Submission to Modernising Business Registers and Director Identification Numbers Legislation

DETAILS OF PARTIES MAKING THE SUBMISSION

1) This submission is made on behalf of Mendelsons National Debt Collection Lawyers Pty Ltd ACN 125 099 701 (**Mendelsons**) and Prushka Fast Debt Recovery Pty Ltd ACN 005 962 854 (**Prushka**).

2) Mendelsons is the in house law firm of Prushka and it focusses on debt recovery and insolvency in all Australian jurisdictions, specialising in commercial debt collection.

3) Prushka has a 42 year history and handles debt collection work for over 56,000 businesses across Australia, mostly being SMEs but also for larger corporate clients. Prushka acts on the No Recovery – No Charge basis and has a strong presence across regional Australia.

4) This submission is written by Roger Mendelson, Principal Lawyer of Mendelsons and CEO of Prushka and Alison Lee, Special Counsel and Practice Manager of Mendelsons.

PROPOSALS

Modernisation of Commonwealth Registers

5) The legislative package creates the *Commonwealth Registers Act 2018* (**New Act**) with the stated objective to facilitate a modern government registry regime that is flexible and both technology and government neutral (**Stated Objective**).

6) It is only 'registry' aspects of the current law that are being brought into the new registry regime. 'Regulatory' functions and powers are not going to be affected by the new law and continue to be administered by the body that currently administers those functions and powers. Therefore, how the relevant regulators interacts with the entities it regulates or how information flows between them is not encompassed in this new law.

7) Information related to 34 registers currently being kept by ASIC and the Australian Business Register which is currently kept by the Commissioner of Taxation will initially be subject to the new registry regime. These registers are set out in Table 1.1 of the Exposure Draft Explanatory Materials. Additional registers may be brought into the regime by future legislative reforms.

8) Under the new regime, the Minister may, by notifiable instrument, appoint any existing Commonwealth body (as defined in the New Act) to be the registrar. State government bodies or a private body cannot be appointed as registrar. Any appointed body may also be changed by the Minister at any time.

9) The new law sets out the functions and powers of the registrar, with most of these already set out in existing Commonwealth laws and more specifically, in the existing provisions of primary and subordinate legislation that relate to the registers being brought into the regime, as well as laws of general application such as those relating to freedom of information, archiving of Commonwealth records, good governance and management of financial resources.

10) The consequential amendments therefore do not create new functions and powers. They transfer existing functions and powers, which are currently allocated to specific regulators, to the registrar.

11) The Minister may prescribe additional functions for the registrar by rules made for this purpose as required, permitted, necessary or convenient to be prescribed for the carrying out or giving effect to the new Act.

12) The functions and powers apply to all information subject to new regime, therefore designed to enable a more holistic, consistent and flexible application of the regime regardless of the information that it holds.

13) In respect of the amended functions and powers of the registrar, these relate to:

- The subject matters for which the registrar can collect information.
- How persons make applications to the registrar for certain things.
- The ability of the registrar to assess those applications.
- The ability of the registrar to hold information.

14) The registrar performs its functions and powers in accordance with the data standards that the new law allows the registrar to make and other Commonwealth laws. Data standards are disallowable instruments for the purposes of the *Legislation Act 2003* and therefore will be subject to the same parliamentary scrutiny and process to disallow currently applicable to regulations.

15) The data standards relate to the performance of the registrar's function and the exercise of the registrar's powers and may deal with a variety of registry related matters dealt with in existing legislation that does not currently meet the Stated Objective.

16) The benefits of the functions and powers being contained in the New Act overcome the following difficulties with the current regime that creates regulatory burden and an increase in the cost of administering registry services:

- Registers being maintained separately from each other despite sometimes containing similar information leading to the same information needing to be provided several times in relation to different registers.
- Regulators having limited abilities to determine what information is required for each register leading to outdated registers.
- Regulators having varying abilities to determine the manner and form in which registry information is collected resulting in inefficiencies, inability to make full use of technology and to consistently and flexibly deal with incomplete/defective applications.

