

27 September 2018

Nathania Nero  
Senior Adviser  
Corporations Policy Unit  
Consumer and Corporations Division  
The Treasury  
Level 5, 100 Market Street  
SYDNEY 2000



**All correspondence  
and payments to:**  
L28 Casselden  
2 Lonsdale Street  
Melbourne VIC 3000  
[www.cbussuper.com.au](http://www.cbussuper.com.au)  
P: 1300 361 784  
F: 1300 228 739

### **Cbus submission to *Reforms to combat illegal phoenix activity – Draft Legislation***

Cbus welcomes the opportunity to comment on the *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018* and the *Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018*, (the Bills).

Cbus strongly supports efforts to combat illegal phoenixing activity and welcomes the introduction of new offences that target both those people who conduct and those who facilitate illegal phoenix activity.

Viewed alongside recent legislative reforms around corporate insolvencies and the black economy, the measures contained in the Bills represent a positive step forward in combatting serial phoenix activity that results in significant financial harm to many Cbus members, the economy, and the wider community.

The impact of illegal phoenixing activities on Cbus members has been profound. It is recognised that the construction and building industry in Australia has a significant problem with phoenix activity. The Australian Securities and Investment Commission (ASIC) has stated that “The construction industry is the highest represented sector in illegal phoenixing activity”<sup>1</sup>.

Cbus is an industry super fund with a strong affinity and understanding of the construction and building industry and maintains a robust arrears process on behalf of our members as part of our overall Trustee obligations.

In the past five years Cbus has recovered around \$330m in unpaid superannuation owed to members and more than \$600m over the past 15 years. And over the past 10 years Cbus, working with Industry Funds Credit Control (IFCC), has recovered more than \$31m in members’ superannuation entitlements from insolvency actions.

The measures contained in the Bills are a positive step in combatting illegal phoenix activity that will be strengthened by other regulatory instruments, such as full implementation of the Single Touch Payroll system and the implementation of Director Identification Numbers (DINs), explored in the Treasury discussion paper *Modernising Modern Business Registers (July 2018)*.

Attached are our comments on the proposed legislation and the impact of phoenix activity on Cbus members. Please do not hesitate to contact Jane Barrett on 03 9910 0339 or [jane.barrett@cbussuper.com.au](mailto:jane.barrett@cbussuper.com.au), if you have any queries in relation to our submission.

Regards,

A handwritten signature in blue ink that reads 'Robbie Campo'.

**Robbie Campo**  
**Group Executive Brand, Advocacy, Marketing and Product**

**Cbus’ Trustee: United Super Pty Ltd ABN 46 006 261 623 AFSL 233792 Cbus ABN 75 493 363 262**

This information is about Cbus. It doesn’t take into account your specific needs, so you should look at your own financial position, objectives and requirements before making any financial decisions. Read the relevant Cbus Product Disclosure Statement to decide whether Cbus is right for you. Contact **1300 361 784** or visit [www.cbussuper.com.au](http://www.cbussuper.com.au) for a copy.

## Determining the economic impact of phoenix activity

Phoenixing is the intentional act of liquidating a company in order to avoid payment of outstanding debts to creditors, including wages, superannuation and other workplace entitlements.

A recent PwC report commissioned for the Australian Government's Phoenixing Taskforce estimates the cost of illegal phoenixing activity at up to \$5 billion across the economy<sup>1</sup>. This includes an upper estimate of \$300 million in unpaid entitlements to employees, of which a substantial component is believed to be unpaid superannuation.

The PwC report notes significant difficulties in determining an accurate figure for the true cost of illegal phoenixing activity to the economy and community. Several studies have noted that illegal phoenixing has significant flow on effects throughout the economy and community that can be difficult to measure.

This lack of comprehensive data on phoenix activity acts as a barrier to effectively identifying and combatting the behaviour.

Long-term research on phoenix activity conducted by the Melbourne Law School and Monash University led by Professor Helen Anderson, summarised in a submission to the *Modernising Business Registers (July 2018)* consultation paper<sup>2</sup>, outlines the challenges of identifying and detecting illegal phoenixing activity and proposes several measures that would enable greater insight and early awareness of potential phoenix activity.

These include the introduction of a Director Identification Number (DIN) for all existing and new directors to allow regulators such as ASIC and the ATO to more easily identify and track potential phoenix activity.

Further to this, a submission by Industry Super Australia (ISA) to the *Senate Economics Committee Inquiry into Superannuation Guarantee non-payment* also recommends the introduction of DINs as a matter of priority<sup>3</sup>.

