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Introduction

Background

1.1 On 13 October 2011 the Selection Committee referred the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and the Pay As You Go Withholding Non-compliance Tax Bill 2011 to the committee for inquiry and report.

1.2 The Bills were introduced by the Government into the House of Representatives earlier on the same day.

Purpose and overview of the Bills

1.3 There are four parts to the Bills:

- to provide the Commissioner of Taxation with discretion to disregard certain events that would otherwise trigger the assessment of certain income for a primary production trust;
- to clarify that the taxing point for the Petroleum Resource Rent Tax (PRRT) is when a product reaches its final form, rather than when it first chemically meets the definition of a marketable petroleum commodity;
- to extend the director penalty regime to make directors personally liable for their company's unpaid superannuation guarantee amounts; and

- to make minor consequential amendments to the taxation arrangements for gaseous fuels.

1.4 The second and third parts generated the most interest from stakeholders and the committee pursued these aspects in the inquiry.

Petroleum Resource Rent Tax

1.5 Schedule 2 of the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 amends the *Petroleum Resource Rent Tax Act 1953* (TAA 1953). It has two main effects, the first of which is to amend the definition of a marketable petroleum commodity as follows:

> (1) A marketable petroleum commodity is a product listed in subsection (2) that:
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> (a) is produced from petroleum for the purpose of:
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> (i) sale; or
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> (ii) use as a feedstock for conversion to another product (whether a product listed in subsection (2) or not); or
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> (iii) direct consumption as energy; and
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> (b) is in its final form for that purpose.
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> (2) The products are as follows:
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> (a) stabilised crude oil;
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> (b) sales gas;
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> (c) condensate;
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> (d) liquefied petroleum gas;
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> (e) ethane;
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> (f) any other product specified in regulations made for the purposes of this paragraph.
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> (3) However, a product cannot be a marketable petroleum commodity if it has been produced wholly or partly from a product that was a marketable petroleum commodity.

1.6 The Schedule's second main effect is to apply the definition back to the tax year commencing 1 July 1990.

1.7 Subsections (2) and (3) in the new definition are very similar to the current provisions. The new aspect to the definition is subsection (1), in particular the clause 'is in its final form for that purpose'. Petroleum companies can have a chain of production processes, commencing with drilling and extraction, but then also processing, where a product can be separated and filtered in order to meet the specifications for the market in which the company wishes to compete.

1.8 For example, a product might meet the chemical definition of being liquefied petroleum gas before being processed and might have a possible commercial demand. Subsection (1) makes it clear that a product becomes a marketable petroleum commodity when it reaches the state at which the company's operations are designed for it to be sold, used for energy by the company, or to be converted to another product. In other words, the definition depends on the commercial context of the project in question.

1.9 This definition is important because the term 'marketable petroleum commodity' is used in section 24 of the *Petroleum Resource Rent Tax Assessment Act 1987* (PRRTA Act), along with other terms such as an 'excluded commodity', to determine a company's assessable petroleum receipts. The PRRT is calculated as 40 per cent of a company's petroleum profits, which depend on its assessable petroleum receipts. If the point at which assessable petroleum receipts are calculated is earlier in the production process when the product is less valuable, this will reduce receipts and profits for tax purposes, and thus reducing the tax liability.

1.10 The current definition of a marketable petroleum commodity was considered by the Federal Court in *Esso Australia Resources Pty Ltd v The Commissioner for Taxation [2011] FCA 360*. The judgement was delivered in April this year. Esso (ExxonMobil) argued that the 'taxing point' occurs at the earliest stage when the product meets the relevant chemical composition, regardless of whether it would subject it to further processing for sale. The Court agreed with the Commissioner that the current definition implies the later taxing point and that this question must be decided in the context of the project as a whole. After analysing the Act, Justice Middleton stated, 'This points to an actual sale or "marketability" being a concept at the heart of the determination of liability under the PRRTA Act'.[1]

1.11 The Bill is seeking to confirm the Court's decision. The Explanatory Memorandum states that the Court's decision and the approach in the Bill confirm 'the long established application of the PRRT'. It also notes that Esso's interpretation would lead to greater uncertainty because a derived (or estimated) market value would needed to calculate the tax amount since the company is not seeking to sell the product at this point in the production process.[2]

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1 Esso Australia Resources Pty Ltd v The Commissioner for Taxation [2011] FCA 360, para 222.

