



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: BLC:PWib 1411889

7 November 2017

James Mason
Financial Systems Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: phoenixing@treasury.gov.au

Dear Mr Mason,

Reforms to address illegal phoenix activity

The Law Society of NSW appreciates the opportunity to comment on the Consultation Paper 'Combatting Illegal Phoenixing'. The Law Society's Business Law Committee has contributed to this submission.

General comments

The Government has acknowledged the need for carefully targeted reforms which minimise any impact on legitimate business activities and honest business restructuring. We note that the Government's recent insolvency reforms, including the insolvent trading safe harbour and ipso facto clause reforms, as part of its National Innovation and Science Agenda, aim to drive a "cultural shift" from penalising and stigmatising failure, to "promoting a culture of entrepreneurship and innovation".¹

We stress that it is necessary to look at this issue in the context of both the Government's reform agenda and the current regulatory environment, including the resourcing of regulators.

While the Consultation Paper outlines the many initiatives that the Government has undertaken as part of its anti - phoenixing agenda, it is important to identify how effectively the relevant regulators are exercising their current powers. There is a perception that these powers are not being fully utilised and that this is possibly a resourcing issue.² We consider that this issue needs to be examined and if necessary addressed before any further legislative action is undertaken.

¹ Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017 3.

² See, for example, the submission by the Law Council of Australia, *Combatting Illegal Phoenixing Consultation*, 15.

Specific questions

Our comments in relation to the specific questions from the Consultation Paper are set out in the attached table.

These comments address the specific issues raised and are focused on the effectiveness of the proposed measures to deter and disrupt phoenix activity. Our comments and rankings in addressing the effectiveness of the proposed measures have not weighed the benefits of these measures against the impact of any adverse effects on genuine restructuring efforts.

Thank you for the opportunity to provide comments to this review. Please direct any questions at first instance to Liza Booth, Principal Policy Lawyer, by email at [REDACTED] or by phone on [REDACTED]

Yours sincerely,



Pauline Wright
President

Encl.

CONSULTATIONS ON REFORMS TO ADDRESS ILLEGAL PHOENIXING

Focus Questions	Law Society Submissions
Identifying Illegal Phoenix Activity – A Phoenix Hotline	
<p>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?</p>	<p>We rate this measure five (5) on a scale of one to ten.</p> <p>It is difficult to provide a ranking in relation to this, or any other measure, without more details. The effectiveness of any measure will depend on how it is implemented and how it interacts with all the other measures that are put in place.</p> <p>Liquidators presently report this type of behavior to the Australian Securities and Investments Commission (“ASIC”) via the section 533 reports¹ that a liquidator is required to submit. We suggest that under the current system, the number of such reports, compared with the number of directors prosecuted and /or banned, appears unlikely to lead to public confidence in a reporting hotline.</p> <p>The reporting should not be limited to directors engaging in phoenix activity, but should encompass reports of those facilitating phoenix activity such as pre-insolvency practitioners, accountants and other advisers.</p>
<p>2 Are there any other reporting mechanisms which you think would assist people to report suspected illegal phoenix activity?</p>	<p>Reports could also be made via web form submissions on a dedicated website.</p>
<p>3. What are the benefits and risks of a ‘phoenix hotline’?</p>	<p>The benefits of establishing a ‘phoenix hotline’ are that it will:</p> <ul style="list-style-type: none"> ▪ Enable the collection and consolidation of information relating to directors suspected of utilising phoenixing as a business model; and

¹ *Corporations Act 2001 (Cth)* s 533.

Focus Questions	Law Society Submissions
	<ul style="list-style-type: none"> ▪ Enable regulators to more readily and easily identify high risk phoenix operators (“HRPOs”). <p>The possible risks of a hotline include:</p> <ul style="list-style-type: none"> ▪ The potential for reports that are not genuine including hoax, malicious or vindictive reports leading to a waste of resources for ASIC and the persons reported on.
<p>4. Which agency do you believe would be best placed to operate such a hotline?</p>	<p>We consider ASIC would be best placed to operate such a hotline.</p> <p>Reform of phoenix activity cannot focus solely on liabilities owed to the Australian Taxation Office (“ATO”) as phoenix activity is more endemic, although there may be benefit in multiple channels for reporting.</p> <p>However, while our submission and the draft legislation are focused on ASIC’s powers in relation to phoenixing, the ATO also has a role to play as the largest creditor in the country. The ATO has been given increasing powers for data matching information submitted by taxpayers and is using that information to triangulate its data sets. For example, it is now able to tell a taxpayer that a number of its contract counterparties are trading while insolvent.</p>
<p>5. What public reporting would be appropriate to ensure transparency? What other mechanism could be considered?</p>	<p>Information relating to phoenix activity, once it is unequivocally established, ought to be made available in ASIC searches such as company searches and director name searches.</p>

