AICM SUBMISISONS TO COMBATTING ILLEGAL PHOENIXING

October 2017

CONTENTS

PART ONE – BROAD REFORMS

1. IDENTIFYING ILLEGAL PHOENIX ACTIVITY – A PHOENIX HOTLINE

Current situation

Several agencies such as ASIC and the ATO operate 'hotlines' or similar systems that allow the public to communicate concerns, including in relation to illegal phoenix activity.

While there are increasing levels of co-ordination between agencies, it is possible that information reported by members of the public, employees, or creditors is not well matched with a report about the same phoenix operator from a different source reported to another agency.

Further, even if two agencies do match independent reports of information, there is not necessarily a strong mechanism to ensure that other relevant agencies with an interest in the information will receive a copy of the information.

Proposed reform

The Phoenix Taskforce has developed a robust distribution mechanism to allow for information from the members of the Taskforce to be collated and shared.

To help in the collation and distribution of information, the ATO, or whichever agency is best placed to do so, could operate a singular 'phoenix hotline' such that any information reported by the community about phoenix concerns could be shared with all members of the Taskforce.

The 'hotline' itself may be one or more of many channels, including telephone, e-mail, smartphone application and physical mail to accommodate the entire community.

Best practice would mean that persons providing information to the 'hotline' could do so anonymously if they wished.

Transparency and public confidence could be improved through public reporting on information provided through the hotline.

Most typically, the operational protocols of the various members of the Phoenix Taskforce would not allow a person who provided information to be informed about how or when such information was used, and, if the information was provided anonymously, there would be no capacity to do so.

ITEM	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
1.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how		10

	well you think this measure will operate to deter and disrupt illegal phoenix activity.		
2.	Are there any other reporting mechanisms which you think would assist people to report suspected illegal phoenix activity?	Whistleblower protection so that employees of businesses which: 1. Are illegal phoenix activities, or 2. Are the previous enterprise which has been phoenixed Are able to report their belief and inside knowledge with effective protection as well as potential financial reward	10
3.	What are the benefits and risks of a 'phoenix hotline'?	Benefits are that agencies will obtain inside and outside information sooner and possibly even before a phoenix enterprise occurs. Risks are that vexatious complaints may be made towards a lawful phoenix due to persons not understanding restructuring laws	10
4.	Which agency do you believe would be best placed to operate such a hotline?	ATO	10
5.	What public reporting would be appropriate to ensure transparency? What other mechanism could be considered?	No identification of the informant unless the informant agrees or a court orders. public reporting of the court cases and generally how the information came to hand, the assets recovered generally and the reward which the whistle blower received	10

Additional comments

While the AICM is supportive of a phoenix hotline credit professionals may continue to be reluctant to come forward due to the perceived lack of action. The hotline will only be an effective tool if those that report have confidence action will be taken. Currently AICM members would be lacklustre about reporting feeling "nothing will be done" or "it's a waste of time".

2. A PHOENIXING OFFENCE

Proposed reform – a specific phoenix offence

It is proposed to amend the *Corporations Act 2001* (Corporations Act) to specifically prohibit the transfer of property from Company A to Company B if the main purpose of the transfer was to prevent, hinder or delay the process of that property becoming available for division among the first company's creditors.

This could operate in a similar manner to the provision set out in section 121(1) of the *Bankruptcy Act 1966*, which states that the main purpose in making the transfer will be taken to be the prescribed purpose, *"if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent".*

Rebuttable presumptions of insolvency would apply, and such a transaction would be void against a liquidator (so that the assets can be clawed back in liquidation).

The offence would give rise to a right in creditors and liquidators (and ASIC) to sue for compensation for the loss caused by the conduct of those who engage in the prescribed conduct as well as those who are knowingly involved in that conduct under section 79 of the Corporations Act.

Similar defences to those available under section 121(4) of the Bankruptcy Act would be available (regarding payment for the property, knowledge of the main purpose of the transfer and inability to infer that the transferor was or was about to become insolvent at the time of the transfer).

One of the significant difficulties in bringing an action against directors in relation to illegal phoenix activity (for both ASIC and for liquidators) is demonstrating that the transferred assets were in fact originally the property of Company A, and that Company B did not pay proper consideration for them.

Section 139ZQ of the Bankruptcy Act allows the Official Receiver to send a notice to a person who the Official Receiver considers has received property in contravention of section 121, demanding payment of money for the value of the property received. The notice is required to set out the facts and circumstances pursuant to which the Official Receiver considers that the transaction is void against the trustee.

It is proposed that where ASIC (or a liquidator) suspects that illegal phoenix activity has occurred and that assets of Company A have been transferred to Company B for no or less than their market value:

- ASIC may issue a notice upon Company B (either on ASIC's behalf or at the request of a liquidator who is able to satisfy ASIC as to the matters above) requiring that Company B deliver up property or monies' worth, along the lines of the regime in place under section 139ZQ of the Bankruptcy Act; and

- the recipient of the notice would have the right to apply to court to set aside the notice.

Such a regime may significantly assist in pursuing illegal phoenix activity because it would greatly reduce the cost of either taking action to recover the property or to seek compensation for the loss suffered.

ITEM	QUESTIONS	COMMENTS	SCORE OUT OF 10 (IF APPLICABLE)
6.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		10
7.	What are the benefits and risks of this approach?	The benefits are it is a more cost efficient approach for recovery of assets without court proceedings being required. The risk is that bona fide creditors who receive payment may be targeted.	
8.	Should ASIC retain control of the issuing of such notices to ensure that they are not issued inappropriately?	No. Liquidators are considered sufficiently supervised by the courts and current conduct regulators to ensure they will be reviewed if inappropriately issued.	
9.	Are there other regulators who should also be able to issue such notices (for example the Fair Entitlement Guarantee Recovery Program)?	No. This may lead to inconsistencies and duplicitous notices. Failure by a liquidator to issue such notices could be overcome by the replacement of the liquidator by creditors under recent reforms.	
10	Should liquidators have the ability to independently issue such notices in cases where they suspect that illegal phoenixing has taken place?	Yes.	
11	How long should the law allow for the recipient to respond?	20 business days after giving of the notice, or so soon after that as a court may extend such time.	

