



Construction, Forestry, Maritime, Mining and Energy
Union submission into:

Modernising Business Registers and Director Identification Numbers legislation

29 October 2018

CFMEU

1. The Construction, Forestry, Maritime, Mining and Energy Union (**CFMEU**) represents over 120,000 people in a range of industries including construction, mining, manufacturing, forestry, maritime, furniture and building products and power generation. Our membership includes many self-employed people and small business operators, as well as tens of thousands of wage earners / PAYG taxpayers.
2. This submission is made in response to the draft Bills that are aimed at modernising business registers and introducing Director Identification Numbers (**DIN**) legislation.

Phoenix behavior in the construction industries

3. Deliberate and pre-meditated corporate insolvencies are routinely used in the construction industry to defeat creditors and avoid the remittance of tax, and to avoid obligations relating to workers' entitlements. The CFMEU has been a long-time advocate for reform designed to address the serious problems associated with phoenixing behaviour, as well as other features of the 'Black Economy' which are endemic to the industry. These include:
 - a. cash-in-hand payments;
 - b. sham contracting and the abuse of Australian Business Numbers (**ABNs**);
 - c. non-reporting or under-reporting of income;
 - d. the use of interposed entities to side-step the taxation system;
 - e. poor or false record-keeping; and
 - f. the underpayment and exploitation of workers through dubious labour hire and other employment arrangements.
4. It is important to note, from the outset, that any serious reform in this area must be part of an ongoing inter-agency approach, including the adoption of measures identified by the Phoenix and Black Economy Taskforces. To this end, we refer you to the CFMEU's previous submissions:
 - a. to Treasury, in relation to proposed reforms to combat illegal phoenix activity dated 27 September 2018;
 - b. to Treasury, in relation to the consultation paper relating to the re-design of the Australian Business Number (**ABN**) system, dated 31 August 2018; and
 - c. to the Black Economy Taskforce, dated August 2017.

Modernising Business Registers

5. The consolidation of the 34 existing registers maintained by ASIC, and the Australian Business Register maintained by the ATO, would appear to be a constructive reform. However, the CFMEU shares the ACTU's concerns in relation to any broader plan to privatise a consolidated and centralised register. While not explicitly foreshadowed in the draft material released by Treasury, any proposal to privatise a consolidated register should be strongly resisted. We join the ACTU in inviting the Government to make a firm commitment to retaining the registers in public hands.

6. Further, if the draft legislation is to achieve its public policy aim to combat illegal phoenix activity, then public access to the consolidated register is also essential. It should be easily available online, and for little or no charge. It is unjustifiable that, at the moment, there does not appear to be a publicly available search on individuals and which companies they hold directorships in; this must change.
7. We note that the proposed consolidation would incorporate the Australian Business Register pursuant to s.24 of the *Australian Business Number Act*. We have previously made submissions on the re-design of the ABN system and we repeat our recommendations as well as those in the CFMEU's August 2017 submission to the Black Economy Taskforce. In particular, and at the least, the process for issuing ABNs needs to be tightened. To this end:
 - there should be minimum mandatory forms of personal identification and documentation required, when an applicant seeks to obtain an ABN, which demonstrates the nature of the commercial undertaking it is proposed would be associated with the ABN. Consideration should be given to excluding certain further categories of persons from the on-line ABN application process, such as certain categories of visa holders;
 - the ATO (or relevant regulatory agency) should audit multiple ABN holders, issue a 'show cause' letter and initiate a mandatory cancellation policy (after 28 days) where the ABN holder is unable to substantiate that the number is associated with a genuine commercial enterprise;
 - the ATO (or relevant regulatory agency) should compile a register of users of incorrect ABNs in the construction industry (the 'Bunnings' ABN users) using data obtained from the TPRS and issue 'warning letters' to those users. Further, any person appearing on that register and who has been found to have incorrectly used a 'Bunnings' ABN or similar, should be required to demonstrate through the provision of appropriate documentation to a dedicated ATO ABN unit that they conduct a genuine commercial enterprise before any further ABN is issued;
 - existing ABN holders should be required to regularly verify, by declaration attached to their tax return, that they continue to carry out a commercial enterprise;
 - the penalties for making false declarations in order to obtain an ABN should be substantially increased for both individuals and their advisers; and
 - inactive ABN holders should be given 28 days in which to cancel or justify the continuation of the ABN.
8. We note that these matters may be affected by the proposed data standards contemplated by the legislation, which are not detailed. Our concerns in relation to the data standards relevant to the proposed DIN system is outlined below.

