



ASIC
Australian Securities &
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By email: Phoenixing@treasury.gov.au

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Dear Ms Nero

ASIC Submissions - Reforms to combat illegal phoenixing - Draft legislation: *Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2018, Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018.*

We refer to the draft legislation and rules released by Treasury on 16 August 2018, proposing a range of legislative measures to deter and disrupt illegal phoenix activity.

We set out our submissions on the draft legislation in paragraphs 1- 6 below with the objective of clarifying aspects of the draft legislation to make it as effective as possible. First though, we make some introductory comments.

Introductory comments

ASIC recognises the significant harms to creditors, employees, government revenue and the broader economy caused by illegal phoenix activity, and strongly supports legislative initiatives designed specifically to deter and disrupt illegal phoenix activity.

In particular, ASIC strongly supports legislation that targets and deters facilitators of illegal phoenixing.

In ASIC's view, the draft legislation strikes an appropriate balance between supporting genuine restructures and deterring transactions that cross the line into illegal phoenix transactions.

We think that overall, the draft legislation does not inhibit genuine restructures and we recognise the need to ensure an appropriate balance in the provisions.

Finally, ASIC notes proposals to introduce provisions about director identification numbers, which, while not part of this package of draft legislation, are an important additional measure to deter phoenix transaction behaviour.

1. Phoenixing offences, civil penalty provisions, administrative orders

ASIC supports introducing specific offence provisions, with a substantial criminal penalty, civil penalty provisions, and enhanced administrative order powers for ASIC to combat illegal phoenixing. In ASIC's view, targeted offences, civil penalty provisions and administrative orders by ASIC are appropriate to deter and combat illegal phoenixing activity by officers and, importantly, facilitators of that activity.

2. Voidable transactions

ASIC also supports the operation of voidable transaction provisions (in proposed s588FE(6B)) that do not require proof of insolvency, and instead rely on a 12 month look back from the start of an external administration. However, in ASIC's view, the efficacy of the look back period is affected by the requirement for the external administration to occur "as a direct or indirect result of the [voidable] transaction..." (proposed s588FE(6B)(b)(iii)).

ASIC submits this proposed causal relationship between the transaction and the external administration is likely to be a significant evidentiary barrier to the use of the provisions, and it ought to be removed, or modified. While removal would cast the net of potential voidable transactions very widely, this is appropriate in circumstances where the exceptions to the offence and civil penalty provisions (for schemes, liquidator disposals and transactions at market value in proposed ss588GAA(3) and 588GAB(3)) ensure that genuine restructuring transactions are protected.

3. "Market value"

ASIC also submits that the market value exceptions to the offence and civil penalty provisions (proposed ss588GAA(3) and 588GAB(3)) would benefit from additional legislative certainty about the meaning of "market value". Statutory support for a definition referring to the price negotiated between a willing buyer and willing seller in an arm's length transaction after appropriate marketing would, in ASIC's view, confer welcome certainty on the operation of the proposed exemptions.

Further, ASIC submits there is at least one circumstance that ought not constitute market value in the proposed provisions, which is a newco assuming an oldco's debts in the absence of the newco providing evidence of newco's capacity to pay those debts as and when they fall due. This circumstance ought to be expressly excluded from "market consideration", and the *Bankruptcy Act 1966* model of setting out what is **not** consideration under that Act is a possible model for such a provision.

4. Proposed ss588GAA and 588GAB – drafting submissions for the offences

ASIC submits that the operation of proposed s588GAA and s588GAB as offence provisions would be clearer if the physical elements of the offences were listed in separate paragraphs of each provision. Separating physical elements into separate paragraphs is suggested as the preferred drafting model for offences, in the [Guide to](#)

[Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) published by the Attorney-General's Department (refer page 19).

For example, in s588GAA(1) this would mean “engaging in conduct” “that results in [a creditor defeating disposition of property]”, and “in circumstances where...” should each appear in separate subparagraphs.

We submit this separation is particularly important in the drafting of proposed s588GAB, which would see “procuring inciting inducing or encouraging...” “that results in the company making a creditor defeating disposition...” and “in circumstances where...” appearing in separate subparagraphs, for clarity.

Both these drafting suggestions would confer clarity for the prosecution of the relevant offences and avoid confusion about the physical elements of each offence.

5. Director resignation measures – transitional provisions

ASIC strongly supports the measures in the draft legislation designed to prevent backdating of director resignations without ASIC or Court approval. As drafted, the provisions will significantly and appropriately limit abuses of those provisions by directors seeking to avoid liability for phoenixing activity by backdating resignations to periods before phoenixing activity occurs.

The proposed draft legislation also appropriately balances the needs and circumstances of those who may, for reasons unconnected with phoenixing activity, neglect or otherwise fail to lodge resignation notices, by requiring ASIC or Court approval for backdating. ASIC supports the limitation on ASIC's power to permit backdating, on the basis that significant backdating ought to be subject to Court scrutiny and based on admissible evidence.

The proposed director resignation measures will have technology and systems implications for the processing of director resignation notices “on or after the commencement” of the amendment, and the draft legislation provides for the amendments to commence the day after the Act receives the Royal Assent.

In light of the technology and systems implications of the measures, and of recent consultation on the Modernising Business Registers Program, ASIC submits that an appropriate transitional period for either ASIC, or the Registrar (under the modernisation program) to make IT changes for the amendments will be necessary. As a guide, a period of 12 months would be necessary for this purpose.

6 Related party voting restrictions

ASIC strongly supports the measures in the draft rules designed to ensure voting at creditor meetings is a true reflection of the commercial interests of creditors who are not colluding with illegal phoenix facilitators to the detriment of legitimate creditors. The proposed rule amendments go some way to achieving that goal; specifically, by imposing requirements to substantiate the consideration paid to take an assignment of a debt and restricting the ability to vote to the value of the (substantiated) consideration paid.

ASIC submits the draft legislation could be strengthened to ensure the provisions are effective to restrict voting abuses at creditor meetings extending the operation of the voting restriction provisions to all resolutions of creditors, and not just those about removing and appointing an external administrator. This is because abuses of creditor

voting rights to assist a complicit liquidator's actions may occur at any meeting of creditors, not only at meetings to remove and appoint a liquidator.

Further, ASIC submits that the provisions ought to apply to all creditors, to minimise the potential for abuses of voting power occurring amongst the wider body of creditors, levelling the field and inserting a minor anti-avoidance provision.

For completeness, ASIC would welcome the opportunity to revisit the operation of the amended rules about related party voting after they have operated for a period, to test their effectiveness in comprehensively addressing abuses of creditor voting rights. At present, we think this would involve reconsideration of the evidence required from creditors to support their claims, admission of proofs of debt for the purpose of voting, and the timing of lodging those with liquidators.

Finally, ASIC supports, but has no detailed submissions to make, about the tax measures proposed in the draft legislation.

We would be pleased to provide any further information, or answer any questions raised by these submissions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. D. Price', written in a cursive style.

John Price
Commissioner