

GOVERNANCE INSTITUTE PROPOSAL TO REMOVE DIRECTOR INFORMATION

TOP LINES:

- The Productivity Commission recommended in its draft report the introduction of a Director Identification Number, but not the removal of personal director information from the ASIC register, as proposed by the Governance Institute of Australia.
- The Government will provide its formal response to the Commission's final report after it is released.
- The Government is also undertaking a competitive tender process to market test the capacity of a private sector provider to upgrade and operate the ASIC Registry.
- As the Government is in the middle of the tender process, I cannot comment any further in relation to the ASIC Registry tender process.

KEY FACTS AND FIGURES

- In 2014-15, there were 55.3 million company register searches, of which 4.1 million (7.4%) were paid searches. Director information is only available in paid searches.
- ASIC have advised that within the last three years, there have been five instances of alleged fraud from information on the ASIC register.

KEY QUOTE:

- 'What Governance Institute is calling for is for ASIC to issue directors a unique director identity number that is linked to the name of that director. And we will continue to support any proposal denying public access to the private address of directors' - Governance Institute of Australia Press Release dated 10 July 2015.
- "Directors and officers are required by law to provide a degree of personal information and that's absolutely appropriate for the regulator to have that information, but if the registry business is privatised that information cannot and should not be privatised" – Judith Fox, national policy director of the Governance Institute as reported in the Australian Financial Review 13 May 2015.
- 'As journalists who depend on the Australian Securities and Investments Commission's database of companies, shareholders and directors to do our work we urge you to reject a misguided and wrong-headed proposal to remove important information from the public domain' - Letter from journalists to Assistant Treasurer dated 13 July 2015.

BACKGROUND:

- The Governance Institute (the Institute) wrote to Treasury on 6 January 2016 proposing that the Australian Securities and Investments Commission issue officeholders with a unique identification number, while removing currently available information such as the date of birth and residential address.
- The Institute is concerned that the availability of the information on a public register exposes directors to potential identity fraud and heightens the risk to personal safety.
- The Institute re-iterated its views in its submission to the Productivity Commission inquiry 'Business Set-up, Transfer and Closure' on 2 July 2015.
 - The Productivity Commission in its draft report recommended the introduction of a Director Identification Number. The Commission considers that a DIN would enable better tracking of directors of failed companies and prevent the use of fictitious identities.
 - The Commission's final report is expected to be released on 30 September 2015. The Government is required to respond within 25 sittings days of the release date.
- Members of the media, including the Media, Entertainment & Arts Alliance wrote to the Assistant Treasurer on 13 July 2015, opposing the Institute's proposal. Journalists use registry information to verify and cross-reference information in the course of their investigative work.
- The Institute has stated that if the registry business is privatised, directors' personal information cannot and should not be privatised.
 - As the information is presently public, there are no concerns with permitting a private sector operator to manage that information.
- Consistent with previous processes, the Registry tender process will be conducted to the highest standards of probity and accountability.
 - To comply with your probity obligations, you should not disclose any confidential information in relation to the Registry tender process.

Confidential information

- The Registry process will not change policy settings with respect to directors' personal information (**not public**).
 - The Government will retain flexibility to change policy settings in relation to the Register, including the contents on the Register, if a private sector operator is appointed.

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TREASURY MINISTERIAL BRIEF

PDR No: MB16-000375

30 September 2016

Minister for Revenue and Financial Services cc: Treasurer

STEPS TAKEN BY NEW ZEALAND TO STOP PHOENIX COMPANIES

Timing: Your office requested briefing by 30 September 2016.

KEY POINTS

- You, through your office, requested briefing on steps being taken by New Zealand to address illegal phoenix activity through the introduction of Director Identity Numbers (DINs).
- On 18 November 2015, the New Zealand Government established the Insolvency Working Group, a panel of experts tasked with examining, and providing independent advice on, aspects of corporate insolvency law. Their first report, *Review of Corporate Insolvency Law* (NZ Report), was released for public consultation on 25 August 2016.
- The NZ Report recommends, among other things, the introduction of DINs. The recommendation is based on Recommendation 15.6 of the Australian Productivity Commission's report, *Business Set-up, Transfer and Closure* (PC Report).
- DINs, as envisaged in both the NZ Report and the PC Report, are publicly searchable, unique identification numbers to be allocated to existing and future directors after a proof of identity process.
- While introducing DINs might have some benefits, such as reducing the problem of fictitious company directorships and improving the data available to the Australian Taxation Office (ATO) and the Australian Securities and Investments Commission (ASIC), it would also increase the regulatory burden involved in appointing directors.
 - Stakeholder views are noted at [Additional Information](#).
- On 22 September 2016, the Minister for Small Business wrote to you seeking your agreement to the Government's response to the PC Report. The response notes the recommendation to introduce DINs and that the Government will give this proposal further consideration as part of its ongoing work on insolvency reforms (MS16-002091 refers).
- DINs will be considered as part of Treasury's work with the Phoenix Taskforce to identify potential administrative and law reform measures addressing abusive phoenixing (MS16-002195 refers).

s.22(1)(a)(ii)

Contact Officer: s.22(1)(a)(ii)

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Consultation: Small Business Policy Division.

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ADDITIONAL INFORMATION

Phoenixing

- Illegal phoenix activity involves the intentional transfer of assets from an indebted company to a new company to avoid paying creditors, tax or employee entitlements. Those affected by illegal phoenix activity include employees of the original failed company, other businesses that are owed money because they have supplied goods and services and statutory bodies like the ATO. It also impacts those businesses competing with phoenix companies.
- The PC Report notes that the costs of illegal phoenix activity have been estimated to range from nearly \$1.8 billion to nearly \$3.2 billion per annum. However, as the PC Report acknowledges, the prevalence and impact of phoenix activity are difficult to determine.
 - There is no reliable data on the costs of illegal phoenixing.