Director Identification Numbers

9. The introduction of DINs is a crucial element of the wider reform that is necessary to ensure the identification, monitoring and tracking of phoenix operators in the construction industries in particular, and elsewhere. If implemented properly, the introduction and regulation of DINs should:
 - allow regulators such as ASIC and the ATO to more easily identify and track phoenix activity;
 - assist unions and other service providers (such as the Industry Funds Credit Control) in the early identification of suspicious phoenix activity; and
 - aid in facilitating other proposed measures arising from the Black Economy Taskforce report and Treasury's proposed reforms to combat illegal phoenix activity.
10. However, the lack of detail regarding the proposed disclosure framework and data standards in the exposure materials (particularly in relation to how a person's identity is to be established, and how the registrar may check and validate the accuracy of records) is concerning.
11. Any success of the proposed legislation will rely heavily on the vigour of the data standards and disclosure framework that are adopted. The verification of director's identities, the ability to track historical behaviour against the individual, and the transparent availability of this information is absolutely essential.
12. In order to ensure the identity and traceability of Directors, applications for DINs should:
 - require minimum mandatory forms of personal identification and documentation, including the *mandatory* provision of Tax File Numbers (subject to the current rules limiting the use and disclosure of tax file information contained in the *Taxation Administration Act 1953*);
 - ensure that directors are 'fit and proper', including by reference to the *ongoing*, mandatory and accurate disclosure of:
 - ownership or directorships of previous companies that have entered into liquidation or external administration;
 - adverse administrator's reports following an insolvency event;
 - directorship disqualifications; and
 - outstanding court or tribunal orders against the applicant or any entity owned/operated by the applicant.

13. In order to ensure the integrity and transparency of the regime, and to assist in the protection of vulnerable workers, information provided in relation to the second category above should also be publicly available via the proposed consolidated register.
14. We note that the new law provides the registrar with the ability to cancel a DIN that has been given to a person if the registrar has given the person another DIN. The cancellation of a DIN, and an ability to re-apply, would significantly undermine the potential benefits of the proposed reform by preventing the tracking of historical behaviour. The registrar should have no discretion on this regard. A DIN should be for life.
15. There should also be strict and specific offences incorporated into the legislation to ensure that accurate information is provided not only at the point of an application for a DIN, but also following insolvency events and adverse administrators reports. To this end, the legislation would benefit from the inclusion of strong and strict penalty provisions rather than mere reliance on existing Criminal Code provisions relating to the provision of false information to the Commonwealth.
16. We note that it is a defence to the requirement that directors apply for a DIN if a director is appointed without their knowledge. While we appreciate that s201D of the *Corporations Act* requires a person to consent to being a director, legislative reform would be strengthened by the provision of a specific offences which address the underlying conduct associated with the installation of 'straw' directors. That is, the use of the defence should be coupled with access to offences and penalties directed towards outgoing directors, as well as other officers of the corporation who actively facilitate such conduct, which should include:
 - appointing directors without their knowledge;
 - appointing a directors who do not exist; and
 - excluding directors from decision-making processes or from obtaining information necessary to properly engage in decision-making processes.
17. As with any regulatory measure, it is also vitally important that the relevant authority is properly resourced so as to be able to actively audit DINs, to ensure that no individual holds multiple DINs, and to ensure the accuracy of information provided. We have previously criticised ASIC's ongoing failure to bring prosecutions under the current anti-phoenixing laws, and continue to maintain that ASIC needs to take a more active and prominent enforcement role, including by running high-profile prosecutions and publicising them extensively. In the absence of concerted, well-funded enforcement activity, our concern is that these and other draft laws designed to address phoenix activity will be significantly undermined, or rendered entirely nugatory.
18. We also support recommendations of the ACTU, particularly those to the effect that:
 - the proposed 15 month period for existing directors to transition to the new system seems excessive. Given the underlying public policy concerns, it should be not longer than 6 months;

- access to the DIN register should be open and free of charge, with protections against the future impost of fees. Free public access is necessary in order to provide maximum transparency to aid unions, the public and enforcement authorities in promoting corporate accountability and to guard against phoenixing behaviour; and
- privacy concerns on the part of directors should not be used as a screen behind which phoenix operators can hide. Hence, the disclosure framework and proposed data standards should ensure that sufficient information is made available to the public to identify registered directors.

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