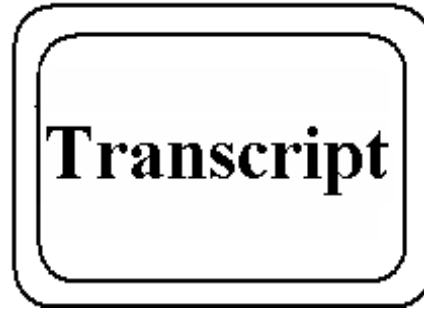




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**Senator Nick Sherry**

Assistant Treasurer

ABC Radio National

The National Interest

Interviewer: Peter Mares

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**SUBJECT: Phoenix activities**

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PETER MARES: The phoenix is a magical bird that rises from the ashes of its own destruction. Of course, the phoenix bird is a myth, but the phoenix company, well that's a very real phenomenon. Simply described, "phoenixing" is when a business that has supposedly gone bust continues to trade with only slight different plumage. It involves liquidating one firm and setting up a new one to carry on the very same activity with a similar name, often at the same premises, with the same phone number and often with the same directors. Or perhaps, some very close relatives. The point is to avoid outstanding debts from the firm's previous incarnation – annoying things such as tax liabilities, bills and workers; entitlements like super guarantee payments. Assistant Treasurer Nick Sherry reckons such activities costs taxpayers \$600m a year in lost revenue. And he's looking to strangle phoenix companies at birth. Senator Sherry joins me from Hobart, Senator welcome to The National Interest.

NICK SHERRY: Hello Peter and hello to your listeners.

MARES: How widespread is phoenixing?

NICK SHERRY: Well is it widespread, the cost figure you gave earlier is a cost to revenue of cases that the ATO estimates in a year, of \$600m. Now \$600m is a lot of money. The broader cost if you add in the cost to the community because phoenix companies just don't pay tax, they also don't pay suppliers, for example. The broader cost is estimated at up to about 1.2, 1.3 billion dollars, so ... and the ATO's reported that phoenix operations have become more prevalent in the last couple of years – it used to predominate in small business areas but there are cases now where the activity has spread to larger businesses. So the phoenix is growing, if you like.

MARES: And is it particularly prevalent in particular sectors of the economy?

NICK SHERRY: It is, the building construction industry, hospitality, cleaning services, but again the trend is growing into other sectors. The Cole Royal Commission which was established by the previous Liberal Government to look at issues relating to the building and construction industry identified this as an issue.

MARES: And as you say, the effect is not just on tax receipts, but there can be flow-on effects to other .... to workers who may have missed out on entitlements and to other businesses that are owed money because they've been supplying a service or a commodity to that company and they haven't been paid.

NICK SHERRY: Well exactly. I mean, superannuation is a pretty obvious one. And of course that really does hurt, not only do you lose your wages or possibly annual leave, you lose part of your future retirement income. I have to say, the whole area makes me particularly angry, but when you are also effectively denying a person part of their retirement income it really does get my blood boiling, I have to say. And then there are other, the vast majority of businesses who pay their bills and accounts, who are left with debts which puts further economic pressure, commercial pressure, on the vast majority of businesses that do the right thing.

MARES: Now aren't there existing measures to stop this? I mean surely if directors keep liquidating companies with outstanding debts and then immediately establishing new ones to carry on in the same business area, then they shouldn't be too hard to track and to stop, should they?

NICK SHERRY: There are some existing provisions in the corporations law, directors' duties and liabilities, there are a range of measures, for example there's an employee entitlements scheme that cover part of the entitlements when a business, a company, in this case a phoenix company, liquidates. However, those ... the employee entitlements scheme which does provide a large part of protection for non-payment is paid for by the taxpayer. So really, the approach should be trying to minimise this activity at the base, if you like. We've been doing a lot of work on off-shore tax havens, there's a big crackdown on off-shore tax havens. Phoenix activity reminds me of on-shore tax havens, the establishment of a legal entity to avoid tax. So there are some measures which can be used at the moment, however, they are

not as effective, the Government believes they are not as effective as they could be given the growing activity and the massive loss of revenue.

