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## **Submission by the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia on Combatting Illegal Phoenixing**

**27 October 2017**

The Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, and the Australian Catholic Religious Against Trafficking in Humans (ACRATH) welcome this opportunity to make a submission to the Treasury consultation into measures to combat illegal phoenixing. The issue is of relevance to our work as we encounter illegal phoenixing and allegations of illegal phoenixing in the work we do around seeking to eradicate human trafficking, forced labour and egregious exploitation of people on temporary visas in Australia. Labour hire businesses phoenix to escape having to pay the wages they should have paid or to avoid civil legal action to recover unpaid wages.

WEstjustice community legal centre have reported that they have contacted employers on a number of occasions only to be provided with fake email addresses, fake postal addresses, and false promises of repayment. Several of their clients have brought claims to the Federal Circuit Court or Victorian Civil and Administrative Tribunal (VCAT) at considerable personal expense. These clients have won their case, only to discover that the employing company has been deregistered. Enforcement action is complex, futile, and often ill-advised where companies no longer hold any assets.

The submitting bodies agree with the consultation paper that (p. 5) "The existing regulatory toolkit is resource intensive and inefficient and focuses too heavily on enforcement and prosecution rather than deterrence." Further that (p.23) "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."

There is a need to focus on measures that will act as general deterrence, by making illegal phoenixing harder, creating a perception and reality that those engaged in illegal phoenixing will be detected and subject to sanction and that the sanctions are at an adequate level to be meaningful and outweigh the benefits of illegal phoenixing.

Review of criminological literature on what works to deter crime finds that there is substantial evidence that the increased visibility of law enforcement personnel and allocating them in

ways that materially heighten the perceived risk of apprehension can deter crimes.<sup>1</sup> This literature finds that perceived certainty of punishment is associated with reduced intended offending.<sup>2</sup> The conclusion is that certainty of apprehension and not the severity of the legal consequences ensuing from apprehension is the more effective deterrent, especially when the level of sanction is already adequate.<sup>3</sup>

In addition to the measures in the consultation paper, the submitting bodies also support the following measures to deal with illegal phoenixing:

- The introduction of a Director Identification Number;
- The implementation of a public register of beneficial owners of companies and trusts. Community legal centres have reported cases of phoenixing entities holding assets in trusts to avoid disclosure of the ultimate beneficial owners.
- Introduction of an offence to act as a 'front' director for a company and not disclose who they are acting for. As a 'front' director will usually not be involved in any underlying criminal activity themselves, making it an offence to act as a 'front' director where there is concealment of who they are acting for should act as a significant disincentive for the 'front' director; and
- Introduction of a national licensing regime for labour hire companies in high risk industries (such as agriculture, horticulture and security) where phoenixing is common, to force disclosure of the ultimate beneficial owners of the labour hire companies and ensure people highly unsuitable to run such a business are unable to (such as excluding High Risk Phoenix Operators from setting up labour hire businesses).

**1. 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.**

A single point hotline to collect reports of illegal phoenixing activity is a worthwhile measure, but its impact is likely to be low. It will allow the detection of a greater number of cases of illegal phoenixing activity, but then relies on intensive use of resources to investigate and prosecute cases within the existing legal framework. The hotline's effectiveness at detection will be improved if combined with a promotion campaign so that people know where they should call. across all regulatory agencies with a consistent message. The benefits of a hotline or any public reporting mechanism in detection, relies heavily on public capacity in identifying illegal phoenixing and the process for reporting.

The Fair Work Ombudsman (FWO) commissioned report found that consulted industries considered an education campaign to raise public and business awareness was the most strongly supported recommendation.<sup>4</sup>

However, for increased detection to be meaningful there needs to be adequate staff and resources to investigate reports of illegal phoenixing activity and mount prosecutions. Without such resources being present there is a danger the outcome is simply a longer

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<sup>1</sup> Daniel S Nagin, 'Deterrence in the Twenty-First Century', *Crime and Justice* Vol. 42, No. 1, (August 2013), 201.