2 The Hon. Wayne Swan MP, *Explanatory Memorandum* to the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and the Pay As You Go Withholding Non-compliance Tax Bill 2011, 2011, pp. 16-17.

1.12 At the Budget in May this year, the Government announced its intention to clarify the taxing point and entrench the decision in *Esso*. The Bill gives effect to this policy commitment.

Company directors and the superannuation guarantee

1.13 Schedule 3 of the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 amends the *Taxation Administration Act 1953* (TAA 1953). It does this by:

- extending the director penalty regime to make directors personally liable for their company's unpaid superannuation guarantee amounts;
- allowing the Commissioner of Taxation (Commissioner) to commence proceedings to recover director penalties three months after the company's due day where the company debt remains unpaid and unreported after the three months passes, without first issuing a director penalty notice; and
- in some instances making directors and their associates liable to pay as you go (PAYG) withholding non-compliance tax where the company has failed to pay amounts withheld to the Commissioner.

1.14 The tax on directors and their associates to give effect to denying their credits is imposed by the Pay As You Go Withholding Non-compliance Tax Bill 2011.

1.15 Schedule 3 will provide better protection to workers' entitlements to superannuation, further define the statutory obligations of company directors and enhance the deterrence of fraudulent phoenix activity.

1.16 The proposed amendments are designed to provide disincentives for directors to allow their companies to fail to meet their existing obligations, particularly obligations to employees. They do not introduce new obligations on the company but, rather, penalise company directors who fail to ensure that their companies meet their obligations under the existing director penalty scheme.

1.17 This scheme was introduced in 1993 to assist the Australian Taxation Office (ATO) to recover certain company liabilities. The director penalty regime replaced the Commissioner's priority that previously existed under insolvency law for certain amounts withheld (particularly from salary or wages), but not paid to the Commissioner. The director penalty regime was re-written into Division 269 in Schedule 1 to the TAA 1953 in 2010, with minimal policy change.

1.18 The regime ensures that directors cause their company to meet certain tax obligations or promptly put the company into liquidation or voluntary administration. This applies generally to directors of all non-complying companies, not simply phoenix companies.

1.19 The tax laws require companies to withhold amounts from certain payments they make, such as wages to employees and fees to directors. The withheld funds must be paid to the Commissioner or, where applicable, to pay estimates of those funds.

1.20 The director penalty regime has always made directors of non-compliant companies personally liable for the amount that the company should have paid, through imposition of a penalty.

1.21 While the existing director penalty regime makes directors liable to a penalty, at the end of the day the company is left with the responsibility to meet its obligation.

1.22 Furthermore, as the existing regime allows directors 21 days notice of the penalty before the Commissioner is able to commence proceedings to recover the liability, directors inclined to do so are free to extinguish their personal liability by placing the company into voluntary administration or liquidation within that notice period and before the Commissioner can sue to recover their personal liability. This often means that the full amount of PAYG withholding liabilities is never recovered.

1.23 To compound matters still further, company directors are currently able to claim PAYG withholding credits (for amounts withheld from payments to them by the company) in their individual tax returns, even when the company has failed to pay some or all of its PAYG withholding liability to the Commissioner.

1.24 It is also critical to note that while the director penalty regime addresses non-payment of PAYG withholding amounts to the Commissioner, non-payment of employee entitlements such as superannuation cannot be addressed through the regime. Thus, the Commonwealth has effectively established one standard for its debtors, while leaving other lawful creditors with less effective means of redress.[3]

3 Discussion drawn from the *Explanatory Memorandum* for the Tax Laws Amendment (2011 Measures No. 8) Bill 2011 and the Pay As You Go Withholding Non-compliance Tax Bill 2011.