Director Identification Numbers are not covered in the draft *Reforms to combat illegal phoenix activity* Bills. However, a recent Treasury discussion paper on *Modernising Business Registers* includes provision for the introduction of DINs.

### **Cbus position**

Cbus submits that the Bill should include measures to introduce Director Identification Numbers as a mechanism to better identify and track potential phoenix activity. As well as giving greater oversight to regulators such as ASIC and the ATO, a DIN would assist Cbus and service providers such as IFCC in the early identification of suspicious phoenix activity and assist in effective communication of such activity to the regulators.

In conjunction with the measures outlined in these Draft Exposure Bills, the introduction of DINs and associated regulatory structures, could substantially improve the capacity to detect potential phoenix activity early on.

<sup>1</sup> [The economic impacts of potential illegal phoenix activity report](#), ATO,

<sup>2</sup> Anderson, H, Ramsay, I, Welsh, M, and Hedges, J, [Phoenix Activity: Recommendations on Detection, Disruption and Enforcement](#) (February 2017)

<sup>3</sup> [ISA submission to the Senate Economics Committee Inquiry into Superannuation Guarantee non-payment](#), March 2017

## Superannuation guarantee non-compliance

Cbus has strongly advocated for a range of law reform measures to improve compliance with Superannuation Guarantee (SG) obligations, given the impact on Cbus members. However, this issue also impacts employers in our industry, given the unfair competitive advantage gained by those who are able to avoid meeting all their legal and regulatory obligations.

The ISA submission to the *Senate Economics Committee Inquiry into Superannuation Guarantee non-payment* puts the cost of non-payment of superannuation at up to \$5.6 billion dollars, affecting 2.76 million people and costing \$2,025 per person in the 2013/14 financial year<sup>4</sup>. This data builds on earlier research conducted by Tria Investment Partners (for Cbus).

Non-payment of SG within the construction industry has been long identified. There are several reasons for this, including: the industry being the biggest contributor to the cash economy, having a high level of small businesses, being prominent in insolvency, having one-third of the nation's independent contractors and being the highest represented sector in illegal phoenixing activity.

It is Cbus' experience that the failure in payment of employee entitlements, such as superannuation, is often a sign of a deeper cash-flow problem that may be a precursor to insolvency. Cbus works with its services providers, including IFCC, to continually improve processes around superannuation arrears collection and better predictive modelling to assist in averting the loss of our members' entitlements through early intervention.

Over the past fifteen years Cbus has collected more than \$600 million in unpaid superannuation guarantee from employers. This includes more than \$330 million in the past five years. The recent increase is attributable to both growth of the fund generally and improved practices in collecting unpaid super.

