



# Combatting Illegal Phoenixing: submission on the consultation paper for proposed reforms to address illegal phoenix activity

Dated 27 October 2017

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## 1. Introduction

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### 1.1 Who we are

SV Partners Pty Ltd (**SV Partners**) provides professional corporate and personal insolvency advice to accountants, financial institutions, corporations, financial and legal advisors, and individuals. With a team of over 100 insolvency specialists across the Eastern and Western seaboard, our expert advisors focus on recovery, reconstruction advice and formal insolvency appointments. We also operate one of the largest private bankruptcy practices in Australia.

### 1.2 Our experience

Our executive and management teams have extensive experience in the insolvency and turnaround industry and hold memberships with Australian Restructuring, Insolvency and Turnaround Association (**ARITA**), Chartered Accountants Australia and New Zealand (**CAANZ**), Certified Practising Accountants Australia (**CPA**), Institute of Public Accountants (**IPA**), Australian Institute of Credit Management (**AICM**), Turnaround Management Association (**TMA**), Society of Construction Law Australia (**SOCLA**), Australian Institute of Company Directors (**AICD**) and the QLD Master Builders Association (**QMBA**).

We also hold positions on the Australian Securities and Investments Commission (**ASIC**) Liquidator panel, the Australian Taxation Office (**ATO**) Liquidator panel and Department of Employment Fair Entitlements Guarantee (**DoE FEG**) panel.

### 1.3 Summary of our submission

SV Partners welcome the opportunity to provide our submission on the range of proposed reforms outlined in the Consultation Paper. SV Partners have had an opportunity to read the draft version of the Australian Restructuring, Insolvency and Turnaround Association (**ARITA**) submission on the Consultation Paper (**ARITA's Submission**). Unless otherwise stated within our submission, we agree with ARITA's Submission.

We trust that Treasury will listen to industries concerns about many of these proposed reforms, but in particular the proposed cab-rank appointment<sup>1</sup> and Government Liquidator proposal.<sup>2</sup> In June 1997, the Working Party<sup>3</sup> produced its Report<sup>4</sup> to the Commonwealth Attorney-General (**the WP Report**). At [9.19] of the WP Report, the Working Party found that the main reasons for favouring the current practice of a nomination system for appointing Liquidators (as opposed to a cab rank system) were:

- *“selection of a liquidator by the market encourages competition;*
- *most skilled and efficient liquidators would be rewarded;*
- *the number of liquidators required would be set by market forces; and*
- *creditors would be encouraged to appoint the most able and competitive liquidators based on skill, experience, efficiency and costs.”*

SV Partners would add to this list the following other reasons why the nomination system must be favoured over and above a cab rank system (on a non-exhaustive basis):

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<sup>1</sup> Proposal Item 9 of the Consultation Paper “Appointing Liquidators on a Cab Rank Basis”.

<sup>2</sup> Proposal Item 9 (Option 2) of the Consultation Paper “Appointing Liquidators on a Cab Rank Basis”.

<sup>3</sup> The Working Party was established by the then Commonwealth Attorney-General, the Honourable Michael Lavarch MP.

<sup>4</sup> The WP Report was titled ‘Review of the Regulation of Corporate Insolvency Practitioners’ and can be found at this website: <http://archive.treasury.gov.au/contentitem.asp?ContentID=295>.



- a cab rank system would significantly decrease the number of insolvency staff or prospective insolvency practitioners at specialised firms;
- insolvency law is complex and requires specialist professionals. A cab rank system would mean that specialist firms could not sustain current levels of employment, meaning that many specialists would be lost in the market;
- a cab rank system does nothing to improve independence. Supposed facilitators of phoenix activity would still have access to this system; and
- the Insolvency Law Reform Act 2016 has already introduced a number of initiatives that allow creditors to replace Liquidators. See for instance 90-30 of the *Insolvency Practice Schedule (Corporations) 2016*.

In June 2004, the Parliamentary Joint Committee on Corporations and Financial Services published its report (**the Stocktake Report**),<sup>5</sup> which at [3.37] found in favour of the current nomination system. The following screenshot (which is a highlighted sentence found within 3.37 of the Stocktake Report), remains persuasive and correct:

of initiating the VA procedure be repealed at this time. The method of appointment of an administrator must be seen in the context of the overall rationale of the VA procedure, which is designed to be capable of swift implementation, and to be as uncomplicated and inexpensive as possible as well as sufficiently flexible to provide alternative forms of dealing with the financial affairs of the company. The procedure

To avoid doubt, we oppose any proposal to introduce a cab-rank system.

The following page contains our views and comments on the scale of the effectiveness of each of the proposed reform ideas to combatting illegal phoenixing activities.



Nicky Lonergan  
Chief Operations Officer

[Redacted]



Matthew Hudson  
Manager

[Redacted]

Yours faithfully



**TERRY GRANT VAN DER VELDE**  
**MANAGING DIRECTOR**  
**SV PARTNERS PTY LTD**

<sup>5</sup> Parliamentary Joint Committee on Corporations and Financial Services, 'Corporate Insolvency Laws: a Stocktake', and can be found at here: [https://www.aph.gov.au/binaries/senate/committee/corporations\\_ctte/completed\\_inquiries/2002-04/ail/report/ail.pdf](https://www.aph.gov.au/binaries/senate/committee/corporations_ctte/completed_inquiries/2002-04/ail/report/ail.pdf).