Factual background

Petroleum Resource Rent Tax

1.25 The PRRT is a Commonwealth tax and applies to areas where the Commonwealth has jurisdiction, in particular the offshore areas outside the three nautical mile boundary. Up until the 1980s, all petroleum was taxed through a royalty and excise, or volume, basis.

1.26 This system had its weaknesses. For example, in order to encourage more oil exploration and extraction, the Government imposed lower tax rates for more recently discovered oilfields. Further, the levy did not take into account changing economic conditions. When oil prices were low, a fixed levy could potentially make oil production uneconomic and when oil prices were high, the nation missed the opportunity to participate in these gains.[4]

1.27 The PRRT is a profits-based tax. The Australian Petroleum Production and Exploration Association provided the following summary of how it works:

- it is assessed on a project basis;
- liability to pay PRRT is on a producer/company;
- it is assessed at a rate of 40 per cent;
- a liability is incurred when all allowable expenditures (including compounding) have been deducted from assessable receipts;
- assessable receipts include the amounts received from the sale of all petroleum;
- deductions include capital and operating costs that relate to the petroleum project, and are deductible in the year they are incurred; and
- undeducted expenditures are compounded forward at a variety of set rates depending on the nature of those expenditures.[5]

1.28 The *Petroleum Resource Rent Tax Assessment Act 1987* was effective from 15 January 1988. It applied retrospectively to exploration permits awarded on or after 1 July 1984, which relates back to the Government's formal announcement of the tax. Initially, it applied to all offshore areas except

4 Mr Craig Emerson, 'The More Oils Change, the More They Stay the Same' *The Australian*, 7 May 2010, p. 14; Mr Richard Webb, 'Crude Oil Excise and Royalties', Department of the Parliamentary Library, Research Note 29, 2000-01.

5 APPEA, *Submission 1*, p. 1.

for Bass Strait and the North West Shelf. Bass Strait became subject to the PRRT on 1 July 1990.[6]

1.29 The tax has several advantages over the previous levy. For example, the Government does not need to adjust tax rates to achieve certain economic outcomes or to take into account economic conditions. The tax amounts follow oil companies' ability to pay. Further, it encourages companies to more fully exploit available reserves because oil that is more costly to extract will attract lower rates of tax. In effect, the Government has accepted more risk through the PRRT, which has reduced risk for oil companies and led to a more secure supply of oil for the Australian market.

1.30 This feature of the tax was related to the decision to include Bass Strait within the PRRT in 1990. At the time, oil prices were very low, making it less attractive for Esso and BHP to maintain production with high fixed costs caused by a fixed levy. When Bass Strait left the volume system between 1990-91 and 1991-92, crude oil excise collections dropped from $1.3 billion to $64 million. PRRT revenues increased from $300 million to $876 million, which reduced tax on the joint venture by over $600 million at that time. However, this came with the possibility that taxes would increase if oil prices rose.[7]

1.31 Further, the PRRT, as a tax on profits, has no direct effect on the petrol price for consumers because it is absorbed by petrol companies. A levy, similar to other volume based taxes, would directly raise prices for consumers.[8]

1.32 The trigger for the Bills has been a long running court case between ExxonMobil and the Tax Office about the taxing point under the PRRT. The case commenced in 2004, following correspondence and discussions between the Bass Strait joint venturers and the Tax Office for the previous 10 years. The case concerns the tax liability for the Bass Strait joint venturers from 1990-91 to 2001-02, which were the relevant periods when the legal action commenced.

1.33 ExxonMobil stated in evidence that, the maximum refund to which they would be entitled in relation to the dispute between the years 1990-91 to

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6 Department of Resources, Energy and Tourism, 'The History of Petroleum Resource Rent Tax (PRRT)' <http://www.ret.gov.au/resources/enhancing/taxation/prrt/Pages/TheHistoryofPetroleumResourceRentTax(PRRT).aspx> viewed 17 October 2011.

7 Mr James O'Toole, Treasury, *Committee Hansard*, Canberra, 27 October 2011, p. 6; Mr Stuart Brown, ExxonMobil Australia, *Committee Hansard*, Canberra, 27 October 2011, p. 13.

