



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

26 September 2018

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

By email: Phoenixing@treasury.gov.au

Dear Ms Nero

REFORMS TO COMBAT ILLEGAL PHOENIX ACTIVITY – DRAFT LEGISLATION

We support the overall direction of the proposed amendments to combat illegal phoenix activity as small businesses are disproportionately impacted when assets are moved to avoid debt obligations. Key to success will be the implementation of proper safeguards for small businesses that are inadvertently caught up in this type of activity.

While we support the improved recovery of assets reforms we recommend that a review after one year to ensure that these measures are operating as intended.

Similarly, extending the voidable transactions' determination to 12 months prior to entering external administration, is appropriate. However, the voidable transaction exemption of achieving market value consideration for a creditor-defeating disposition is problematic. Determining market value for real estate and company assets in a distressed state or when the assets of a business are not sold as a whole make this harder to achieve. Establishing a defined process as well as focusing on the outcome is a better way to determine if market value has been achieved.

Pre-insolvency advisors and other facilitators

Establishing a proof of intention for insolvent trading has proven to be a high bar. The amendments will capture both intentional conduct and when there's been a failure to exercise reasonable care that result in a creditor-defeating disposition.

By lowering the criminal threshold of intention to recklessness and establishing a new civil provision is likely to create a tougher and better targeted penalty in practice. The added benefit is that it will 'enable regulators to start building an evidence-based understanding of the scale on workings of this industry'¹ and see patterns of behaviour to better monitor and detect such individuals.

Director Accountability

¹ Melbourne Law School and Monash Business School, Phoenix Activity Recommendations on Detection, Disruption and Enforcement, 2017, p. 17

The reforms particular to directors are another welcome accountability measure. To be effective they will require the implementation of the proposed Director Identification Number and take into account the recently introduced safe harbour provisions.

Any actions against directors must be balanced with adequate safeguards for small businesses to call out and appeal any errors. The recent investigation into the treatment of small business by the ATO has shown that the ATO needs to be transparent in their decision-making processes, allow appeals and provide adequate compensation where the ATO has made an error.

Establishing what phoenix activity is and the development of director centric measures, will provide the framework to identify and address dishonest behaviour. For the framework to be effective the government must undertake a comprehensive, extended, education program for small business owners. Education will act both to inform potential victims on how to identify and report illegal phoenixing and deter others to undertake illegal phoenix activities.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Jill Lawrence on 02 6263 1558 or at jill.lawrence@asbfeo.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Kate Carnell', written in a cursive style.

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman