Ref: 11.1.6 — 2 October 2018

Nathania Nero
Senior Adviser
Corporations Policy Unit
Consumer and Corporations Division
The Treasury
Level 5, 100 Market Street
SYDNEY NSW 2000

Dear Ms Nero

RE: ADIA Comment – Reforms to combat illegal phoenix activity – Draft Legislation

As the peak business organisation representing manufacturers and suppliers of dental products, the Australian Dental Industry Association (ADIA) takes this opportunity to tender advice concerning the draft legislation for reforms to combat illegal phoenix activity.

Illegal phoenix activity, including the use of serial deliberate insolvency as a business model to avoid paying company debts imposes direct costs on lawful affected parties as well as broader adverse economy-wide impacts.

Analysis undertaken by PricewaterhouseCoopers (PwC) in July 2018 on behalf of the Australian Taxation Office (ATO) found that total direct cost to lawful creditor businesses of illegal phoenix activities in FY2015-16 was $1.16 - $3.12 billion. The total cost to employees in the form of unpaid entitlements was calculated to be up to $298 million, whereas the cost to Government in unpaid taxes and compliance costs was $1.66 billion. The impact of these costs extends to the broader economy, with the potential total headline impact on GDP to be between $1.76 and $3.46 billion or 0.11-0.21 per cent of real GDP for 2015-16.

The growth and sustainability of Australia's dental industry is, to a significant degree, conditional upon external factors such as upon the strength of the broader Australian economy and a sustainable Government balance sheet. To this end, given PwC's findings, illegal phoenix activities have an adverse impact on the businesses that supply and manufacture dental products in Australia.

Further, Small to Medium Enterprises (SME), which constitute the majority of businesses in Australia's dental industry, are particularly vulnerable to the adverse impacts of illegal phoenix activity. Should a debtor of an SME that supplies or manufactures dental products illegally phoenix, the impact on the cash-flow of the lawful SME could be disastrous; resulting in the destruction of jobs and, in circumstances involving high-value medical equipment capital, shutter the business completely.

Given the above, ADIA supports amendments to the *Corporations Act 2001* and its associated legislative instruments to prevent creditors facilitating illegal phoenix activity by unduly influencing the removal or replacement of external administrators. This includes the introduction of new phoenix offences and associated penalties to company directors that engage in creditor-defeating transfers of company assets that prevent, hinder or significantly delay creditor's access to those assets. ADIA also supports, in-principle, other proposed measures including the prevention of directors' backdating of resignations; the abandonment of a corporate shell without a director; holding phoenix directors liable for their company's GST and related liabilities; expand the ATO's powers to retain tax refunds; and restrict the voting rights of creditors that are related to a phoenix operator at meetings regarding the appointment or removal of an external administrator.

ADIA's support for these provisions in-principle notwithstanding, there is a need for Treasury and the ATO to submit for public consultation updated guidelines that will govern how and in what circumstances these expanded powers will be used. Without clear guidelines, there is a risk that company directors engaging in legitimate and lawful liquidation proceedings may be unintentionally subjected to mechanisms designed to address illegal phoenix activities. ADIA recognises the difficulty in distinguishing, from a statutory perspective, between specific lawful and legitimate activities and those of illegal phoenix operators. As such, ADIA would welcome the opportunity to provide further assistance to the Australian Government in qualifying this distinction in a manner that provides assurances to lawful operators that they will not be unintentionally impacted and, thereby, strengthen support for these reforms among the business community and SMEs in particular.

In terms of other observations and recommendations, Treasury's attention is drawn to the submission from the Australian Chamber of Commerce and Industry. Having reviewed the Australian Chamber's submission, I can advise that the commentary and recommendations set out in that document reflect those of both ADIA and its membership. On that basis, the Australian Chamber's submission is commended to you.

As Treasury continues its deliberations with respect to this matter, if there is a need to seek guidance on matters specifically related to the manufacture, export, importation or supply of dental products please do not hesitate to contact the ADIA at your convenience.

Yours faithfully

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Policy & Research Manager