

## CRACKDOWN ON PHOENIX ACTIVITY

The Assistant Treasurer, Senator Nick Sherry, today issued an Australia-wide warning against fraudulent phoenix activity and released a package of tough new proposals to crackdown on businesses who rip-off of their workers and the general taxpaying community.

Fraudulent phoenix activity involves avoiding the payment of tax liabilities, wages, superannuation and leave entitlements and other responsibilities, such as supplier accounts, through the deliberate liquidation of a company.

The business in question then continues, free of liabilities, in the form of another corporate entity, controlled by the same person or group of individuals. Evidence now shows this is increasingly occurring in a systematic and sometimes cyclical manner.

"The days of using "phoenix" arrangements to dodge tax liabilities owed to the whole community and to swindle hard-working staff out of their pay, their super and their leave entitlements are about to end," said the Assistant Treasurer.

"The latest estimates provided to me indicate that phoenix activity may be ripping up to \$600 million from the national revenue base – that is simply unacceptable and it's hurting the whole community and hitting the integrity of the system."

"As far as I am concerned, the people who engage in this practice deserve the full force of the law brought to bear against them – that is why we've commissioned a package of tough reform options that will use the tax and corporate legal systems to close them off at the pass."

The final package of measures will build on the Rudd Government's \$70.9 million funding boost provided to the Tax Office in the 2009-10 Budget to fight against fraudulent small business activities.

The package of reforms released today, which are now open for public consultation, include:

- ensuring that there are anti-avoidance provisions in the taxation law to cancel any benefits derived through fraudulent phoenix activity;
- reinstating the failure to remit offence that would make it an offence for an entity not to

remit the required Pay-As-You-Go (Withholding) (PAYG(W)) amounts;

- making it an offence for directors to claim credits in relation to their own income for PAYG(W) amounts that have not been remitted by the company of which they are a director;
- extending the promoter penalty regime to provide a disincentive to those who promote fraudulent phoenix activity;
- expanding the Australian Securities and Investment Commission's powers to disqualify directors;
- expanding the role of the director penalty notice to impose stricter liabilities on directors and to cover a broader range of taxes and superannuation guarantee payments;

"I have met too many hard working people across Australia that have been the victims of these fraudsters," said the Assistant Treasurer.

"And the impact on revenue is hitting all fair, honest taxpayers in the community."

"The Government is of course strongly committed to helping those businesses suffering from the global recession and will ensure that innocent directors and companies are not captured inadvertently by any features of new regime."

"This initiative is a significant step towards helping honest business compete on a level playing field and will address dishonest and unfair behaviour that costs business significantly".

"I ask interested parties to take this opportunity to comment on the options in the reform package and the implementation details of this proposal".

Full details of the package of proposals can be obtained at [www.treasury.gov.au](http://www.treasury.gov.au).

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## Options in the Taxation Law

### Option

### Brief description

Amendment to the director penalty regime

Remove the ability of directors engaged in fraudulent phoenix activity to avoid personal liability for Pay As You Go (Withholding) (PAYG(W)) liabilities by placing the company into voluntary administration or liquidating the company.

Expansion of the director penalty regime

Expand the director penalty regime to apply to superannuation guarantee (SG) liabilities and other taxation liabilities such as indirect tax liabilities and a company's own income tax liability.

Amendment to the promoter penalty regime

Ensure that the promoter penalty regime is able to target those individuals promoting fraudulent phoenix activity.

Expansion of anti-avoidance provisions

Ensure that there are anti-avoidance provisions in the taxation law (either through an expansion of the existing general anti-avoidance rule (GAAR) or through the creation of a specific provision) to effectively negate any taxation benefit derived from fraudulent phoenix activity.

Reinstate the 'failure to remit' offence

Reintroduce a provision that would make it an offence for an entity not to remit the required PAYG(W) amounts.

Denial of PAYG(W) credits

Deny directors of companies (and potentially close relatives) from being able to access PAYG(W) credits in relation to their own income where amounts withheld have not been remitted (to the ATO) by the

company.

Introduce an offence for claiming non-remitted PAYG(W) credits

Make it an offence for directors to claim credits in relation to their own income for PAYG(W) amounts that have not been remitted by the company of which they are a director.

Amendment of taxation bond provision

Provide the Commissioner of Taxation with the discretion to require a company to provide an appropriate bond (supported by sufficient penalties) where it is reasonable to expect that the company would be unable to meet its tax obligations and/or engage in fraudulent phoenix activity.

### Options in the corporations law

#### Option

#### Brief description

Expand the scope for disqualification of directors

Give a Court or the Australian Securities and Investment Commission (ASIC) a discretion to disqualify a person from being a director if the relevant company has been wound up and the conduct of the person, as a director of that company, makes them unfit to be concerned in the management of a company.

Restrict the use of a similar name or trading style by successor company

Make directors personally liable for the debts of a liquidated company in circumstances where a 'new' company adopts the same or similar name as its previous incarnation.

Adopt the doctrine of inadequate capitalisation

Allow the corporate veil to be lifted where a company sets up a subsidiary with insufficient capital to meet the debts that could reasonably

be expected to arise.