MARES: This is The National Interest on ABC Radio National, I'm speaking to Assistant Treasurer Senator Nick Sherry. Now Senator Sherry, you've published a discussion paper on this issue late last year, we've put a link to that on The National Interest website, you've also been taking submissions in response to your proposals - what are the key – just outline if you can for us the key measures or some key measures you're proposing or you've put out for discussion.

NICK SHERRY: Sure. In the past ten years there's been three reports, and I thought it's time to put out some specific proposals to crack down on this activity – specific amendments to the law. A lot of reports, let's get some action moving. So the proposals papers received 25 submissions, and the submission period has closed, and I'm going to receive recommendations but a couple of areas for example, at the present time directors engaged in fraudulent phoenix activity can avoid personal liability for paying tax that is owed and super guarantee.

MARES: So even if they're found guilty under existing laws and it's clear they've been engaged in illegal activity, phoenixing, they can't actually be held liable for their tax they've avoided?

NICK SHERRY: That's right.

MARES: So that's one thing you want to change?

NICK SHERRY: That's one thing we certainly want to change. There are in the Tax Act some what's called specific anti-avoidance provisions, which give extensive latitude to the Tax Commissioner, and the Tax Commissioner remember is independent, which give extensive latitude to crack down on tax avoidance more generally. But interestingly they don't apply to phoenix activities, so one of the proposals is to extend that power of the Tax Commissioner to phoenix type ... you'd have a description of phoenix-type activity – and the Tax Commissioner could take action very much more quickly than the current law allows.

MARES: Well what about more, sort of I suppose, commonsense things, like stopping a company reusing the same name that it's just used when it gone bust, or stopping directors setting up essentially the same company?

NICK SHERRY: Yes, look, they're options, you can also require, if someone's got a previous record of phoenix-like activity, is issuance of a bond, they have to pay effectively some tax up front before they can activate the business through the company structure. If they've got a bad record, get some money in advance, so that's another option.

MARES: Some people in the business community are alarmed at the proposals, Fairfax business writer Adele Fergusson described as quote "so draconian that they

could stifle entrepreneurship, lead to more insolvencies and increase the red tape already suffocating business". So, I guess there is an issue here that if you go too far you do actually run the risk of creating hurdles for legitimate businesses trying to set up with limited capital, for example.

NICK SHERRY: Sure, but I make the point that vast majority of companies, the overwhelming majority, are acting in a totally proper way and would not be affected by these particular proposals that we are considering. And, you know, frankly, it is time to stop reports, it is time, given the considerable amount of money and the loss to workers and other businesses, it is time to improve the regulatory and supervisory structures, we've got to take action in this area. And look, I'm sure there will be some people who will make criticism of that nature, but the problem is a serious one, and you know, I'm utterly determined, I'm prepared to wear some flak on this issue, frankly, in order to protect workers' entitlements and also legitimate businesses who'll lose out when not paid for their supplies.

MARES: Unions on the other hand, particularly the construction union, the CFMEU, think you're not going not far enough, they want to see criminal prosecutions and the threat of jail to bring dodgy directors into line.

NICK SHERRY: Well, when we finalise the package of changes to the law, I believe it'll be done in a balanced way. Sure, unions have got some legitimate concerns, I might say businesses have got some concerns because suppliers ... I mean this is a problem as I've mentioned in the construction industry ... and legitimate construction companies, and that's the vast majority in the building and construction sector – are very concerned about phoenix activity as well. So I see this as not just a pro-employee/worker measure but also a pro-business measure if you like.

MARES: So when can we expect your legislative changes?

NICK SHERRY: I'm going to be receiving the detailed analysis from Treasury on the submissions in the next month and then, I don't want to set a timeframe on it, a specific timeframe, but I'm keen that we get some specific amendments, proposals to the law, out for this year.

MARES: Before a Federal election?

NICK SHERRY: Oh, I want to get some specific proposals out this year, and the election's scheduled in November, so I can't give any undertakings as to the passage of legislation because you know that's always extremely tight and will depend on an election, but I want to get some specific proposals out this year.

MARES: Senator thank you for your time.

NICK SHERRY: Thank you and thank you to your listeners.