

Taxation Administration Amendment (Disclosure of Information) Regulation 2015

Submission by Associate Professor Helen Anderson, Professor Ian Ramsay, Professor Ann O'Connell, and Hannah Withers, Melbourne Law School, and Associate Professor Michelle Welsh, Department of Business Law and Taxation, Monash University.

21 May 2015

We thank Treasury for this opportunity to comment on the design of the proposed amendments to the *Taxation Administration Act 1953* and the accompanying explanatory material. We are a group of academics in the second year of a three year Australian Research Council-funded project examining the regulation of illegal phoenix activity. Our aim is to devise ways in which this damaging behaviour can be most efficiently and effectively prevented and deterred, without damaging legitimate business activities to the detriment of the economy.

Our most recent output is a major report entitled *Defining and Profiling Phoenix Activity*, which is available from the following URL: <<http://law.unimelb.edu.au/cclsr/centre-activities/research/major-research-projects/regulating-fraudulent-phoenix-activity>>.

Part A of this submission outlines relevant background information. Part B considers the proposed *Taxation Administration Amendment (Disclosure of Information) Regulation 2015* (this Regulation), specifically Item 2 of this Regulation: the listing of the Fraud and Anti-Corruption (FAC) Centre as a prescribed taskforce to address the growth of serious financial crime in Australia.

A. Background

The concept of phoenix activity broadly centres on the idea of a corporate failure and a second company ('Newco'), often newly incorporated, arising from the ashes of its failed predecessor ('Oldco') where the second company's controllers and business are essentially the same. These are generally known as 'successor' companies. Phoenix activity can also arise within corporate groups where an already established subsidiary takes over the business of a related entity that has gone into liquidation.

In either case – successor companies or phoenix activity within corporate groups - assets may be transferred between the first and second companies, however this is not necessarily the case. In some instances, the first company only has employees, and their accruing entitlements and unremitted superannuation and Pay-As-You-Go withholding (PAYG(W)) instalments are left unpaid when the company is liquidated. Those employees may or may not find work with the second company within the group.

The creditors of the failed company suffer: unpaid suppliers face their own financial pressures, employees are forced to rely on the Fair Entitlements Guarantee ('FEG'), and the ATO and state

revenue authorities do not receive remittances of Pay-As-You-Go withholding ('PAYG'), payroll and other taxes.

This costs the Australian taxpayer in three ways – the suppliers' bad debts are tax-deductible; the FEG is taxpayer-funded; and the ATO receives less revenue. In 2009, illegal phoenix activity was estimated to cost the ATO \$600 million per annum in unrecovered taxes alone.¹ In 2012, PriceWaterhouseCoopers assessed its cost to the economy at up to \$3 billion a year.²

In our report *Defining and Profiling Phoenix Activity* we identify five categories of phoenixing; two of which are legal, and three of which are illegal.

The five categories are:

1. The legal phoenix, or business rescue
2. The problematic phoenix
3. Illegal type 1 phoenix: intention to avoid debts formed as company starts to fail
4. Illegal type 2 phoenix: phoenix as a business model
5. Complex illegal phoenix activity



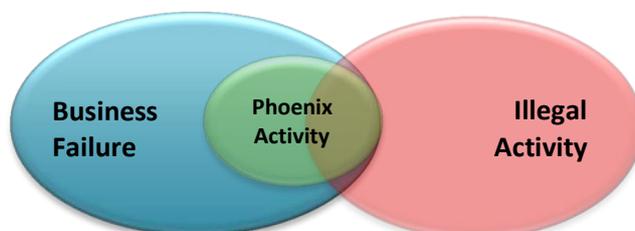
Phoenix activity can be entirely legal, especially if the worth of the failed company's assets is maintained and the employees keep their jobs and entitlements. This behaviour is often described as 'business rescue'. The behaviour becomes illegal where the intention of the company's controllers is to use the company's failure as a device to avoid paying Oldco's creditors (who may include the company's employees and revenue agencies) that which they otherwise would have received had the company's assets been properly dealt with.

