24 September 2018

Ms 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 Ms Nero

Thank you for the opportunity to attend the Roundtable discussion dated 3 September 2018 and to discuss the proposed *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018* and *Insolvency Practices Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018* ("**Phoenix Law Reform**").

As per my previous submission for the *Combating Illegal Phoenixing* paper that was released in September 2017, I support the move towards deterring illegal phoenix activities through the Phoenix Law Reform ("**2017 Submission**"). My 2017 Submission advocated 5 law reforms with respect to *Corporations Act 2001* (Cth) ("**Corporations Act**")- namely, they are:

1. Defining the term "phoenix activity" under s 9 of the Corporations Act;
2. Amending the uncommercial transaction provision under s 588FB of the Corporations Act to allow those who have standing to set aside transaction that led to, or would lead to, phoenix activities;
3. Amending the winding-up provision under s 459A of the Corporations Act to allow phoenix companies to be wound up through the courts;
4. Amending the reinstatement provision under s 601AH of the Corporations Act to allow ASIC to reinstate, through the courts, deregistered companies that were deregistered for the sole purpose of conducting phoenix activities; and
5. Including a prohibition against phoenix activities by introducing criminal and civil penalties through s 588GA of the Corporations Act

(collectively as the "**Proposals**")

Overall, I support the Phoenix Law Reform because it, and a number of law reforms since the introduction of the Proposals, have addressed the essence of the Proposals. For more details about the Proposals, please refer to the 2017 Submission.

For your consideration, please see below my submission for the Phoenix Law Reform in more details:

Proposed provision within the Phoenix Law Reform	**Submission**
s 588FDB of the Corporations Act	This provision is designed to capture the definition of an illegal phoenix activity. This proposed provision currently contains quite a number of subjective elements and they include: - "preventing the property from becoming available…"; and - "hindering, or significantly delaying…". While it is understandable that the definition provides some flexibility with respect to its interpretation, such flexibility could allow these criteria be opened to more than one interpretation. This could cause the regulator (or those who wish to rely on this provision) some difficulty to enforce. For example, the Australian Securities and Investments Commission ("**ASIC**") could find it difficult to prove an illegal phoenix activity has taken place if it is difficult for one to establish evidence to support the element of hindering or significantly delaying the process of making the property available for the benefit of the creditors. In addition, it is unclear whether this

	proposed provision addresses situations where the creditors are simply not paid but the act does not meet the definition set out in s 588FDB(1) of the Corporations Act. Given that there is no specific timeframe built into this provision, it is possible for one to argue that the creditors are not prevented from, or hindered from the assets because there is no evidence to show that creditors are permanently deprived from the company assets. Depending on the intention behind this proposed definition, it is recommended that the Treasury considers how much subjective or discretionary elements it wishes to include in the definition.
s 588FDB(a) of the Corporations Act	Recommending the inclusion of "some or all" in the drafting. Please consider amending the sentence to: "preventing the property from becoming available for the benefit of the company's creditors <u>(some or all)</u> in the winding-up of the company". The reason for such inclusion is to prevent a person avoiding the law by looking after those creditors who are considered as related party creditors. That is, a person can technically avoid being prosecuted if he or she only prevents the non-related party creditors from accessing company assets.
s 588FDB of the Corporations Act	Recommending the title (or the actual drafting of the provision) makes reference to the term illegal phoenix activity. This would promote

	transparency on what the law is trying to deter. There is no reference to phoenix activity in this provision. If the intention is to ban illegal phoenix activity, the title of the provision (or the actual drafting of the provision) should make reference to the very act that it is trying to ban. Please refer to the 2017 Submission for details on why phoenix activity should be expressly defined under the Corporations Act.
s 588FE(6B) of the Corporations Act	Recommending inclusion of "or close to being insolvent" in s 588FE(6B)(b)(i) of the Corporations Act. Please consider amending the sentence to: "the transaction was entered into, or an act was done for the purposes of giving effect to it, when the company was insolvent <u>or close to being insolvent</u>". The reason for such inclusion is to capture any avoidance behaviour (e.g. to structure a company to be almost insolvent yet it does not meet the legal definition of corporate insolvency in order to avoid being categorised as voidable transaction). Please refer to the 2017 Submission as it showed that illegal phoenix activities could occur without the company declared insolvent.
s 588FG(9)(a) of the Corporations Act	Recommending deletion of "reasonable possibility that". Please consider amending the sentence to: "there is evidence before the court that suggests ~~a reasonable possibility~~".