<sup>2</sup> Daniel S Nagin, 'Deterrence in the Twenty-First Century', *Crime and Justice* Vol. 42, No. 1, (August 2013), 201.

<sup>3</sup> Daniel S Nagin, 'Deterrence in the Twenty-First Century', *Crime and Justice* Vol. 42, No. 1, (August 2013), 202.

<sup>4</sup> Price Waterhouse Coopers 2012 Phoenix activity: sizing the problem and matching solutions, Fair Work Ombudsman, 34.

backlog of cases for overworked regulatory officials to triage and a greater proportion of cases that do not get dealt with for lack of resources.

A promotion campaign could contribute to an increased perception of the likelihood of being caught as the activities associated with illegal phoenixing are in the spotlight.

Another important consideration for a public reporting mechanism is the promotion of consistent information and establishing a consistent format so that regardless of which regulatory body a person begins their search they are provided clear phoenix activity information and can easily follow a phoenix reporting process.<sup>5</sup>

**2. Are there any other reporting mechanisms which you think would assist people to report suspected illegal phoenix activity?**

The collaborative report between Monash University and Melbourne University suggests Phoenixing could be included in the regulatory agencies other reporting mechanisms. These reports could then be directed to the main body coordinating the hotline reports investigations<sup>6</sup>.

**3. What are the benefits and risks of a 'phoenix hotline'?**

The benefits of a phoenix hotline are it will increase the options for reporting suspected illegal phoenixing activity and allowing for anonymous reporting gives the community a clear and safe pathway to report suspicious business behaviour.

The main risk with the hotline is that if it is not backed up with adequate investigative and prosecution resources it adds to a backlog of cases that go unaddressed. Those making reports will become disillusioned with the hotline if they see no evidence that reports are investigated and acted upon. This could result in a net reduction in reporting of cases, as cynicism about government inaction results. The Justice and International Mission Unit has already experienced that with other organisations that no longer choose to report all cases of detected exploitation of people in breach of the *Fair Work Act* as they lack confidence that the Fair Work Ombudsman has the resources to investigate and take action on reported cases.

**4. Which agency do you believe would be best placed to operate such a hotline?**

The Unit believes that the hotline should be operated by an agency that has the resources to properly operate it and a culture of wanting to see cases of alleged illegal phoenixing investigated and prosecuted. The submitting bodies would see the ATO or AUSTRAC as examples of appropriate agencies that could operate the hotline, assuming they have the resources and the willingness to do so.

**5. What public reporting would be appropriate to ensure transparency? What other mechanism could be considered?**

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<sup>5</sup> Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenixing activity recommendations on detection disruption and Enforcement', The University of Melbourne, February 2017.

<sup>6</sup> Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenixing activity recommendations on detection disruption and Enforcement', The University of Melbourne, February 2017.

To increase the validity of the hotline both in deterring offenders and building community trust, there should be an easily accessed and searchable public registry of companies and directors that have been subject to sanctions related to illegal phoenixing.<sup>7</sup> The hotline should also report the number of reports it receives in a year, how many were investigated, how many cases were closed and how many resulted in actions to sanction those involved in illegal phoenix activity.

“Knowledge of available sanctions should impact people’s perception of the cost of noncompliance. It may also help validate and continue to motivate those that do comply” as it legitimates the legal requirement in question.<sup>8</sup>

Full depictions of fraudulent circumstances would also help clarify the grey areas inherent in phoenix activities.

Similar to the typology reporting that AUSTRAC does on money-laundering and terrorism financing cases, the agency running the hotline could provide typologies of phoenix cases on which action has been taken.

Avenues of redress for those impacted by illegal phoenixing and further advice for businesses that want to be proactive in protecting themselves from illegal phoenixing are other mechanisms that should be setup to support a reporting hotline.