Focus Questions	Law Society Submissions
A Phoenixing Offence	
<p>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 legal phoenix activity.</p>	<p>An appropriate, well thought out and well drafted specific offence could rate eight (8) on a scale of one to ten.</p>
<p>7. What are the benefits and risks of this approach?</p>	<p>The benefits are similar to those provided under s 121(1) of the <i>Bankruptcy Act 1966</i> (Cth) (“Bankruptcy Act”). We consider that:</p> <ul style="list-style-type: none"> ▪ Section 121 of the Bankruptcy Act is a powerful and effective tool which makes a transfer of property void against the trustee in certain circumstances. A similar provision in the <i>Corporations Act 2001</i> (Cth) (“Corporations Act”) would benefit liquidators seeking to claw back assets in a liquidation. ▪ Although the effect of implementing such a provision would be similar to the effect of s 588FDA of the Corporations Act, a new provision would enable the same types of transactions to be made void in circumstances where the transferee was not a related entity, which they are often not. ▪ A specific offence may have a greater deterrent effect, particularly given the criminal penalty provisions. <p>The risks are similar to those that have been identified in relation to s 121(1) of the Bankruptcy Act.</p> <p>We suggest adopting similar provisions to s 139ZQ of the Bankruptcy Act:</p> <ul style="list-style-type: none"> ▪ The s 139ZQ Notice provides a cost effective method of recovering the property of a bankrupt. Similar provisions in corporate insolvency would be welcome.

Focus Questions	Law Society Submissions
	<p>The risks of adopting similar provisions to those of s 139ZQ of the Bankruptcy Act:</p> <ul style="list-style-type: none"> ▪ Issuing a notice similar to a 139ZQ Notice needs to be a regulated procedure so as to ensure that the process is not abused and utilised in any questionable way; and ▪ A liquidator should be required to establish the elements which make the transaction voidable and that application ought to be assessed, preferably by a person with legal experience, before the notice is issued to the recipient.
<p>8. Should ASIC retain control of the issuing of such notices to ensure that they are not issued inappropriately?</p>	<p>Yes.</p>
<p>9. Are there other regulators who should also be able to issue such notices (for example, the Fair Entitlement Guarantee Recovery Program)?</p>	<p>No.</p>
<p>10. Should liquidators have the ability to independently issue such notices in cases where they suspect that illegal phoenixing has taken place?</p>	<p>No.</p>
<p>11. How long should the law allow for the recipient to respond?</p>	<p>We consider that any new provision that is similar to the s 139ZQ process should be implemented in a way that is consistent with the process under s 139ZS of the Bankruptcy Act and allow the recipient 60 days to set aside the notice after becoming aware of it.</p> <p>The time limit ought to be strict.</p>
<p>12. What course of action should be pursued where the recipient fails to comply with a notice?</p>	<p>The course of action should again be consistent with the equivalent provisions of the Bankruptcy Act which allow for security to be afforded and the ability to pursue a monetary debt.</p>

