

**Australian Government  
Treasury and Department of Employment**

**REFORMS TO ADDRESS CORPORATE MISUSE OF THE FAIR ENTITLEMENTS  
GUARANTEE SCHEME**

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**Introduction**

We thank Treasury and the Minister for Revenue and Financial Services for this opportunity to make a submission regarding the Reforms To Address Corporate Misuse Of The Fair Entitlements Guarantee Scheme Consultation Paper. We are a group of academics currently undertaking an 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.

As well as a series of scholarly and professional publications, we have produced three major reports: *Defining and Profiling Phoenix Activity* (December 2014); *Quantifying Phoenix Activity: Incidence, Cost, Enforcement* (October 2015), and *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement* (February 2017). Please click [here](#) to access these reports. While not all exploitation of the Fair Entitlements Guarantee is through illegal phoenix activity, we base our recommendations on what we have learnt through our extensive research into this area.

We applaud the government for its commitment to the Fair Entitlements Guarantee and for its desire to explore options to address corporate misuse of the program. We are very pleased to note that the government is looking at the wrongdoing of corporate controllers as a means of dealing with the FEG cost blowout, and is not penalising innocent workers through limiting their access to the program.

**Background**

The concept of phoenix activity broadly centres on the idea of a corporate failure (‘Oldco’) and a second company (‘Newco’), often newly incorporated, arising from the ashes of its failed predecessor where the second company’s controllers and business are essentially the same. Phoenix activity can be legal as well as illegal. Legal phoenix activity covers situations where the previous controllers start another similar business, using a new company when their earlier company fails, usually in order to rescue its business. Illegal phoenix activity involves similar activities, but the intention is to exploit the corporate form to the detriment of unsecured creditors, including employees and tax authorities. The illegality here is generally as a result of a breach of directors’ duties in failing to act properly in respect of the failed company and its creditors.

### **Critical issues in understanding corporate misuse of the Fair Entitlements Guarantee**

We strongly recommend that Treasury and the Department of Employment read our three reports, in particular our final recommendations report. This is a complex problem extending far beyond the exploitation of a government safety net scheme.

However, to summarise, it is vital to understand the following:

- An increased reliance on FEG is not necessarily caused by an increase in moral hazard or ‘sharp practice’. A limited liability company can fail without any wrongdoing by its controllers.
- There are already provisions of the *Corporations Act* that target director and officer wrongdoing that leads to exploitation of FEG.
- Corporate wrongdoing cannot be detected without a proper investigation of what went wrong in each instance.
- Enforcement depends upon:
  - The offence being detected by a regulator or external administrator, and
  - A regulator or external administrator having the resources to bring action, and
  - A regulator or external administrator being willing to bring action.
- The victims of corporate wrongdoing are far broader than employees and the government via support of FEG.
  - Unsecured trade creditors suffer through non-payment of their debts, with no safety net scheme to avoid the consequences. This includes their own insolvency and the reliance of *their* employees on FEG.
  - Law abiding competitors lose business to their fraudulent counterparts and may themselves be tempted to abuse the corporate form.
- If the government deals with the abuse of the corporate form more broadly, it will have flow-on effects for all creditors, including the Department of Employment.

Therefore, we advise that:

- A small targeted reform of liability provisions will be ineffective unless the government tackles some of the wider systemic issues that allow abuse of the corporate form to happen.
- The government and the economy is exposed to much wider losses than just FEG misuse, through unremitted PAYG and superannuation with consequent over-reliance on the age pension. This justifies much more extensive reforms than the ones currently proposed.

Our submission now addresses, first, the options raised by the Consultation Paper and second, some suggestions to deal with abuse of the corporate form more broadly.

## Consultation Paper Options

### REFORM TO PART 5.8A OF THE *CORPORATIONS ACT*

There are three possible enforcement actions available for a breach of the directors' duty to prevent insolvent trading:<sup>1</sup> a civil penalty application,<sup>2</sup> a criminal prosecution where the director acted dishonestly,<sup>3</sup> and a civil recovery action by the liquidator.<sup>4</sup> This pattern should be replicated in relation to s 596AB. To do so would require the insertion of a civil penalty version of the breach provision while keeping the criminal provision with the required intention element, as follows.