**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.**

While the submitting bodies supportive of the proposed mechanism, they are not in a position to assess its effectiveness.

**7. What are the benefits and risks of this approach?**

As noted in consultation paper the benefit of the proposed approach to allow ASIC to issue a notice requiring the new company (Company B) to deliver up property or monies’ worthy, along the lines of the regime in place under section 139ZQ of the *Bankruptcy Act* is it would greatly reduce the cost of either taking action to recover the property or to seek compensation for the loss suffered.

**8. Should ASIC retain control of the issuing of such notices to ensure that they are not issued inappropriately?**

It makes sense for ASIC to issue the notices as a safeguard against misuse. However, at the same time, the submitting bodies concerned if ASIC has the resources to take on this extra obligation. There is a risk in an environment of constrained enforcement resources, ASIC may leave many cases unaddressed as other enforcement tasks unrelated to phoenixing take priority.

**9. Are there other regulators who should also be able to issue such notices (for example the Fair Entitlement Guarantee Recovery Program)?**

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<sup>7</sup> Price Waterhouse Coopers 2012, *Phoenix activity: sizing the problem and matching solutions*, Fair Work Ombudsman

<sup>8</sup> Helen Anderson, Ann O’Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, ‘Phoenixing activity recommendations on detection disruption and Enforcement’, The University of Melbourne, February 2017.

Allowing additional regulators to issue notices would help address the issue of illegal phoenixing going unaddressed because of a lack of regulatory resources.

**10. Should liquidators have the ability to independently issue such notices in cases where they suspect that illegal phoenixing has taken place?**

This option would further assist in allowing illegal phoenixing to be addressed in an environment where government funded enforcement resources to address the problem are constrained compared to the prevalence of the problem.

**11. How long should the law allow for the recipient to respond?**

**12. What course of action should be pursued where the recipient fails to comply with a notice?**

A failure to respond could result in an automatic suspension of licenses or the placement of other financial or business related holds to encourage compliance.

**13. What are the some of the challenges ASIC is likely to face in seeking compliance with the notice?**

**14. Do you think that such an arrangement will reduce the cost of taking recovery action or seeking compensation for the loss suffered?**

**15. Are there safeguards which should be implemented in respect of the proposal?**

**16. If such a provision were to be introduced, should any of the existing voidable transaction provisions be amended or repealed?**

**17. Are these remedies appropriate? Are there further remedies or penalties we should consider?**

The submitting bodies are supportive of an offence:

- to allow both liquidators and ASIC should be able to claw back assets or compensation from the transferee;
- to allow liquidators, ASIC and creditors 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 to apply to illegal phoenix activity, including against those who are knowingly involved in illegal phoenix activity.

However, the submitting bodies realise there will be a significant challenge in framing the offence to be effective in catching illegal phoenixing activity, while excluding honest rescue activity. Also, actions that involve court processes will be slow and costly. The submitting bodies believe the prime focus of government action to address illegal phoenixing should be on measures that will help deter the process in the first place. Research may be needed to identify what would have the most impact on deterring illegal phoenixing activity.

**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)?**

The submitting bodies agree, but there needs to be provisions that protect employees lower on the hierarchy becoming scapegoats. Offences should apply to those with decision making power and those in charge of bodies that facilitate and advise on illegal phoenixing activity.

**19. What tests can be applied to determine if a person has been involved in the facilitation of illegal phoenix activity?**

**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.**

Increasing penalties under the *Corporations Act* and the *Fair Work Act* for noncompliance at significantly higher levels compared to the financial benefit achieved through noncompliance is likely to encourage greater compliance, if the persons carrying out the phoenixing activity believe they will get detected and the penalty will apply.