8 Mr Richard Webb, 'Petroleum Resource Rent Tax (PRRT)' Department of the Parliamentary Library, Research Note 20, 2000-01.

2001-02 would be $323 million.[9] It appears that BHP's liability would be for a comparable amount.

1.34 In April this year, the Tax Office won a decision in the Federal Court with a single judge. Justice Middleton found that the definition of a 'marketable petroleum commodity' depended on the commercial context of a project, rather than when it met the chemical composition of sales gas, liquefied petroleum gas, stabilised crude oil, or any of the other compounds listed in the legislation. This implied a higher value of the product at the taxing point, which was consistent with the tax payments made by ExxonMobil and BHP since 1990-91.

1.35 In the May Budget, the Government announced that it would legislate to confirm the Court's decision. The Budget Papers state:

> The Government will amend the tax law to provide greater certainty around how the taxing point is calculated for the purposes of the Petroleum Resource Rent Tax (PRRT), with effect from 1 July 1990. This measure will confirm existing application of the PRRT in relation to the taxing point and will provide greater certainty for PRRT taxpayers.
>
> The location of the taxing point within a PRRT project is used in determining PRRT liabilities, and was the central issue recently considered by the Federal Court in *Esso Australia Resources Pty Ltd v The Commissioner of Taxation*.
>
> The amendments will provide further statutory support for the Court's judgment, and will be consistent with the established application of the PRRT law. As such, this measure has no revenue impact.[10]

1.36 ExxonMobil has stated that it would prefer to exhaust its legal options in the court system. A media report after the Budget announcement stated:

> ExxonMobil said it was premature of the Government to change the law given it had yet to decide whether to appeal against the Court's decision ...

9 Mr Stuart Brown, ExxonMobil, *Committee Hansard*, Canberra, 27 October 2011, p. 10.

10 The Hon. Wayne Swan MP and Senator the Hon. Penny Wong, *Budget Measures, Budget Paper No. 2, 2011-12*, 10 May 2011, p. 40.

> 'Obviously we are concerned about the timing of this announcement given that legal action is ongoing ... and we are reserving all of our rights in relation to this matter.'[11]

1.37 ExxonMobil has appealed the Federal Court's decision. The Federal Court's website lists a hearing in the Full Federal Court for the week commencing 7 November 2011.[12]

Phoenix activity

Introduction

1.38 So called phoenix activity refers to the actions of company directors or management who have deliberately sought to avoid paying liabilities, including taxation liabilities wages, superannuation and leave entitlements and a variety of other responsibilities, such as supplier accounts, through the use of contrived company liquidation.

1.39 Once formally liquidated, such companies resume trading through a new company structure controlled by the same person or group of individuals. Alternately, phoenix activity may be described as the use of the process of sequential company registration, liquidation and re-registration as a means of corporate fraud or tax evasion. A phoenix company may even be used to intentionally accumulate debts that the directors never intended to repay.

1.40 On occasion, phoenix operators may use family members or other associates to gain further benefits, such as inflated incomes or credit claims. There are cases where a family member or associate of a phoenix company director may be the commanding or controlling agent behind the company.

1.41 Phoenix activity is conducted for personal enrichment or gaining an unfair competitive advantage. It invariably constitutes a gross and unprincipled abuse of the corporate form and the long established privilege of limited liability which is of essential importance to our economic system. It undermines the integrity of corporate regulation. It deprives the Commonwealth of revenue. It reduces public trust in the economic system, lowers the reputation of business and potentially deters investors.

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11 Mr Perry Williams, 'ExxonMobil comes out swinging' *The Australian Financial Review*, 12 May 2011, p. 19.

12 Federal Court of Australia, 'Appeals and Related Actions in the Federal Court', <http://www.fedcourt.gov.au/ctlists/ctlists_appeals.html> viewed 17 October 2011.

It also confers an unlawful benefit on those who evade the law and a disadvantage to those who comply with it.