Section 596AB should provide:

- (1) A person must not enter into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of:
  - (a) preventing the recovery of the entitlements of employees of a company; or
  - (b) significantly reducing the amount of the entitlements of employees of a company that can be recovered. (*current provision*)
  
- (1A) A person must not enter into a relevant agreement or a transaction if a reasonable person would not have entered into the relevant agreement or the transaction unless they had the intention of, or intentions that include the intention of:
  - (a) preventing the recovery of the entitlements of employees of a company; or
  - (b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.

Note: This subsection is a civil penalty provision (see subsection 1317E(1)).

This was the recommendation from our final report.<sup>5</sup> This is different to both Option 2A (what a reasonable person would have known or be expected to have known) and 2B (an objective assessment of the agreement or transaction).

There is no draft section to comment upon, so we cannot say whether our recommended section is superior to the Options in the paper. However, we note that s 588G, dealing with insolvent trading, has a 'double reasonable' test that might be worth exploring. It is as follows:

*(the circumstances in which the section applies)*

- (1) This section applies if:
  - (a) a person is a director of a company at the time when the company incurs a debt; and
  - (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
  - (c) at that time, there are **reasonable grounds for suspecting** that the company is insolvent, or would so become insolvent, as the case may be; and
  - (d) that time is at or after the commencement of this Act.

*(the actual imposition of liability)*

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<sup>1</sup> *Corporations Act 2001* (Cth) ('*Corporations Act*') s 588G.

<sup>2</sup> *Ibid* s 588G(2).

<sup>3</sup> *Ibid* s 588G(3). Note that the court, as a consequence of a criminal conviction, can also order the director to compensate the company: s 588K.

<sup>4</sup> *Ibid* s 588M.

<sup>5</sup> Helen Anderson, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenix Activity: Recommendations on Detection, Disruption and Enforcement' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, February 2017) [3.4.1].

- (2) By failing to prevent the company from incurring the debt, the person contravenes this section if:
  - (a) the person is aware at that time that there are such grounds for so suspecting; **or**
  - (b) **a reasonable person in a like position in a company in the company's circumstances** would be so aware.

As you would be aware, s 588G was amended in 2000, not only to include Part 5.8A but also to amend Part 5.7B. This amendment added s 588G(1A) to s 588G, with the effect that an uncommercial transaction under s 588FB can be actioned as insolvent trading. Section 588FB provides:

- (1) A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that **a reasonable person in the company's circumstances would not have entered into the transaction**, having regard to:
  - (a) the benefits (if any) to the company of entering into the transaction; and
  - (b) the detriment to the company of entering into the transaction; and
  - (c) the respective benefits to other parties to the transaction of entering into it; and
  - (d) any other relevant matter.

This captures at least some of the 'sharp practice' which concerns Treasury and the Department of Employment. Inserting uncommercial transactions into s 588G opened up enforcement by ASIC, both criminally (via s 588G(3)) and via a civil penalty action (s 588G(2)). However, we could find no evidence of this section being enforced. *Needless to say, the law reform proposed by the FEG consultation paper will only be effective if the provision is enforced.*

It should also be noted that the directors' duties under Part 2D.1 of the *Corporations Act* capture a very wide range of director conduct, both within the corporate failure context and outside of it. These may be enforced under Part 9.4B as civil penalty breaches. For example, s 181 provides that

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
  - (a) in good faith **in the best interests of the corporation**; and
  - (b) **for a proper purpose**.

Section 182 provides that:

- (1) A director, secretary, other officer or employee of a corporation must not **improperly use their position** to:
  - (a) **gain an advantage for themselves or someone else**; or
  - (b) cause detriment to the corporation.

These sections undoubtedly deal with the sorts of 'sharp practice' that crosses the line between the canny organisation of a company or group's affairs and those deliberate arrangements to avoid payment of tax and employment related obligations. These directors' duty provisions also cover the wider range of 'schemes' that Option 4's suggestion (broader wording for the existing s 596AB) seeks to address.