## 2. Proposals identified in the Consultation Paper

Below are SV Partners responses to relevant questions identified in the Consultation Paper. We have only provided a short form response; if the Government requires further details or explanations from us, please contact one of our authors. Please note we have not responded to all questions.

Question	Proposed Reform	Scale <sup>6</sup>	Comments (where relevant)
1	A phoenix hotline	1	<p>The Consultation Paper provides that ASIC and the ATO operate hotlines of their own. Yet the Consultation Paper does not set out the effectiveness or percentage use of these hotlines.</p> <p>If a hotline were to be set up, a model similar to the National Debt Helpline might be best.</p> <p>We also query which industry or persons would be required to pay for this hotline. The ASIC Funding Model is already a huge (and unreasonable) new tax on the insolvency profession.</p>
6	A phoenixing offence	5	<p>We broadly support this proposed idea, but re-iterate the concerns and comments in ARITA's Submission.</p> <p>Rather, we prefer introducing a provision into the Corporations Act that is similar to the s 139ZQ notice regime, which currently exists under the Bankruptcy Act (<b>s 139ZQ notices</b>).</p> <p>We also support provisions that favour a stricter-enforcement approach to a breach of s 286 of the Corporations Act.</p>
8 & 10	Issuing s 139ZQ notices	N/A	Yes, Liquidators should have the power and the discretion to issue s139ZQ notices, as well as ASIC, if introduced.
9			No – we oppose any other regulators having the right to issue a s139ZQ notice.
11			<p>Five business days. Companies have obligations to maintain books and records (per s 286 of the Corporations Act). Books and records should always be readily accessible.</p> <p>Liquidators are bound by the same timeframe in responding to a request for information from creditors or Government Agencies (where applicable) (section 70-1 of the <i>Insolvency Practice Rules (Corporations) 2016</i>).</p>
20	Designating breaches of existing provision as phoenix offences	5	We otherwise support ARITA's Submission on this point.
22	Director resignation notices	8	Limiting backdating of director appointments and resignations will assist with pursuing misconduct.
23		N/A	Yes, failure to lodge notice of change to director appointments should carry a penalty.
25			We agree with ARITA's Submission.

<sup>6</sup> 1 = ineffective and 10 = highly effective in combatting illegal phoenix activity



Question	Proposed Reform	Scale <sup>7</sup>	Comments (where relevant)
28	Shell companies	10	Proposed reform to limit the resignation of a sole director without a replacement or winding up the company is supported.
34	Restrictions on related creditor voting rights	1	We do not agree with this proposal, except in the circumstances outlined in ARITA's submission.  The paragraphs under the heading "how phoenix operators exploit the current law" in the Consultation Paper are unsupported by empirical evidence.
47	Promoter Penalties	3	We support ARITA's Submission insofar as we do not believe that the proposed new law is necessary (based on the three options put forward in the Consultation Paper).
54		N/A	We are of the view that promoters of safe harbour services should be appropriately qualified professional accountants and lawyers, with adequate professional insurance.  The recent passage of the safe harbour reforms, without these requirements, only goes to facilitating illegal phoenix activity.
55	Extending the DPN regime to GST	9	We agree with this proposal.
57		N/A	The DPN regime should be extended to all directors (those formally appointed and shadow directors of all companies (high risk or otherwise).
59	Security Deposits	1	We do not agree with this proposal. The ATO should not receive greater protections to the detriment of other creditors.
68	Targeting higher risk entities	1	We do not support this proposal.
69		N/A	If such a proposal was brought in, those entities declared as High Risk Phoenix Operators ( <b>HRPO</b> ) should have a right to appeal the decision to designate them as such, and whilst said appeal is being heard, the new preventative measures should be suspended.  A person has a natural right to justice and a Government agency should not be the investigator, complainant and judge – at least not without appropriate judicial oversight.
74	Cab rank system	1	We strongly disagree with this proposal. The contents and statements found on page 27 of the Consultation Paper are without empirical evidence and have no basis.  Quoting the draft version of ARITA's Submission "a cab rank is a step towards the 'de-professionalisation' of the highly specialised and expert work performed by registered liquidators." We concur.  We are concerned with how, in practice, an external administrator would refuse an appointment based on the circumstances suggested in the consultation paper.
77	Cab rank system application	N/A	No, the cab rank system should not apply to all external administration appointments. We disagree with the proposal in its entirety.

<sup>7</sup> 1 = ineffective and 10 = highly effective in combatting illegal phoenix activity

Question	Proposed Reform	Scale <sup>8</sup>	Comments (where relevant)
81	Government Liquidator	1	We strongly oppose this proposal.
85		N/A	The Government should instead look at ways to increase funding to external administrators to support their investigations and recoveries of voidable transactions, etc. Especially where the company in liquidation has no or limited assets. The current funding models that are supposedly available are cumbersome and inefficient.
86	Removing the 21 day waiting period for a DPN	10	We do not support this proposal. We refer to ARITA's Submission in this regard.
87		N/A	No.
91	Providing the ATO with the power to retain refunds	3	We otherwise support ARITA's Submission on this point.
92		N/A	Yes, but we believe that this should be extended to all taxpayers.

<sup>8</sup> 1 = ineffective and 10 = highly effective in combatting illegal phoenix activity

