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Reply To: Parramatta

14 March 2018

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via Online Lodgement – My Parliament

Dear Mr Fitt,

Re: Treasury Laws Amendments (Combatting Illegal Phoenixing) Bill 2018

I refer to your request for submissions to Senate Economics Legislation Committee in relation to the proposed *"Treasury Laws Amendments (Combatting Illegal Phoenixing) Bill 2018"* and take pleasure in preparing these submissions.

A. CONDON ASSOCIATES

Condon Associates is a specialist Firm of Forensic, Insolvency and Turnaround Practitioners headquartered in Parramatta, NSW. The Firm undertakes Liquidations (Official and Voluntary), Receiverships, Voluntary Administrations and Deeds of Company Arrangement under the provisions of the Corporations Act 2001 (Corporations Act), as well as the formal administration of Bankrupt estates and Part X Arrangements pursuant to the Bankruptcy Act 1966 (Bankruptcy Act). In addition the Firm provides services within the related areas of Forensic Accounting, and Litigation Support as well as business and financial Turnaround and Advisory Services not involving formal appointments.

It should be noted that the general focus of our corporate work is in the small to medium, proprietary companies rather than Publicly Listed entities.

The Firm's Managing Principal, Schon Gregory Condon, was an Official Liquidator, now a Registered Liquidator and Registered Trustee in Bankruptcy with in excess of 40 years of experience in the field, with almost 30 years at the Principal/Partner level.

B. SUBMISSIONS RELATING TO CHANGES OR AMENDMENTS

We note that whilst we have not adopted the numbering of the Exposure Draft, we will base our responses on the proposed new and/or amended sections of the relevant legislations.

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Generally

We note that we have purposefully not made any commentary on changes that would appear to be purely consequential amendments as a result of the main significant changes being proposed. As such our submissions have focused on those main changes.

On a more general note within the insolvency industry we are seeing a returning trend towards ASIC and the Australian Taxation Office ("ATO") initiating tenders, calls for information or other types of requests that would appear to create a panel of short listed Insolvency Practitioners or firms which would then undertake work on behalf of those entities. We see this as a concern on the basis that any panels held by ASIC and the ATO should contain a very broad group of registered insolvency practitioners rather than a selective short list.

We believe that short listings of this type create a form of perceived conflict and may threaten the practitioner's independence due to the fact that to remain on such lists may require acquiescence to the demands of the list operator so remain and gain the benefit of future referrals. Further once a practitioner has become a member of the panel, they may become induced to avoid giving advice that would potentially contradict the desires or intentions of the appointor. It raises the potential for perceived bias that would not exist if such panels did not exist, thus clearly leaving the appointee with the responsibility to attend to the needs and interests of all stakeholders equally.

We believe a more practical approach to this problem would be that all registered insolvency practitioners be placed automatically on the panel and be able to accept the relevant type of work being issued. The registered insolvency practitioner should make the decision to not be included on these panels. We note that any practitioner who chooses not to be a part of the panels should be investigated on the reasons why as it may be that they are providing assistance to directors in undertaking the type of activity the proposed changes are seeking to stamp out. Appropriate steps could be taken to exclude certain practitioners where appropriate but it would be extremely unlikely that such applications would genuinely reduce a potential field of some 650 to say 20.

Schedule 1 – Phoenixing Offences and other rules about property transfers to defeat creditors

11 - After Section 588FDA

We note that the proposed legislation brings in the idea of a "creditor defeating disposition". This creates a new class of voidable transaction which may be recovered by an external administrator. The key element of this new section would appear to be the inclusion of a void transaction that has the effect of "preventing, hindering or significantly delaying the property becoming available in a winding-up".

On an initial view it would appear that this is not unlike the current provisions of the Act dealing with void transaction, specifically the idea of an uncommercial transaction as contained in Section 588FB.

20 – After Subsection 588FE(6A)

We hold some concerns with the wording of the proposed amendments. The basis of the concerns is that it may capture some transactions that could be undertaken in the normal course of business. This could include a business that is a retail operation that in the lead up to Christmas, after a particular season or event, or after the end of the financial year offers significant discounts on their stock so much so that it may in actual fact be sold for under its "market value" or even cost.

These sales could be undertaken for a proper purpose, to sell excess stock, out of season items, redundant stock, or to remain competitive on that item. The business may still make some profit overall but on an individual basis the items could be deemed to be sold for less than "market value" and could be caught as a creditor-defeating disposition.

We also note that the changing of the wording to be only those transactions that occur during the 12 months ending on the relation back day, may have the unintended consequence of parties undertaking what may be considered a creditor defeating disposition then letting the company go dormant for a period to ensure any necessary timeframes have lapsed. This may result in no action being taken to have the company wound up and affair dealt with in a timelier manner. This would result in the number of dormant companies increasing.

We believe that the above situation would not be in the spirit of the proposed changes.

25 - After Section 588FG

We believe that an increase of the powers available to ASIC to grant an order requiring the repayment of funds is a welcome introduction. We have concerns as to ASIC's ability to undertake this task in a cost effective manner. We note the AFSA has similar powers available to it pursuant to Section 139ZQ of the Bankruptcy Act 1966 and charges a relatively modest fee for reviewing these types of request. By way of example, a fee of $480 is charged for the issuing of a notice under Section 139ZQ of the Bankruptcy Act 1966. This represents a very cost effective solution.