Both of these sections have criminal equivalents – s 184(1) and s 184(2) respectively – where the conduct was reckless or intentionally dishonest. There are very few cases brought under either the civil penalty or criminal provisions. As an aside, both the criminal and civil penalty

provisions allow for accessory liability,<sup>6</sup> which would capture improper advice from accountants, lawyers and pre-insolvency advisors involved in the directors' contraventions.

Here, it is important to pause and ask: do we need more legislative provisions, or more enforcement of existing ones?

In this regard, we support Option 3 (Expand the parties who may initiate civil action) and agree that there is good justification for allowing the Department of Employment, Fair Work Ombudsman and the ATO to be able to bring action for arrangements that deprive employees of their entitlements. Obviously there would need to be careful coordination to ensure that 1) two regulators were not bringing the same action, or 2) that each regulator assumed another agency would do it. The second is the greater danger, given tight litigation budgets and the risk-averse nature of regulators.

### **PREVENTING ABUSE OF CORPORATE GROUP STRUCTURES TO AVOID PAYING EMPLOYEE ENTITLEMENTS**

Many have called<sup>7</sup> for a reconsideration of the present law which largely shields holding companies within corporate groups from the improper actions of their subsidiaries – improper actions from which they undoubtedly benefit. As the Consultation Paper acknowledges,<sup>8</sup> it is legitimate for businesses to be structured in such a way that different aspects are operated by different companies within a corporate group. It is the wrongdoing of the controllers of these companies, rather than the amount of reliance by employees of corporate groups upon FEG, that should prompt action. Certainly, the consolidation laws from New Zealand and Ireland are worth a careful examination, but once again, new laws make no difference unless action is brought to enforce them.

Treasury and the Department of Employment should be aware that there are other 'multi-corporation' arrangements to defeat payment of debts that are not within the typical corporate group structure.<sup>9</sup> Controlling and controlled entities<sup>10</sup> must also be considered. In addition, the spate of recent abuses of employees of labour hire companies and of franchises shows that supply chains can perpetrate the same sorts of avoidance tactics that were once the domain of fraudulent corporate groups. A major supermarket chain may outsource trolley collection, for example, to a company that subcontracts it through a number of other entities.<sup>11</sup> The final employer company breaches workplace laws and is quickly placed into liquidation at the hint of regulator action.

Our recommendations report therefore took a different approach to the one adopted in New Zealand and Ireland. It moved away from the corporate structure and focused on the recipient of the benefit. The logic here is simple. If 'crime doesn't pay', people won't do it. The government should not focus on defining the relationship between the entities. Instead, 'follow the money' from the original wrongdoer's actions to the eventual beneficiary.

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<sup>6</sup> *Corporations Act* ss 181(2), 182(2); criminal accessory liability is pursuant to the extensions of criminal responsibility in pt 2.4 of the *Criminal Code Act 1995* (Cth) Schedule ('*Criminal Code*').

<sup>7</sup> See for example, Helen Anderson, 'Piercing the Veil on Corporate Groups in Australia – the Case for Reform', (2009) 33(2) *Melbourne University Law Review* 333 and references cited therein.

<sup>8</sup> Consultation Paper, 14.

<sup>9</sup> *Corporations Act* ss 46, 47, 50.

<sup>10</sup> *Corporations Act* s 50AA.

<sup>11</sup> *Fair Work Ombudsman v Al Hilfi* [2015] FCA 313; *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193.

Therefore, in our opinion, there needs to be a more targeted approach to removing the benefit of illegal phoenix activity from a phoenix Newco or from an existing holding company or beneficiary of the wrongful action.

At present, s 1317H(1) allows the court to order a person in contravention of a civil penalty provision to compensate the company for damage resulting from the contravention. Section 1317H(2) provides that '[i]n determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made *by any person* resulting from the contravention or the offence.'<sup>12</sup> This sub-section has been interpreted by the courts to be a standalone 'account of profits' mechanism.<sup>13</sup> That is, it is not necessary to prove *any* loss on the part of the corporation or scheme that has 'suffered the damage' in order to obtain a 'compensation' order under s 1317H; the 'damage' can be *entirely* comprised of profits. So-called 'compensation' orders under s 1317H can therefore be compensation orders, account of profits orders, or a combination of both.

