

Geoff Green

26 September 2018

Nathania Nero
Senior Adviser
Corporations Policy Unit
Consumer and Corporations Division
The Treasury
Level 5, 100 Market Street
SYDNEY 2000
Email to: phoenixing@treasury.gov.au

Dear Ms Nero,

Reforms to combat illegal phoenix activity – Draft Legislation

I am a Chartered Accountant and former registered liquidator, with more than 20 years' experience in financial and professional services at Nab, ANZ Bank, and Ernst & Young.

I very much appreciate the opportunity to provide feedback on the *Reforms to combat illegal phoenix activity – Draft Legislation*, which for clarity represent my personal views and are not made on behalf of ARITA.

Creditor defeating disposition

I support the creation of a 'Creditor Defeating Disposition' ('CDD'), however I believe that it is important that it only apply where the transaction involves a related party.

If the CDD regime applies to sales to third parties then it may complicate legitimate asset sales. Potential purchasers who believe a vendor to be under financial pressure may be concerned about whether they can take clear and irreversible title to business assets, or whether there may be a risk of later claw back. Such a purchaser has a theoretical access to the general good faith defence that is available to purchasers without 'knowledge of insolvency,' but they may need to think carefully about when exactly a suspicion about financial stress might amount to 'knowledge of insolvency.' Some potential acquirers may decide they need more information, or details of how the funds will be dispersed, and some may decide that it is safer to walk away and wait for a formal insolvency to deliver clear title.

If there is a view that the current definition of 'Related Parties' is inadequate then it should be amended, rather than expand the scope of CDD to transaction with third parties.

Administrative Recovery process

It appears that this regime is based upon a similar regime in bankruptcy administered by AFSA, which based on anecdotal feedback I understand to be rarely used.

I suggest that it would be helpful to understand why the AFSA process is little used, to ensure that any practical limitations in the AFSA regime are avoided in implementing the ASIC regime.

New Offences

In my view the creation of new offences is purely symbolic, absent the provision of significant additional resources for ASIC. ASIC is very clearly unable to address the offences that liquidators currently report, and to add to the number of offences unable to be investigated will achieve little in practice.

Safe Harbour a defence

I support the availability of 'Safe Harbour' as a defence – this is a commendable policy alignment.

Director resignations

I support the 28 day limit on backdating director resignations and the prohibition on director resignations that would leave a company with no directors. These are simple and well thought through policy initiatives that will be easily understood, and easy to apply.

Related Party voting

One of the most notable of many problems caused by the *Insolvency Law Reform Act* is the ease by which parties can disrupt a liquidator's proper investigation, by replacing the liquidator.

The proposed reform will partly address this deficiency by restricting the voting rights of a related party who purchases the debt, in relation to a resolution to replace the liquidator. However this restriction does not address:

- Such action by a non-related party (or a party that cannot be shown to be related).
- Disruption to a liquidator's proper recovery action by voting against resolutions seeking approval of arrangements to fund litigation, or resolutions approving the remuneration of liquidator or his or her legal representation in relation to that recovery action.

A better approach would be to limit the voting value of a debt to the price paid to acquire it for all resolutions – as the Bankruptcy Act has done for many years in relation to personal insolvency.

If that cannot be achieved then the reform should be extended to resolutions ancillary to a liquidator's recovery action, and should not be limited only to related party purchasers.

Please feel free to call me on **** if that would be of assistance.

Yours sincerely,

Geoff Green