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27 October 2017

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

By Email Only: phoenixing@treasury.gov.au

Dear Sir

RE: COMBATING ILLEGAL PHOENIXING

We refer to the law reform proposals (set out in the consultation paper) aimed at deterring and disrupting illegal phoenix activities. We are a firm that specialises in insolvency and have three (3) active registered liquidators.

The prevalence of illegal phoenix activity is a relatively recent phenomenon. It is driven by businesses which advertise pre-insolvency services and make unsolicited approaches, generally based on court filings, to businesses seemingly in financial difficulty. The parties which benefit from the activity are the directors of the companies in financial difficulties.

Directors who resort to such activity often continue in business unhindered.

We believe any approach to preventing such activity needs to target the directors.

If directors are prosecuted, not just with minor fines or bonds, but with loss of the assets involved, personal liability, and gaol in serious cases then the model may be disrupted.

Personal liability does not seem to be a concern for many directors involved in phoenix activity and this will be less so if the term of bankruptcy is reduced to one (1) year.

Stopping the backdating of director resignations, limiting related party voting rights, etc, will assist but ASIC needs to act on offences reported to it.

Whilst the intention of the proposals is admirable we believe they will fail and the marketers of illegal phoenix activity will continue.

We, like many small to medium insolvency firms, are feeling the impact on our business of the pre-insolvency operators. Referrals that have traditionally been directed to registered liquidators have reduced in number.

We believe the measures proposed will only capture a very minor percentage of repeat offenders.

Accordingly we believe:

- the existing laws and penalties need to be enforced by the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO). Breaches of legislation are already referred to ASIC by liquidators and it seems little ever happens,
- liquidators should be provided with more tools to pursue the assets involved. The proposed administrative recovery notice is a good start but the detail of this needs to be agreed to with our profession.
- the ATO must be more diligent in collecting taxes. It is not unusual to find companies in liquidation that have not lodged any income tax returns, BAS and PAYG summary statements for many years. We believe the ATO should consider whether the cancellation of ABN's or some other action it can take can prevent these companies continuing to trade.

Finally, all the work done to investigate and report on illegal phoenix activity is almost always done by registered liquidators for no remuneration. This is an unsatisfactory system that needs rectification.

In short the measures do not go far enough and will not succeed without direct consultation with registered liquidators.

regards


KL SUTHERLAND
DIRECTOR


MICHAEL QUIN
DIRECTOR

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