Section 1317H(2) would allow a court to order the director in breach of duty to compensate their company for the profits made by another company from an undervalued transaction. But what it does *not do* is allow the court to order the other company – an entity not in breach of any law – to hand over its gains. Expanding the reach of s 1317H would both facilitate enforcement and provide important signalling benefits. Courts, and those tempted by illegal phoenix activity or any other sort of 'sharp practice', would have a clear indication from Parliament that the beneficiary of the breach of duty should be stripped of the gains it has made. This explicit statement overcomes the need for courts to 'piece together' the same outcome which is implicit in accessory liability and the compensation provision.

We propose that s 1317H be amended as follows, to allow for orders to be made against the other company where it is 'involved in the contravention' (within the meaning of s 79 of the *Corporations Act*) or 'controlled' (within the meaning of s 50AA of the *Corporations Act*) by the director in breach.

### **Compensation orders—corporation/scheme civil penalty provisions**

*(current provision)*

Compensation for damage suffered

- (1) A Court may order a person, including a corporation (the *liable person*) to compensate another person, including a corporation, or a registered scheme, for damage suffered by the other person or scheme if:
  - (a) the liable person has contravened a corporation/scheme civil penalty provision in relation to the other person or scheme; and
  - (b) the damage resulted from the contravention.

The order must specify the amount of compensation, which may include, or be solely comprised of, profits pursuant to s 1317H(2).

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

*(first recommended provision)*

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<sup>12</sup> Emphasis added.

<sup>13</sup> See *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, [620]–[631]; *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Limited* (2013) 296 ALR 418, [54]; R. P. Austin and I. M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (Online edition, LexisNexis Butterworths, 2016) [3.400.12].

- (1A) A Court may order a person, including a corporation (the ***involved beneficiary person***) to compensate another person, including a corporation, or a registered scheme, for damage suffered by the other person or scheme if:
- (a) the liable person has contravened a corporation/scheme civil penalty provision in relation to the other person or scheme; and
  - (a) the involved beneficiary person was involved in the contravention within the meaning of s 79 of this Act; and
  - (b) the damage resulted from the contravention.

The order must specify the amount of compensation, which may include, or be solely comprised of, profits pursuant to s 1317H(2).

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

*(second recommended provision)*

- (1B) A Court may order a person, including a corporation (the ***controlled beneficiary person***) to compensate another person, including a corporation, or a registered scheme, for damage suffered by the other person or scheme if:
- (a) the liable person has contravened a corporation/scheme civil penalty provision in relation to the other person or scheme; and
  - (b) the damage resulted from the contravention; and
  - (c) the liable person controls the controlled beneficiary person within the meaning of s 50AA of this Act; and
  - (d) the controlled beneficiary person possesses property as a result of the contravention; or
  - (e) the controlled beneficiary person has made profits within the meaning of s 1317H(2) as a result of the contravention.

The order must specify the amount of compensation, which may include, or be solely comprised of, profits pursuant to s 1317H(2). The amount of compensation must not exceed the combined value of the property that the controlled beneficiary person possesses pursuant to s 1317H(1B)(d) and the profits that the controlled beneficiary person has made pursuant to s 1317H(2).

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

Damage includes profits

- (2) In determining the damage suffered by a person or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention. A compensation order may be solely comprised of such profits.

Damage to scheme includes diminution of value of scheme property

- (3) In determining the damage suffered by a registered scheme for the purposes of making a compensation order, include any diminution in the value of the property of the scheme.
- (4) If the responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to the scheme property. If anyone else is ordered to compensate the scheme, the responsible entity may recover the compensation on behalf of the scheme.

Recovery of damage

- (5) A compensation order may be enforced as if it were a judgment of the Court.

The expanded s 1317H ensures that those engaging in illegal phoenix activity or other abuse of the corporate form are deprived of the benefits of their behaviour where those benefits are held by another company, and victims are compensated to the maximum extent possible. This

is a critical amendment to directors' duties enforcement, which currently does not provide any clear pathway for recovering the benefits of wrongdoing except from the wrongdoers themselves.

