



**AUSTRALIAN CREDIT FORUM Inc.**

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The Manager,  
Government & Insolvency Unit  
Corporations & Capital Markets Division  
The Treasury  
Langton Crescent  
PARKES, ACT 2600

By email: [insolvency@treasury.gov.au](mailto:insolvency@treasury.gov.au)

**RE: Exposure Draft – Corporations Amendment (Phoenixing & Other Measures) Bill 2012**

Dear Sir / Madam,

The Australian Credit Forum welcomes the opportunity to comment on the Exposure Draft of the Corporations Amendment (Phoenixing & Other Measures) Bill 2012 and whilst it is pleasing to see the Federal Government starting to look at ways to control PHOENIX Companies in Australia the Exposure Draft does nothing to address this ongoing vexing problem.

The Australian Credit Forum (ACF) was formed over 40 years ago and is composed of Senior Credit Executives from a broad range of industry groups, Solicitors, Barristers, Administrators/Liquidators, Commercial Mercantile Agents and Credit Insurance Underwriters. All of the members have over the years encountered Phoenix companies and in the case of the practising professional Credit Executives amongst the members all have developed a policy and processes in extending and providing credit to Phoenix companies.

The ACF is concerned that the release of this Exposure Draft was made on the 20/12/2011 with a cut off date for submissions of 23<sup>rd</sup> January, 2012 giving just 4 weeks for an interested party to review and respond to the Exposure Draft. Had the draft contained any matters of substance it is doubtful if anyone would have been able to have reviewed the proposals and respond in the time frame allowed. This has been an ongoing problem with all draft bills placed in the public domain for comment and needs to be addressed if the Government is to be free from accusations of playing lip service to involvement of the broader business community in its decision making processes.

That aside the Government has the opportunity to look at and consider steps to bring under control the actions of Directors and Phoenix Companies but has failed to do so. The current proposed legislation does not in the opinion of the ACF do anything to address the problem.

It must be recognised that not every company collapse and subsequent rebirth as a Phoenix company is the result of a deliberate act on the part of the directors. The collapse may be as the result of the collapse of one of their own customers with the impact affecting their own liquidity. The building industry seems to have its fair share of this as a builder collapses his collapse can in turn impact on unpaid sub-contractors forcing them to fail and collapse as well - the Domino Effect.

Should Directors of companies thus affected be tarred with the same brush as those Directors who deliberately and with the specific intent of avoiding their creditors, incur debts then place their company into Administration/Liquidation?

Should a Director of a business who, as a result of one of his own customers collapsing, struggles on with mounting debts as he/she watches their life's work to build up their business crumbling around them be accused of acting deliberately when they form a Phoenix Company and starts again? After the smoke has settled and they have in a lot of cases lost not only their business but frequently their life's savings and even their matrimonial home (and their marriage/family) they chose to shrug their shoulders roll up their sleeves and start a new company where the old one left off?

Any attempt to control Phoenix companies must take into account and allow for Directors who are simply trying to rebuild their lives after having lost a life's work through no fault of their own.

Under Bankruptcy legislation a Bankrupt is not prevented from obtaining credit BUT they must disclose that they are a Bankrupt if the amount they are applying for is over a specified amount.

Many companies in Australia do not have the depth of experience within their Credit Departments that is found amongst the members of the ACF as a result many of these companies are unable or do not have the skills necessary to fully investigate applicants for credit with their company. As a result they can and frequently are caught a second time when the Directors of a Phoenix company obtain credit from them and again default on payment.

The Government could consider including in its legislation a requirement that Directors of Companies that have been placed into Liquidation must declare when applying for credit under their new company or business that they have previously been involved in an insolvent company. The company considering the application is then put on notice of their past history – caveat emptor!

If it is subsequently found that the Director(s) neglected to declare their involvement with a previous insolvent company then the Director of the new company is personally liable for any debts thus incurred should the new company collapse.

Of additional concern to the ACF is the fact that despite Liquidators being required to inform ASIC when the return to unsecured creditors is less than \$0.50 cents in the \$1.00 ASIC seems to have no interest in taking ANY action against the Directors unless the Director is a high profile person/individual and ASIC is guaranteed press coverage. Most of the time the Liquidator is simply thanked by ASIC for their notice but informed that ASIC will take no further action in this matter.

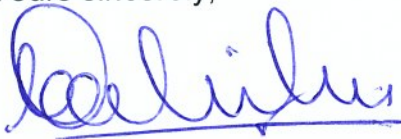
Liquidators are well versed to make a valued assessment of the real reasons behind a company failure and should be required to highlight to ASIC their belief/opinions if the Directors were negligent in their actions. Whilst ASIC may chose not to take action against the Director at that time they should be obligated to put the Director on notice that a further subsequent collapse caused by their negligence or mismanagement will result in them being prevented from acting as Directors or in a management position within a company for a specified period of time.

The Act should clearly spell out to Directors that they will be given one chance at running a company they will not get a second chance if the collapse of that company was directly attributable to their actions and lack of management skills/knowledge. Basically two strikes and you are out.

The time has come for the Government to take a stand to target and remove those Directors who deliberately set out to incur debts and then walk away leaving creditors out of pocket. Steps need to be taken to ensure that the various Government Departments in particular ASIC are able, willing and prepared to act to remove these people from the business community irrespective of their standing in that community. Continually going after the high profile Director simply because it ensures publicity will not deter the many small Directors/Businesses who time and time again are able to get away with their actions.

Introduce meaningful legislation that will remove these 'cowboys' from the business community and allow the majority of honest and hardworking businessmen to get on with the task of building this country and providing solid growth to Australian Business and Industry.

Yours sincerely,



Eric R A Milne LICM CCE  
Chairman  
Australian Credit Forum