Focus Questions	Law Society Submissions
<p>13. What are some of the challenges ASIC is likely to face in seeking compliance with the notice?</p>	<p>The challenges that ASIC are likely to face include:</p> <ul style="list-style-type: none"> ▪ Difficulty in being able to establish, with precision, the identity of the equipment/goods transferred; ▪ Difficulty in being able to establish the value of the equipment/goods transferred; ▪ Difficulty in establishing the identity of the recipient of the equipment/good in circumstances where there is no written agreement as to the transfer; ▪ The likelihood that the equipment/goods are not being held by the recipient; and ▪ The lack of books and records of both the transferor and the transferee.
<p>14. Do you think that such an arrangement will reduce the cost of taking recovery action or seeking compensation for the loss suffered?</p>	<p>Yes.</p>
<p>15. Are there safeguards which should be implemented in respect of the proposal?</p>	<p>Ensuring that the notices are properly assessed before they are issued by a person with legal qualifications.</p>
<p>16. If such a provision were to be introduced, should any of the existing voidable transaction provisions be amended or repealed?</p>	<p>No. The new provision of the Corporations Act should operate effectively provided that it captures the transfer of money, property or assets. The Bankruptcy Act is limited only to money or property and relies on the interpretation of 'property' to determine if the notice may be used. By the inclusion of the word 'assets', the new provision could capture transfers of almost any nature, without consideration of value.</p> <p>The new provision should apply to transactions that are void against a liquidator.</p>

Focus Questions	Law Society Submissions
Remedies	
<p>17. Are these remedies appropriate? Are there further remedies or penalties we should consider?</p>	<p>There is a general view that lack of enforcement of existing breaches is a problem. At present, banning orders appear to be under-utilised so it is difficult to determine whether banning is an effective measure.</p>
<p>18. If the above amendments are made, should the law also be amended to include 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)?</p>	<p>Yes.</p>
<p>19. What tests can be applied to determine if a person has been involved in the facilitation of illegal phoenix activity?</p>	<p>A presumption of knowing involvement should arise where the transfer is to a related entity with common or related party directors.</p>
Proposed reform – designating breaches of existing provisions as phoenix offences	
<p>20. On a scale of one to ten, 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.</p>	<p>We rate this measure eight (8) on a scale of one to ten.</p>
<p>21. Which existing breaches of the law, if any, should be designated as phoenix offences?</p>	<p>Given that existing provisions, if designated as phoenix offences, will trigger the special status of High Risk Entity, we are still considering this issue.</p>

Focus Questions	Law Society Submissions
Addressing issues with Directorships – current situation – appointment and resignation	
<p>22. On a scale of one to ten, 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.</p>	<p>We rate this measure five (5) on a scale of one to ten.</p>
<p>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?</p>	<p>Yes, as long as the responsibility for lodging notice of director resignation with ASIC is changed to require lodgment by the director.</p> <p>We consider that all directors should remain liable until they lodge a notice of resignation with ASIC so that there would be no debate as to whether a resigning director was liable between the resignation date under the company’s constitution and the date that director lodges a resignation notice with ASIC.</p>
<p>24. What are the benefits and risks of this approach?</p>	<p>The main risk is that if there is any period of time between a director resigning under a company’s constitution and lodging a notice of resignation with ASIC; phoenixing could occur in that period.</p> <p>If a director remains liable until the notice of resignation has been lodged with ASIC, the benefit is that any phoenixing that occurs must occur while the director is liable.</p>
<p>25. What is a reasonable period to allow for the requisite notice to be lodged with ASIC?</p>	<p>We suggest 28 days is a reasonable period, but see our suggestion in response to question 23 to the effect that the resignation should only be effective from the date that the director lodges the notice of resignation with ASIC.</p>
<p>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?</p>	<p>Yes. We suggest that no significant compliance burden arises and once a resigning director has lodged the notice of resignation with ASIC, that lodgment should show on an ASIC company search.</p> <p>Alternatively, the onus for reporting to ASIC should be on both the</p>

Focus Questions	Law Society Submissions
	director and company so that both bear the burden and there is a measure to ensure the accuracy of the information.
27. How should the above measure be enforced? For example, by application to Court or ASIC taking other administrative action?	We support enforcement by ASIC taking administrative action.
Addressing issues with Directorships – Current situation – abandoning a company	
28. On a scale of one to ten, 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.	We rate this measure five (5) on a scale of one to ten.
29. Should sole directors be able to resign without appointing a liquidator or deregistering the company?	No.
30. What are the benefits and risks of this approach?	A sole director will not be able to resign in an abandonment situation as outlined in the consultation paper. The result is a situation where the company may not make the necessary director resignation lodgment nor can it appoint a replacement director.
31. Should abandoning a company instead be an offence?	Yes.
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?	Yes, but with the same ability to stay de-registration on any informal application being made by a creditor seeking to recover or enforce a liability.
33. What other options are available for consideration?	The ‘abandoning director’ ought to remain liable as though the office of director was still held.

