Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 3-5 June 2008

Question: bet 119

Topic: **Phoenix Companies**

Hansard Page: **E117**

Senator Fierravanti-Wells asked:

Senator FIERRAVANTI-WELLS—What are the trends in relation to phoenix companies? From what you have said, the trend seems to be downwards. Do I read that into what you are saying?
Mr Cooper—I do not have specific phoenix—
Senator FIERRAVANTI-WELLS—If you could just take that on notice.
Mr Cooper—I will take that one on notice.

Answer:

Phoenix activity does not have a statutory or legal definition. However, phoenix activity can be regarded as typically involving:
1. The transfer of assets (such as the business) of a company (the 'previous company') to a subsequent company in circumstances where the previous company:
- was unable to pay its debts; and
- may have been conducted in a manner so as to deprive unsecured creditors equal access to its assets; and

2. There is a connection between the management or shareholding of the previous company and the subsequent company.

Phoenix activity trends are difficult to measure owing to a lack of clear measurements on the extent of the "phoenix" cost to the economy. We understand from the ATO that the phoenix problem is significant however measurement has been difficult.

The extent of phoenix activity is potentially considerable because the activity almost always incorporates avoidance of statutory tax debts and employee superannuation contributions. Phoenix also competitively disadvantages honest businesses.

We have worked with the ATO Phoenix Trading Unit over the last 12 months, with a particular focus on how to reliably measure the activity. At our last liaison meeting representatives of ASIC's and the ATO Economic units attended to further progress a specific approach around measurement of the estimated cost to the economy.

In the last two years, ASIC has disqualified 139 directors. 85 of these disqualifications were as a result of Assetless Administration Funded reports (more than one report may have been used for the disqualification). Directors banned that have been involved in two or more failed companies will not be able to hold a directorship during the period of the banning. This reduces the possibility of phoenix activity directly involving these directors. We believe the increasing number of banning actions have a deterrence impact to those that are contemplating entering into a phoenix type transaction.

There is no specific provision dealing with an offence for phoenix. In addition to banning directors we are focusing on facilitators and compliant insolvency practitioners. Enforcement action against facilitators will have a deterrence impact and should reduce the incidence of phoenix activity. (For a recent example see media release 08-110).