



Jones Partners
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SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON ECONOMICS
Anti Phoenix Legislation

In response to the media release issued on the 19 October 2011 in relation to the Anti Phoenix Legislation, we make the following submissions.

THE LEGISLATION FAILS TO ACHIEVE ITS OBJECTIVE FOR THE FOLLOWING REASONS:

- 1) The ATO already has significant debt recovery tools which it currently under utilises. The Legislators have responded to this point by saying the current legislation is “undermined by a large administrative burden”. This is an inadequate response and it appears to the writers that will not be addressed by the new legislation. Furthermore it is obvious that the “administrative burden” should be dealt with administratively and not legislatively.
- 2) The ATO is particularly tardy in its general debt recovery program and it is this tardiness that in fact fuels “Fraudulent Phoenix Activity”. Again this is an administrative problem and not a problem that will be addressed by the new legislation. Unless the ATO aggressively pursues all outstanding debts, Phoenix Activity will not be addressed.
- 3) If the D.P.N.s are no longer required (in certain circumstances) and having regard to “the administrative burden” it is unlikely that the ATO will consistently continue to issue these notices. Anecdotal evidence confirms that directors will not take positive steps to rehabilitate the companies unless they are forced to do so. It is quite clear that in the absence of a notification, no action will be taken whatsoever. Indeed, it is clear that even when notices are served, a large number of directors are still inert. This is largely because the presentation, wording and general appearances of the existing notices are somewhat bland.
- 4) The broader economic concerns will not be addressed by this legislation and may get worse. If the ATO relies on the new legislation and “cherry picks” the directors it wishes to pursue rather than address the administrative issues, it will continue to allow inefficient businesses to compete with genuine and compliant proprietors. This is perhaps the greatest concern.

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My documents submission to the House of Representatives final version 20 October 2011

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- 5) The term Fraudulent Phoenix Activity is not defined or even mentioned in the legislation. This is despite the fact that this term was used in the original proposals paper, the budget, and indeed the explanatory memorandum. Transparency would dictate that if the legislation is indeed designed to curtail such activity it needs to be a defining term.
- 6) The proposed Legislation defeats the objectives of the Voluntary Administration Regime One of the objectives of the D.P.N. is to encourage directors of failing companies to seek assistance from an insolvency specialist. If the company can be restructured, the regime then sets out due process for a Deed of Company Arrangement to be settled. In the absence of this notification, it is unlikely directors will seek assistance.

WE THEREFORE SUBMIT

- 1) In order to address the broader economic concerns the ATO should be mandated to pursue all outstanding tax debts via the processes it already has available to it. This may need some administrative streamlining such as less negotiating time for defaulters and the earlier issue of D.P.N.s
- 2) The Director Penalty Notices should be served via an automated process, uniformly and not piece meal on an ad hoc basis.
- 3) Director Penalty Notices need to be re drafted to reflect a greater sense of urgency.
- 4) Director Penalty Notices should be copied to the company's tax agent and or registered offices (it is important to note here that these notices are unique in that they relate to company's affairs and they are not served on the tax agents.
- 5) Automatic liability should only apply in cases where there is evidence of Phoenix Activity. We have suggested that the automatic liability should only apply whether the company's directors (or associates) have been involved in previous failed companies in the last 5 years or there is evidence of Fraudulent Phoenix Activity "(to be defined)"

IN CONCLUSION

Overall the Legislation appears to be directed at providing the ATO with better debt recovery processes rather than dealing with the stated objective that is curtailing "Fraudulent Phoenix Activity". The amendments appear to cast too wide a net. We see that it will catch many innocent directors of failing companies and that the sophisticated Phoenix operators will still find a means to circumvent the law. We support the widening of application of the legislation to include Superannuation Guarantee and denying director tax credits for non remitted company PAYG. **However we oppose the automatic liability and deletion of notification to directors in form proposed.**