Penalties should be targeted at directors and other associated people rather than corporations. It has been recognised that where a company is fined, rather than the sanction applying to the individuals involved, it fails to act as a general deterrent to the illegal behaviour. Associate Professor Soltes gives an example:<sup>9</sup>

*For instance, the day after settling criminal charges with federal prosecutors for helping wealthy individuals evade taxes, executives at Credit Suisse held a conference call to reassure analysts that the criminal conviction would have “no impact on our bank licenses nor any material impact on our operational or business capabilities.” And, ironically, fines levied on offending firms are ultimately paid by shareholders rather than by executives or employees who actually engaged in the misconduct. Without the spectre of the full justice system hanging over them as is the case with individual defendants, labelling firms as criminal often has surprisingly weak, or even misdirected, effects.*

**21. Which existing breaches of the law, if any, should be designated as phoenix offences?**

The submitting bodies agree that failure to maintain adequate books and records, and the failure to provide them to an insolvency practitioner in a formal insolvency being made ‘designated phoenix offences’, where instances of breaches could result in a director of a company being deemed a Higher Risk Entity, would help act as general deterrence against phoenixing activity. It will be easier to prove that a person failed to keep adequate books and records than it will be to show they were part of illegal phoenixing activity. Thus such breaches are easier to take action on

**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.**

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<sup>9</sup> Eugene Soltes, ‘Why they do it’, Public Affairs, USA, 2016, 325.

The measure is worthwhile, but its effectiveness is dependent on the prevalence of use of backdating a director's resignation so the director cannot be held liable for offences committed after that time.

**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?**

The submitting bodies support 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. This will help address one mechanism related to illegal phoenix activity.

**24. What are the benefits and risks of this approach?**

**25. What is a reasonable period to allow for the requisite notice to be lodged with ASIC?**

In the view of the submitting bodies the lodgement period for a change in director should be 14 days. In the case above, legitimate business activity will not be impacted. It will only be in cases where there is illegal activity by the new director (or on behalf of a 'dummy' new director) that a previous director would be held liable.

**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?**

The transfer of the onus of reporting being placed on the director does not constitute significant compliance burden. If there is no intended illegal activities being planned there should be no reason a director cannot notify the ASIC within 14 days.

**27. How should the above measure be enforced? For example, by application to court or ASIC taking other administrative action?**

ASIC should have the ability to issue an infringement notice for failing to file the change in director notice on time. The courts would need to be involved to impose more significant penalties for illegal activity that the previous director will be held to account for.

**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.**

While the submitting bodies are not aware of the prevalence of directors abandoning companies as a tactic in phoenixing, they support this measure of rendering the resignation of a director(s) to abandon a company as ineffective unless the affairs of the company have been settled and the company closed down.

**29. Should sole directors be able to resign without appointing a liquidator or deregistering the company?**

Sole directors should take responsibility for the company and meet their statutory obligations as best they can to remove their own liability. If onus is on director then it should deter illegal activity. Thus a sole director should not be able to resign unless they have a replacement director, have appointed a liquidator or have deregistered the company.

**30. What are the benefits and risks of this approach?**

**31. Should abandoning a company instead be an offence?**

The submitting bodies are of the view the above measure to effectively not allow a director(s) to abandon a company and hold them responsible for the abandoned company is more likely to be effective than creating an offence that needs to be enforced by a law enforcement agency or regulator and requires additional resources to prosecute through the courts.

**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?**

**33. What other options are available for consideration?**

**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.**

This measure would appear to work at elaborate phoenix activity.

**35. What are the benefits and risks of this approach?**

The risk here would be where the related creditors are legitimate and are the main creditors, they could be held captive to minor creditors who are unrelated in the appointment and replacement of an external administrator. However, this risk would appear to be low and the possibility of adverse outcomes for the legitimate related creditors appear low.