Where there are asset transfers between 'related party' companies, it is also worth looking at whether there should be an **independent valuation of assets**. We think that a rebuttable presumption has many advantages. In action by ASIC or the liquidator for breach of directors' duty, there would be a rebuttable presumption that a related party transaction is not arm's length. The presumption could be rebutted by an independent valuation or such other evidence as the court considers appropriate. It is then open to the company's directors to decide whether there is a risk of the transfer being challenged by an external administrator or ASIC and thus whether they should spend the time and money on an independent valuation. To avoid unfairly harsh operation, there would need to be limits on the time period over which the presumption would operate. Twelve months prior to insolvency seems reasonable.

This suggestion is discussed more in our [final report](#), at [2.4].

### **SANCTIONING DIRECTORS AND OFFICERS WITH A TRACK RECORD OF INVOLVEMENT IN INSOLVENCIES WHERE FEG IS RELIED UPON**

We agree that sanctioning directors with a proven track record of poor performance with companies – repeated insolvencies and poor behaviour during those insolvencies – is a useful strategy.

We have identified this type of behaviour as problematic phoenix activity and these individuals as 'serial inept entrepreneurs'.<sup>14</sup> While we have consistently advocated for widening the regulators that can seek disqualification,<sup>15</sup> we have gone further and recommended a 'probationary' system, called 'restricted directorship', which would automatically be imposed on directors with multiple previous failures.<sup>16</sup> Such a system would avoid the need to prove the three elements set out in the Consultation Paper, ie, breach of the Act, multiple reliance on FEG, and limited return to FEG from the insolvency administration. However, our 'restricted directorship' would kick in at a higher number of insolvencies.

The system suggested by the Consultation Paper has the advantage that the breaches of the Act – eg, a failure to provide books and records – and the other two requirements are easily knowable facts. There is no scope for interpretation, as there might be with a breach of the *Corporations Act* involving wrongdoing. This greatly simplifies enforcement. Placing enforcement in the hands of the Fair Work Ombudsman, with a highly active litigation profile, is likely to result in frequent use of the provision.

Therefore, we support the extension of the disqualification power to this FEG-related set of circumstances (Option 6).

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<sup>14</sup> Helen Anderson, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenix Activity: Recommendations on Detection, Disruption and Enforcement' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, February 2017) ii, 1, 50, 57, 77, 80.

<sup>15</sup> Ibid [2.2.3].

<sup>16</sup> Ibid [2.1].

In terms of extending *automatic* disqualification to *convictions* of company officers of employee entitlement related offences, this does not appear to cover accessory liability, pursuant to s 550 of the *Fair Work Act*, for the employer company's breach of ss 45 and 50 relating to non-payments and underpayments. These are civil remedy breaches, both by the company and the accessory. It is unclear what employee entitlement related offences are covered by the Consultation Paper's question.

We prefer a *court-ordered* disqualification of an accessory to a civil remedy breach, whether that person is a director or advisor. As noted above, pursuant to the *Corporations Act*, civil penalty directors' duty breaches under ss 181 and 182 allow for accessory liability, so this would be a consistent approach. We therefore recommend that the FWO be empowered to seek court-ordered disqualification against a person for a period the court considers appropriate where

- (a) the court is satisfied that the person has contravened, has attempted to contravene or has been involved in a contravention of the Fair Work Act; and
- (b) the court is satisfied that the disqualification is justified.

## **OTHER RELATED REFORMS PROPOSED IN THE CONSULTATION PAPER**

These reforms (Options 7 and 8) are not directly relevant to our research and we have formed no expert view of them. However, we are aware of the considerable consternation that both situations create for insolvency practitioners and we agree that they should be addressed.

## **BROADER ISSUES RELATING TO PHOENIX ACTIVITY**

The government's aim is to minimise reliance on the FEG, and it comes at this problem as though FEG reliance is the objective of the improper behaviour of directors. This is not necessarily the case. While some directors might be more willing to engage in abuse of the corporate form because they know their employees will be 'looked after' by FEG, corporate law allows the director to walk away from the company and its debts *whether FEG is there or not*.

