

Our Ref: DEPAOF01/16/SGC:GK:cb  
Reply To: Parramatta

27 September 2018

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

*Via email: phoenixing@treasury.gov.au*

Dear Ms Nero

**Re: Treasury Laws Amendments (Combatting Illegal Phoenixing) Bill 2018**

I refer to your request for submissions in relation to The Treasury's proposed "*Treasury Laws Amendments (Combatting Illegal Phoenixing) Bill 2018*" and take please in preparing these submissions.

**A. CONDON ASSOCIATES**

Condon Associates is a specialist Firm of Forensic, Insolvency and Turnaround Practitioners headquartered in Parramatta, NSW. The Firm undertakes Liquidations (Official and Voluntary), Receiverships, Voluntary Administrations and Deeds of Company Arrangement under the provisions of the Corporations Act 2001 (Corporations Act), as well as the formal administration of Bankrupt estates and Part X Arrangements pursuant to the Bankruptcy Act 1966 (Bankruptcy Act). In addition the Firm provides services within the related areas of Forensic Accounting, and Litigation Support as well as business and financial Turnaround and Advisory Services not involving formal appointments.

It should be noted that the general focus of our corporate work is in the small to medium, proprietary companies rather than Publicly Listed entities.

The Firm's Managing Principal, Schon Gregory Condon, was an Official Liquidator, now a Registered Liquidator and Registered Trustee in Bankruptcy with in excess of 40 years of experience in the field, with almost 30 years at the Principal/Partner level.

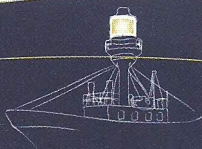
**B. SUBMISSIONS RELATING TO CHANGES OR AMENDMENTS**

We note that whilst we have not adopted the numbering of the Exposure Draft and will base our responses on the proposed new and/or amended sections of the relevant legislations.

**CONDON**  
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## **Generally**

We note that we have purposefully not made any commentary on changes that would appear to be purely consequential amendments as a result of the main significant changes being proposed. As such our submissions have focused on those main changes.

### **11 - After Section 588FDA**

We note that the proposed legislation brings in the idea of a “creditor defeating disposition”. This creates a new class of voidable transaction which may be recovered by an external administrator. The key element of this new section would appear to be the inclusion of a void transaction that has the effect of “preventing, hindering or significantly delaying the property becoming available in a winding-up”.

On an initial view it would appear that this is not unlike the current provisions of the Act dealing with void transaction, specifically the idea of an uncommercial transaction as contained in Section 588FB.

### **13 – After Subsection 588FE(1)**

We hold some concerns with the wording of the proposed amendments. The basis of the concerns is that it may capture some transaction that could be undertaken in the normal course of business. This could include a business that is a retail operation that in the lead up to Christmas or after the end of the financial year offers significant discount on their stock so much that it may in actual fact be sold for under its “market value”. These sales could be undertaken for a proper purpose, to sell excess stock, out of season items or to remain competitive on that item. The business may still make some profit overall but on an individual basis the items could be deemed to be sold for less than “market value” and could be caught as a creditor-defeating disposition.

We believe that the above situation would not be in the spirit of the proposed changes.

### **18 - After Section 588FG**

We believe that an increase of the powers available to ASIC to grant an order requiring the repayment of funds is a welcome introduction. We have concerns as to ASIC’s ability to undertake this task in a cost effective manner. We note the AFSA has similar powers available to it pursuant to Section 139ZQ of the Bankruptcy Act 1966 and charges a relatively modest fee for reviewing these types of request. By way of example, a fee of \$480 is charged for the issuing of a notice under Section 139ZQ of the Bankruptcy Act 1966.

We also hold concern in relation to the amendment at (6) which would allow ASIC to revoke an Order at any time. There may be significant consequences for a liquidator whom has made a recovery under an original ASIC order which is subsequently revoked. The proposed amendments fail to clarify on limiting claims made against either the Liquidator or ASIC. Attached an Annexure ‘A’ is a worked example of our concern.

