

# Turnbull Government announces reforms to address illegal phoenixing

Lisa Morrissey & Amy Bayliss | September 2017 | Commercial Disputes & Transactions

## Summary

Phoenixing is the registering of a new company to take-over the failed or insolvent business of another company. While phoenix activity does not always involve illegal conduct, illegal phoenix activity has attracted significant media and public scrutiny – and rightly so. Illegal phoenix activity involves company directors deliberately trying to avoid paying liabilities such as taxation debts and employee entitlements.

On 12 September 2017, the Turnbull Government announced it is taking action to “crack down” on illegal phoenixing activity. In her media release, Minister for Revenue and Financial Services, the Hon Kelly O’Dwyer MP said:

“The Turnbull Government is committed to ensuring individuals who engage in illegal activity are held to account and that the regulators are equipped to take stronger action to both deter and penalise phoenixing activity for the benefit of all Australians<sup>1</sup>.”

## Director Identification Number

Presently those applying to be company directors do not have to prove their identity nor do they need to provide a record of their corporate history. This has unfortunately allowed directors to register a number of companies using different versions of the same name.

The Turnbull Government’s package of reforms will include the introduction of a Director Identification Number (DIN). The DIN will identify company directors with a unique number. It will connect with other government agencies and databases to allow regulators to trace the relationships between individuals and entities.

## Measures to deter and disrupt phoenixing

In addition to the DIN, the Government will consult on implementing a range of other measures to deter and disrupt the core behaviours of phoenixing, including targeting non-directors such as facilitators and advisers.

These measures include:

- creating specific phoenixing offences to better enable regulators to take decisive action against those engaged in this illegal activity;
- setting up a dedicated hotline to provide a single point of contact for reporting illegal phoenix operators;
- penalties to be extended to those who promote tax avoidance schemes such as advisers who assist phoenix operators;
- stronger powers to the ATO to recover a security deposit from suspected phoenix operators with the deposit to be used to cover outstanding tax liabilities (including future liabilities);
- directors to be personally liable for GST liabilities;
- no backdating of resignations by directors to avoid personal liability or resigning and leaving a company with no directors; and

- preventing related entities (to the phoenix operator) from appointing a liquidator.

### **Preventative and early intervention measures**

The Government will also consult on how best to identify high risk individuals, who will be subject to new preventative and early intervention tools including:

- a next-cab-off-the-rank system for appointing liquidators to stop the appointment of so called “friendly” liquidators who turn a blind eye to phoenixing;
- allowing the ATO to retain tax refunds; and
- allowing the ATO to commence immediate action following the issuance of a Director Penalty Notice.

The Government has indicated that consultation on the non-DIN measures will commence in the coming weeks.

<sup>1</sup> <http://kmo.ministers.treasury.gov.au>

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