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## **Submission from the Synod of Victoria and Tasmania, Uniting Church in Australia on reforms to combat illegal phoenix activity – Draft Legislation**

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The Synod of Victoria and Tasmania, Uniting Church in Australia welcomes this opportunity to provide input to the consultation on reforms to combat illegal phoenix activity, specifically the exposure draft *Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2018* and *Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018*. The Synod supports both the Bill and the Rules as additional measures to deal with illegal phoenixing, but they are far from the only measures needed. There is a need to improve the integrity of the Australian Business Number system, to introduce a Director Identification Number, to have a public register of beneficial owners and controllers of companies and trusts and to ensure that the various business registries maintained and controlled by the government speak to each other so that data across the registries is consistent and up-to-date. Of vital importance is that the laws to deal with illegal phoenixing and laws that would help prevent such activity are actually enforced. For example, as noted in the explanatory memorandum of the *Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2018*, subsection 205B(5) of the *Corporations Act 2001* already makes it an offence for a person not to notify ASIC that they stopped being a director within 28 days of the resignation happening. Yet in our experience, we know it is common for this law to not be enforced and a person can ignore the obligation almost with impunity. For example, Kong Vibol the head of the Cambodian tax department was able to inform ASIC that he ceased being a director of Panhariddh Pty Ltd this year, claiming he ceased being a director in 2012.<sup>1</sup> Despite the six year delay in informing ASIC no enforcement action appears to have been taken by ASIC. Further a document filed with ASIC in 2014 informing ASIC of a change in company details still listed Kong Vibol as the director of the company.

At its core, phoenixing in order to cheat creditors, employees and the Australian community (through not paying taxes that should have been paid) is an abuse of the privilege that the Australian community has granted to businesses through legal limited liability. Limited liability is a privilege that allows a person to set up a company to take risks and if the business fails for legitimate reasons the owners of the business will not be held accountable for all the debts owed beyond the assets of the company. Phoenixing is the abuse of this limited liability, to not pay those owed legitimate payments even when there are assets to do so. Thus, ultimately in the case of phoenixing, the owners of the business should be held liable for the debts they owe.

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<sup>1</sup> <https://www.sbs.com.au/news/cambodian-tax-boss-faces-jail-over-aussie-residency-claims>

The reforms in schedule 1 are a small step forward in dealing with phoenixing. However, the provisions can be defeated by a person who plans far enough ahead with a phoenix activity. For example, they can avoid the provisions as long as the creditor-defeating disposition is made 12 months before the company enters into external administration. Further, businesses and individuals that advise on how to phoenix and get away with it will undoubtedly develop methods to advise clients on how to defeat the measures contained in schedule 1.

Further, as has been pointed out by Professor Helen Anderson, Professor Ian Ramsay, Jasper Hedges and Professor Michelle Welsh, section 558FE(5) of the *Corporations Act 2001* already allows a liquidator to claw back transfers where the company became party to the transaction for the purpose, or for purposes, of defeating, delaying, or interfering with the rights of any or all of its creditors on a winding up of a company. The liquidator is permitted to look back at transactions over the last ten years. The only stipulation relevant here is that it must be 'an insolvent transaction' as defined in Section 588FC as the company becomes insolvent partly or wholly as a result of the transaction. They argued that this section already granted liquidators considerable recovery powers relating to asset transfers made deliberately within ten years prior to a company's insolvency to render the company unable to pay its creditors.

However, despite these comments the measures are worth implementing as they will make illegal phoenixing harder, which will probably deter some people from engaging in such activity.

The Synod supports Section 588E that applies a presumption of insolvency where a company has failed to keep or maintain financial records in accordance with section 286.

In terms of the provisions to allow ASIC to intervene to protect the interests of legitimate creditors, again this increased power will be meaningless unless ASIC has both the resources and the will to use the power. These powers appear to only be useful in a limited number of cases. For example, we are aware of examples where a person sets up one company that holds the assets of the business, while a second company is established to conduct the employment function and holds no assets. The second company is used to engage in wage theft and tax evasion. The second company is then phoenixed, leaving debts to employees and the ATO. There are no assets to be pursued in the second company, so ASIC will have no incentive to use the new power. The assets will remain safe in the first company. In this case it will be up to the Fair Work Ombudsman and the ATO to determine if the criminal activity is significant enough that they can spare the enforcement resources to pursue it.

It would be more desirable that when a company engages in creditor-defeating disposition the protection of limited liability be removed entirely and the assets of the directors and beneficial owners and controllers of the company become available for creditors to pursue. However, in the absence of such measures, the Synod supports the criminal and civil penalties for officers that engage in conduct that results in the company making a prohibited creditor-defeating disposition or where a person procures, incites, induces or encourages a company to make a prohibited creditor-defeating disposition, noting the difference in the fault elements that apply between the civil and criminal penalties.

The Synod supports Schedule 2 to prevent directors back-dating their resignation or resigning to leave a company without a natural person's oversight. However, these laws will be meaningless unless ASIC is required to take responsibility for checking that directors registered with a company are real people and the addresses given are the actual addresses of the directors. At the moment ASIC takes almost no responsibility to enforce the *Corporations Act* provisions relating to a person providing false information about who the directors are and their addresses. In the current case of

Philip Whiteman, for example, it is alleged that a number of people were appointed as directors of companies without their knowledge and it appears ASIC never checked that these people even agreed to be directors.<sup>2</sup> The reality is that criminals are able to set up companies with straw directors almost with impunity, making the task of other law enforcement agencies to identify the real criminals in wrong-doing by companies more difficult. Without ASIC providing verification of the directors registered for a company, the Schedule 2 provisions may be easily defeated by an increased use of straw directors by those planning to carry out illegal Phoenixing.

In fact there are businesses that offer a service to provide 'straw' nominee directors, like ABN Australia.<sup>3</sup> As stated on their website, they assist foreigners in hiding their identities as directors and controllers of companies registered in Australia:

*Maintain your personal privacy – clients are often in a position where it is unwise for their name to appear on the corporate registers of a company, especially where such registers are available to be viewed via a basic company search. We can provide you with a Resident Director as well as registered office and business address – which will help to protect your reputation, other business interest, current employment, family & associates.*

The company's registered office address is the address of the nominee director service.

However, the Synod is not aware of any cases where such a service has been used to carry out illegal Phoenixing.

It is the Synod's view that allowing a person to apply to the court to allow them to backdate a resignation as a director within 12 months is an overly generous period of time and this should be cut to six months. It is hard to envisage circumstances where a person has ceased to be a director and takes longer than six months to inform ASIC of the fact this has occurred.

The Synod supports Schedule 3 to allow the Commissioner of Taxation to collect estimates of anticipated GST, LCT and WET liabilities and make company directors personally liable for their company's GST, LCT and WET liabilities in certain circumstances.

The Synod supports Schedule 4 to allow the Commissioner of Taxation to retain tax refunds where a taxpayer has failed to lodge a return or provide other information to the Commissioner that may affect the amount the Commissioner refunds.

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<sup>2</sup> Ben Butler, 'Locksmith used in phoenix scheme to stash away millions', *The Australian*, 29 August 2018, p. 23; Sarah Danckert, 'How country boy Tim got duped in scam', *The Age*, 29 August 2018, p. 25; and Sarah Danckert, 'Rats chasing tails': An accused fraudster's contempt for the law', *The Age*, 1 September 2018, p. 9.

<sup>3</sup> <https://www.abnaustralia.com.au/business-services/nominee-director>