**36. Is the current definition of "related creditor" too broad for this purpose? If so, how should "related creditor" be defined?**

**37. Should related creditors that were company employees be subjected to a different treatment than, say, if they were directors? Why or why not?**

**38. What level of evidence should be imposed on related creditors to substantiate their respective debts?**

**39. Should restrictions on related creditor voting be extended to all resolutions proposed in an external administration? Why or why not?**

**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.**

**41. Should the above rule apply to a particular size or type of external administrations or liquidations?**

**42. Should the court have the power to overturn this restriction?**

The court having the power to overturn the restriction would address the concern about a legitimate related creditor having an avenue to address being unfairly locked out of decision to replace an external administrator. At the same time, there is a risk that court processes could be misused by related creditors that are assisting in the illegal phoenix activity to delay action by a legitimate external administrator.

**43. Should this restriction only be applied to certain types of companies, for example small proprietary companies?**

**44. Are there circumstances where this restriction should not apply?**

**45. What are some of the ways a related creditor might attempt to circumvent the above measure?**



**46. What other measures could be considered to avoid collusion between liquidators and related creditors?**

**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.**

The submitting bodies believe placing penalties on promoters and facilitators of illegal phoenixing activity is likely to be moderately effective, 7 out of 10. It is a measure that should be implemented as part of the package of reforms to address illegal phoenixing activity.

**48. Should the promoter penalty laws be expanded to apply to promoters or facilitators of illegal phoenix activity?**

The promoter penalty laws should be extended to apply to the promoters and facilitators of illegal phoenix activity.

The Phoenixing Activity Recommendations on Detection, Disruption and Enforcement report suggested that the educational role of professional bodies in communicating and encouraging members to advise the dangers of phoenix activities should be complementary to the work of regulators to promote a consistent message.<sup>10</sup>

The professional bodies could also be partnered with to find more opportunities for detection and deterrence of phoenixing advice, such as professional bodies setting standards. They could also utilise a 'naming and shaming' measure that generates negative publicity and may impact business reputation which can also act as a deterrent. Another example is for professional bodies or courts to revoke or impose conditions upon other relevant professional licences that would impact an advisors right to manage corporations if they have been found guilty of being an accessory to a director's breach of duty.<sup>11</sup>

**49. What are the benefits and risks of this approach?**

The benefits of this approach would be to deter those that seek to profit from the promotion and facilitation of illegal phoenix activity. This in turn should make organising illegal phoenix activity more risky and difficult and thus reduce the prevalence of illegal phoenix activity.

The risks with this approach are that those advising on legitimate business rescue and restructuring get caught up in having to defend against illegitimate claims they are facilitating illegal phoenixing activity. It may deter people from entering into businesses that provide legitimate advice on business rescue and restructuring.

On balance the submitting bodies are of the view the benefits outweigh the risks.

**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?**

The submitting bodies are of the opinion that Options 1 (broadening the current definition) and 2 (adding new limb to the test) are likely to be more effective than Option 3 (creating a new provision similar to the provision on the promotion of illegal early release of superannuation benefits).

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<sup>10</sup> Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenixing activity recommendations on detection disruption and Enforcement', The University of Melbourne, February 2017, 109.

<sup>11</sup> Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenixing activity recommendations on detection disruption and Enforcement', The University of Melbourne, February 2017, 111.

The 'Phoenixing Activity Recommendations on Detection, Disruption and Enforcement' report suggest that penalties connected to the current promotor laws could be amended to act as better deterrence. It is suggested that "empowering the court to be able to impose conditions on professional licences where advisors have engaged in misconduct and making advisors directly liable for improper advice in addition to being liable as accessories."<sup>12</sup>

**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 submitting bodies agree that the adviser should have to corroborate that they acted as a mere adviser and not as a promoter.

**52. If promoter penalties are expanded to apply to promoters of illegal phoenix activity, do the existing sanctions provide sufficient deterrent?**

**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 options above?**

**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?**

**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.**

The submitting bodies strongly support this measure. Regardless of its impact on the disruption and deterrence of illegal phoenix activity it addresses a form of tax evasion, which is a serious criminal activity in its own right.

