selling the name will only punish the creditors of the insolvent company. If the insolvent company can't sell its name, it will realise a lower price for its assets, compared with being able to sell the name with the goodwill.

Criminalise directors claiming PAYG(w) credits – to the extent that there has been a failure to remit withheld amounts?

Question for Consultation

13. Should it be an offence for directors to claim non-remitted PAYG(W) when the company has not remitted PAYG(W)? As this approach would target both fraudulent phoenix directors as well as legitimate directors, would it achieve the right balance between protecting revenue and protecting the interests of legitimate directors?

Consultation Response

No, such an offence should be created. If denying credits is not wise, then it is certainly not justified to criminalise the claiming of credits. And if the credits were denied, that would be quite enough.

Widen ATO's ability to demand a bond

Question for Consultation

14. Is it appropriate for the ATO to require a bond to be paid in relation to an expanded range of liabilities if fraudulent phoenix activity is suspected or expected? What would be an appropriate amount? Should it be referable to three months of anticipated tax liabilities? Six months?

Consultation Response

This measure deserves careful consideration.

Giving the Commissioner greater power to require a bond or perhaps security has the potential to nip the problem in the bud (rather than being left trying to recover amounts or impose penalties 'after the horse has bolted').

The measure would need safe-guards – a key one of which must be a full merits review before the Administrative Appeals Tribunal.

If that were done, then perhaps the law could give the Commissioner a guided discretion, and he could publish more detailed guidance about how he will exercise the discretion (as he does in his Receivables Policy or perhaps in Practice Statements).

It could also alleviate any hardship that this could cause innocent parties, if there were an option that didn't require capital (i.e. that did not require payment of money or security over other property). What the Committee has in mind is a system, which the Remitter could volunteer to join, where it could simultaneously withhold and remit to the Commissioner (at the same time as paying the wages).

There are obviously technology issues, but this could use the infrastructure being developed for the superannuation 'clearing house' facility that will provide employers with a 'one stop shop' for paying super contributions to many different funds. Perhaps this could be extended to allow a gross wage payment to be simultaneously split between the employee and the ATO. The Remitter might have to give electronic advice to the ATO about when the wage payment days are, so that an exception report could be automatically generated the next day, if the ATO had not received its remittances.

If those safe-guards and options were in place, then it could be appropriate for the ATO to have a more effective sanction than even criminal offences, for not paying the bond (or entering the Simultaneous withholding and remitting system). The Committee has in mind something that makes it almost impossible to carry on business, such as withdrawing the remitters Australian Business Number (ABN). This ought to be effective as then they would have half of their cash flow withheld by their customers under PAYG system of withholding for entities without an ABN (in s12-190 of the TAA, Schedule 1).

But for a start, the Committee would recommend that the power to demand a bond was limited to phoenix successors that had left only the Commissioner unpaid.

Other suggestions

The Committee suggests that resources be put into prosecutions using existing laws, rather than seeking new laws which are likely to be very broad in scope and thus likely to impact on those that are not fraudulent as well as those that are. More prosecutions under existing laws would certainly provide evidence about whether any new laws were needed.

Question for Consultation

15. Do you have any other suggestions that would assist to deter entities from engaging in fraudulent phoenix activity?

Consultation Response

First, the Committee notes again the suggestion (in Q14 above) that a system of simultaneous withholding and remittance to the ATO be developed (perhaps by extending the infrastructure being developed for the Superannuation Contribution Clearing House). It might be voluntary, and an alternative to a compulsory bond.

But the most important suggestion that the Committee wishes to make, is that the relevant regulators prosecute those involved in this serious phoenix activity under existing laws. Some concerted effort and some high profile prosecutions and recoveries would change the landscape much more effectively and much more fairly than the proposed measures.
