



MASTER BUILDERS
AUSTRALIA

SUBMISSION TO

Treasury

On the

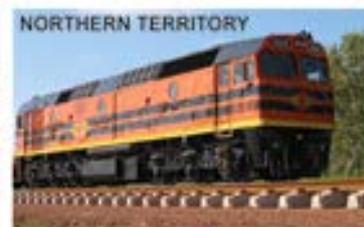
Exposure Draft: Corporations Amendment (Phoenixing and Other Measures) Bill

24 January 2012

Master Builders Australia Ltd

ABN 68 137 130 182

building australia



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1 INTRODUCTION

- 1.1 This submission is made by Master Builders Australia Ltd (Master Builders).
- 1.2 Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 33,000 members.

2 PURPOSE OF SUBMISSION

- 2.1 The Government has released for public consultation exposure draft legislation which would change the law to establish means by which the Australian Securities and Investments Commission (ASIC) is able to order the winding up of a company. The Corporations Amendment (Phoenixing and Other Measures) Bill 2012 (the Bill) would amend the Corporations Act to:
 - provide ASIC with an administrative power to order the winding up of a company;
 - impose a notification requirement on insolvency practitioners in relation to paid parental leave (PPL) payments; and
 - include a regulation-making power to prescribe methods of publication of events relating to the external administration of a company.
- 2.2 The ASIC administrative power to wind up a company is an election commitment from the Government's "Protecting Workers' Entitlement Package" announced in July 2010. This links with the fact that a precondition of any payment to employees of a failed company under the General Employee Entitlements and Redundancy Scheme (GEERS) is that a company has been formally placed into liquidation. The Bill gives ASIC the requisite power to invoke the precondition.
- 2.3 These measures are being put in place ahead of the proposed creation of laws to make GEERS a statutory scheme.
- 2.4 Master Builders takes this opportunity to reinforce its policy of support for targeted legislation that punishes those who deliberately liquidate a company to avoid paying liabilities, including employee entitlements i.e. operates as a "phoenix" company. The business is then "re-created" and continues operations through another corporate entity, controlled by the same person or group of individuals, often with a

very similar name and “free” of debts which have been fraudulently left behind in the liquidated structure.

- 2.5 The structures referred to in paragraph 2.4 are built on fraud. The businesses do not intend to compete in the market except for a short period when debt levels are able to be built up without any intention of repaying the monies. Master Builders condemns this practice, particularly as it disadvantages bona fide participants in the building and construction industry both in competitive terms and when caught up by the fraudulent practices.
- 2.6 This Bill, however, does not directly attack phoenix activities. It facilitates access to Government provided funding to employees who have been caught up as victims in a phoenix company’s fraud. In addition, it adds to the administrative burden of insolvency practitioners because of the flawed basis of administration of the PPL leave scheme.
- 2.7 In this submission, Master Builders asks the question: is this Bill necessary? The answer to that question would be “no” if:
- The measures relating to the ASIC power were part of the package to legislate GEERS and hence formed part of the law relating to that subject; and
 - Government policy on the PPL scheme was changed so that employers were not required to act as day-to-day administrators of the payroll function of making PPL payments.

3 IS THE BILL NECESSARY NOW?

- 3.1 Master Builders submits that there is no evidence of a pressing need for the legislation. It should be deferred to the time when the GEERS scheme is legislated. The current proposal could then be crystallised as part of the changes to the law needed to take GEERS from an administrative scheme to one based on statute.
- 3.2 Master Builders recommends the Bill be deferred until the relevant GEERS legislation is ready.
- 3.3 In any event, the Bill in the criteria listed in proposed s489F(1) to s489F(4) merely implies that phoenix activity might have occurred because of, for example, non-lodgement of documents or payments of the annual review fee within 12 months of the due date. In revised legislation better targeting of phoenix activities could be made.

4 THE PAID PARENTAL LEAVE SCHEME

- 4.1 Paying the PPL monies to employers permits fraudulent phoenix operators ready access to funds that should be paid directly from Government to eligible employees. In other words phoenix operators now have access to another source of Government funds which they are able to fraudulently acquire. The Bill does not target that issue. Master Builders' policy is for Government to administer the PPL scheme.
- 4.2 Master Builders opposes the payroll function relating to PPL being vested in employers for a number of reasons. These include:
- a) Substantial civil penalty and criminal offences can be imposed on employers and individuals, if they fail to abide by the detailed and complicated requirements under the PPL legislation. This also includes on-the spot fines, in the form of infringement notices. Other provisions appear to deal with debt recovery and also expose employers to offences and litigation.
 - b) Costs for training staff on the PPL Scheme, updating pay-roll software and maintaining records do not add to productivity but detract from it. Most firms also need to obtain professional advice on how to implement the PPL scheme to understand the detailed rules and procedures associated with processing payments.
 - c) If the employer disputes the agency's decision, for example, that it is required to be the paymaster, the employer will be required to expend time and costs to appeal the Secretary's determination internally or externally to the SSAT (or the AAT). Meanwhile the employee sits in a state of limbo until the issue is resolved.
 - d) There are complicated eligibility rules and procedures for both employers and employees to follow. These would not be necessary if the Government made payments directly to employees. For example, where the employee applies for less than 8 weeks leave, or is not an Australian based employee, the employer does not have an ABN, or the employee has not worked for 12 months, the Government will make direct payments.

- e) Unfortunately, it is foreseeable that the PPL scheme will not be administered without fault. That will put pressure on both the employer and employee, particularly where the agency has not forwarded the payments in advance to the employer, with the employee not knowing who to contact for advice, or the employer appealing a decision of the agency (e.g., where it opposes being the paymaster, or that the employee is eligible for PPL). To insert a third party, such as the Government agency and workplace inspectorate, into the employment relationship, raises potential unnecessary workplace disputation and friction between employers and employees.

5 CONCLUSION

Master Builders supports measures which assist to target phoenix arrangements. We also support better recognition of when a phoenix operation has occurred. However, the Bill in the criteria listed in proposed s489F(1) to 489F(4) merely implies that phoenix activity might have occurred because of, for example, non-lodgement of documents or payments of the ASIC annual review fee within 12 months of the due date. These administrative failures do not of themselves indicate phoenix activity. In light of these points Master Builders reiterates its policy that the Bill should be deferred until the GEERS scheme is legislated and, in that context, for better targeted anti-phoenix provisions to be devised.
