Age, Melbourne
12 Jan 2015

Voice, page 6 - 389.00 cm²
Capital City Daily - circulation 130,767 (MTWTF--)

ID 360357519

Phoenix activity in the spotlight

Melbourne Law School's **Professor Ian Ramsay** explains a complex illegal business practice known as phoenixing.

VIEWPOINT

Researchers from Melbourne Law School and Monash University have been investigating phoenix activity – which has been in the media frequently since 2009 when Treasury estimated that it cost the Australian Taxation Office $600 million per year in unremitted taxes. In 2012, PriceWaterhouseCoopers assessed its cost to the economy at up to $3 billion a year.

What is phoenix activity? It centres on the idea of a new company arising from the ashes of its failed predecessor, with the same owners running the same business but minus the debts of the old company. Phoenixing can also occur in a corporate group structure, where the business of a failing subsidiary is transferred to an existing related company in the group.

The trouble with regulating this sort of behaviour is that it can be legal as well as illegal. This makes detecting the illegal form, which typically involves a breach of directors' duties, problematic for regulators.

Legal phoenix activity covers situations where the previous controllers start up another similar company to rescue a struggling company's business. What separates illegal and legal phoenix activity is that in the illegal scenario the owners intend to exploit the corporate form to escape paying the debts of the failed company. Proving this intention is not easy.

Illegal forms of phoenix activity have been linked to certain industries, in particular, the building and construction industry and 'personal services' businesses that don't need to own assets. Illegal phoenixing leaves behind a trail of victims including government through lost tax revenues, unsecured trade creditors, employees owed wages, annual and long service leave, redundancy and superannuation, and the public at large. Competitors can also be priced out of the market.

The research team's new report Defining and Profiling Phoenix Activity defines, profiles and categorises phoenix activity, considers existing legislative responses, provides case examples and raises important policy questions.

The report is aimed at regulators, to help them in the formation of strategies designed to educate the regulated community, detect incidences of the activity, and enhance enforcement. It identifies five categories of phoenixing: legitimate, where the intention is to save the business and not to defraud creditors; problematic, where no laws were broken but the repeated attempts to save the business are detrimental to the economy and marketplace; illegal 'type 1' where the intention to avoid debts is formed only as the company starts to fail; illegal 'type 2', where the business was set up to be 'phoenixed' as a means of avoiding debts; and finally complex illegal, which involves other types of criminal activity such as the use of false invoices, false identities, fictitious transactions, money laundering, or visa breaches and misuse of migrant labour.

The issues raised in the report demonstrate the need for further study to minimise the harmful consequences of problematic and illegal forms of phoenix activity. The research team is currently investigating the difficulties associated with quantifying the costs of phoenix activity, how often it occurs, the level of enforcement by regulators, and the best ways to stop this type of activity.

Authors of this report are: Helen Anderson, Ann O'Connell, Ian Ramsay, and Hannah Withers (Melbourne Law School) and Michelle Welsh (Monash University).

http://law.unimelb.edu.au/cclsr/centre-activities/research/major-research-projects/regulating- fraudulent-phoenix-activity