Focus Questions	Law Society Submissions
Restrictions on Voting Rights	
<p>34. On a scale of one to ten, 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.</p>	<p>We rate this measure eight (8) on a scale of one to ten.</p>
<p>35. What are the benefits and risks of this approach?</p>	<p>The benefit is that there would be no related creditor support for the phoenix activity, which allows unrelated creditors to exercise their rights unfettered.</p> <p>The risk is that unless the administrator has proof that a creditor is not related, the effectiveness of the measure is mitigated.</p>
<p>36 Is the current definition of “related creditor” too broad for this purpose? If so, how should “related creditor” be defined?</p>	<p>No.</p>
<p>37. Should related creditors that were company employees be subjected to a different treatment than, say, if they were directors? Why or why not?</p>	<p>No.</p>
<p>38. What level of evidence should be imposed on related creditors to substantiate their respective debts?</p>	<p>The level of evidence imposed should be the same level of proof as for every other creditor of the corporate entity.</p> <p>A liquidator has an obligation to independently and impartially assess the rights of creditors in relation to that creditor’s ability to prove and vote in the context of a liquidation. Every creditor should have the same onus of proof and the standard of proof ought to be based on objectively establishing that the liability is in fact owed.</p>
<p>39. Should restrictions on related creditor voting be extended to all resolutions proposed in an external administration?</p>	<p>Yes, or at least in relation to:</p> <ul style="list-style-type: none"> ▪ Removal and replacement of a liquidator; and

Focus Questions	Law Society Submissions
Why or why not?	<ul style="list-style-type: none"> ▪ Remuneration.
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.	No, other than requiring proof that a creditor is not related.
41. Should the above rule apply to a particular size or type of external administrations or liquidations?	No.
42. Should the court have the power to overturn this restriction?	Yes.
43. Should this restriction only be applied to certain types of companies, for example, small proprietary companies?	No.
44. Are there circumstances where this restriction should not apply?	No. The legislation should be uniform in its application.
45. What are some of the ways a related creditor might attempt to circumvent the above measure?	<p>A creditor may attempt to circumvent the measure by:</p> <ul style="list-style-type: none"> ▪ The use of other creditors' proxies; ▪ The creation of fictitious liabilities that are not supported or pursued when called upon to prove the debt for the purpose of distribution; or ▪ Doing deals with certain other creditors in order to secure voting in a particular fashion.
46. What other measures could be considered to avoid collusion between liquidators and related creditors?	Action should be taken against the liquidators that are found to be promoting or involved in assisting related creditors or phoenixing activity.

Focus Questions	Law Society Submissions
Promoter Penalties	
<p>47. On a scale of one to ten, 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.</p>	<p>We rate this measure eight (8) on a scale of one to ten, subject to our comments below.</p>
<p>48. Should the promoter penalty laws be expanded to apply to promoters or facilitators of illegal phoenix activity?</p>	<p>Yes.</p>
<p>49. What are the benefits and risks of this approach?</p>	<p>We have no comments. While we support the approach in principle, more details are required to allow a proper evaluation of it.</p>
<p>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 provision or creating a separate new provision?</p>	<p>Given that illegal phoenix activity impacts all creditors and not just the ATO, it would be better to structure the promoter penalty laws as a separate regime, as was done with the early release of superannuation. The regime should mirror the current promotion of taxation and evasion scheme laws that apply to aiders, abettors and facilitators and apply to illegal phoenix activity.</p>
<p>51. Are there additional safeguards that would be needed to ensure innocent advisers are not caught by the provisions? Is the defence to show that mere advice was provided, independently verified, appropriate protection?</p>	<p>Yes.</p>
<p>52. If promoter penalties are expanded to apply to promoters of illegal phoenix activity, do the existing sanctions provide sufficient deterrent?</p>	<p>No, we consider that expanding the current sanctions is warranted.</p>
<p>53. Are the offences of civil penalty and criminal prosecution available under section 202 of the <i>Superannuation Industry (Supervision) Act 1993</i> preferred to the promoter penalty options above?</p>	<p>No.</p>