This remedy was proposed in the 2009 Treasury Proposal Paper but was not adopted due to concerns that 'honest' directors would lose the protection of operating a business via a limited liability company as a separate legal entity. It should be noted that the limited liability concept should apply to shareholders and DNP regime does not impose liability on shareholders.<sup>13</sup> Further, tax evasion is a criminal activity carried out by individuals and those individuals engaged in the activity should be held to account.

There should be reconsideration of the current 21 day 'non-lockdown' penalty notice period which carries no penalties and give illegal phoenix operators a period of 21 days to try and strip and conceal assets.

The DPN regime should also be extended to include state taxes.<sup>14</sup>

**56. What are the benefits and risks of this approach?**

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<sup>12</sup> Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenixing activity recommendations on detection disruption and Enforcement', The University of Melbourne, February 2017, 108.

<sup>13</sup> Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenixing activity recommendations on detection disruption and Enforcement', The University of Melbourne, February 2017, 74.

<sup>14</sup> Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenixing activity recommendations on detection disruption and Enforcement', The University of Melbourne, February 2017.

**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)?**

The DPN regime should be expanded to cover GST for all directors. The ability for the ATO to address this form of tax evasion should not be dependent on if the director is identified as a High Risk Phoenix Operator.

**58. Are there alternative approaches to securing outstanding payment of GST from companies and their directors?**

**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.**

This measure seems likely to be effective and the submitting bodies believe that it is 7 out of 10 in assisting to deter and disrupt illegal phoenixing activity. Regardless of addressing illegal phoenixing, it is a measure that addresses a form tax evasion, which is a serious criminal activity in its own right.

**60. What are the benefits and risks of this approach?**

**61. Would improvements to the garnishee provisions adequately address the proposal to strengthen the effectiveness of the security deposit power?**

**62. Should the proposal be limited to businesses that have been identified as High Risk Phoenix Operators (see Part Two)?**

**63. Are there concerns or practical issues that would need to be addressed with expanding the garnishee power generally for *future* tax liabilities?**

**64. 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?**

**65. Are there any issues with the existing garnishee processes that should be considered?**

**66. Should the Government consider additional measures to prevent circumvention of the provisions by transferring, disposing or encumbering assets where a request is issued?**

**67. Should the penalties for not complying with a security deposit request be increased to improve compliance?**

There is a need to ensure penalties are at a sufficient level that non-compliance cannot be chosen as the lower cost option.

**68. 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.**

The implementation of the proposed High Risk Entities and High Risk Phoenix Operator is likely to have a high impact on deterring and disrupting illegal phoenix activity and help focus law enforcement resources towards people and entities of the greatest risk. The submitting bodies rate these measures as 9 out of 10 for the effectiveness.

**69. What are the benefits and risks of this approach?**

The benefits of this approach are that it captures people who repeatedly engage in illegal phoenix activity and allows for taking preventative action to deter them in continuing to carry out the behaviour with the resulting harm. It also targets law enforcement resources to people and entities of the highest risk.

It may not adequately address examples the submitting bodies have seen where it appears a family is engaged in illegal phoenixing activity. In these cases it would appear different family members take turns at being company directors, so there is not an accumulation of penalties and adverse findings on any one individual. The control and direction of other family members remains in the background as undisclosed beneficial owners.

Reviews and requests for cancellations needs to be conducted in a timely manner to ensure natural justice, while at the same time not allowing reviews and appeals to be allowed to be used as cover for on-going illegal phoenixing activity.

**70. 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?**

The submitting bodies believe the proposed safeguards should be adequate.

**71. What safeguards would be required to ensure that the measure is appropriately targeted?**

**72. 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?**

The submitting bodies support the Commissioner of Taxation being able to declare a company to which a HRPO is, or has recently been, an officer to also be a HRPO. It should also be extended to other individuals or entities which are associated of the HRPO. This measure would allow for action to address the examples the submitting bodies have encountered where it appears a family may between then orchestrate illegal phoenixing activity, by rotating who acts as the director of the companies.