1.42 In cases where phoenix activity involves the evasion of superannuation liabilities, it deprives workers of their financial security in old age, potentially contributes towards the creation of otherwise unnecessary welfare dependence and frustrates the efforts of successive governments to ensure the highest possible standard of living for Australians in their retirement.

1.43 The failure of phoenix companies to pay employees' entitlements or tax liabilities enables them to offer lower prices for goods and services. They can either reinvest money that compliant businesses would have to allocate to tax and superannuation payments or simply disburse this as profit or wages to the principals behind the phoenix scheme.

Reports and reviews

1.44 Almost a decade ago, the Royal Commission into the Building and Construction Commission (The Cole Commission) was concerned about the frequency of phoenix activity in the building industry. The Commission made a number of recommendations addressing this issue, including that:

> The Commonwealth, after consultation with the Australian Securities and Investments Commission, consider the need for an increase in the maximum penalties provided in the *Corporations Act 2001(C'wth)* for offences that may be associated with fraudulent phoenix company activity.[13]

1.45 The Commission also called on the Commonwealth to consider the need to amend existing legislation in order to disqualify company directors guilty of fraudulent phoenix activity.[14]

1.46 Several years ago, Treasury estimated that phoenix activity cost the federal revenue about $600 million per annum.[15]

1.47 The subject of phoenix activity has been pursued by Parliament on a number of occasions in recent years. For example, the Joint Committee on

13 *Final Report of the Royal Commission into the Building and Construction Commission* (2003), Recommendation 108," Summary of Findings and Recommendations", p. 110.

14 *Final Report of the Royal Commission into the Building and Construction Commission* (2003), Recommendation 109," Summary of Findings and Recommendations", p. 111.

15 Mr Nick Sherry (then Assistant Treasurer) *Crackdown on Phoenix Activity*, a press release of 13 November, 2009.

Public Accounts and Audit were advised in 2009 by the ATO that the incidence of phoenix activity was increasing: since 2008 the ATO employer obligations program had identified 6,013 companies as being a high-risk of defaulting on their obligations; of these over 4,600 had not complied with their PAYG withholding obligations and almost 3,000 had not met their super guarantee obligations.[16]

1.48 At that time the ATO explained the difficulty of prosecution because:

> ...in the early-2000s we obtained a number of high profile successful prosecutions, but after a few years we found that the penalties that were imposed on people who were successfully prosecuted became ineffective. We went from people getting custodial sentences to people getting home detention, which included a provision that allowed them out during daylight hours to conduct business, so there was essentially no penalty. I think that led to a loss of confidence and a loss of interest, to some extent. When you are dealing with the court system and the Director of Public Prosecutions, they have an enormous caseload of very serious cases. It is hard to get cases up when their assessment is that the penalty is likely to be a slap on the wrist.[17]

1.49 In March 2010 the Inspector-General of Taxation (IGT) published a report, *The Review into the ATO's administration of the Superannuation Guarantee Charge*. In this report he found that insolvent employers were responsible for approximately $600.8 million owed to the ATO under the superannuation guarantee charge (SGC) and that most of this debt had been written-off as lost employee retirement savings.[18]

1.50 The report also found that the groups most effected by the problem were employees of micro businesses, contracted and casual employees, younger employees; and employees in particular sectors — the arts and recreation services; the transport, postal and warehousing sectors; accommodation and food services; and the agriculture, forestry and fishing sector. The mean salary and wages across each of these high risk segments is less than $30,000 a year, which indicated that those most at risk of having

16 Mr Mark Konza, Deputy Commissioner, Small and Medium Enterprises, ATO, *Joint Committee of Public Account and Audit, Biannual Hearing with the Commissioner of Taxation: Hansard*, Friday 23 October 2009 pp. 8-9 and Mr Bruce Quigley, Second Commissioner, ATO, *ibid*, pp. 26-27.

17 Mr Mark Konza, Deputy Commissioner, Small and Medium Enterprises, ATO, *Joint Committee of Public Account and Audit, Biannual Hearing with the Commissioner of Taxation: Hansard*, 23 October 2009, Friday 23 October 2009, p. 24.