12	What course of action should be pursued where the recipient fails to comply with a notice?	A liquidator should be entitled to make application to a court against the addressee for contempt, or similar offence, for failure to comply with such notice. A court would then be entitled to penalise or imprison such person/ addressee as if for contempt. As a minimum the liquidator should be able to pursue as a debt.	
13	What are the some of the challenges ASIC is likely to face in seeking compliance with the notice?	It being alleged that it was an alleged bona fide transaction for value. The burden should be on the addressee to prove such bona fide and value.	
14	Do you think that such an arrangement will reduce the cost of taking recovery action or seeking compensation for the loss suffered?	Yes.	
15	Are there safeguards which should be implemented in respect of the proposal?	Yes. But that the obligation be on the addressee to apply to the court within such 20 business days for an order setting aside, or to extend the time for compliance, of the notice. As stated, the addressee should carry the burden of showing cause why either order should be made.	
16	If such a provision were to be introduced, should any of the existing voidable transaction provisions be amended or repealed?	The proposed test of *"if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent*" appears too narrow. See the wider test applied in sections 592 and 596 *Corporations Act.* We would suggest that consistent	

		with sections 592 and 569 Corporations Act, and the *Fraudulent Conveyances Act 1571* (and its equivalent in each state) that the section/s which provide as to "phoenix" to the effect that: ***Phoenix transaction*** *(1)Subject to this section, every use or alienation of property [whether or not property of the company at any time], made whether before or after the commencement of this section, with intent to defraud creditors [and is likely to prejudice or reduce the property available to a liquidator of the company], shall be voidable and actionable at the instance of the liquidator of the company whose creditors may be prejudiced by such use or alienation of property.* *(2)This section does not extend to any action against a persons who received the benefit of any such alienation or use of property alienated or used for valuable consideration and in good faith and such person not having, at the time of the alienation or use, notice of the intent to defraud creditors.* NB There exists in each state and various countries, an equivalent provision available to creditors before an appointment under the Bankruptcy Act or Corporations Act (eg see section 228 -230 *Property Law Act 1974* (Qld) (**PLA**), which are founded on the *Fraudulent Conveyances Act 1571*, also known as the Statute of Elizabeth Act). There is the need for consistency in the law of credit in the modern world of commerce and location of property to satisfy debtors' obligations. It would be important to not remove such rights if no appointment has or is made under the *Corporations Act* or *Bankruptcy Act* (eg a foreign corporation is involved). Section 588FE and FF Corporations Act 2001 should be reviewed to be consistent with these intended changes also.	

		Section 588FE – as to the grounds which include an insolvent transaction, that the fraudulent conveyance be added without any test as to the act causing the insolvency of the company or being made whilst it was insolvent. There also appears to be a lack of reference to those who are a party to the transaction also being liable for such loss or damage caused to the company. Reference to the liability of persons who are a party or "accessory" to the insolvent and phoenix transaction should be added, such as pre-insolvency advisors Section 588FF - as to the orders which might be made might be amended to include orders for contempt for failure to comply with such notices and against those who are an accessory to such transaction.	

Remedies

Compensation orders and civil penalty orders may not be a significant deterrent in circumstances where persons who typically engage in and facilitate illegal phoenix activity often have few assets in their own names.

In implementing the above offence, the Government is considering whether:

- both liquidators and ASIC should be able to claw back assets or compensation from the transferee;
- liquidators, ASIC and creditors should be able to pursue compensation for the loss caused by illegal phoenix activity from directors of the transferor, the transferee, and from others who are knowingly involved in the illegal phoenix activity; and
- civil and criminal penalties should apply to illegal phoenix activity, including against those who are knowingly involved in illegal phoenix activity.

ITEM	QUESTIONS	COMMENTS	SCORE OUT OF 10 (IF APPLICABLE)
17	Are these remedies appropriate? Are there further remedies or penalties we should consider?	Both liquidators (and their assignees under recent changes by the Insolvency Reforms) and ASIC should be able to claw back assets or compensation from the transferee and persons involved as an accessory to the activity. Further, that any property or remuneration conveyed or fees paid to or at the direction or for the benefit of the accessory or their related entities be a debt due and owing by the accessory to the liquidator.	10
18	If the above amendments are made, should the law also be amended to include a specific provision to the effect that knowing involvement in a contravention of the provision will itself constitute a contravention of the provision (as per sections 181 — 183 of the Act)?	Yes.	10
19	What tests can be applied to determine if a person has been involved in the facilitation of illegal phoenix activity?	This is not intended to be a final draft of any legislation. A person (called **the accessory**) is involved in the facilitation of illegal phoenix activity if: 1. the alienated property of the company was not conveyed for valuable consideration and in good faith to a person having, at the time of the conveyance, no notice of the intent to defraud creditors (See case law on this similar section of the *Fraudulent Conveyance Act* and modern day equivalents); 2. 2. would not have been so conveyed but for the advice or actions of the	

		accessory, and 3. whether or not another is proven to have been involved in the illegal phoenix activity Unless either: 3. The accessory provided any such advice, did such actions solely in their role, and consistent with the lawful obligations, whilst licensed to engage in legal practice under the *Legal Professional Act (Qld)* or the other states or territory law equivalent, or 4. The accessory provided any such advice, and consistent with the obligations, solely whilst licensed to be a liquidator under the *Corporations Act* or the other states or territory law equivalent.	

Proposed reform – designating breaches of existing provisions as phoenix offences

The Corporations Act contains numerous offences which are commonly breached by those involved in phoenix activity.

For example, section 286(1) states that a company must keep written financial records that:

- correctly record and explain its transactions and financial position and performance, and
- would enable true and fair financial statements to be prepared and audited.

The Corporations Act also imposes obligations to assist an administrator, liquidator or controller in a formal insolvency.

A key element of most illegal phoenix activity is the failure to maintain adequate books and records, and failure to provide them to an insolvency practitioner in a formal insolvency.

It is proposed that breaches of these provisions would be made 'designated phoenix offences', where instances of a breach could result in a director of a company being deemed a Higher Risk Entity (see section 8).

It is also proposed that the law be amended so that knowing involvement in a contravention of a phoenixing provision will itself constitute a contravention of the provision.

ITEM	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
20.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		10
21.	Which existing breaches of the law, if any, should be designated as phoenix offences?	Failure to provide information and intention to defraud creditors (590, 592 and 596 Corporations Act) should be designated as phoenix offences. Whilst not "offences", the transactions which are Uncommercial transactions (section 588FB) or Unreasonable Director Related Transactions (section 588FDA) might have their section title, but not the body of their provisions, changed to add the words **"Apparent phoenix activity"** as a deterrent to those who would wish to undertake such activity.	

3. ADDRESSING ISSUES WITH DIRECTORSHIPS

Current situation – appointment and resignation

Currently under the law, a proprietary company must have at least one appointed director that ordinarily resides in Australia and is at least 18 years of age, and a public company must have at least three appointed directors of which two must ordinarily reside in Australia.

Generally a director may resign by giving notice of the resignation to the company. Director resignation is unilateral, and the company does not need to agree to the resignation for it to be effective.

The resignation of a director is generally a matter dealt with by the company's constitution, which most commonly stipulates that a director must resign in writing.

Currently under the Corporations Act a company has the responsibility of lodging a notice with ASIC informing them of a director's appointment or resignation within 28 days of it occurring. Although the Corporations Act provides discretion for directors to lodge notice of retirement with ASIC, it does

not stipulate a time period within which a director must notify the company of their retirement or resignation.

The lodgement of a notice with ASIC that a director has resigned by necessity occurs after the fact, and a discrepancy can arise where a director alleges that a resignation notice was provided to the company, but the company has not communicated this to ASIC, as it is the company, not its former director, who has liability for proper record keeping and making necessary ASIC lodgements.

How phoenix operators exploit the current law

Illegal phoenix operators exploit the current law by ensuring that the company (electronically or via paper copy, through an agent or directly) lodges the appropriate ASIC form noting a change of director, but the notice backdates the director's resignation so that the director cannot be held liable for offences committed after that time.