Figure one below illustrates the intersection between business failure, phoenix activity and illegal activity. Some business failure involves neither phoenix nor illegal activity. Phoenix activity itself may be legal or illegal. Where there is illegal activity associated with business failure it may or may not involve phoenix activity.

¹ Commonwealth of Australia, 'Action Against Fraudulent Phoenix Activity Proposals Paper' (2009 Phoenix Proposals Paper), [2].

² PWC and Fair Work Ombudsman, 'Phoenix Activity - Sizing the Problem and Matching Solutions' (June 2012), 15.

Figure 1: The Intersection between Business Failure, Phoenix Activity, and Illegal Activity



B. The Proposed Regulation

We commend Treasury for seeking to extend the mandate of Project Wickenby until 30 June 2017 and to list the Fraud and Anti-Corruption (FAC) Centre as a prescribed taskforce (the Serious Financial Crime Taskforce), which will enable taxation officers to share taxpayer information with other FAC Centre agencies on an ongoing basis.

Illegal phoenix activity is a serious financial crime that would fall within the mandate of the Serious Financial Crime Taskforce. Currently, there is no specific phoenix offence, so the enforcement action that regulators can take must revolve around the breach of some other law. The laws routinely breached by illegal phoenix operators include provisions in the *Taxation Administration Act 1953* (Cth), the *Corporations Act 2001* (Cth), the *Criminal Code Act 1995* (Cth), and the *Fair Work Act 2009* (Cth), in addition to relevant State and Territory laws. As a result, illegal phoenix activity involves criminal activity that can span the work areas of numerous agencies. A whole-of-government approach is thereby necessary to eradicate illegal phoenix activity.

We recognise and draw Treasury's attention to the difficulties faced by regulators and others in obtaining meaningful data about illegal phoenix activity. The dissemination of information held by regulators is subject to specific limitations contained in their governing legislation, as well as general limitations in privacy laws.³ Despite the establishment of the Inter-Agency Phoenix Taskforce and the

³ For example, s 127 of the ASIC Act provides that 'ASIC must take all reasonable measures to protect from unauthorised use or disclosure information: (a) given to it in confidence in or in connection with the performance of its functions or the exercise of its powers under the corporations legislation ...'. However, it is open to the Chairman of ASIC to authorise disclosure of information where it '(b) will enable or assist the government, or an agency, of a State or Territory to perform a function or exercise a power; or ... (d) will enable or assist a prescribed professional disciplinary body to perform one of its functions; ...'

Another example is s 91 of the *Taxation Administration Act 1997* (Vic) which governs the Victorian State Revenue Office, the collector of payroll tax in Victoria. This section provides that '(1) A person who is or was a tax officer must not disclose any information obtained under or in relation to the administration or execution of a taxation law, except as permitted by this Part.' Disclosure is permitted under s 92 in relation to the administration of a tax law or to a wide range of government

Australian Business Register Phoenix Watch List, we believe that the detection and enforcement of illegal phoenix activity continues to be hampered by these privacy constraints.

In light of this, we consider that the Serious Financial Crime Taskforce could play a critical role in enabling regulators to work together in a timely fashion to detect problematic activity and prevent it from escalating to illegal phoenix activity, to detect illegal types of phoenix activity where it has occurred, and to bring compliance and other regulatory actions to stamp this harmful activity out.

In addition, we strongly urge Treasury to consider including the Fair Work Ombudsman and Fair Work Building and Construction into the taskforce. Consideration should also be given to state revenue offices being included in the taskforce. These regulators play a crucial role in the detection and enforcement of illegal phoenix activity, and a failure to include them will encumber the taskforce from obtaining necessary information to regulate illegal phoenix behaviour.

