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27 October 2017

Mr James Mason
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email Only

By Email: phoenixing@treasury.gov.au

Dear Mr Mason

Re: Combatting Illegal Phoenixing

We refer to the law reform proposals (set out in the consultation paper) which have the aim of deterring and disrupting phoenix activity.

We have considered the proposals and concur with the submissions of the Australian Restructuring Insolvency & Turnaround Association ("ARITA").

In particular we concur with the key points set out in ARITA's submissions:

- There already exist a variety of laws and penalties for transactions, acts and omissions which either constitute or facilitate illegal phoenix activity. Rather than creating new laws, the present laws need enforcement and stiffer penalties.
- There is already a system for designating 'high risk' operators of companies: the disqualification regime in Part 2D.6 of the Corporations Act 2001 (Cth) ('the Act'). That regime should be enforced more rigorously to disqualify high risk individuals from managing corporations.
- Registered liquidators are part of the solution to addressing illegal phoenix activity. Apart from the many statutory reports they provide to ASIC which identify misconduct, which generally are not acted upon, liquidators are often hampered by inadequate funding and a lack of documentary evidence (by reason of breaches of laws relating to books and records) which means that phoenix activity often passes unchallenged.
- We support the introduction of an administrative recovery notice regime in corporate liquidations (similar to the present s 139ZQ of the Bankruptcy Act 1966 (Cth) ('Bankruptcy Act'), which will provide a more expedient and cost-effective manner of pursuing voidable transactions, including those transactions which reflect illegal phoenix activity (eg, uncommercial transactions).
- We support measures to prevent miscreant directors abandoning companies or 'gaming the system' by backdating resignation notices. We support attaching the responsibility for

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notification of resignation of directorships to the directors themselves rather than merely the company concerned.

- A cab rank or 'roster' system for the appointment of external administrators was rejected by the Harmer Report and is fraught with issues of practicality, timeliness and cost. A cab rank appointment system is an anti-competitive measure which sits in tension with recent law reforms introduced by the Insolvency Law Reform Act 2016 (Cth) ('ILRA') enhancing the rights of creditors to replace external administrators appointed under a voluntary system.
- We support the limited exclusion of related creditor voting rights on resolutions for the removal and replacement of an external administrator, which will ensure the new and improved ILRA rights of creditors to replace external administrators work better and as intended.
- ARITA does not support the notion of a Government liquidator to conduct external administrations. The existing profession of private, registered liquidators are better placed – in terms of efficiency, competence, expertise and costs – to conduct external administrations. A Government liquidator would also confront complications borne from the fact that the Commonwealth Government is often a major creditor in external administrations.
- Rather than creating new administrative (recurring) expenditure through a cab rank system or Government liquidator, Government funding and resources should be devoted to enforcement of present laws and providing liquidators of assetless companies with the funding required to pursue illegal phoenix activity.
- We are concerned by proposals which seek to elevate the pre-liquidation rights and status of Government creditors (principally the Australian Taxation Office) above those enjoyed by other general unsecured creditors.

We also set out below our ratings of how effective we believe each proposed measure would operate to deter and disrupt illegal phoenix activity:

Measure	Question	Rating (/10)
Phoenix hotline	1	2
Phoenixing offence	6	2
Empowering liquidators to issue, or apply for the issue of, an administrative recovery notice	6	8
Designating breaches of existing provisions as phoenix offences	20	1
Limiting backdating of director appointments and resignations	22	9
Limiting ability of a sole director to resign from office	28	9
Restrictions on voting rights of related creditors	34	9
Promoter Penalties	48	1
Extending the Director Penalty Notice regime to GST	55	10
Security deposits to ATO	59	4
Targeting higher risk entities	68	2



Measure	Question	Rating (/10)
Cab rank system applying only to High Risk Phoenix Operators	74	1
Introduction of a Government Liquidator	81	1
Removing the 21 day waiting period for DPN	86	1
Providing the ATO with the power to retain refunds	91	2

Should you have any queries please contact the writer.

Yours faithfully
PILOT PARTNERS

NIGEL MARKEY
DIRECTOR