Similarly, a company may backdate the commencement of a different 'dummy' director prior to the period where some offending conduct has occurred, to shield the real controller of the company. In some cases, this dummy director may be a fictitious, deceased, or transient person who cannot be found, and/or a person who has no financial means.

Proposed reform: limiting backdating of director appointments and resignations

This proposal would involve amending the Corporations Act to impose a rebuttable presumption that where a change in director notice is lodged more than 28 days (or another suitable period) after the date of the director's resignation, the director could still be held liable for misconduct that had occurred up to the point of lodgement.

The presumption could be overturned on application to the court or at the provision of appropriate information to the satisfaction of ASIC.

Additionally, the onus for reporting director resignations could be shifted from the company to the individual resigning director.

This would ensure that the responsibility attaches to the resigning director so the director can't abrogate this to the company, which may be nothing more than an empty corporate shell.

ITEMS	QUESTIONS	COMMENTS	SCORE OUT OF 10 (IF APPLICABLE)
22.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		10
23.	Do you agree that there should be a rebuttable presumption that a director should still be held responsible for misconduct if the required notice is not lodged with ASIC in a timely way?	We say that the rebuttable presumption should still be allowed provided a court decides to extend the time to lodge to the time actually lodged on the application of such person. It should not be a auto defence if the person has not proven to a court why and to what extent the time should be extended.	
24.	What are the benefits and risks of this approach?	Certain officers might rely upon others to effect their paperwork, however the extension of such time to lodge is sufficient protection where they have relied on another such as a suitable professional advisor.	
25.	What is a reasonable period to allow for the requisite notice to be lodged with ASIC?	5 business days from date of resigning, or being appointed, a director, whichever is the case.	
26.	Should the onus for reporting to ASIC be placed on the individual director, rather than the company? If so, would this constitute a significant compliance burden?	Be placed on the individual director.	
27.	How should the above measure be enforced? For example, by application to court or ASIC taking other administrative action?	Daily penalties (whether or not a court extends the date to lodge), and Liability for any debts incurred during the period that the notice has not been lodged (subject to any	

		extension by a court) and the company is, or is presumed to be, insolvent.	

Current situation - abandoning a company

Because a director can resign unilaterally, this can lead to a situation where a sole director resigns from their directorship but does not advise ASIC of their resignation and the company is left without a natural person's oversight.

As a result, the company may not make the necessary director resignation lodgements with ASIC, and nor can it appoint a replacement director. The company is thus abandoned until such time it is placed into external administration by a creditor via court proceedings or is deregistered or administratively wound up by ASIC.

How phoenix operators exploit the current law

A phoenix operator may undertake trading for a period of time with no directors in place, strip the company of any assets, leave behind unpaid debts, and place the company into external administration.

Although ASIC may deregister a dormant company if it believes the company has ceased trading or has outstanding fees and penalties, there is currently a significant time delay which can be exploited by phoenix operators to avoid the heightened scrutiny of an investigation by an administrator or liquidator.

Proposed reform

The Government intends to limit a sole director's ability to resign from office without either first finding a replacement director or winding up the company's affairs by amending the Corporations Act to deem such a resignation ineffective.

In circumstances where a company has more than one director who simultaneously (or nearly simultaneously) resign and abandon a company, similar restrictions would apply.

Alternatively, abandoning a company in this manner could be made an offence.

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
28.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		10
29.	Should sole directors be able to resign without appointing a liquidator or deregistering the company?	Not unless a replacement director is appointed and so registered before their resignation occurs (whether or not the resignation registered).	
30.	What are the benefits and risks of this approach?	Transparency of control as well as ensuring it has a suitable authorised person at all times and does not become a "rudderless vessel" on the ASIC and other registers (eg PPS register).	
31.	Should abandoning a company instead be an offence?	Abandoning duties (without proper cause eg insanity) of office should also be an offence.	
32.	Should a company with no director for a prescribed period be automatically deregistered? If so, what would be an appropriate period before deregistration should commence?	Yes (eg death or bankruptcy of sole director). We wish that 2 years be the designated period	
33.	What other options are available for consideration?	That a creditor or other interested person (eg shareholder, trustee of deceased or bankrupt shareholder's estate or creditor of the company) can properly apply to ASIC before then.	

4. RESTRICTIONS ON VOTING RIGHTS

Current situation

Directors initiate most external administration appointments and decide which registered liquidator is appointed as the external administrator of the company.

Depending on the type of appointment, the external administrator is obligated to hold creditors' meetings in which various resolutions pertaining to the company's affairs are passed, including a resolution confirming their appointment.

It is fundamental that creditors can remove and replace an external administrator if they are concerned that the external administrator chosen by the director will not act in their interests.

Where creditors are concerned about the external administrator's independence they may pass a resolution to remove and replace the external administrator.

Before a creditor can vote at a meeting, they must provide details of their claim to the external administrator. The Corporations Act does not prescribe the level of proof required before the person presiding at the meeting may admit a claim for voting purposes. As a result, claims are not scrutinised as much as they are when the external administrator pays a dividend.

A resolution put to the creditors' meeting to remove and replace the external administrator is decided on the voices. Alternatively, a poll may be demanded. If a poll is demanded, the resolution is passed if the majority in both number and value of creditors present vote in favour of the resolution. If there is not a majority in number and value, the person presiding at the meeting may only exercise a casting vote in favour of their removal. However, the person presiding can also choose not to exercise their casting vote, ensuring the resolution fails.

The Corporations Act defines, "related creditor". However, its scope is complex and the external administrator may have difficulty identifying whether a creditor is a related creditor (and the amount of the claim) if the company's books and records are incomplete; and particularly for voting at a creditors' meeting if the claim is made at the meeting.

Although the Corporations Act provides creditors power to remove and replace the external administrator, and apply to court for orders if the outcome is decided by related creditors, it does not prevent related creditors influencing the conduct of the external administration and frustrating the interests of creditors not related to the director or the company.

How phoenix operators exploit the current law

The current regime allows phoenix operators to "stack" votes in a creditors meeting whereby they are able to exert their influence through voting power of related creditors. Through this channel the phoenix operator can influence the outcome of proposed resolutions.

The concern that related creditors can frustrate investigations into suspected illegal phoenix activity is heightened where the external administrator's relationship with the pre-insolvency adviser or director might result in an actual conflict or the reasonable apprehension that the external administrator might not bring an impartial mind to the administration of the company's affairs.

Proposed reform

The Government is considering legislative reform to restrict the rights of related creditors to vote at creditors' meetings.

The aim is to minimise the risk that related creditors, with or without the assistance of the external administrator, can frustrate unrelated creditors – particularly where a resolution is proposed to remove and replace the external administrator.

Under this proposed measure the external administrator will be required to disregard "related creditor" votes received in relation to a resolution remove and replace an external administrator.

