Corporate Phoenixing

Policy Background

- Illegal corporate phoenixing is a persistent public policy problem that has widespread negative impacts on the economy.
- Phoenixing will be illegal when there is deliberate and systematic liquidation of a company with the fraudulent or illegal intention to avoid tax and other liabilities. The business then continues to operate and take profit through another entity, disclaiming any responsibility for the debt of the previous company.
- While the majority of business failures and insolvencies in the residential building industry are not caused by deliberate intent or design, according to ASIC data, the ‘construction’ industry is largely represented in the overall number of insolvencies across the economy, with almost a quarter of all business failures coming from the sector.
- In light of this and increasing pressure on the Commonwealth to take action on illegal phoenixing and the potential impact future policies or legislation may have on residential building companies, HIA developed a position statement in relation to Corporate Phoenixing.

Policy Issues

- The challenge for governments looking to regulate in this space is that it is impossible to distinguish between legitimate business rescue and intentional activities to avoid legal liabilities. It is important to balance the potential risks of legislation inappropriately applying to those engaged in appropriate business practices. Not all company failures will involve illegal phoenix activity and genuine company failures do occur.
- A difficulty in responding to government measures and proposals is that there is no legal or statutory definition of ‘phoenix activity’. The problem with developing a definition resides partly in the fact that phoenixing, of itself, is not inherently unlawful unless it is undertaken with malevolent intent in which case a range of broader generic criminal law sanctions may be applicable.
- Harmful phoenixing activity, left unchecked, has the capacity to undermine Australia’s revenue base and the competitive ‘level playing field’. It is foreseeable that legitimate business operators, paying taxes, wages and other debts, might be driven out of business by those engaging in illegal phoenix activity.
- While it is difficult to quantify its impact, according to the Fair Work Ombudsman and PwC, the cost of illegal phoenix activity is estimated to be in the range of $2.85 to $5.13 billion, with the estimated direct cost on business being between $1,162 – $3,171 million per year.
- Illegal phoenix activity represents an inefficiency in the construction industry which leads to misallocation of resources, additional costs and lower productivity.
- HIA does not support individuals who engage in illegal corporate phoenixing.

HIA's Policy Position on Corporate Phoenixing

Illegal phoenixing activity creates an uneven playing field and represents an inefficiency in the construction industry which leads to a misallocation of resources, additional costs and lower productivity.

1. The Australian Government should make it an offence to deliberately and systematically liquidate a corporate trading entity with the fraudulent or illegal intention to:
   a. avoid tax and other liabilities, such as employee entitlements; and
   b. continue the operation and profit taking of the business through another trading entity.
2. The offence should be extended to advisors and those facilitating phoenixing activity with fraudulent or illegal intent.
3. Incorporation is a legitimate business arrangement and must be preserved:
   a. It is a fundamental principle of company law in Australia (and elsewhere) that a company is a separate legal entity, independent of its directors and shareholders.
   b. Adopting a corporate structure should continue to be regarded as an appropriate risk management strategy to respond to project and business risk.
4. The offence of illegal phoenixing should not extend to a company, director and/or an officeholder if the behaviour was directed at legitimate business rescue.
5. Existing regulatory powers to manage corporations should be enforced including measures that would improve directorships transparency and visibility over an individual's history of involvement with corporate entities.
6. Educating the industry and community on activities associated with illegal phoenixing activity should be a priority.
7. Regulators should target those that engage in certain phoenixing behaviours to assist education, compliance and enforcement activities.

Policy endorsed by HIA National Policy Congress: May 2019