- Different and/or inconsistent rules applying to the management and use of registers resulting in Government failing to make best use of registry data.

17) The new law provides for the recording, protection and disclosure of information held by the registrar, including disclosure via a disclosure framework made by the registrar. Under the disclosure framework, the registrar may authorise the disclosure of registry information where it is satisfied that the benefits of the disclosure outweigh the risks, after those risks have been mitigated. The new law also clarifies that the disclosure framework may include different provisions relating to the different functions or powers of the registrar, which ensures that the disclosure framework can be tailored to particular functions and powers of the registrar.

18) The disclosure framework is also a disallowable instrument for the purposes of the *Legislation Act 2003*. In addition, the framework will be subject to consultation requirements under that legislation together with privacy impact assessments under the *Privacy Act 1988*.

19) The new law otherwise provides for other matters intended to support the effectiveness and efficiency of the regime, including:

- When the Minister can direct the registrar;
- The circumstances in which, and to whom, the registrar may delegate its functions and powers;
- The use of assisted decision making processes by the registrar;
- Review rights with respect to decisions made by the registrar;
- The extent to which the registrar and associated persons may be liable for damages in connection with the new regime, including statutory immunity for acts done in good faith and when such immunity applies;
- The admissibility of registry information in court proceedings to enable a document, or a copy of a document, that purports to be an extract of information held by the registrar, to be admissible as prima facie evidence of the information stated in it without the need for certification or any other further proof of, or the production of, the original;
- The information that must be included in the registrar's annual report about the operation of the new regime;
- What rules may be made by the Minister for the purposes of the new regime.

20) The intention is to ensure a coordinated approach across several governmental bodies across which the functions and powers are currently allocated.

21) We support the New Act and its Stated Objective.

22) Currently, it is our expectation (from experience) that ABR is not always accurate and up to date and that information extracted from the records maintained by ASIC is more reliable. The new regime will boost the public confidence in the accuracy and reliability of the information obtained, understanding that the information will be, amongst other things, gathered, maintained and updated by the registrar and sourced from the one registry.

23) The flexibility of the regime aligns with the Stated Objective of the New Act and is seemingly required to achieve its application in an efficient and effective manner. Whilst only time will tell, we hope that any flexibility that replaces any prescriptive parts of the regime does not impact negatively and produce unintended consequences such that the consistency and accuracy of the information is inadvertently not maintained instead as a result.

24) The centralisation of information will also hopefully assist the relevant regulators to enforce the law as currently, we see some need for improvement, particularly from ASIC in this regard. It is not only about streamlining processes and obtaining information easily and efficiently but also using that information to produce outcomes.

Future Registers

25) As noted earlier, additional registers may be brought into the regime by future legislative reforms.

26) We again take the opportunity to set out our proposals outlined in previous submissions for a Statutory Demand Register as implementing the idea would be simple, cheap and largely wipe out incidental phoenixing actively.

Statutory Demands

27) Under the Corporations Law (Section 459E), it is possible to serve a Statutory Demand on a company where the debt owed exceeds $2,000.00 and where it is not subject to dispute. No judgment is required.

28) Mendelsons use the Statutory Demand process on a regular basis and obtain good results from it.

29) The benefits are that there are no external disbursements payable and it is quick and cheap.

30) The way the process works is that the Statutory Demand is served on the company by post at its registered address and it details the amount demanded. The debtor-company has 21 days in which to "satisfy the Demand" or otherwise, to take action in the court to seek an order that there is a genuine dispute about the account or that otherwise, the company is solvent.

31) In our experience, it is rare for a company to respond to the Statutory Demand by seeking a court order and the greatest response is usually to pay or settle the amount demanded.

32) If the Statutory Demand is not satisfied and no action is taken by the debtor-company, then from that time onward, the debtor-company is deemed to be insolvent and if it continues trading, the directors are personally exposed to insolvent trading action in relation to any losses suffered by creditors after that date. From that time, the creditor may then use the failure to satisfy the Statutory Demand as a ground for commencing wind-up action of the company.