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
34.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.	Acquisition of voting rights might not always be by absolute acquisition of debt owed to an unrelated creditor. Sometimes, unrelated creditors will allow their vote/ value to be exercised by a related creditor for a commercial benefit outside of the administration formalities. Just as easily, a related entities rights might be acquired by an unrelated creditor and voted, but on condition of how such vote will be exercised or by a controlled proxy.	10
35.	What are the benefits and risks of this approach?	The benefit is as to transparency of related and unrelated creditors' rights and actions, especially if the voting rights are acquired from an unrelated creditor but exercised by another under a proxy.	
36.	Is the current definition of "related creditor" too broad for this purpose? If so, how should "related creditor' be defined?	Without further information (such as the location of the definition of "related creditor" relied on in the Corporations Act 2001) the current definition is likely to be sufficient and suitable and able to be avoided even if amended due to the above mechanics of voting and assignment.	

37.	Should related creditors that were company employees be subjected to a different treatment than, say, if they were directors? Why or why not?	No. Sufficiently close relatives of companies often receive benefits which other employees do not.	
38.	What level of evidence should be imposed on related creditors to substantiate their respective debts?	Whether their own debt absolutely, or they or their agent are appointed proxy to exercise another's entitlement to vote, the related creditors should not count unless full disclosure is made and a poll called. Failure to make such disclosure or to call for a poll, will automatically invalidate the vote cast, and make the resolution obtained (to change the appointee) void ab initio ie the effect is more than just not counting the related party vote.	
39.	Should restrictions on related creditor voting be extended to all resolutions proposed in an external administration? Why or why not?	The related creditors should not count unless full disclosure is made and a poll called on any resolutions of the external administration.	
40.	Will limiting related creditor voting participation in a creditors' meeting add additional complexities to proceedings? For example quorum requirements in order to validly hold a creditors' meeting.	Not if the full disclosure is provided and a poll called.	
41.	Should the above rule apply to a particular size or type of external administrations or liquidations?	No. No need to restrict if full disclosure is made.	
42.	Should the court have the power to overturn this restriction?	Only if it can be shown that the outcome on the resolution proposed would have been the same (but not necessarily the same votes cast) if disclosure had been made and a poll called.	

43.	Should this restriction only be applied to certain types of companies, for example small proprietary companies?	No.	
44.	Are there circumstances where this restriction should not apply?	No.	
45.	What are some of the ways a related creditor might attempt to circumvent the above measure?	Proxies, assignment of voting rights from an unrelated creditor and undisclosed acquisition of an unrelated entities debt and/ or proxy.	
46.	What other measures could be considered to avoid collusion between liquidators and related creditors?	See above as to required disclosure and poll.	

5. PROMOTER PENALTIES

The current situation

The promoter penalty laws were introduced in 2006 to deter the promotion of tax avoidance and evasion schemes. In essence, the laws seek to hold accountable a person or persons who may not implement a tax avoidance scheme themselves, but who aid and abet others to do so.

The law also provides guidance on how to deal with potential breaches of the provisions. The ATO has the flexibility to seek from the Federal Court an enforceable voluntary undertaking, an injunction, or civil penalty against the promoter.

There are parties that do not undertake illegal phoenix activities themselves, but who facilitate or encourage those who undertake such activities.

How phoenix operators exploit the current law

The current promoter penalty regime relies on the existence of a tax exploitation scheme, where a scheme benefit must be derived. The existing promoter penalty law is very technical and will not always apply to those who aid or abet others to be involved in phoenix activity.

Proposed reform

Extending the promoter penalty laws to apply to promoters or facilitators of illegal phoenix activity will assist in disrupting the phoenix business model and in particular facilitators who advise or aid and abet illegal phoenix activity. The targets of these provisions may include those advisers closely involved in the design, marketing or implementation of illegal phoenix arrangements, such as unscrupulous pre-insolvency advisers, business consultants and repeat shadow directors.

This change would allow promoter penalty provisions to be used proactively to deter illegal phoenix activity – for example through enforceable voluntary undertakings where advisers undertake to provide full disclosure of their activities and to ensure their advice complies with the law.

The current promoter penalty regime could be expanded in a number of ways so that it applies to promoters of illegal phoenix activity.

Option one – broadening the current definition

One option would be to expand the scope of the promoter penalty law to apply not just to a 'tax exploitation scheme' to also apply to activities designed to avoid taxation obligations, including by rendering a company unable to pay its obligations.

Feedback on previous proposals to expand the definition of what constitutes a 'tax exploitation scheme' raised concerns that a broad definition could potentially affect innocent advisers involved in legitimate business rescue and restructuring.

These concerns could potentially be addressed by allowing a defence that mere advice provided for legitimate purposes is a protection for advisers.

Option two – adding a new limb to the test

As an alternative to the above option, an independent limb or third limb could be added to the promoter penalty provisions[1] providing that an entity must not engage in conduct that results in that or another entity being a facilitator of "illegal phoenix activity" where the same test is applied as for the proposed Phoenix Offence: the transfer of property from one company to another where the main purpose of the transfer is to prevent, hinder or delay the payment of existing or expected liabilities including tax liabilities, employee entitlements and debts to creditors.

As with the existing promoter penalty laws, the proposed new limb would also apply where the arrangements were not actually implemented but would have been if not for regulatory intervention.

Option three – creating a new provision

A third option is the creation of a new provision outside of the existing promoter penalty laws similar to the provision on the promotion of illegal early release of superannuation benefits.[2] This provision applies to promoters of schemes that incorrectly offer people early release from their preserved superannuation benefits prior to retirement without meeting the statutory conditions for such release. Offences can attract civil penalties or criminal prosecution. This activity undermines the Government's retirement income policy and exploits vulnerable people within the community.

1 In Division 290 of Schedule 1 to the *Taxation Administration Act 1953*.
2 See section 68B of the *Superannuation Industry (Supervision) Act 1993*.

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
47.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		5
48.	Should the promoter penalty laws be expanded to apply to promoters or facilitators of illegal phoenix activity?	Yes	
49.	What are the benefits and risks of this approach?	The expansion would ensure that the movement of property (eg to a SMSF) cannot be used to avoid payment of creditors of the enterprise.	
50.	If the promoter penalty laws are expanded to illegal phoenix activity, how would they best be structured? For example by adding a new limb to the existing provisions or creating a separate new provision?	Adding a new limb to the existing provisions.	
51.	Are there additional safeguards that would be needed to ensure innocent advisers are not caught by the provisions? Should the adviser have to corroborate that they acted as mere adviser and not as a promoter?	The adviser must be a licensed advisor also and hold an AFSL or appointment as agent for AFSL and such AFSL holder confirm that it ratifies with such advice provided being suitable and correct.	
52.	If promoter penalties are expanded to apply to promoters of illegal phoenix activity, do the existing sanctions provide sufficient deterrent?	No	
53.	Are the offences of civil penalty and criminal prosecution available under section 202 the Superannuation Industry (Supervision) ACT 1993 preferred to the promoter penalty	Offences of civil penalty and criminal prosecution available under section 202 the Superannuation Industry (Supervision) ACT	

	options above?	1993 preferred	
54.	An alternative approach to stop the promotion or facilitation of illegal phoenix activity may be a Court order to require specific performance of some action, for example, submitting a company liquidation proposal for consideration by ASIC. Is there merit in this or alternate approaches to effectively deter those who promote or facilitate illegal phoenix activity?	No. This would increase time and costs to creditors and of administration for having to gain ASIC approval.	