	The reason for such deletion is to remove any vagueness within the provision. In turn, this would promote certainty in its application.
s 588FG(9)(b) of the Corporations Act	Recommending deletion of "no" twice to avoid any double negative language. Please consider amending the sentence to "the court is ~~not~~ satisfied that subparagraph (a)(ii) does ~~not~~ apply". The reason for such deletion is to promote plain English and to avoid any confusion in legal interpretation.
s 588FGAA(1) of the Corporations Act	Please consider whether this provision requires subsection (c) given the asset disposition is already deemed as creditor-defeating in subsection (a).
s 588FGAA(2) of the Corporations Act s 588FGAB(3) of the Corporations Act s 588U(1)(c) of the Corporations Act s 588U(1)(d) of the Corporations Act	Please consider whether these provisions are applicable to liquidators only. That is, the current provision does not make any reference to the administrators despite they are also in the position to identify any creditor-defeating dispositions or illegal phoenix activities.
s 588FGAA(5) of the Corporations Act	Recommending inclusion of the estimated value of creditors' detriment or known rights or interest of creditors. The Corporations Act aims to offer consumer protection. For example, s 912D of the Corporations Act sets out a licensee is requires to consider the clients' detriment when deciding whether a breach is significant or not. Creditors' rights and detriments should form part of considerations for ASIC

	when deciding whether or not to make orders. In addition, these factors seem important for ASIC to make a determination pursuant to ss 588FGAB(2) and 588FI(2A) of the Corporations Act (i.e. order for payment).
s 588FGAA(6) of the Corporations Act	Please consider whether this provision would prevent ASIC for being accountable for its decision given that ASIC may vary this at any time. This position is contrasted with ASIC's existing administrative powers where its decision is final, but there is a review process that involves the Administrative Appeals Tribunal ("**AAT**") and the Federal Court ("**FC**"). The current provision suggests that ASIC's decision is not final, and that there is no time limit for the person of interest to make further submission. Consequently, there is a question on whether this provision will affect a person's ability to apply for a review at the AAT or the FC.
s 588FGAE(2) of the Corporations Act	Recommending deletion of "or otherwise became aware of it". Please consider amending the sentence to "The period is 50 days after the day the applicant was given the order ~~or otherwise became aware of it~~". The reason for such deletion is to remove any ambiguity or uncertainty within the provision.

s 588GAA(1) of the Corporations Act s 588GAA(2) of the Corporations Act s 588GAB(1) of the Corporations Act s 588GAB(2) of the Corporations Ac	Recommending inclusion of "directly or indirectly" into this provision. Please consider amending the sentence to "An officer of a company must not directly or indirectly engage in conduct…" The reason for such inclusion is to capture situations where the director has asked someone else to carry out the act. Also, if the intention of this provision is to highlight the criminality behind this act, then please consider strengthening the mental element required in order to prove contravention of this provision.
s 588GAA(1)(c) of the Corporations Act	Please consider whether this provision would unintentionally curb any genuine corporate restructure.
Schedule 3, item 138B, Corporations Act	Please consider whether it is required to better define the term "the body corporate" given that phoenix activities often involve more than one body corporate.
s 75-110(7)(c) of the *Insolvency Practice Rules (Corporations) 2016*	Recommending inclusion of "or via any electronic means". Please consider amending the sentence to "is present at the meeting personally, or via any electronic means, by telephone…" The reason for such inclusion is to show that the law is technology neutral, and to avoid unintended consequences of excluding certain creditors' participation.

As per the 2017 Submission, in order to determine whether a law is considered successful or not in curbing illegal phoenix activities, the operation of the law needs

to be assessed under the “DEFEAT test”. The term “DEFEAT” is an acronym for a group of six tests designed to assess the effectiveness of an insolvency law- that is, Deterrence, Efficiency, Fairness, Expertise, Accountability and Transparency. It is recommended that, after a certain period of operation, the Phoenix Law Reform and its subsequent amendments (if any) be assessed under the DEFEAT test.

Thank you again for the opportunity to comment on the Phoenix Law Reform and to participate in the consultation process. Please let me know if you have any questions.

With regards,

Shine Wong
PhD (UNSW), MIL (USYD), MCrim (USYD), LLB (UNSW), BSc (UNSW)