33) The problem is that many companies simply do not respond to a Statutory Demand and continue trading, in the knowledge that the creditor is unlikely to incur the cost of wind-up action (approximately $5,000.00), on the basis that it is unlikely to provide a financial return.

Statutory Demand Register

34) Our proposal is that a register be set up of companies which have been subject to a Statutory Demand which has not been satisfied, where the debtor company has not initiated legal action in relation to the Statutory Demand and where the creditor has a reasonable belief that the amount demanded is still owed (**Register**).

35) This is not the place to go into the proposed detailed workings of the Register but we believe that it could be set up simply, through an online process and it could be easily searched, without charge by businesses which plan to allow credit to the company. There could be a simple objection process, to ensure that the system is not abused.

36) If the Register is in place, it would be the first time there would be visibility by both the public and the regulators to Statutory Demands which are being served and which are not satisfied.

37) If this in place, recalcitrant companies which have not satisfied Statutory Demands would find it difficult to obtain credit.

Director Identification Numbers

38) The act of registering a new company to take over a failed or insolvent business of a predecessor is not in and of itself is not illegal. In some instances, it is a legitimate form of business rescue.

39) It becomes fraudulent when it is carried out to intentionally avoid paying creditors by stripping the old company of assets to avoid paying liabilities and leaving it insolvent. This is known as illegal phoenixing activity and is done by the controllers, or directors, of the company.

40) Schedule 2 of the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2018* amends the *Corporations Act 2001* (CW) (**CA**) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**CATSI**) to introduce a Director Identification Number (**DIN**).

41) The objective of the new requirement is to promote good corporate conduct and assist regulators to detect and address unlawful behavior and by doing so, to deter such behavior.

42) The DIN will require all directors to confirm their identity and it will be a unique identifier for each person who consents to being a director which will be kept, even if that person's directorship with a particular company ceases. The DIN will not, initially, extend to de facto or shadow directors. However, the new law provides that "eligible officers" are subject to the new requirement and defines this term. The definition may be extended by regulation to any other officers of a registered body with the effect that the DIN may apply to any such officer if doing so is appropriate. The intention is to provide the flexibility necessary to ensure the effectiveness of the new requirement into the future.

43) The current law requires directors to lodge their details with ASIC, but does not require ASIC to verify the identity of directors. The verification via DIN will prove the integrity of the data and help enforcement associated with phoenixing.

44) Under the new requirement, a person appointed as a director of a company must apply to the registrar for a DIN within 28 days from the date they are appointed a director unless they are provided an exception or extension by the registrar. After receiving an application,

the registrar must provide the director with a DIN if the registrar is satisfied that the director's identity has been established. Persons that are currently appointed as a director has 15 months to apply for a DIN from the application day of the new requirement. It is also a defence in relation to this obligation if the director was appointed without the knowledge, with the evidential burden resting on the person seeking to rely on the defence.

45) The registrar is provided with powers to administer the new requirement. These include powers to issue DINs, keep necessary records, cancel and re-issue DINs, determine the numbering of DINs and determine how directors are to establish their identity. The registrar may make data standards, by way of legislative instrument, in relation to these and other matters.

46) Civil and criminal penalties exist for directors that fail to apply for a DIN within the applicable timeframe and to conduct that otherwise undermines the new DIN requirement. For example, providing false identification documents to the registrar, providing a false DIN and intentionally apply for multiple DINs. For this purpose, the new law relies upon existing prohibitions in the *Criminal Code*, the CA and CATSI that aim to prevent the provision of false or misleading information.

47) The registrar will administer the registry aspects of the DIN whilst the regulators that have the general administration of the CA and CATSI will enforce the provisions.

48) We support the idea of DINs because it will certainly make it easier to track directors and will act as a means of deterrent for directors who are serially operating companies which will ultimately fail. The impact will be similar to the introduction of the ACN, which made it much easier to track companies.