6. EXTENDING THE DIRECTOR PENALTY NOTICE REGIME TO GST

Current situation

Currently, the Director Penalty Notice (DPN) regime only applies to pay-as-you-go withholding (PAYGW) and to compulsory superannuation contributions (through the collection of super guarantee charge (SGC)). It does not apply to a company's unpaid GST liabilities.

How phoenix operators exploit the current law

Companies can fall behind in paying GST to the ATO, and directors can deliberately exploit the time between collecting GST and the due date for paying it to the ATO. Non-compliant businesses, including those that are engaged in phoenixing, claim GST input tax credits for their costs and expenses, collect GST from customers, do not report their liability to the ATO and then liquidate the company pocketing the GST for personal gain. Compliant companies are at a competitive disadvantage with non-compliant companies, which are able to undercut prices knowing that GST collected will not be paid to the ATO.

Proposed reform

Extending the DPN regime to include companies' outstanding GST obligations will allow the ATO to recover penalty amounts equivalent to the GST. Directors of these companies would be personally liable to pay a penalty equivalent to the amount of unpaid GST. The proposed expansion would apply to all directors. The penalty would be discharged in accordance with same rules that apply to PAYGW and SGC penalties as outlined above.

This proposal is designed to act as a financial disincentive to engage in illegal phoenixing behaviour. The proposal complements other phoenixing measures to remove pathways by which phoenix operators seek to obtain an unfair personal advantage. This proposal also assists to level the playing field with compliant companies competing with companies run by phoenix operators, removing one tool such companies use to reduce prices.

The proposal complements and builds on other Government action to strengthen GST compliance – namely, requiring purchasers of newly constructed residential properties or new subdivisions to withhold GST.

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
55.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.	They more often use the GST as an interest free loan (or even fraudulent BAS) from government and so gain an unfair advantage in the market place as a business as against competitors.	10
56.	What are the benefits and risks of this approach?	It stops the officers setting up another business unfairly competing against proper businesses.	
57.	Should the DPN regime be expanded to cover GST for all directors, or be restricted to those identified as high risk phoenix operators (see part two)?	DPN should be expanded to apply to all.	
58.	Are there alternative approaches to securing outstanding payment of GST from companies and their directors?	None we are aware of or could recommend.	

7. SECURITY DEPOSITS

Current situation

Under the tax law, the ATO can require a bond or other security from a business for existing or future tax liabilities that are at high risk of not being paid[3]. High risk situations are those where the ATO believes that the taxpayer will carry on an enterprise for a limited time only, or that is otherwise appropriate to request a security.

3 Section 255-100 of Schedule 1 to the *Taxation Administration Act 1953*.

The ATO may consider a number of relevant factors before requesting security, including the nature of the enterprise and the taxpayer's current or future tax liabilities, compliance and payment history, other financial liabilities and debtor arrangements and ability to pay.[4]

Examples of high risk situations include businesses, their directors and associates, with a history of non-compliance or past phoenixing, and businesses created in Australia by foreign business people who plan to leave the business with unpaid tax debts.

How phoenix operators exploit the current law

Although the security could be in any form, the ATO usually demands a charge, lien or a mortgage over an asset. The security provided will secure the tax debt that is owing or likely to be owed in the future. Refusing to provide the requested security is a criminal offence, subject to a maximum penalty of $21,000.

Where the ATO demands a security that is of a higher value than the penalty, there is no incentive for the taxpayer to provide that security. This situation creates an incentive for the taxpayer to risk having to pay the penalty rather than provide the security requested. Furthermore, pursuing a Court penalty decision can take time, giving a business the opportunity to enter voluntary administration and phoenix. To address this issue, the Government has announced, as part of changes to superannuation guarantee,[5] a change to the tax law to improve the effectiveness of security deposits. This amendment will apply to all applicable tax liabilities for consistent administration and collection.

Proposed reform

The Government intends to further strengthen the effectiveness of the security deposit power to target illegal phoenixing. Combatting phoenix operators protects the integrity of the tax system, provides a level playing field for business and protects employees.

Currently, any security bond requested by the ATO is unable to be recovered under third party debt collection provisions. These provisions[6] , known as the statutory garnishee power, are limited in that they apply to tax-related liabilities. As a security deposit is not presently a tax-related liability, the garnishee power cannot apply in relation to the security deposit demands. It is proposed that the ATO should be able to use the garnishee power to garnishee an amount from a third party to cover, in full or part, the amount of requested security.

As security deposits can be requested for either a current or an expected future tax liability, the use of garnishee powers from third parties will include amounts that are not yet due. This extension to the garnishee powers will be strictly limited to the circumstances of security deposits. This change will disrupt and deter businesses that are suspected of phoenix behaviour or are otherwise requested to provide security bonds by the ATO.

This proposal does not prevent a business from continuing to be able to seek a judicial review of any garnishee order.

4 Law Administration Practice Statement PS LA 2011/14 General debt collection powers and principles, paragraphs 98-105.

5 The Hon Kelly O'Dwyer, ***Turnbull Government backs workers on superannuation,*** 29 August 2017.

6 Subdivision 260-A of the *Taxation Administration Act 1953*.

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
59.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		10
60.	Would improvements to the garnishee provisions adequately address the proposal to strengthen the effectiveness of the security deposit power?	No. The Garnishee provisions should be altered so that the ATO must send copies of garnishees to PMSI holders registered against the taxpayer for proceeds on the PPSR, as well as persons registered against the tax payer on the PPSR for "accounts" class collateral. This is because any payments obtained from persons who are grantors to the tax payer are the subject of priority by such PMSI and account collateral holders. Without notice from the ATO however, such creditors are losing their priority under section 62, 63 and 64 PPSA as they are never made aware of the ATO taking such collateral. This way the perfected security interest can have an effective means to obtain judicial review as to priority over such proceeds. AICM is aware that the ATO uses the PPS registry to identify debtors of the tax payer, and then provides garnishee notices to such debtors. There is currently no obligation upon the ATO to send notices to the taxpayer's creditors (who have lodged PMSI's against the taxpayer). A tax payer's liquidator/ trustee cannot receiver such funds from the ATO (as they are not an unfair preference / voidable transaction by the tax payer)	
61.	Should the proposal be limited to businesses that have	Yes	

	been identified as high risk phoenix operators (see part two)?		
62.	Are there concerns or practical issues that would need to be addressed with expanding the garnishee power generally for future tax liabilities?	See above as to notice to PPS registered security interests.	
63.	Are there any further concerns if this were achieved through amending the definition of 'tax-related liability' to include the amount of an anticipated future tax liability which is the subject of a security deposit demand?	No	
64.	Are there any issues with the existing garnishee processes that should be considered?	Yes – see above.	
65.	Should the government consider additional measures to prevent circumvention of the provisions by transferring, disposing or encumbering assets where a request is issued?	None are apparent.	
66.	Should the penalties for not complying with a security deposit request be increased to improve compliance?	Yes.	