18 The Inspector-General of Taxation, *The Review into the ATO's administration of the Superannuation Guarantee Charge: A report to the Assistant Treasurer,* March 2010, p. 3.

insufficient superannuation contributed on their behalf by employers were low-income employees.[19]

1.51 The IGT stated that he had received many submissions on the growing practice of employers misclassifying workers as subcontractors, rather than employees, to avoid paying superannuation.[20] In addition, over 70 per cent of complaints concerning superannuation guarantee obligations come from ex-employees. There was also anecdotal evidence to suggest that many employees are concerned that, if they query their employer about their superannuation guarantee entitlement or lodge a complaint with the ATO, then they could either lose their job or no longer be given work. [21] Finally, the IGT noted that:

> A delay in triggering ATO audit activity significantly increases the likelihood of non-payment of SGC debt (requiring more costly debt recovery action) and irrecoverability through insolvency. It also hampers the ATO's and government's efforts to maintain a level playing field amongst employers and ensure that compliant employers do not face a financial disadvantage against non-compliant competitors.[22]

1.52 The IGT recommended that the Government consider making company directors personally liable for the unpaid superannuation guarantee charge liabilities of their companies. [23]

Government consultations

1.53 On 14 November 2009 the Government released a proposals paper containing options to address such fraudulent phoenix activity.[24] The paper outlined a number of possible amendments to the taxation and corporations law to address the problem. These included the following actions in relation to taxation law:

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19 The IGT, *The Review into the ATO's administration of the Superannuation Guarantee Charge,* March 2010, p. 4.

20 The IGT, *The Review into the ATO's administration of the Superannuation Guarantee Charge,* March 2010, p. 4.

21 The IGT, *The Review into the ATO's administration of the Superannuation Guarantee Charge,* March 2010, p. 5.

22 The IGT, *The Review into the ATO's administration of the Superannuation Guarantee Charge,* March 2010, p. 6.

23 The IGT, *The Review into the ATO's administration of the Superannuation Guarantee Charge,* March 2010, p. 14.

24 See *Action Against Fraudulent Phoenix Activity*, November 2009 and is available at: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1647>.

- amending the director penalty regime to remove the ability of directors engaged in fraudulent phoenix activity to avoid personal liability for Pay As You Go (Withholding) (PAYG(W)) liabilities by placing the company into voluntary administration or liquidating the company;
- expanding the director penalty regime Expand the director penalty regime to apply to superannuation guarantee (SG) liabilities and other taxation liabilities such as indirect tax liabilities and a company's own income tax liability;
- amending the promoter penalty regime to ensure that the promoter penalty regime is able to target those individuals promoting fraudulent phoenix activity;
- expanding anti-avoidance provisions in the taxation law (either through an expansion of the existing general anti-avoidance rule (GAAR) or through the creation of a specific provision) to effectively negate any taxation benefit derived from fraudulent phoenix activity;
- reinstating the 'failure to remit' offence that would make it an offence for an entity not to remit the required PAYG(W) amounts;
- denying directors of companies (and potentially close relatives) from being able to access PAYG(W) credits in relation to their own income where amounts withheld have not been remitted (to the ATO) by the company;
- introducing an offence for claiming non-remitted PAYG(W) credits by making it an offence for directors to claim credits in relation to their own income for PAYG(W) amounts that have not been remitted by the company of which they are a director; and
- providing the Commissioner of Taxation with the discretion to require a company to provide an appropriate bond (supported by sufficient penalties) where it is reasonable to expect that the company would be unable to meet its tax obligations and/or engage in fraudulent phoenix activity.

1.54 The paper also identified the following options in the corporations law:

- expanding the scope for disqualification of directors by giving a Court or the Australian Securities and Investment Commission (ASIC) a discretion to disqualify a person from being a director if the relevant company has been wound up and the conduct of the person, as a director of that company, makes them unfit to be concerned in the management of a company;

- restricting the use of a similar name or trading style by successor company and making directors personally liable for the debts of a liquidated company in circumstances where a 'new' company adopts the same or similar name as its previous incarnation; and
- adopting the doctrine of inadequate capitalisation by allowing the corporate veil to be lifted where a company sets up a subsidiary with insufficient capital to meet the debts that could reasonably be expected.