If HRPO lists were made publicly available along with making associates also accountable for who they do business with, it is likely to have a significant deterrent effect on illegal phoenixing activity as many people will seek to avoid being associated with a HRPO.

The danger is if a person is misclassified as a HRPO they may be subjected to exclusion from legitimate business activity. The risks of such misclassification seem low and can be addressed by an appropriate appeal system.

**73. Should “associate” be defined or determined administratively?**

The submitting bodies support “associate” being defined and determined administratively to make the mechanism more effective in its application. Having to take such decisions to a court will be costly, time consuming and will make it difficult for regulatory authorities to make effective use of the system as an adequate deterrent of illegal phoenixing activity.

**74. 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.**

The submitting bodies are highly supportive of a cab rank system for appointing a registered liquidator for a company where an officer of the company is, or was during a prescribed period prior to the appointment of an external administrator, a High Risk Phoenix Operator.

It addresses the issue raised in the consultation paper of cases where the liquidator has been captured by a facilitator and has become complicit in the illegal phoenixing activity.

**75. Are there alternate measures that would be more effective? If so, please provide an outline of what you think would work.**

**76. 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.**

The submitting bodies agree that the cab rank apply to cases where an HRPO is or has recently been an officer of the company.

**77. Should a cab rank apply to all external administration appointments?**

**78. Should it be applied more widely, but be limited to specified types of external administration appointments where certain criteria are met? For example:**

- **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.**

**If the cab rank applies only to those companies where specified criteria are met what should those criteria be? Please specify your reasons.**

**79. Who should administer the cab rank and how should it be administered? Please explain your reasoning.**

Given it is proposed the ATO will be the agency with responsibility to determine if a person or entity is a HRPO, then it seems appropriate that this be the body that administers the cab rank.

**80. How do you think such a system should be funded?**

There is a need to ensure that registered liquidators in the cab rank system are properly paid for their work, so that they conduct their duties appropriately. Independent liquidators who are paid a minimal amount would have neither the duty, the time nor the incentive to delve below the surface of transactions. A safeguard against poor performance by registered liquidators on the cab rank system would be they lose their ability to remain on the cab rank system.

**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.**

The submitting bodies see merit in a government liquidator, provided that it is adequately resourced for the task

**82. Should consideration be given to establishing a government liquidator to conduct small-to-medium external administrations? Please provide your reasons.**

**83. What are the benefits and risks of this approach?**

The benefit of this approach is that there is no cab rank to administer and there is effectively no risk the government liquidator would be captured by a facilitator of illegal phoenixing. There is a risk the government liquidator will do a poor job if inadequately resourced.

**84. If a government liquidator is created, what external administrations should they conduct? Please provide your reasons.**

**85. How do you believe a government liquidator should be funded?**

**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?**

The submitting bodies believe that this will be an effective tool to deter directors from trying to dispose of their personal assets as a means to prevent the ATO from acquiring those assets to discharge the penalty, where the director has been designated a HRPO. The submitting bodies rate this measure 8 out to 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?**

**89. Should further safeguards attach to DPNs issued to HRPOs in addition to the existing legal rights and safeguards that currently apply to DPNs?**

**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?**

**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.**

The submitting bodies support this measure, as a deterrent to illegal phoenixing and to ensure HRPO pay the taxes they are required to for the benefit of the community.

**92. Should the ATO's power to retain refunds be broadened in respect of HRPOs who have failed to provide other notifications/lodgements capable of affecting their tax liability?**

The ATO should be able to retain refunds where a HRPO has failed to provide notifications and lodgements capable of resulting in taxes payable to the ATO.

**93. What are the benefits and risks of this approach?**

The benefits of this approach are to deter HRPO trying to 'game' the tax system by claiming refunds while seeking to avoid the payment of their tax liabilities.

**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?**

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