PART TWO - DEALING WITH HIGHER RISK ENTITIES

Part Two of this paper sets out reforms which target the most egregious illegal phoenix operators who have adopted phoenixing into their business model, or who are active facilitators of illegal phoenix activity.

The Government has determined that in order to prevent phoenix activity from occurring, new preventative and early intervention measures are required.

However, it also acknowledges that it is important that any measures which have the potential to interfere with standard business practices are targeted as much as possible to entities which present the highest risk.

This Part sets out a mechanism for identifying those who present the highest risk of ongoing phoenix activity, and three specific reforms aimed at curbing their activities.

8. TARGETING HIGHER RISK ENTITIES

Current situation

Regulators largely rely on enforcement as a mechanism to deal with those who engage in illegal phoenixing as a business model. Where there are clear criminal or fraudulent actions, criminal charges may be available. These are expensive and time consuming for all parties. Criminal charges are also applied 'after the fact' when the phoenix activity has already been carried out.

How phoenix operators exploit the current law

There are presently no special compliance measures applied to entities or individuals who present a high risk of engaging in illegal phoenix activity.

The absence of effective preventative or early intervention measures which disrupt phoenix activity can make it difficult for regulators to prevent phoenix activity from occurring, even when the entities being targeted have previously been determined to be high risk.

Experienced phoenix operators will continue to cause loss to their employees, creditors, the revenue system and ultimately the Australian economy unless they are prevented from phoenixing further businesses.

For example taxpayers who are suspected of posing a higher level of risk to the tax system (as well as employees and other creditors), remain entitled to privileges of the self-assessment tax system, which they are able to exploit to their advantage.

The self-assessment tax system relies largely on voluntary compliance, where taxpayers are trusted to do the right thing until investigations establish otherwise. However, high risk phoenix operators exploit these privileges, and follow up compliance action may do little to deter them from repeating their behaviour.

Phoenix operators exploit the settings in regulatory regimes to their advantage. For example, under the current law, suspected phoenix operators may still:

- select their own liquidator, allowing them to engage a dishonest or conflicted liquidator;
- seek tax refunds while being overdue on forms that give rise to tax liabilities, for example by hastening lodgement of their Business Activity Statements to ensure they receive GST refunds while delaying lodgement of income tax returns which will result in a tax liability; and
- exploit the 21 day notice period under a Director Penalty Notice (which is intended to provide directors with a reasonable time to comply with their obligations such as remitting amounts withheld under the PAYGW system or payment of their employees' Superannuation Guarantee amounts) to dispose of or transfer assets.

Proposed reform – a two-tiered approach

A definitional approach to identifying those at highest risk of conducting illegal phoenixing faces the same challenges as defining "illegal phoenixing": any definition is likely to be either too narrow, and thus ineffective, or too wide, and thus impact on legitimate businesses.

Additionally, some academic researchers have noted that it is difficult to provide a definition of high risk that is sufficiently inclusive of what might be described as the most egregious phoenix activity without also capturing some business rescue activities or other more accidental activities.[7] Regulators and administrators note that those involved in phoenix activity exploit existing legislative provisions and are adept at circumventing black letter law, for example inserting unsuspecting "dummy" or "straw" directors into corporate structures and sometimes placing themselves outside of a recognised legal relationship with the businesses they control. There is a risk that a statutory definition would not adequately capture these individuals.

Rather than taking a definitional approach, the Government is proposing a mechanism for identifying and targeting the most egregious phoenix operators who have adopted phoenixing as a business model. This mechanism leverages off common phoenix behaviour.

This mechanism involves a two-step process:

1. designation as a "Higher Risk Entity" (HRE); and
2. being declared to be a "High Risk Phoenix Operator" (HRPO) by the Commissioner of Taxation, which would enliven the early intervention and prevention laws set out in this Part.

Designation as an HRE is a pre-requisite to being declared to be an HRPO.

Designation as a HRE will not automatically result in that individual being subjected to the exercise of the new powers proposed in this Part, nor any other powers which do not already apply.

Regardless of how a HRE is designated, the designation has no automatic or material impact on the activities of the individual or their associated entities.

7 Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenix Activity: Recommendations on Detection, Disruption and Enforcement', The University of Melbourne, February 2017.

Step one – the objective test

Designation as an HRE would be based on certain objective threshold tests.

Individuals would automatically be designated HREs once the threshold had been met.

The Government is proposing to designate an individual an HRE where:

- They have previously been disqualified from managing a corporation; or
- They have been an officer of two companies which have entered liquidation in the previous seven years (or other appropriate period) and where:
  - there has been a failure to provide adequate books and records to an insolvency practitioner, or
  - an insolvency practitioner has lodged a report under section 533(1) of the Corporations Act in respect of the company, or
- They have been found to have committed a Phoenix Offence (if one is introduced (See section 0)) or the subject of promoter penalty sanctions; or
- They are an officer of an entity which has a poor regulatory compliance history that is consistent with suspected illegal phoenix activity, and they are provided with notice of their designation by the ATO (or another appropriate regulator, such as ASIC).
  - This may include involvement in past liquidations where claims have been made to the Fair Entitlements Guarantee Scheme, repeated failure to lodge required forms and returns in the lead up to liquidations, or repeated failure to keep records relating to the transfer of assets to related entities.

Step two – an administrative declaration

It is accepted that the pool of HREs may capture instances of honest business failure, and that those individuals should not be punished for their behaviour.

That is why a second step before the new powers can be imposed is proposed.

Once an individual is identified as an HRE, the Commissioner of Taxation would have the power to declare them to be an HRPO, and consequentially to apply the HRPO measures set out in this Part.

Decisions to apply these powers would be made on a case by case basis taking into account the surrounding circumstances, and rights of review continue to attach to the exercise of the powers.

Where an HRPO is an officer of a company, or has recently been an officer of the company, the Commissioner of Taxation will have the discretion to declare that company to also be an HRPO.

Notification and Safeguards

It is proposed that the Commissioner would be required to provide notification of their decision to declare an individual a HRPO, and that the declaration be subject to review.

However, on occasion it may be necessary for action to be taken swiftly by regulators against an entity to apply preventative measures (such as retaining tax refunds) where there is an imminent risk of phoenix activity occurring.

If an extensive merits review process were to attach to the designation as a HRPO, the review process could delay the application of these preventative measures. Such delay may undermine the effectiveness of these new measures in protecting employee entitlements, trade creditors and revenue.

One option could be for individuals designated as HRPOs to be entitled to request a statement of reasons for the designation, and given an opportunity to put forward contentions as to why the designation should be cancelled and supporting evidence of improved business practices. However this process would not suspend the use of the new preventative measures.

Cancellation of a determination could also occur unilaterally where the operator demonstrates a behavioural change.