1.55 Treasury received 28 submissions, 2 of which were confidential.

1.56 In their submission the Australian Institute of Company Directors supported the case for reform in relation to companies that fail to pass on PAYG deductions to the ATO. Apart from that, they did not believe that there was strong case for additional legislation. They opposed ASIC being awarded any additional powers to disqualify a director beyond that which it already has under section 206F of the Corporations Act. They wanted greater clarity concerning the use of similar names or trading style by successor companies and claimed that no case had been made for introducing the concept of 'inadequate capitalisation'.[25]

1.57 In their submission the Corporations Law Committee of the Business Law Section of the Law Council of Australia:

- strongly opposed the expansion of ASIC's power to disqualify a person from managing corporations by administrative action;
- strongly opposed the adoption of the doctrine of adequate capitalisation;
- stated that there was simply no need to extend the director penalty regime in the taxation law beyond PAYG deductions.[26]

1.58 The Insolvency and Reconstruction Law Committee of the Business Law Section of the Law Council of Australia took issue with the definitions involved in criminalising phoenix activity. They argued that not all phoenix activity was necessarily immoral or unethical:

> ...if one defines phoenix activity merely as the phenomenon by which a person or persons who have been controlling company A carry on the same or substantially the same business through

25 The Australian Institute of Company Directors, submission to the Treasury, December 2009. All of the submissions that were not confidential are available at: <http://www.treasury.gov.au/contentitem.asp?ContentID=1892&NavID=037>.

26 Law Council of Australia (Corporations Law Committee), submission to Treasury, November 2009, pp. 1-2.

> company B, often with the same or substantially the same name, following the demise of company A...[there will be] circumstances where this might happen quite legitimately – eg where a director buys the business, including the right to use the name, from the liquidator. [27]

1.59 The Insolvency and Reconstruction Law Committee argued that the concept could be defined by way of the intention of the parties or by way of the consequences. They suggested that sections 216-217 of the UK's *Insolvency Act 1986,* which restricts the re-use of a company's name after liquidation, might be relevant. They also suggested that thought needed to be given to protect the interests of innocent directors caught up unwittingly in phoenix activities.

1.60 The Committee argued against any amendment to the director penalty provisions which would make a company director automatically liable for unremitted withholding taxes 3 months (or any other period) after the date they should have been remitted. They were concerned that such changes might catch many directors not engaged in phoenix activity of any sort who may, for example, be reasonably engaged in proper attempts to restructure a company's affairs. In their view, such an amendment would not target the issue of phoenix activity with any precision. They also believed that the proposal would provide the ATO with an unwarranted advantage over other creditors.

1.61 In their submission, the Taxation Law Committee of the Law Council of Australia took the general view that existing legal remedies against fraud were sufficient to resolve the problem of fraudulent phoenix activity, but were not used as often as they should be:

> 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.[28]

27 Law Council of Australia (Insolvency and Reconstruction Law Committee), submission to the Treasury, March 2010, p. 2.

28 Law Council of Australia (Taxation Law Committee), submission to the Treasury, February 2010, p. 3.

Committee objectives and scope

1.62 The objective of the inquiry is to investigate the adequacy of both Bills in achieving their various policy objectives and, where possible, identify any unintended consequences.

Conduct of the inquiry

1.63 Details of the inquiry were placed on the committee's website. A media release announcing the inquiry and seeking submissions was issued on Wednesday 19 October 2011.

1.64 Eighteen submissions and seven exhibits were received. These are listed at Appendix A.

1.65 A public hearing was held in Canberra on Thursday 27 October 2011. A list of the witnesses who appeared at the hearing is available at Appendix B. The submissions and transcript of evidence were placed on the committee's website at http://www.aph.gov.au/house/committee/economics/index.htm.