Australian Chamber of Commerce and Industry

Reforms to combat illegal phoenix activity – Draft Legislation

Submission to the Treasury
September 27, 2018

Illegal phoenix activity imposes costs on economy

The Australian Chamber of Commerce and Industry (Australian Chamber) welcomes the opportunity to respond to the Reforms to combat illegal phoenix activity – draft legislation.

The Australian Chamber generally supports the Government considering targeted, balanced and workable ways in which to reduce the incidence and incentives of directors and businesses to engage in *fraudulent* phoenix activities. It is important to note however, that measures **should not inhibit responsible risk taking, innovation, entrepreneurship.**

The Australian Chamber also supports targeted enforcement action against those who deliberately or knowingly liquidate a company to avoid payment of liabilities to creditors, including employees, and who recreate the business through another corporate entity controlled by the same person or persons who have engaged in illegal and/or fraudulent activity.

The Australian business community does not support directors engaging in deliberate and fraudulent phoenix activities. Illegal phoenix activity and arrangements entered into with the intention of avoiding liabilities to creditors, including employees, create an uneven playing field for legitimate operators who are paying wages, taxes and debts as they fall due. It can also have the effect of causing significant financial hardship and the collapse of other businesses which are owed debts that remain unpaid.

However, it is important that the Government does not overcook efforts to target fraudulent phoenix activities. Overzealous actions can have negative unintended consequences. It is important to note that the Corporations Act already imposes significant reporting obligations on companies and directors, and the Australian Chamber strongly believes the implementation of the Director Identification Numbers (DINs) will significantly help in the identification and compliance targeting of fraudulent phoenix activities. DINs will provide an additional level of transparency to help the regulator combat patterns of behaviour that are non-compliant with obligations under the Corporations Act.

In particular, there are situations where businesses undertake legitimate liquidations or legal restructuring in the form of business rescues. It is critical that any changes do not inhibit responsible risk taking, innovation, entrepreneurship, legitimate business structuring and restructuring and rescue efforts. Care needs to be taken to ensure our laws do not have the effect of discouraging business rescue.

Members' concerns with the proposed changes

Members of the Australian Chamber have expressed a number of concerns with the proposed reforms:

- Instead of creating a new set of regulatory provisions, a more appropriate response would have been to strengthen existing provisions that target fraudulent phoenixing. While the Australian Chamber understands the purpose of the new provisions is to compensate for the insufficiency of the existing provisions, potentially duplicating measures already in place will likely create confusion. Furthermore as data becomes more readily available and pooled collectively through the Government's program of modernising business registers, data analysis should increase the effectiveness of identifying illegal phoenix behaviour.
- The creation of an 'illegal phoenix activity' offence, with a clear definition, is necessary to highlight to the community the type of behaviour that is unacceptable and illegal. An awareness and education campaign would be far more effective if it were centred on a clear definition of what it means to undertake illegal phoenix activity.
- **Changes concerning the retention of tax refunds by the ATO need further amendment.** Importantly, the discretion should not be unrestrained and it should only apply where there is clear evidence of illegal phoenix activity – whether current or historical. As it stands, no limitations to this discretion have been outlined in the draft legislation. Clear limitations to the discretion are important as it is proposed to include tax debts that are due but not yet payable. It is also important that the discretion does not apply to a contested tax debt, except in the instance where there is clear evidence of illegal phoenix activity (e.g. employees not being paid, unpaid superannuation guarantee contributions or history of creating shell companies etc).
- The 'creditor-defeating disposition' should not include dispositions that occur in the ordinary course of business. It is also quite similar to the existing 'voidable transaction'.
- While the reforms to prevent officers from backdating resignations or abandoning companies are supported in-principle, the effectiveness of these changes will largely be dependent on the successful implementation of the DINs. DINs will help prevent identity theft and the occurrence of fictitious directors.

Members have also requested clear guidance from the ATO, and consultation, on how it proposes to administer the expanded powers.

Working for business.
Working for Australia

About the Australian Chamber

The Australian Chamber of Commerce and Industry speaks on behalf of Australian Businesses at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

Telephone | 02 6270 8000 Email | info@australianchamber.com.au
Website | www.australianchamber.com.au