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
67.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		10
68.	What are the benefits and risks of this approach?	Clear risk management. The "points" accrued by a person should be reduced (like a driver's license) after a suitable period, but their past conduct still be able to be viewed.	
69.	Are the safeguards for designating HRPO sufficient? Can you suggest any alternative safeguards that would still allow for swift preventative action to be taken to prevent phoenix activity from occurring?	Possibly better past conduct comparable with current conduct by reduction of points/ transparency of past conduct as set out above.	
70.	What safeguards would be required to ensure that the measure is appropriately targeted?	AAT review plus whistle blower protection for those who inform ASIC.	
71.	Should the Commissioner of Taxation have a discretion to declare a company of which a HRPO is, or has recently been, an officer to also be a HRPO? Should this be extended to other individuals or entities which are associates of the HRPO?	No. the ATO 's input however should carry heavier "points" as to conduct.	
72.	Should "associate" be defined or determined administratively?	Defined so as to exclude professional licensed advisors providing advice within the scope of the role as an advisor. .	

9. APPOINTING LIQUIDATORS ON A CAB RANK BASIS

The current situation

A well-functioning financial system should provide an efficient process for the external administration of insolvent or financially distressed companies which builds confidence, protects against misconduct, and promotes self-regulation and competition. Insolvency practitioners thus play a crucial role in the financial system.

A registered liquidator may be appointed as an external administrator of a company in the following capacities:

- as voluntary administrator of the company;
- as administrator of a deed of company arrangement entered into in relation to the company;
- as liquidator of the company (appointed by members or the court); or
- as provisional liquidator of the company.

Company directors initiate most of these appointments.

Before an appointment occurs, a registered liquidator must be approached to consent to act as external administrator of the company. In most instances, those approaches are made as a result of a referral by a lawyer, accountant or other pre-insolvency adviser.

In order to compete for work, a registered liquidator forms, and builds on, relationships with lawyers, accountants and other pre-insolvency advisers who might refer work to them.

How phoenix operators exploit the current law

Registered liquidators act in a fiduciary capacity and, in some cases they are officers of the court. They are required to maintain professionalism, independence, impartiality, honesty and ethics in the performance of their functions and duties.

However, as phoenixing becomes more sophisticated, the Phoenix Taskforce has identified cases where facilitators will cultivate a relationship with an individual registered liquidator who will facilitate their client's interests to the detriment of creditors.

An incentive exists for these registered liquidators not to 'bite the hand that feeds them', which can undermine their independence or lead to a conflict of interest. The current referral model potentially facilitates and provides opportunities for a dishonest registered liquidator to exercise "wilful blindness" and act in other ways which facilitate misconduct, including illegal phoenix activity.

In these circumstances, referral relationships between pre-insolvency advisers and a dishonest registered liquidator can result in illegal phoenix activity occurring and not being adequately investigated. Even the actions of a single individual can undermine market confidence.

These circumstances provide an unfair advantage over other registered liquidators competing in the market for insolvency services who strive to ensure they meet their statutory and fiduciary obligations and properly perform their duties and functions.

Appropriate measures to address actual or perceived concerns regarding independence arising from the current referral system for the appointment of external administrators are central to combatting illegal phoenix activity.

A cab rank model has been recommended as one method of addressing issues of registered liquidator independence, facilitator referrals and director misconduct that underpin some illegal phoenix activity by:

- minimising the risk that the registered liquidator is subject to any influence that might lead them to not bring an impartial mind to the conduct of the external administration;
- reducing the ability for untrustworthy advisers to collude with registered liquidators to operate to defeat the interests of creditors; and
- increasing the prospect of illegal phoenix activity being detected and investigated.

Proposed reform – what is a cab rank system?

The idea of a cab rank system is to provide a director with access to an independent registered liquidator who can provide advice on the options available to the director to deal with the company's financial position.

Under a cab rank system, a registered liquidator would be chosen from a panel on a "next-cab-off-the-rank" basis in certain circumstances.

Panels would be regionally based, and panel liquidators would retain the right to refuse an appointment, for example because of a conflict of interest, time constraints or if they considered that they lacked the requisite experience to properly carry out the administration or liquidation.

When dealing with instances of low or no-asset companies, the activities of panel-appointed liquidators would need to be funded, for example via a component of the industry levy on corporations, to ensure that matters were investigated and properly reported to both the creditors and to ASIC.

The funding would finance registered liquidators' basic investigations and reporting, and would replace the current widespread practice of directors indemnifying registered liquidators for their costs.

Most external administration appointments do not result from a referral where improper pre-insolvency advice has been provided and where illegal phoenix activity is suspected. It is thus important that any mechanism aimed at curbing illegal phoenixing is not detrimental to the overwhelming majority of registered liquidators who have done the right thing.

Option 1 – High Risk Phoenix Operators

Under this proposal, the cab rank rule would apply only to a company where an officer of the company is, or was during a prescribed period prior to the appointment of an external administrator, an HRPO (section 2).

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
73.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		2
74.	Are there alternate measures that would be more effective? If so, please provide an outline of what you think would work.	That the appointing director/s or applicant creditor/s (in case of court ordered winding up) must provide a written declaration to the intended appointee (to then be supplied to ASIC) as to the referral source	
75.	Currently, it is intended that the cab rank be restricted to circumstances where an HRPO is or has recently been an officer of the company.	Not supported. The likelihood is that an intended appointee or replacement appointee will have previously discussed with creditors and/ or bankers the appointment. Also, it is not the wish that the company continue if the HRPO cannot obtain a suitable appointment due to cab rank rules (and refusals by possible appointees) delaying an appointment which might hinder voidable transaction recoveries.	
76.	Should a cab rank apply to all external administration appointments?	No. It is not the wish that the company continue if the HRPO or a creditor cannot obtain a suitable appointment due to cab rank rules (and refusals by possible appointees) delaying an appointment which might hinder voidable transaction and other recoveries.	
77.	◦ Should it be applied more widely, but be limited to specified types of external administration appointments where certain criteria are met? For example:	No. See above.	

	◦ whether it was a director initiated creditors' voluntary liquidation and/or the appointment of a liquidator following a voluntary administration ◦ industry sector ◦ whether pre-insolvency advice was received ◦ prescribed criteria on the company's financial affairs ◦ when there has been a recent transfer identified for some or all the companies assets ◦ where there has been a change of directors within a prescribed period.		
78.	If the cab rank applies only to those companies where specified criteria are met what should those criteria be? Please specify your reasons.	Not applicable.	
79.	Who should administer the cab rank and how should it be administered? Please explain your reasoning.	Not applicable.	
80.	How do you think such a system should be funded?	By government.	

Option 2 – a Government Liquidator

Another option is to establish a "government liquidator" to conduct a streamlined external administration of small-to-medium size enterprises with the option to appoint a private registered liquidator if circumstances warranted it. A similar system currently operates in personal insolvency.

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
81.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		0
82.	Should consideration be given to establishing a government liquidator to conduct small-to-medium external administrations? please provide your reasons.	No.	
83.	What are the benefits and risks of this approach?	They would not be experienced enough for the multiple industries.	
84.	If a government liquidator is created, what external administrations should they conduct? Please provide your reasons.	ATO appointments.	
85.	How do you believe a government liquidator should be funded?	ATO pay for same.	

Additional comments

The AICM believes the government should play an active role in small to medium size enterprise insolvencies especially those deemed as high risk but feels this role is best played by funding and supporting private liquidators. The AICM suggests that consistent funding at a significant and publicly promoted level will effectively deter and disrupt illegal phoenix activity reducing the $3.2bn cost to our economy.