Therefore, it is important for Treasury and the Department of Employment to recognise that FEG itself might not be the (sole) moral hazard. The temptation for directors is walking away from corporate tax debts (federal and state), superannuation debts, unsecured trade creditor debts, court judgments, warranties, and fines to name a few. None of these are covered by FEG. We have been amazed and horrified at the vast array of circumstances evidencing illegal phoenix activity.

It appears that this damaging behaviour is prevalent. PricewaterhouseCoopers has estimated that phoenix activity costs the Australian economy [\\$1.78 to \\$3.19 billion per annum](#), including up to \$655 million in costs to employees. Although precise quantification of illegal phoenix activity is not possible due to a lack of available data, it is nonetheless a significant problem that justifies the commitment of substantial government resources.<sup>17</sup>

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<sup>17</sup> Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Hannah Withers, 'Quantifying Phoenix Activity: Incidence, Cost, Enforcement' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, October 2015) ('*Quantifying Phoenix Activity Report*').

A number of our recommendations have been adopted by the Australian Labor Party,<sup>18</sup> including:

- requiring all company directors to obtain a unique Director Identification Number (DIN) with a 100-point identification check;
- increasing penalties associated with phoenix activity;
- introducing an objective test for transactions depriving employees of their entitlements, as discussed earlier in this submission;
- clarifying the availability of compensation orders against accessories.

The proposal to introduce a 100-point identity check and Director Identification Number is an urgently needed reform. It will greatly enhance data gathering about directors and their failed companies by ASIC and this data can then be shared with other agencies with enforcement powers including the ATO and FWO. Importantly it will ensure that illegal phoenix operators cannot escape detection by creating false identities. Our view is that this reform would substantially reduce illegal phoenix activity and inappropriate reliance on the FEG. This proposal has been supported widely, including by:

- the Productivity Commission inquiry into business set-up, transfer and closure;<sup>19</sup>
- the Productivity Commission inquiry into the workplace relations framework;<sup>20</sup>
- the Senate Economics References Committee inquiry into insolvency in the Australian construction industry;<sup>21</sup>
- the Senate Economics References Committee inquiry into corporate tax avoidance;<sup>22</sup>
- the Senate Economics References Committee inquiry into superannuation guarantee non-payment;<sup>23</sup>
- the Australian Restructuring, Insolvency and Turnaround Association ('ARITA');<sup>24</sup>
- Governance Institute of Australia ('GIA');<sup>25</sup>
- the Australian Institute of Company Directors ('AICD');<sup>26</sup>
- the Australian Small Business and Family Enterprise Ombudsman;<sup>27</sup>
- the Australian Chamber of Commerce and Industry;<sup>28</sup>
- Master Builders Australia;<sup>29</sup>

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<sup>18</sup> The Hon Andrew Leigh MP, Shadow Assistant Treasurer, 'Exposing Dodgy Directors' (Media Release, 24 May 2017) <[http://www.andrewleigh.com/exposing\\_dodgy\\_directors](http://www.andrewleigh.com/exposing_dodgy_directors)>.

<sup>19</sup> Productivity Commission, *Business Set-up, Transfer and Closure*, Report No 75 (2015) 423 ('*Business Set-up Report*') recommendation 15.6 ('*Business Set-up Report*').

<sup>20</sup> Productivity Commission, *Workplace Relations Framework*, Report No 76 (2015) vol 1, 48, vol 2, 915, 938.

<sup>21</sup> Senate Economics References Committee, Parliament of Australia, *'I just want to be paid': Insolvency in the Australian Construction Industry* (2015) recommendation 36 ('*SERC Construction Insolvency Report*').

<sup>22</sup> Senate Economics References Committee, Parliament of Australia, *Corporate Tax Avoidance – Part 1: You Cannot Tax What You Cannot See* (2015) recommendation 16.

<sup>23</sup> Senate Economics References Committee, Parliament of Australia, *Superbad – Wage Theft and Non-Compliance of the Superannuation Guarantee* (2017) recommendation 20.

