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

By email: Phoenixing@treasury.gov.au

Dear Nathania,

Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018

CPA Australia represents the diverse interests of more than 163,000 members working in 125 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

CPA Australia supports the Government's continuing strong and deliberate endeavours to eradicate as far as practical this abuse of the privileges of corporate legal persona and limited liability which have far reaching deleterious effects on creditors, the business environment and the community at large. In our previous submission to the September 2017 Consultation Paper we stressed the need for both strong statutory powers and institutional capacity within and across relevant agencies.

Turning to the Exposure Draft, Schedule 1 is, of course, the most significant aspect of the proposed reform representing the first serious attempt to devise in Australian corporate law a definition of illegal phoenixing. The concept of 'creditor-defeating disposition' (s 588FDB) is commendable, derived as we understand, from s 121 of the Bankruptcy Act 1966 and it is highly significant that the reprehensible behaviour of illicit pre-insolvency advise facilitating phoenixing is directly addressed through the procuring provision within s 588GAB. Having embedded *creditor-defeating disposition* within the scheme of Part 5.7B the consequential need to give rise to mechanisms of duty, consequence of breach of duty, take-up within the structure of voidable transactions, reflecting within arrangements for compensation, along with ensuring harmony with insolvent trading defences, insolvent trading safe harbour and exception where dispositions have been made consequent of a form(s) of external management, all-in-all create significant drafting challenges which seem to have been amply met. The outcome is nevertheless one of significant complexity. We make the following limited number of observations and suggestions concerning the drafting and ensuing complexity:

- Subsections 588FDB(2) and (3) provide extensions to the concept of dispositions. Each subsection is respectively referenced to in paragraphs 2.13 and 2.14 of the Explanatory Materials. The example presented in para. 2.15 we read as aligned with s 588FDB(3). We understand further that the mischief attacked in s 588FDB(2) is the practice of one company performing work (ultimately 'collapsing') with a new company issuing an invoice so that, through intended effect of this subsection, the invoice becomes "property that did not previously exist". Bearing in mind the significant interpretative value given to extrinsic explanatory memoranda under s 15AB(2)(e) of the Acts Interpretation Act 1901, we suggest that the distinction between subsections (2) and (3) be more fully explained and that a separate example be presented illustrating the mischief at the heart of s 588FDB(2).

- The Exposure Draft proposes introduction of (6B) into s 588FE Voidable Transactions. First, we urge that it be clarified either within the statute or Explanatory Materials the distinction between both the nature of *creditor-defeating dispositions* and fraudulent dispositions (s 588FE(5) Insolvent transaction for purpose of defeating creditors) and their respective relation-back timeframes. Secondly, addressing the challenges in understanding the interaction and effect of the various sections within Division 2 of Part 5.7B, we would like to suggest inclusion of some form of tabular representation. Examples of such drafting can be found in other legislation including Chapter 3 Capital Gains Tax provisions of the Income Tax Assessment Act 1997 which has an illustrative sequences of steps applied in the intended calculations.

- The Exposure Draft proposes particular protections through rending certain dispositions as not voidable thus negating the otherwise effect of proposed s 588FE(6B). The elements around good faith and giving of market value consideration are essential elements within a coherent legal system for recovering property and reconciling claims. Despite this, we point to possible evidentiary difficulties and onerous burden of proof where, for example, difficult trading circumstances may compel contractual decision that may not have otherwise been contemplated.

- We note in passing that at Item 68 the proposed inclusion within the Schedule 3 penalties regime. The magnitude of penalty it Items 138A and 138B presuppose successful passage of the draft legislation enacting reforms to strengthen penalties for corporate and financial sector misconduct.

More generally, CPA Australia believes it important to consider the proposed changes to the Corporation Act Chapter 5 External Administration provisions within the context of regulatory burden. We are aware of some views that the proposals around creditor-defeating dispositions are possibly needlessly complexi and that a more appropriate path would be more vigorous application of existing provisions of the Corporations Act, say for example the broad aiding and abetting provisions of s 79, complemented with better institutional response through, say, the Assetless Administration Fund. Indeed, ASIC's actions against Raad and Bazouni announced in a media release (18-246MR of 24 August) would illustrate the effectiveness of existing mechanisms at the disposal of the corporate regulator and company liquidators. Further in this regard ASIC's 2018-22 Corporate Plan emphasis an intended plan to boost the effectiveness of the AA Fund and it is important also that there be gauged the effectiveness of the Director Identification Number (DIN). Given these uncertainties and concerns, CPA Australia strongly urges the building-in to the proposed legislation a review mechanism similar to that enacted in relation to the insolvent trading safe harbour provisions (s 588HA).

Concerning the other reforms proposed in Schedules 2, 3 and 4, CPA Australia is supportive.

CPA Australia is keen to work with Treasury and ASIC on these and similar significant law reform. Germane to the practicalities of addressing illegal phoenixing and making practical use of statutory-based measures, is inclusion within professional accounting ethical pronouncements (APES 110 Code of Ethics issued by the Accounting Professional & Ethics Standards Board) specific obligations in relation to responding to non-compliance with laws and regulations. The accounting profession operates at a pivotal point within the business environment where actual and potential illegal phoenixing becomes evident. CPA Australia will give its utmost to appraising its members in public practice the intent and practical implications of the various anti-phoenixing reforms which unfold and will give positive encouragement to the utilization of the channels for reporting suspect activities made available through the Phoenix Taskforce.

If you require further information on our views expressed in this submission, please contact the undersigned on +61 3 9606 9826 or at john.purcell@cpaaustralia.com.au.

Yours sincerely

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