BRUCE MULVANEY & CO
COMPANY RESTRUCTURING & INSOLVENCY

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The Australian Law Reform Commission
PO Box 12953
George Street
QLD 4003

Sent via email: corporatecrime@alrc.gov.au

Submission to Inquiry - *Illegal Phoenixing* Section
Discussion Paper Corporate Criminal Responsibility – DP 87 November 2019

I became registered as a liquidator in 1988 and continue to hold that registration.

I am responding to the proposals outlined in the Discussion Paper and in particular in "Section 11. Illegal **Phoenix** Activity". Accordingly I comment as follows:

Proposals 21 and 22 recommend further amendments to legislation currently before the parliament, namely the Treasury Laws Amendment (Combating Illegal **Phoenixing**) Bill 2019 ("CIPB").

Proposal 21(a)

If a court becomes the only party able to make orders undoing a creditor-defeating disposition ("CDD") timely intervention is unlikely to occur thereby reducing the practical application of the new CIPB legislation.

A particular advantage of the new Phoenixing Bill (CIPB) will be the presumption that a creditor-defeating transaction is not for market value where the company has inadequate records. This is a value extra tool for liquidators over the existing voidable transaction provisions in the Corporations Act.

Proposal 21(b)

A further provision should be included for the benefits to instead be disgorged to a liquidator or provisional liquidator of the company.

Proposal 22(a)

The circumstances envisaged would also give rise to a court appointing a provisional liquidator to a company which would be a more decisive outcome

Proposal 23

I agree with the recommendation to establish a 'director identification number' register by amending the Corporations Act.

CHARTERED ACCOUNTANTS
AUSTRALIA • NEW ZEALAND

Suite 3, Level 4,
858 Glenferrie Rd, Hawthorn, Vic 3122
[redacted]
www.mulvaney.com.au

Question J Disqualification of advisors who have contravened the proposed creditor-defeating disposition provisions

I agree with the intent of disqualifying insolvency and restructuring advisors.

However, many of the phoenixing transactions are created by unqualified people who are hard to identify and locate. I address this issue in my answer to question K below.

Question K

The key issues in Phoenix matters are obtaining information in a timely manner where a liquidator has limited powers and is unfunded.

I submit that there are two key issues that need to be addressed.

Firstly

A liquidator finds it difficult to identify the identity of the advisor involved in a Phoenixing transaction and to prove their involvement.

Secondly

There is usually opaque information at best about the details of a Phoenix transaction and whether or not a transaction has actually occurred together with what consideration if any has been paid or agreed, and by whom and to whom.

Therefore I submit that there needs to be a procedure established in a simple and cost effective way whereby a notice can be served on relevant parties requiring appropriate information to be produced to a liquidator and/or the court within a very short timeframe. The requirement must be to provide information and documents about key matters. That information must include names of all advisors, full details of the parties to phoenix transactions including purchasers and vendors, copies of all documentation and details of the consideration paid or payable as well as lists of the assets and liabilities that have been transferred.

In the absence of that information being provided there must be certain presumptions invoked including that:

a) The transaction is a CDD because no advisor has been identified
b) The lack of evidence of the transaction enables a liquidator to take possession of the business immediately
c) There will be no damages awarded against a liquidator who acts in such a way to repossess a business

The notices would be also served on whoever is the holder of the Australian Business Number (ABN) being used in the business after liquidation. Where a company or trust is running the business then the Directors, shareholders and unit holders would be required to comply with notices.

Provisions may provide for stronger remedies if the transaction is shown to have occurred after the issuance of a statutory demand by a creditor and/or an application for winding up of the vendor company.

I submit that these processes would enable appropriate civil and criminal actions to be taken in a timely manner. For example a liquidator may be able to obtain indemnities from key stakeholders such as the Australian Taxation Office and Fair Entitlements Guarantee based on actual evidence being obtained.

I also submit that this a more effective proposal than merely seeking to disqualify insolvency and restructuring advisors who often work in a cloud of secrecy and are quite often unqualified and not licenced.

My recommendations would reverse the onus of proof and would provide reasonable presumptions to enable actual civil action to be taken followed by criminal steps as appropriate.

Examinations

I also propose that the examination procedures in liquidations be simplified and made less costly perhaps in a similar way to section 77T of the *Bankruptcy Act 1966*.

Conclusion

I look forward to discussing these issues with you in the future.

Yours Faithfully

pp Bruce Mulvaney