



**Professionals  
Australia**

# Combating illegal phoenixing

Professionals Australia submission to consultation on reforms  
to address phoenix operations

October 2017

**Professionals Australia (formerly the Association of Professional Engineers, Scientists and Managers, Australia) is an organisation registered under the Fair Work Act 2009 representing over 25,000 professionals including professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers, transport industry professionals and translators and interpreters throughout Australia.**

We thank you for the opportunity to make a brief submission in response to the *Combating Illegal Phoenixing* discussion paper.

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Professionals Australia strongly endorses measures to address illegal phoenix activity involving the intentional transfer of assets from an indebted company to a new company to avoid paying creditors, tax or employee entitlements.

Those impacted by illegal phoenix activity include employees of the failed company, businesses owed money because they have supplied goods and services to the failed company, bodies such as the Australian Taxation Office and ultimately the taxpayer.

A report conducted by Price Waterhouse Coopers for the Fair Work Ombudsman in 2012, *Phoenix activity: sizing the problem and matching solutions*<sup>1</sup>, estimated the annual cost of illegal phoenix activity:

- up to \$655 million for employees, in the form of unpaid wages and other entitlements;
- up to \$1.93 billion for businesses, as a result of phoenix companies not paying debts, and for goods and services that have been paid for but not provided; and
- up to \$610 million for government revenue, mainly as a result of unpaid tax – but also due to payments made to employees under the General Employee Entitlements and Redundancy Scheme (GEERS) now the Fair Entitlement Guarantee (FEG).

We agree that reforms should be introduced to:

- deter and disrupt the business activities of phoenix operators while minimising any unintended impacts on legitimate businesses and legitimate restructuring;
- assist regulators to better target action against those who misuse corporate structures and enable them to take stronger action against such entities and individuals;
- protect legitimate directors that get a bad name from phoenixing operations;
- address the phoenixing business model that deliberately shifts costs on to the taxpayer; and
- ensure the integrity and future sustainability of the Fair Entitlements Guarantee Scheme.

We concur that the measures proposed in the discussion paper would assist with combatting illegal phoenix activity including:

- amending the Corporations Act 2001 to establish a specific phoenix offence;
- establishing a “phoenix hotline” to provide a single point of contact for the public and facilitate the sharing of information with the Phoenix taskforce;
- extending the penalty laws applying to promoters of tax avoidance schemes;
- establishing stronger powers for the ATO to recover a security deposit from phoenix operators;
- making directors personally liable for GST liabilities;

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<sup>1</sup> Available at

[https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewi8q9\\_l0tDWAhXIEpQKHe4aB5sQFggmMAA&url=https%3A%2F%2Fwww.fairwork.gov.au%2FarticleDocuments%2F763%2FPhoenix-activity-report-sizing-the-problem-and-matching-solutions.pdf.aspx&usg=AOvVaw1glBamoW0pvWlcSTDBbDWj](https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewi8q9_l0tDWAhXIEpQKHe4aB5sQFggmMAA&url=https%3A%2F%2Fwww.fairwork.gov.au%2FarticleDocuments%2F763%2FPhoenix-activity-report-sizing-the-problem-and-matching-solutions.pdf.aspx&usg=AOvVaw1glBamoW0pvWlcSTDBbDWj)

- ensuring directors are prevented from backdating their resignations to avoid their liabilities;
- prohibiting entities related to the phoenix operator from appointing a liquidator; and
- introducing a Director Identification Number to allow the mapping and monitoring of the relationships between individuals and entities.

### **Unpaid wages and entitlements**

We are particularly concerned about the use of phoenix activity to avoid paying employee entitlements and agree that it threatens the sustainability of the General Employee Entitlements and Redundancy Scheme (GEERS).

### **Labour hire industry**

The practice of deliberately liquidating a business to avoid paying tax and superannuation liabilities very often arises in industries with a high proportion of contractors where employees are often misclassified as contractors - be it deliberately or inadvertently.

In addition to the construction, transport, security and cleaning industries, we particularly endorse measures to encourage deterrence in the labour hire industry where high levels of phoenix activity occur.

Contracting and consulting professionals make a profound contribution to Australia's economic growth and productivity, and provide critical labour market flexibility but they can also be particularly vulnerable to the disadvantage arising from unscrupulous operators of labour hire firms avoiding payment of the entitlements of labour hire workers when they engage in phoenix activity.

### **In summary**

We agree that phoenixing activities impact a broad range of stakeholders, and, in particular, that employees and contractors are being denied their entitlements by unscrupulous operators using such arrangements to avoid their employment obligations and liabilities. We agree that the measures set out in the discussion paper should be established to monitor, disrupt and deter these practices with a subsequent review to ensure any unintended consequences or areas requiring stronger measures or penalties are identified.



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