Focus Questions	Law Society Submissions
<p>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?</p>	<p>As many sanction options as possible should be looked at to deter promotion or facilitation of illegal phoenix activity including:</p> <ul style="list-style-type: none"> ▪ Pre-insolvency practitioners should be subject to civil penalty or prosecution; and ▪ Professional advisers should not only be subject to civil penalties and prosecution, but a finding of such involvement should amount to professional misconduct or trigger some form of disciplinary action.
Extending the Director Penalty Notice Regime to GST	
<p>55. On a scale of one to ten, 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.</p>	<p>We rate this measure seven (7) on a scale of one to ten.</p>
<p>56. What are the benefits and risks of this approach?</p>	<p>The benefit of this approach is that it allows unpaid GST to be collected by the ATO from directors who are personally liable.</p> <p>There is a risk that the personally liable director has insufficient assets to make the payment.</p>
<p>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)?</p>	<p>The proposed regime should be restricted to those identified as HRPOs.</p>
<p>58. Are there alternative approaches to securing outstanding payment of GST from companies and their directors?</p>	<p>Any change to the GST collection process by the ATO that improves the collection timing cycle would assist.</p>

Focus Questions	Law Society Submissions
Security Deposits	
<p>59. On a scale of one to ten, 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.</p>	<p>We rate this measure eight (8) on a scale of one to ten.</p>
<p>60. What are the benefits and risks of this approach?</p>	<p>The benefit is that the ATO does not have to rely on the company or its directors to receive the security deposit value.</p> <p>The risk is that if a creditor of the company cannot pay under the garnishee obligation, then there is no other entity from which the ATO can receive the security deposit value.</p>
<p>61. Would improvements to the garnishee provisions adequately address the proposal to strengthen the effectiveness of the security deposit power?</p>	<p>Yes.</p>
<p>62. Should the proposal be limited to businesses that have been identified as High Risk Phoenix Operators (see Part Two)?</p>	<p>Yes.</p>
<p>63. Are there concerns or practical issues that would need to be addressed with expanding the garnishee power generally for <i>future</i> tax liabilities?</p>	<p>There may be both legal and policy constraints on extending the Commissioner’s powers to garnishee for a future tax liability, as opposed to what is currently a legally enforceable tax debt. In any event, the actual tax position would not be known until the liability has been determined.</p>
<p>64. Are there any further concerns if this were achieved through amending the definition of the “tax-related liability” to include the amount of an anticipated <i>future</i> tax liability which is the subject of a security deposit demand?</p>	<p>See our comments in response to question 63.</p>

Focus Questions	Law Society Submissions
65. Are there any issues with the existing garnishee processes that should be considered?	We have no comments.
66. Should the Government consider additional measures to prevent circumvention of the provisions by transferring, disposing or encumbering assets where a request is issued?	There could be a provision that once a request is issued, a company cannot transfer, dispose of or encumber assets without the prior written consent of the ATO.
67. Should the penalties for not complying with a security deposit request be increased to improve compliance?	Yes.
PART TWO	
Dealing with Higher Risk Entities	
68. On a scale of one to ten, 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.	We rate this measure nine (9) on a scale of one to ten.
69. What are the benefits and risks of this approach?	There is a risk that this measure may capture instances of honest business failure. However, if it is expected that the hallmark of repeat failures is an identifier, then that risk should be lessened.
70. Are the safeguards for designating HRPO sufficient? Can you suggest any alternative safeguards that would allow for swift preventative action to be taken to prevent phoenix activity from occurring?	Yes.
71. What safeguards would be required to ensure that the measure is appropriately targeted?	The ability for an HRPO to appeal the Commissioner of Taxation’s decision.
72. Should the Commissioner of Taxation have a discretion to declare a company of which a HRPO is, or has recently	Yes, although this should not be extended to associates unless the