We thank you again for the opportunity to provide comment on the proposed amendments. Please do not hesitate to contact us if you would like any further information or clarification as to anything contained in this submission.

agencies including the ATO, ASIC, and the Legal Services Board, provided, according to s 94, (a) the disclosure is made to enable the person to exercise a function conferred on the person by law for the purpose of the enforcement of a law or protecting the public revenue; and (b) the Commissioner consents to the disclosure.'

The members of the research project are:

Helen Anderson is Associate Professor at Melbourne Law School specialising in corporations law. She holds an LLB (Hons) from the University of Melbourne, as well as a Grad Dip Bus (Acc), LLM and PhD from Monash University. She is a member of the Insolvency and Reconstruction Committee of the Business Law Section of the Law Council of Australia and an academic member of the Australian Restructuring Insolvency and Turnaround Association (formerly IPAA). Her teaching has predominantly been in the areas of Business Law and Company Law, and her abiding research interest has been the fair treatment of vulnerable parties. Her masters major thesis dealt with parties who rely on published audit opinions, and her doctoral thesis was concerned with creditors in corporate insolvency. She continues this interest with her ARC funded work on improving the recovery rights of employees in corporate insolvency and this project, which looks at ways to regulate fraudulent phoenix activity. She has recently published a book entitled *The Protection of Employee Entitlements in Insolvency: an Australian Perspective*.

Ann O'Connell is Professor at Melbourne Law School specialising in taxation. She is Special Counsel at Allens Solicitors, a member of the Advisory Panel to the Board of Taxation, and a member of the Australian Tax Office Public Rulings Panel and General Anti-Avoidance Panel (GAAR Panel). She was also a member of the Working Group established by the Assistant Treasurer in 2012 to consider the tax concessions for the Not-For-Profit Sector. Ann lectures in taxation and in corporations and securities regulation. In the Melbourne Law Masters program she teaches Taxation of Remuneration, Taxation of Superannuation, Taxation of Sport and Capital Gains Tax - Problems in Practice as well as Regulation of Securities Offerings and Regulation of Securities Markets. She is co-editor of *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) and co-author of *Incentivising Employees: The theory, policy and practice of employee share ownership plans in Australia* (Melbourne University Press, 2013) and *Income Tax: Text, Materials and Essential Cases* (Federation Press) now in its 8th edition.

Ian Ramsay is the Harold Ford Professor of Commercial Law. He is also Director of the Law School's Centre for Corporate Law and Securities Regulation. Ian practised law in New York and Sydney and is a member of the Corporations Law Committee of the Law Council of Australia. Former positions he has held include Head of the Federal Government inquiry on auditor independence, member of the Australian Government's Corporations and Markets Advisory Committee, member of the Takeovers Panel, member of the Australian Securities and Investments Commission's External Advisory Panel, member of the Audit Quality Review Board, member of the Australian Government's Auditors and Liquidators Disciplinary Board, member of the Law Committee of the Australian Institute of Company Directors and member of the International Federation of Accountants taskforce on rebuilding confidence in financial reporting. Ian has published extensively on corporate law and corporate governance issues both internationally and in Australia.

Michelle Welsh is an Associate Professor in the Department of Business Law and Taxation, Monash Business School and is the coordinator of the Ethical Business Regulation Group in the Centre for Global Business. Michelle undertakes research and supervision in the area of corporate law, corporate regulation, enforcement and compliance. Michelle has published her research in leading Australian corporate law journals and a number of international journals. Michelle's PhD thesis, concerning Civil Penalties under the Corporations Act was awarded the Melbourne University Law

Faculty prize for the top PhD thesis in 2009. In 2013 Michelle was awarded the Dean's Award for Excellence in Research by an Early Career Researcher.

Hannah Withers is a full time Research Fellow on the regulating fraudulent phoenix activity project. She holds a Bachelor of Laws and Bachelor of Arts from the University of NSW and a Master of Human Rights from the University of Sydney.