10. REMOVING THE 21 DAY WAITING PERIOD FOR A DPN

Current situation

Currently, where a company has not met certain tax obligations, the company's directors are personally liable to pay the ATO a penalty equivalent to the unpaid tax liability. Currently, this power is only applicable to PAYGW and SGC (but could be extended to include GST, see section 6).

To recover the penalty, the ATO must issue a DPN.[8] Once the DPN is issued, the directors have 21 days to take corrective action. There are three options available to the directors in this situation: ensure their company pays the outstanding amounts, pay the penalty specified in the notice, or ensure their company enters voluntary administration or is placed into liquidation. This third option is not available to the directors if the company's PAYGW or SGC liability is not reported to the ATO within 3 months of the due day.

If the directors take no action within the 21 days, then the ATO may commence proceedings to compel the directors to pay the penalty.

The use of the director penalty is a powerful tool in the collection of outstanding tax obligations, however some directors have found ways to exploit certain aspects of the DPN provisions in order to escape personal liability. To help counter this behaviour, the Government announced on 29 August 2017 proposals to strengthen the DPN regime as part of a package of measures to strengthen employer compliance with superannuation guarantee obligations. The Government has further proposals to strengthen the DPN regime as part of the phoenixing package, which are set out below.

How phoenix operators exploit the current law

Directors of high risk phoenix businesses having received a DPN are known to dispose of their personal assets before the expiration of the 21 day notice period, preventing the ATO from acquiring those assets to discharge the penalty. For such directors, the DPN is effectively a signal to take steps to frustrate the ATO's attempts to recover unpaid PAYGW and SGC.

Proposed reform

By removing the 21 day period for those directors identified as HRPOs, the ATO will be able to commence recovery of the penalty as soon as the DPN is issued.

Directors who are not designated as HRPOs will still be entitled to 21 days' notice from the date a DPN is given.

This proposal is designed to act as a behavioural and financial disincentive for phoenix activity. It removes a time period in which HRPOs can dissipate their personal assets. It will contribute to the collection of outstanding superannuation payments owing to employees of companies that have been subjected to phoenixing behaviour, as well as the collection of PAYGW and GST (if the proposal at section 6 above progresses).

8 DPN provisions are located in Division 269 of Schedule 1 to the *Taxation Administration Act 1953*.

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
86.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		10
87.	Should the 21 day notice period be removed where a director has been designated as a HRPO?	Yes.	
88.	What are the benefits and risks of this approach?	The benefits are that it places a proper burden upon the director to be properly vigilant as to being compliant with all obligations of a director and provides suitable incentive if they are.	
89.	Should further safeguards attach to DPNs issued to HRPOs in addition to the existing legal rights and safeguards that currently apply to DPNs?	Yes. That the person's designation as an HRPO must be in place at the time of the sending of the DPN. Whilst the loss of current DPN defences/ protections is consistent with it not being a single act of non-compliance with the Corporations Act by the director, much improved conduct of a director should not be prejudiced by ongoing risk for past non-compliance after a period of time (see above suggestion as to renewal of director "points").	
90.	Are there alternative approaches to stop a designated HRPO from disposing of their personal assets once they are aware they are required to pay a director penalty?		

11. PROVIDING THE ATO WITH THE POWER TO RETAIN REFUNDS

The current situation

The ATO can only retain refunds in specific circumstances:

1. Any refund where the business has not provided a notification under the Business Activity Statement (BAS) provisions or Petroleum Resource Rent Tax (PRRT) provisions.[9]

2. Any refund where information is being verified by the ATO, where it would be reasonable to do so and relates to the amount that the ATO would otherwise have to refund. This power applies equally to BAS notifications and income tax lodgements.[10]

3. Any refund where the ATO reasonably believes the business has not notified the ATO under the single touch payroll reporting provisions (where they apply).[11]

4. Refunds of a running balance account (RBA) surplus only (not income tax refunds) where financial institution account details have not been provided.[12]

How phoenix operators exploit the current law

Phoenix operators are known to arrange the timing of their lodgements to ensure that they receive their refunds as soon as possible, but delay or avoid lodgement of any returns which are expected to result in a liability.

Where a business has lodged a BAS resulting in a refund/RBA surplus, but has failed to lodge their overdue income tax return, the ATO is currently obligated to refund the credit even where that taxpayer is suspected of seeking to engage in phoenix activity. Due to the lodgement cycles, there can also be many months gap between the due date for lodgement of notifications that may result in a refund (for example a BAS) and notifications that may result in a liability (for example an income tax return). Phoenix operators have been known to exploit this timing difference by stripping assets from the entity that they intend to be left with the debts.

Administrative penalties for late lodgement of returns do apply[13], however these penalties are for relatively small amounts when compared to the cost of illegal phoenix activity and are unlikely to deter phoenix operators who may also end up avoiding payment of the penalties where the company is stripped of its assets and liquidated.

Proposed reform

Where a person has been designated as a HRPO, it is proposed that the law be expanded to allow the Commissioner to retain a refund[14] that otherwise would have been refunded to the HRPO in circumstances where the HRPO has an overdue lodgement or notification capable of affecting a tax

9 Section 8AAZLG of the *Taxation Administration Act 1953*.
10 Section 8AAZLGA of the *Taxation Administration Act 1953*.
11 Section 8AAZLGB of the *Taxation Administration Act 1953*.
12 Subsection 8AAZLH(4) of the *Taxation Administration Act 1953*.
13 Failure to Lodge penalty is calculated at the rate of one penalty unit (currently $210) for each period of 28 days that the return is overdue, up to a maximum of five penalty units ($1050). Higher penalty amounts apply for larger entities.
14 An RBA surplus or non-RBA credit.

liability. HRPOs will therefore be required to lodge all outstanding notifications that are capable of affecting their tax liability before a refund is issued. This will help to disrupt the phoenix business model and protect tax revenue, while still ensuring legitimate businesses can operate in a commercial setting.

Note that if the ATO's power to retain refunds is expanded in relation to HRPOs who have notifications outstanding, interest on the refund would not commence until the 14th day after any such notification were given by the HRPO.[15]

ITEMS	QUESTIONS	COMMENTS	OUT OF 10 (IF APPLICABLE)
91.	On a scale of one to ten, where one is 'ineffective' and ten is 'highly effective', please rate how well you think this measure will operate to deter and disrupt illegal phoenix activity.		10
92.	Should the ATO's power to retain refunds be broadened in respect of HRPO's who have failed to provide other notifications/lodgements capable of affecting their tax liability?	Yes	
93.	What are the benefits and risks of this approach?	It will serve to protect the revenue, and ensure that non-compliant companies and their directors do not gain an unfair cash flow advantage over compliant competitors.	
94.	Should this proposed power be broadened further where notifications are not yet due but will become due in the next reporting cycle? For example where lodgement of an income tax return by the HRPO is not due for some months but is expected to result in a significant liability, should the ATO be able to retain a refund presently owed?	Yes	

15 *Taxation (Interest on Overpayments and Early Payments) Act 1983*.