Focus Questions	Law Society Submissions
<p>been, an officer to also be a HRPO? Should this be extended to other individuals or entities which are associates of the HRPO?</p>	<p>HRPO is a director of an associate entity.</p>
<p>73. Should 'associate' be defined or determined administratively?</p>	<p>The term 'associate' should be defined.</p>
<p>Option 1 – High Risk Phoenix Operators, Cab Rank Rule</p>	
<p>74. On a scale of one to ten, 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.</p>	<p>We rate this measure two (2) on a scale of one to ten.</p>
<p>75. Are there alternate measures that would be more effective? If so, please provide an outline of what you thin would work.</p>	<p>The focus of the regulators should be on the offenders. The cab rank rule has always been available to those commencing proceedings who do not have a chosen liquidator, but we do not support the rule being applied across the board for ordinary members or for a creditor’s voluntary winding up. There should be a focus on identifying those practitioners who do, or are seen to be, regularly assisting HRPOs and taking measures against them.</p>
<p>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.</p>	<p>This proposed restriction should apply.</p>
<p>77. Should a cab rank apply to all external administration appointments?</p>	<p>No.</p>
<p>78. Should it be applied more widely, but be limited to specified types of external administration appointments where certain criteria are met? For example:</p> <ul style="list-style-type: none"> ▪ Whether it was a director initiated creditors’ voluntary 	<p>No.</p>

Focus Questions	Law Society Submissions
<p>liquidation and/or the appointment of a liquidator following a voluntary administration</p> <ul style="list-style-type: none"> ▪ Industry sector ▪ Whether pre-insolvency advice was required ▪ 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. <p>If the cab rank applies only to those companies where specified criteria are met what should those criteria be? Please specify your reasons.</p>	
<p>79. Who should administer the cab rank and how should it be administered? Please explain your reasoning.</p>	<p>We oppose all liquidation appointments being decided on a cab rank basis, as it prevents legitimate consideration being given to all of the factors that need to be considered to ensure the best appointment.</p>
<p>80. How do you think such a system should be funded?</p>	<p>This is unnecessary on the basis of our response to question 79.</p>
<p>Option 2 – A Government Liquidator</p>	
<p>81. On a scale of one to ten, 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.</p>	<p>We rate this measure one (1) on a scale of one to ten.</p>
<p>82. Should consideration be given to establishing a government liquidator to conduct small-to-medium external</p>	<p>We do not consider that there are any identifiable benefits in setting up and maintaining a government liquidator which would require</p>

Focus Questions	Law Society Submissions
administration? Please provide your reasons.	significant resources. Private liquidators have the requisite expertise and can carry out this function without expending these resources.
83. What are the benefits and risks of this approach?	We do not consider that this approach provides benefits.
84. If a government liquidator is created, what external administrations should they conduct? Please provide your reasons.	We do not support the creation of a government liquidator.
85. How do you believe a government liquidator should be funded?	See our response to question 84.
Removing the 21 day waiting period for a DPN	
86. On a scale of one to ten, 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.	We rate this measure six (6) on a scale of one to ten.
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?	<p>The benefit of removing the 21 day notice period is that an HRPO is not afforded time to dissipate assets before the Director Penalty Notice (“DPN”) becomes effective.</p> <p>There is always a risk that an HRPO has no personal assets.</p>
89. Should further safeguards attach to DPNs issued to HRPOs in addition to the existing legal rights and safeguards that currently apply to DPNs?	No.
90. Are there alternative approaches to stop a designated HRPO from disposing of their personal assets once they are	There could be a requirement that once a DPN is issued, any personal asset disposal requires prior consent from the ATO to be

Focus Questions	Law Society Submissions
aware they are required to pay a director penalty?	legally valid.
Providing the ATO with the power to retain funds	
91. On a scale of one to ten, 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.	We rate this measure seven (7) on a scale of one to ten.
92. Should the ATO’s power to retain refunds be broadened in respect of HRPOs who have failed to provide other notifications/lodgments capable of affecting their tax liability?	Yes.
93. What are the benefits and risks of this approach?	The benefit is to seek to disrupt the phoenix business model by preventing HRPOs from using the timing of payments and receipts to and from the ATO to enable phoenix activity.
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 lodgment of an income tax return by the HPRO is not due for some months but is expected to result in a significantly liability, should the ATO be able to retain a refund presently owed?	Yes.