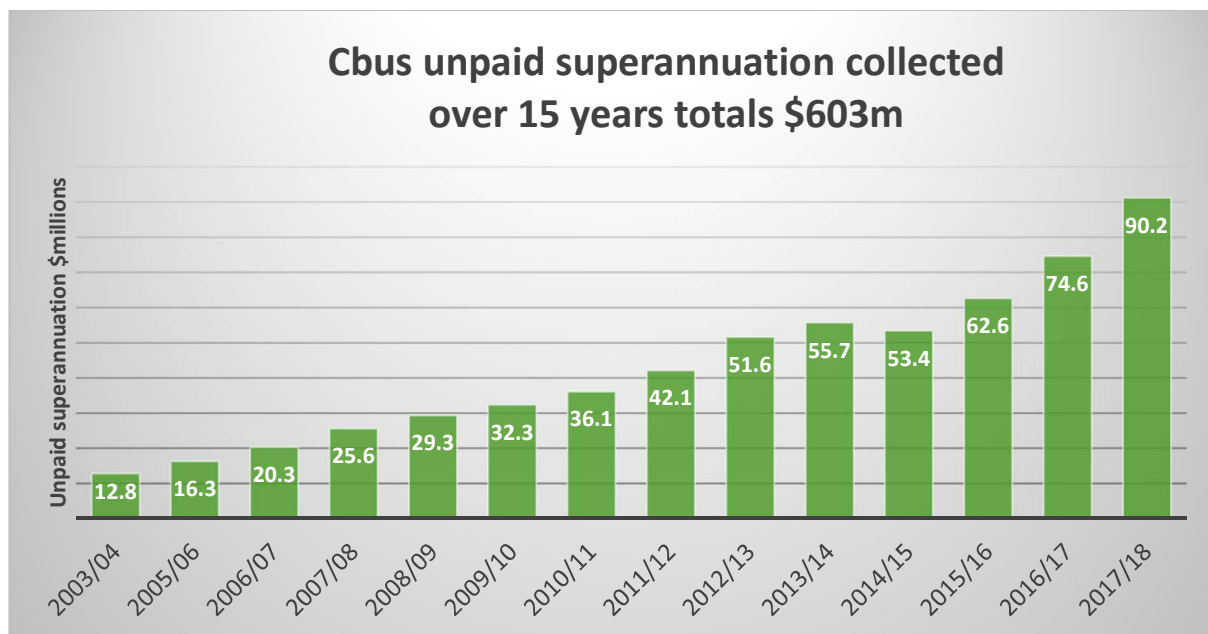


Fig 1: Cbus unpaid superannuation collected over 15 years totals \$603m

<sup>4</sup> [ISA submission to the Senate Economics Committee Inquiry into Superannuation Guarantee non-payment](#), March 2017

## Cbus arrears policy and practice

As an industry super fund, Cbus has maintained a strong affinity with the building and construction industry throughout its more than 30 year existence which has resulted in an intimate understanding of the issues confronted by businesses and employees in the sector.

Cbus has in place a rigorous arrears process designed to establish a level playing field of payment timing across the industry with a built in early detection process of payment failure. It is the Fund's experience that time counts in ensuring compliance with SG payments. Early detection of non-payment and intervention means a much greater likelihood of recovery of monies.

Through a strong arrears process, Cbus estimates that approximately \$90.2 million dollars in SG payments was collected in the FY17/18 on behalf of our members.

Examining the loss of superannuation through insolvency in the construction industry, IFCC figures reveal that across a 10 year period they have returned a total of \$33.9m through insolvency action (see Table 1: *Ten years of Cbus member SG returned following insolvency action: 2008/09 – 2017/18*). There were 983 active insolvency cases at 30 June 2018. We are unable to provide figures on forgone superannuation by our members, due to the complex nature of the phoenixing practice.

| Ten years of Cbus member SG returned following insolvency action: 2008/09 – 2017/18 |        |        |       |        |       |        |        |        |        |        |
|---|--------|--------|-------|--------|-------|--------|--------|--------|--------|--------|
| Financial year  | 08/09  | 09/10  | 10/11 | 11/12  | 12/13 | 03/14  | 14/15  | 15/16  | 16/17  | 17/18  |
| Active cases at EoFY  | 873    | 943    | 1007  | 1228   | 1475  | 1418   | 1284   | 989    | 970    | 983    |
| SG paid to ATO  | 0.63   | 0.943  | 0.61  | 2.49   | 1.57  | 1.305  | 1.458  | 1.494  | 1.319  | 0.723  |
| SG paid to Cbus   | 0.718  | 0.72   | 1.2   | 0.126  | 3.82  | 4.343  | 2.308  | 3.474  | 3.096  | 1.56   |
| Total   | 1.348m | 1.663m | 1.81m | 2.616m | 5.39m | 5.648m | 3.766m | 4.968m | 4.415m | 2.283m |
| Aggregate total: 33.9m  |        |        |       |        |       |        |        |        |        |        |

Table 1: Ten years of Cbus member SG returned following insolvency action: 2008/09 – 2017/18

