

HENRY DAVIS YORK

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BY EMAIL phoenixing@treasury.gov.au

Mr James Mason
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Mason

Combating Illegal Phoenixing - Consultation Paper

We refer to the Consultation Paper issued by the Australian Government dated September 2017 addressing proposed reforms and measures designed to combat illegal phoenixing. We write in response to the Government's request for submissions in relation to the merit and efficacy of the proposed reforms and measures.

We have been afforded the opportunity to review the draft submission prepared by the Australian Restructuring Insolvency and Turnaround Association (**ARITA**). Having considered ARITA's draft submission in detail, we consider that it extensively addresses the proposed reforms. We are supportive of ARITA's views conveyed in its submission. In particular, we agree that:

1. There presently exists a framework of law and penalties to combat transactions, acts and omissions which constitute or facilitate illegal phoenix activity. The law simply needs to be enforced.
2. The introduction of an administrative recovery notice regime akin to section 139ZQ of the *Bankruptcy Act 1966* (Cth) will be a valuable tool. It will simplify proceedings in order to avoid illegal phoenix transactions and to obtain compensation for creditors.
3. There is no need to implement a 'cab rank' or roster system for the appointment of external administrators. The profession is highly regulated, is subject to an existing legal framework which safeguards independence and is comprised of lawful professional advisors. While unscrupulous registered liquidators may exist, we concur with ARITA in that a cab rank system will not prevent those practitioners from continuing to act improperly. Such liquidators should be identified and prevented from further practice.

In addition to the matters addressed in ARITA's submission, there are various other elements that we consider would assist in effectively combatting illegal phoenixing. Those elements include:

1. Education - resources should be made available to the Australian Securities and Investments Commission and professional bodies governing corporate directors to ensure that corporate Australia understands:

- (a) the activities that constitute illegal phoenix activity (as opposed to activities that comprise a genuine attempt to restructure of a company's affairs); and
 - (b) the civil and criminal penalties which may result from engaging in such activity.
2. Resourcing - liquidators are often hampered in their pursuit of illegal phoenix activity by a lack of funds. By its very nature, phoenixing strips the assets of a company and transfers them to another entity, meaning that such assets will not be available to fund a liquidation. The Assetless Administration Fund is presently administered by ASIC and it has a stated focus to assist liquidators investigate and report on, without limitation, phoenix activity. It is critical in the fight against illegal phoenix activity to ensure that ASIC and company liquidators are appropriately resourced to enforce the law and impose penalties. This could be done by enhancing the Assetless Administration Fund, or a specialist fund established for the sole purpose of funding proceedings to combat illegal phoenix activity.

We thank the Government for the opportunity to make this submission.

Yours faithfully
Henry Davis York

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