We also consider that the imposition of a time limit on making the claims of 12 months after the date the winding up may be too short a period. An unfunded liquidator to obtain the necessary information, potentially conduct public examinations or other undertake other work to obtain the necessary information to make a responsible and realistic claim. We believe that it should be the same time period to make a claim as the current voidable transaction which is 3 years.

We also hold concern in relation to the amendment at (6) which would allow ASIC to revoke any such Order at **any** time later. There may be significant consequences for a liquidator, and others, including ASIC, where recoveries had already been made under an original ASIC order which is thus subsequently revoked. The proposed amendments fail to clarify on limiting claims made against any party including the Liquidator or ASIC. Attached an **Annexure 'A'** is a worked example of our concern.

The ability to recover an amount due under an ASIC Order as a debt due to the company greatly increases the ability for an external administrator to recover the amount, this is a welcome amendment. However, given that ASIC is to act as if it were a court, we hold some apprehension, that this provision may in fact increase the costs for external administrators in that they may be required to obtain a legal opinion on matters where they are already unfunded.

We note that the proposed amendments give the recipient of the ASIC order 60 days to apply to the Court to set aside the ASIC Order. It is our opinion that this length of time would appear to be too generous and should be limited to the same as dealing with statutory demand for payment of 21 days or the same as what would be required to lodge an appeal with a formal court.

Clearly by increasing the risks associated with the operation of a piece of legislation is the equivalent of not creating the legislation in the first place as the action will not be taken because :-

a. The risk to do so is too great, or
b. The legal costs associated with removing that risk out weigh the value of the transaction involved.

Thus any perpetrator of an insolvency event will be able to hide behind the fears associated with heightened risk and thus be able to operate with impunity.

33 - After Section 588G

588GAA - The addition of further duties of company officers to prevent certain transaction is welcome, however there, to date, has been a lack of prosecution against directors for offences under the Corporations Act. Adding an additional offence may not have the impact that is really needed, that might be better seen through increasing appropriate funding to bring more prosecution of directors under the current legislative offences.

Further there is a need to educate directors about the obligations they have upon becoming a director; including the penalties for failing to do so.

588GAB – The introduction of an offence for seeking out advice on how to procure a creditor defeating disposition is a step in the right direction, however we do not believe that ASIC is currently sufficiently funded to make any meaningful difference with this new offence. Further this may still be undertaken under the guise of a safe harbour plan.

Schedule 2 – Improving the Accountability of resigning directors

We believe that this is a significant improvement over the current system as the date of a director's resignation can be easily backdated to a date that the director believes is more suitable. It is also appropriate that should a director believe they have resigned but not lodged with ASIC that an appropriate Court, or other body can alter the date of registration where the facts genuinely warrant an earlier change. There will, of course, need to be some guidance so that these applications are not simply without proper foundation nor merely rubberstamped.

Schedule 3 – GST Estimates and director penalties

We believe that the introduction of liability for directors for GST, WET, and Luxury Car Tax is reasonable provided proper steps are taken to make directors aware that their entity has been perceived to have arrived at a point where these amounts may be an issue for them personally. This will properly deal with situations where certain a director or directors are potentially misleading other parties.

C. SUBMISSIONS OF SUPPORT

As noted above there are some areas of the proposed amendments which we believe will significantly increase the ability for an external administrator to recover funds for the benefit of creditors. The introduction of the ability for ASIC to issues orders for repayment of monies is a step in the right direction, however careful consideration needs to be given to how this is implemented to ensure it is of benefit.

D. CONCLUSION

We congratulate Treasury on seeking wide input and thank you for the opportunity to do so. Our responses have been based on experience in the area and the available time, whilst still maintaining an active practice. Should you have any enquiries in respect of this matter, please contact Schon Condon or Gavin King or of this office on (02) 9893 9499.

Yours faithfully
Condon Associates
Forensic, Insolvency and Turnaround Practitioners

[redacted]

Schon G Condon RFD
Managing Principal

Annexure '**A**'

This annexure is to provide an example of the issues that may arise with ASIC revoking an Order

The external administrator request ASIC to issues orders to 5 entities that have received the benefit of what has been determined to be a "Creditor-defeating disposition".

Upon receipt of the Order from ASIC, 4 of the beneficiaries of the "Creditor-defeating disposition" pay the amounts that have been claimed pursuant to the ASIC Order.

The 5th beneficiary, whom is being supported by the party inducing the actions undertaken to give rise to the creditor-defeating dispositions, applies to the Court to have the Order set aside.

Due to this action, ASIC determines that it ought to revoke the other 4 Orders that have since been recovered by the external administrator.

The result of this is the 4 beneficiaries whom have paid the external administrator will now seek to have the Orders set aside on the basis that ASIC has revoked the 5th order. This will result in possible costs orders being made against the external administrator.

Ultimately this will lead the notices becoming ineffectual as an external administrator will be unwilling to take on the risk of receiving a personal costs order.