49) The DIN will also assist creditors when undertaking credit checks and/or in the recovery of any bad debts as well as external administrators appointed to companies to investigate the corporate history of directors, improving the insolvency process.

50) The integrity of the DIN will, however, come down to the effectiveness of the registrar in verifying the director's identity and cross-referencing not only information provided by the director, but also information that may already be available to the registrar.

51) It is also important that bodies tasked with the issuing of various identification documents also undertake the necessary checks at first instance. We are aware of many instances in which a person's date of birth and/or spelling of name(s) does not match across all of their identity documents. If applicable, all of this mismatching data should be collated and marked as being associated with the same person in order to appropriately identify information as indeed belonging to the one person and to properly avoid the application for and the obtaining of multiple DINs.

52) As stated in our previous response to submissions on the draft legislation introduced on this point/area and re-stated again below, the introduction of the DINs will assist to some extent in addressing the problems it intends to, but it can only go so far if:

    (a) Directors are not required to provide proof of identity by way of 100 points of identification to verify their details and this verification process is thorough and comprehensive (noting the identification process is yet to be confirmed);

    (b) Aliases, Anglicised names and spelling variations are not investigated or identified;

(c) Individuals qualify as being appointed as directors by being ordinarily resident in Australia but who go overseas for extended and lengthy periods of time are not flagged, as the effect of this upon creditors is akin to leaving the company without a director;

(d) Appropriate considerations and measures are not given to shadow directors who may intentionally avoid the DIN "tracking" system.

53) Part 2D.6 of the *Corporations Act 2001* already provides a statutory regime to identify and disqualify high risk individuals from managing corporations. Section 206D, in particular, targets the disqualification of persons from managing companies if, amongst other things, the failure of the company is linked to insolvency and the non-payment of debts.

54) The extent to which directors have been disqualified under Part 2D.6 is, to our knowledge, limited. We hope that the increased and targeted focus on illegal phoenixing activity together with the introduction of DINs will change this.

55) The importance of also establishing that directors of Australian companies are able to speak, read and/or write English is also important. In addition to directors who actually reside outside of Australia for the majority of any given year, we also come across many directors that do not speak English. This calls into question many things including their understanding of the applicable rules and regulations to hold a position as a director in an Australian registered company and also as to the basis upon which they have been able to submit documents, in English, to the relevant regulatory bodies and, moving forward, to the registrar and the persons assisting them.

56) We welcome these reforms, although query the extent to which the information submitted by directors will be scrutinised and whether action will indeed be taken in practice. Again, the resourcing to monitor this is crucial.

SUMMARY

57) We re-iterate the position as stated in previous submissions provided by us in this area.

58) We welcome the proposed reforms but hope that the lack of allocation of resources to counter the conduct that the reforms aim to target does not continue. If the Government, regulators and all other parties with an interest (vested or not) are to really address the issues, then resourcing is crucial and, in our view, will be the difference between whether the reforms achieves its goals or whether they simply merge into and form a part of the multitude of laws and measures that already exist and that which are not being enforced.

59) Most of the recommended provisions to date, have been aimed at protecting tax revenue. We are pleased to see that these latest draft reforms appear to be more focused on improving the quality and integrity of the information available to creditors and the general public. This will assist in the making of accurate credit assessments and decisions as to who to do business with, particularly for SMEs.

60) Currently, we do not know the extent that State Police and/or the Australian Federal Police are involved in the criminal penalties currently provided for and intended to be relied upon moving forward. However, we suggest that the regulatory bodies such as ASIC and the ATO need to work closely with the relevant police force in order to achieve a more holistic approach and to properly combat the conduct to which this and the anti-phoenixing legislation seeks to target.

61) As the vital parts of the new regime remain unknown such as who the appointed registrar will be and what data standards will be introduced and/or applied, we will watch with interest as to how this all evolves.

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