KPMG submission

Exposure Drafts

Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018

Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018

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Executive Summary

KPMG supports the Commonwealth Government's objective of combating illegal phoenix activity, and is grateful for the chance to make a submission on the current consultation.

KPMG is, broadly, supportive of the measures under consideration in the current consultation, and would like to make the following key comments about the draft legislation and accompanying materials:

- **Enforcement:** as a general matter, KPMG submits that, irrespective of the changes in the substance of the legislation that result from this consultation, robust enforcement action will be essential to the success of any reform.
- **Creditor-defeating dispositions:** KPMG is generally supportive of the draft legislation concerning creditor-defeating dispositions. However consideration should be given to broadening the exception for obtaining "market value" consideration to include situations where the best possible price is obtained in the circumstances (in line with the existing concept in section 420A of the *Corporations Act 2001).*
- **Improving the accountability of resigning directors:** KPMG is supportive of the proposals relating to improving the accountability of resigning directors. Their efficacy would be enhanced by the timely introduction of the Government's proposed Director Identification Number system.
- **GST estimates and director penalties:** KPMG is supportive of the proposals relating to extending the application of laws relating to director penalty notices to cover GST liabilities (including the Commissioner of Taxation's estimate of such liabilities).
- **Retention of tax refunds:** KPMG generally supports the measures directed at ensuring taxpayers satisfy their outstanding tax liabilities before claiming tax refunds. However the proposals should be modified to ensure that a company in external administration can claim tax refunds (particularly in relation to GST incurred on expenses during the external administration process) in order to ensure appropriate and fair treatment of all creditors.

Detailed comments

1. General

1.1 KPMG welcomes the opportunity to comment on the Exposure Drafts (EDs) of *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018* and *Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018*, and associated materials as published by Treasury on 16 August 2018.

1.2 KPMG believes that combating phoenixing activity is rightfully a high priority for the Commonwealth Government and we support the Government in the pursuit of this objective.

1.3 As a general matter, KPMG submits that, irrespective of the changes in the substance of the legislation that result from this consultation, robust enforcement action will be essential to the success of any reform. The practice of phoenixing is egregious, deliberate, and systematic. It is, by definition, already illegal. While KPMG is broadly supportive of the proposals contained in this consultation, it must also be acknowledged that the activities they target remain persistent even though they are already illegal, which means that enforcement activity will be crucial to support these reforms. Our additional, specific recommendations are outlined below.

2. Creditor-defeating dispositions

2.1 Schedule 1 to the *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018* contains provisions drafted to prohibit creditor-defeating dispositions of company property, penalise those who engage in or facilitate such dispositions, and allow external administrators and ASIC to recover such property.

2.2 In Part 1 of the ED at item 17, the proposed amendment states that a court is not to make a relevant order in circumstances where a disposition of property has been made, if there is evidence suggesting a reasonable possibility that consideration has been given for the disposition, and the value of the consideration was at least the market value of the property in question.

2.3 We recommend that a court should also be prevented from making a relevant order where there is evidence before it suggesting that consideration of at least the *best attainable price having regard to the circumstances of the sale of the property* has been given for the property in question (language similar to that which appears in section 420A of the *Corporations Act 2001* could be used). This may better accommodate situations where there is no true creditor-defeating mischief, because only sub-market value consideration is attainable for sellers facing the urgent need to dispose of property.

2.4 Further, KPMG supports the 'facilitator' penalties relating to creditor-defeating dispositions, but recommends that consideration should be given to only applying penalties for *knowingly* procuring, inciting, inducing or encouraging dispositions

3. Improving the accountability of resigning directors

3.1 KPMG supports the measures contained in the *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018* ED targeting improving the accountability of resigning directors.

3.2 For these measures to have the maximum possible positive effect, they will need to be supported by the timely introduction of the Director Identification Number system.

4. GST estimates and director penalties

4.1 KPMG is supportive of the proposals relating to extending the application of laws relating to director penalty notices to cover GST liabilities (including estimated liabilities).

5. Retention of tax refunds

5.1 KPMG generally supports the measures directed at ensuring taxpayers satisfy their outstanding tax liabilities before claiming tax refunds in respect of a different tax. However there should be consideration of amending these proposals to ensure that a company in external administration can receive, in particular, GST refunds arising from expenses incurred following the appointment of external administrators.

5.2 KPMG submits that allowing the ATO to retain refunds in these situations has a negative impact on other creditors. For instance, it is common for a company in external administration to incur GST, with GST refunds then being used by external administrators to ensure the optimal conduct of the external administration process, and the appropriate treatment of creditors.