<sup>24</sup> Australian Restructuring Insolvency and Turnaround Association, *Policy Positions of the Australian Restructuring Insolvency and Turnaround Association* (February 2015) policy 15-05.

<sup>25</sup> Governance Institute of Australia, 'Identification Numbers Will Make It Easier to Track Directors' (Media Release, MR/2015/13, 10 July 2015).

<sup>26</sup> Senator Katy Gallagher, 'Who Support's Labor's Plan for a Director Identification Number, to Crack Down on Phoenix Companies?' (Media Release, 25 May 2017) <[http://www.katygallagher.net/who\\_supports\\_labor\\_s\\_plan\\_for\\_a\\_director\\_identification\\_number\\_to\\_crack\\_down\\_on\\_phoenix\\_companies](http://www.katygallagher.net/who_supports_labor_s_plan_for_a_director_identification_number_to_crack_down_on_phoenix_companies)>.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

- the Australian Council of Trade Unions;<sup>30</sup> and
- the Commissioner of Taxation, Chris Jordan AO.<sup>31</sup>

We have concluded that illegal phoenix activity is prevalent because it is largely invisible, easy to carry out, and often very profitable. The recommendations in our [final report](#) aim to counteract each of these drivers. The following is a brief summary of the recommendations, some of which have already been discussed in more detail above. For further information on each recommendation, please refer to the corresponding section of the [full report](#).

To make phoenix activity more visible, we recommend that:

- directors obtain password-protected director identification numbers (DINs) after proving their identity with 100 points of identification;
- regulators examine directors' corporate histories when they incorporate new companies;
- regulators and directors provide additional information to liquidators in relation to directors' corporate histories and asset transfers by insolvent companies;
- the penalties for directors failing to inform and assist liquidators be substantially increased;
- liquidators provide specific phoenix-related information in statutory reports to regulators;
- regulators improve the phoenix-related advice and complaint pages on their websites;
- regulators share information with each other more effectively;
- regulators make information about companies and directors available to the public free-of-charge, subject to privacy considerations;
- regulators establish an online and free-of-charge register of restricted and disqualified directors;
- regulators, superannuation funds and trade unions engage in information sharing;
- regulators provide information about corporate debts to credit reporting agencies;
- regulators improve their collection of statistical data about phoenix activity.

To make illegal phoenix activity less easy to accomplish, we recommend that:

- directors that have been involved in five corporate failures within ten years be automatically subject to a 'restriction' period of five years, resulting in limits on concurrent directorships, increased reporting requirements and heightened surveillance;
- regulators make better use of existing director disqualification powers;
- the limit on administrative disqualification of directors be increased from 5 to 10 years;
- taxation and employment regulators be given the power to seek court-ordered disqualification of directors;
- the penalties for managing companies whilst disqualified be increased substantially;
- regulators check whether people who are applying to run businesses are subject to director restriction or disqualification;
- independent valuations of related party asset transfers be introduced;
- the backdating of directorships be limited to three months;

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<sup>30</sup> Ibid.

<sup>31</sup> Ben Butler, 'Plutus Probe Prompts Call for Directors to Have ID Number' (31 May 2017) *The Australian*.

- taxation collection mechanisms be expanded so as to reduce the amount of corporate debt and employee entitlements that remain unpaid.

To counter the profit motive behind illegal phoenix activity, we recommend that:

- liquidators be provided with additional funding to investigate, report and take action against director misconduct;
- regulators make better use of existing powers to take enforcement action;
- regulators improve public reporting of their enforcement activities to stimulate general deterrence;
- ineffective and unclear legislative provisions be amended;
- the penalties for breaches of directors' duties and employment laws be increased substantially;
- regulators be given broader powers to seek compensation and disgorgement remedies to ensure that victims are compensated and wrongdoers are stripped of profits;
- regulators take stronger enforcement action against professional and unqualified advisors who facilitate illegal phoenix activity.

### **Conclusion**

This submission has set out a number of recommendations aimed at reducing illegal phoenix activity and inappropriate reliance on FEG. We would be happy to assist Treasury further in relation to any of these recommendations.