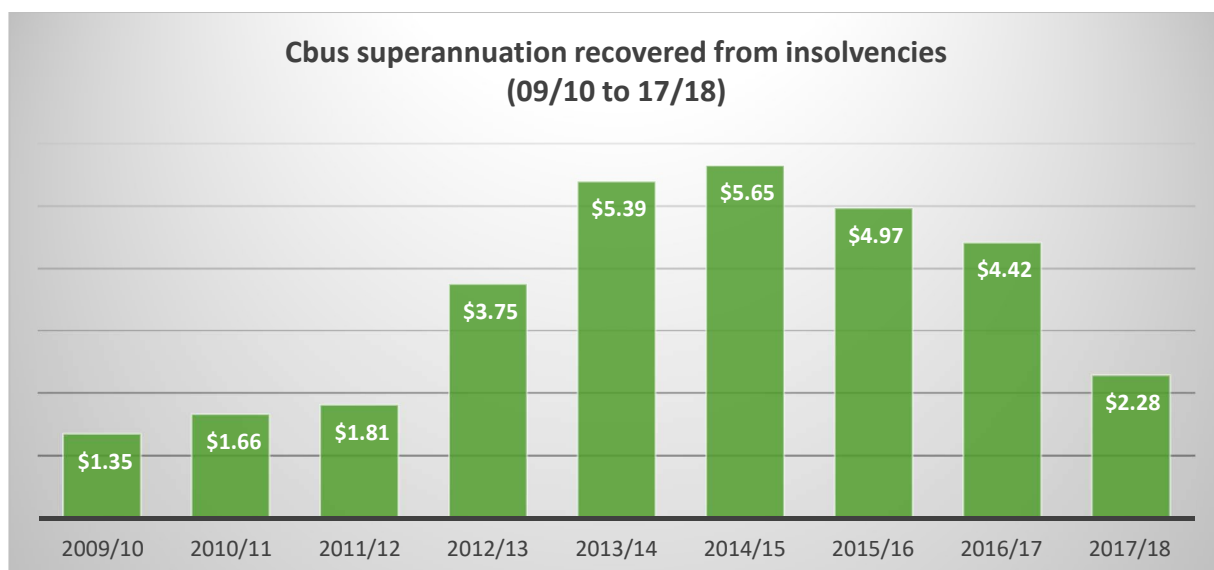


Fig 2: Cbus members' superannuation recovered from insolvencies over 10 years - \$34m

#### Some characteristics of phoenix trading behaviour

IFCC has identified several patterns indicative of phoenix behaviour:

1. Company A is placed under external administration (Administration/Liquidation/Receivership)
2. Company B is registered with the fund (the new company usually has a similar name, same trading address, same contact person and members from Company A)
3. Majority of members are terminated on Company A employer account as at 30/6/2015
4. These members now appear under Company B employer account with commencement date of 1/7/2015

Usually the new company will be registered on ASIC a few months prior to the Liquidation of the old company. The new company usually has a similar name to the insolvent company with a slight variation to include words that are commonly used, such as (Vic) or (Aust).

IFCC might also observe changes to the company occurring on ASIC shortly before the company is placed into Liquidation. An example of this practice would be changing to Company name to the ACN, for e.g. "A.C.N 123 456 789 Pty Ltd".

#### **Response to draft legislation**

The exposure draft legislation includes reforms to:

- 1 Introduce new phoenix offences that target those who conduct and those who facilitate illegal phoenix transactions;
  - The Bills make it an offence for company directors to engage in creditor-defeating transfers of company assets that prevent, hinder or significantly delay creditors' access to those assets.
  - Pre-insolvency advisers and other facilitators of illegal phoenix activities will also be liable, as there will be a separate offence for any person who procures, incites, induces or encourages a company to make creditor-defeating transfers of company assets.
  - These will be both criminal and civil offences, attaching significant penalties available under the law.
  - The offences will be supported by an extension of the existing liquidator asset clawback avenues to cover illegal phoenix transactions. ASIC will also receive a new regulatory tool to recover property that has been transferred under an illegal phoenix transaction.

#### **Cbus response**

Cbus supports the introduction of powers to impose criminal and civil penalties targeting on those who conduct and those who facilitate phoenix activity. Cbus members work in an industry with a high prevalence of phoenix activity and the Fund has long advocated for tougher penalties for those who have engaged in deliberate phoenixing activity.

Cbus also welcomes the inclusion of penalties for pre-insolvency advisers and other facilitators of illegal phoenix activity as an important recognition of the role of third parties in enabling phoenixing to take place.

- 2 Prevent directors from backdating their resignations to avoid personal liability

- 3 Prevent a sole director from resigning and leaving a company as an empty corporate shell with no director

#### **Cbus response**

Cbus supports measures to prevent directors avoiding personal liability.

- 4 Extend the director penalty provisions to make directors personally liable for their company's GST and related liabilities
- 5 Expand the Australian Taxation Office's existing power to retain refunds where there are tax lodgments outstanding

#### **Cbus response**

Cbus notes the extension of director penalty provisions to make directors personally liable for their company's GST and related liabilities and the expansion of ATO powers to retain refunds where there are tax lodgments outstanding.

In preparing this submission the question has been raised as to whether this will have the unintended consequence of 1) reducing the total pool of funds available to creditors, which would have a flow-on impact to Cbus and its members, and 2) locking up outstanding entitlements for creditors, including Cbus members, within the ATO system. Experience tells us that in some cases of insolvency it can take an extensive period time for creditors, including Cbus members, to claim back their entitlements from the ATO. As such, Cbus requests further examination by Treasury of the potential impact of these provisions.

- 6 Restrict the voting rights of related creditors of the phoenix operator at meetings regarding the appointment or removal and replacement of an external administrator.

#### **Cbus response**

Cbus supports measures to restrict the voting rights of creditors related to phoenix operators.