The ability to recover an amount due under an ASIC Order as a debt due to the company greatly increases the ability for an external administrator to recover the amount, this is a welcome amendment. However, given that ASIC is to act as if it were a court, we hold some apprehension, that this provision may in fact increase the costs for external administrator in that they may be required to obtain legal opinion on matters where they are already unfunded.

We note that the proposed amendments give the recipient of the ASIC order 60 days to apply to the Court to set aside the ASIC Order. It is our opinion that this length of time would appear to be too generous and should be limited to the same as dealing with statutory demand for payment of 21 Days.

## **26 - After Section 588G**

588GAA - The addition of further duties of company officers to prevent certain transaction is welcome, however there to date has been a lack of prosecution against directors for offence under the corporations act to date, adding an additional offence may not have the impact that the is really needed, that might be better seen through increasing ASIC funding to bring more prosecution of directors under the current legislative offences.

Further there is a need to educate director about their obligations they have upon becoming a director.

588GAB – The introduction of an offence for seeking out advice on how to procure a creditor defeating disposition if a step in the right direction, however we do not believe that ASIC is currently sufficiently funded to make any meaningful difference with this new offence. Further this may still be undertaken under the guise of a safe harbour plan.

## **Schedule 2 – Improving the Accountability of resigning directors**

### **2 After Section 203A**

We believe that this is a significant improvement over the current system as the date of a director resignation is easily backdated to a date that the directors believe is more suitable. It is also appropriate that should a director believe they have resigned but not lodged with ASCI that an appropriate Court can alter the date of registration, however there will need to be some guidance so that these applications are not simply rubberstamped

## **Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights)**

We generally believe that these changes are a welcome amendment to the Insolvency Practice rules and mirror changes that were introduced into the Bankruptcy act a number of years ago.

**C. SUBMISSIONS OF SUPPORT**

AS noted above there are some areas of the proposed amendments which we believe will significantly increase the ability for an external administrator to recover funds for the benefit of creditors. The introduction of the ability for ASIC to issues orders for repayment of monies is a step in the right direction, however careful consideration need to be given to how this is implemented to ensure it is of benefit.

Further the change to related creditor's voting rights is a significant change that will increase the transparency of related party voting as is bringing in new offences for the procurement and inducement of creditor-defeating dispositions.

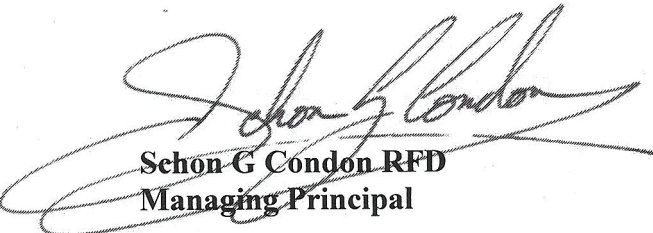
**D. CONCLUSION**

We congratulate Treasury on seeking wide input and thank you for the opportunity to do so. Our responses have been based on experience in the area and the available time, whilst still maintaining an active practice. Should you have any enquiries in respect of this matter, please contact Schon Condon or Gavin King or of this office on (02) 9893 9499.

Yours faithfully

**Condon Associates**

**Forensic, Insolvency and Turnaround Practitioners**



**Schon G Condon RFD**  
**Managing Principal**

This annexure is to provide an example of the issues that may arise with ASIC revoking an Order

The external administrator request ASIC to issues orders to 5 entities that have received the benefit of what has been determined to be a "Creditor-defeating disposition".

Upon receipt of the Order from ASIC, 4 of the beneficiaries of the "Creditor-defeating disposition" pay the amounts that have been claimed pursuant to the ASIC Order.

The 5<sup>th</sup> beneficiary, whom is being supported by the party inducing the actions undertaken to give rise to the creditor-defeating dispositions, applies to the Court to have the Order set aside.

Due to this action, ASIC determines that it would revoke the other 4 Orders that have since been recovered by the external administrator.

The result of this is the 4 beneficiaries whom have paid the external administrator will now seek to have the Orders set aside on the basis that ASIC has revoked the 5<sup>th</sup> order. This will result in possible costs orders being made against the external administrator.

Ultimately this will lead the notices becoming ineffectual as an external administrator will be unwilling to take on the risk of receiving a personal costs order.