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Submission to *Modernising Business Registers* and *Director Identification Numbers legislation*

Cbus welcomes the opportunity to comment on the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2018 (includes Director Identification Numbers)* and the *Commonwealth Registers Bill 2018*, (the Bills).

Cbus supports the intent of the Bills to strengthen oversight provisions on companies and directors to assist with regulatory compliance.

As detailed in the Cbus submission to Treasury in response to the *Reforms to combat illegal phoenix activity – Draft Legislation*, Cbus strongly supports efforts to combat illegal phoenixing activity and to hold both those people who conduct and those who facilitate the activity accountable.

In that submission Cbus strongly supported a previous commitment from the Government for the introduction of Director Identification Numbers (DINs). Cbus sees the introduction of DINS as an important and necessary addition to the proposed laws to combat illegal phoenixing.

Viewed alongside the proposed *Reforms to combat illegal phoenix activity Bills* and other recent legislative reforms around corporate insolvencies and the black economy, the measures contained in the Bills represent a positive step forward in identifying and monitoring 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 significant. 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"[1].

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.

Attached are our comments on the proposed legislation. Please do not hesitate to contact Jane Barrett on 03 9910 0339 or jane.barrett@cbusssuper.com.au, if you have any queries in relation to our submission.

Regards,

Robbie Campo
Group Executive Brand, Advocacy, Marketing and Product

Role of DINs in identifying and monitoring illegal 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[1]. 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[2], 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 recommended the introduction of DINs as a matter of priority[3].

The new law will require all directors to confirm their identity and their DIN will become a unique identifier across all companies in which they hold directorships. This will provide traceability, improved tracking of directors across multiple companies, and prevent the use of fictitious identities to avoid liabilities.

The measures will be backed up by the introduction of civil and criminal penalties for directors who fail to apply for a DIN, and for conduct designed to undermine the new regulatory arrangements such as providing false identity information, applying for multiple DINs, or providing a false DIN.

Cbus position

The introduction of DINs and associated regulatory structures could substantially improve the capacity to detect potential phoenix activity early on and create a framework for identifying people who engage in and facilitate the activity.

Director Identification Numbers will serve 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.

[1] *The economic impacts of potential illegal phoenix activity report*, ATO,
[2] Anderson, H, Ramsay, I, Welsh, M, and Hedges, J, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement* (February 2017)
[3] *ISA submission to the Senate Economics Committee Inquiry into Superannuation Guarantee non-payment*, March 2017

Characteristics of phoenixing that DINs will help address

The introduction of DINs will improve transparency and oversight of the behaviour of company directors who currently seek to avoid their obligations to creditors by engaging in phoenix-type activity.

The practical application of Director Identification Numbers would allow Cbus to take a risk-based approach to our arrears process by flagging high risk employers on commencement. A DIN would allow Cbus to match with employers already existing in the Fund, that may already have an unpaid SG debt. A more stringent approach to these employers, coupled with an improved regulator liaison approach would certainly act to mitigate phoenixing activity.

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”.