Director Identity Numbers

- The NZ Report does not provide much detail on how DINs might work. It cites the PC Report, which has a more detailed outline of the potential operation of DINs.
- Under the PC Report recommendation, an individual would obtain a DIN from ASIC through an online form when they first become a company director. The individual would be required to submit 100 points of identification, similar to the requirements for opening a bank account.
- Directors would be required to provide DINs at the time of a company's registration. For an existing company, directors' DINs would have to be provided to ASIC as a change of company details on the annual review date for the company.
- The PC Report recommends that DINs be introduced as an additional requirement, with no lessening of the existing requirements for recording and disclosure of director information.
 - This is in contrast to a previous proposal by the Governance Institute of Australia to introduce DINs with the concurrent removal of the requirement for ASIC to publicly disclose directors' personal information.

: s.47C(1), s.47E(d)


Current disclosure requirements

- Under the *Corporations Act 2001*, companies must inform ASIC of their directors' current and former given and family names, places and dates of birth and addresses. If there are any changes to these details, companies must lodge notice of the changes within 28 days.
- Members of the public may inspect documents lodged with ASIC, including documents containing the directors' personal information.
- The PC Report notes that the accuracy of the information held by ASIC can be problematic. Companies sometimes provide false names for directors or invent completely fictitious directors. There is no evidence that these practices are widespread. In some instances, 'puppet directors' are appointed.
 - One submission to the PC Report cites anecdotal evidence of pensioners being paid fees to be nominated as company directors, in order to shield disqualified persons.

Arguments for and against introducing Director Identity Numbers

- The table below outlines some of the arguments for and against the introduction of DINs:

s.47C(1), s.47E(d)




Stakeholder views

- The PC Report notes that there was broad support from participants for the introduction of DINs.
- Notably, the Australian Institute of Company Directors reported that two-thirds of the 225 respondent directors to their survey on the matter support DINs. The introduction of DINs was also supported by the Australian Restructuring Insolvency & Turnaround Association.
- The Governance Institute of Australia strongly supported the introduction of DINs, however it also advocated for the concurrent removal of the requirement for ASIC to publicly disclose directors' personal information.

s.47C(1), s.47E(d)



s.47C(1), s.47E(d)




Progress to date

- In briefing the Minister for Small Business and Assistant Treasurer, Treasury proposed that the Government note the proposal to introduce the DIN (rec 15.6) and recommended this proposal receive further consideration as part of its future work on insolvency reforms.
- The Minister for Small Business and Assistant Treasurer agreed with the Treasury recommendation noting that the proposal to introduce a DIN may potentially have significant implementation and compliance costs for business.
 - She proposed that Treasury conduct preliminary inquiries with affected agencies and with key stakeholders to seek to quantify the possible benefits and costs of the proposal.
 - She did not propose a more resource intensive ‘scoping study’ be undertaken at this time.
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Stakeholders views on DIN


- Both the Productivity Commission Inquiry into Business Set-up, Transfer and Closure and the Senate Economics Committee Inquiry into Insolvency in Construction Industry recommended introduction of the Director Identification Number (DIN) as necessary transparency measure that could provide greater regulatory oversight of directors’ duties under s533 of the Corporations Act and assist in early intervention either in compliance and enforcement of these duties or in providing targeted assistance.
 - The Inquiry into Insolvency in Construction Industry argued that DIN would provide the greater regulatory oversight and transparency than limiting the number of directorships an individual can hold concurrently without potentially infringing procedural fairness.
 - The Productivity Commission concluded that linked with other existing databases, DIN could be used to identify businesses involving directors with a history of repeated insolvencies. This information could be used to link with other existing databases to identify those businesses involving directors with a history of repeated insolvencies.
- Also, the Governance Institute advocated DIN be introduced provided the existing requirements arising largely from the need to provide birth date, place details and residential addresses are removed. Similarly, two-thirds of respondents to survey conducted by the Australian Institute of Company Directors supported introducing DIN. Of those who disagreed, their main reasons of concern related to more information on the cost and benefits, the increased administrative burden on directors and effectiveness of DIN in preventing phoenix activity.
- s.47C(1), s.47E(d)

s.47C(1), s.47E(d)




Cost/benefits analysis

- s.47C(1), s.47E(d)




Budgetary impact


- s.47C(1), s.47E(d)



s.47C(1), s.47E(d)




s.47C(1), s.47E(d)




Issues

s.47C(1), s.47E(d)



s.47C(1), s.47E(d)



Senate Economics Committee Inquiry into Insolvency in Construction Industry

Recommendation 36

- The committee recommends that section 117 of the Corporations Act 2001 (Cth) be amended to require that, at the time of company registration, directors must also provide a Director Identification Number.

Recommendation 37

- The committee recommends that a Director Identification Number should be obtained from ASIC after an individual proves their identity in line with the National Identity Proofing Guidelines.

Productivity Commission Report

Recommendation 15.6

- In addition to existing requirements for directors, section 117 of the Corporations Act 2001 should be amended to require that, at the time of company registration, directors must also provide a Director Identity Number (DIN).
- A DIN should be obtained from the ASIC via an online form at the time of an individual's first directorship. In order to obtain a DIN individuals should be required to provide identify proof (based on the personal identification requirements for opening a bank account), and verify that they have read brief material on directors' legal responsibilities provided as part of the online registration.
- For existing companies, their directors should be required to obtain a DIN. The DINs should be provided to ASIC at the annual review date for the company as a change to company details. To enforce these requirements, ASIC should be empowered under section 205E of the Corporations Act 2001 to ask a person who is director to provide their DIN.
- There should be no lessening of the existing recording of, and means of accessing director information.