

Submission response form

Consultation on whether to introduce a director identification number

Please send your submission to corporate.law@mbie.govt.nz by **23 June 2017**.

Please provide your contact details below with your submission.

Name :

Organisation :

Email address or physical address

Are you providing this submission:

As an individual

On behalf of an organisation

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Please select if your submission contains confidential information:

I would like my submission (or specified parts of my submission) to be kept confidential, and attach my reasons for this for consideration by MBIE.

Reason:

1 Are you aware of the issues identified? Please describe the extent to which you think they are a problem.

Yes. Report No 1 of the Insolvency Working Group identified phoenix company abuse in New Zealand as a significant concern. The current rules in the Companies Act 1993 and Regulations applying to the recording on the Companies Register of who is appointed a director of companies in New Zealand are inadequate and can easily be manipulated/abused.

2 Are there any other issues that we have not identified? If so, please describe them and provide evidence if available.

Helen Anderson and Ian Ramsay, et al, in February 2017 published a Report titled 'Phoenix Activity: Recommendations on Detection, Disruption and Enforcement'.¹ The number one recommendation to detect phoenix company abuse² in Australia is for

¹ Helen Anderson, Ian Ramsay, Michelle Welsh and Jasper Hedges, 'Phoenix Activity: Recommendations on Detection, Disruption and Enforcement' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, February 2017) at 2.

² Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh and Hannah Withers, 'Defining and Profiling Phoenix Activity' (Research Report, Centre for Corporate Law and Securities Regulation, The

Australia to introduce a legal requirement for all current and new directors of companies to obtain a director identification number (DIN). I consider the reasons behind this recommendation as to the incidence of phoenix company abuse in Australia and its effect on the wider economy can equally be said to apply to New Zealand.

While some of the reasons for this recommendation mirror the drivers identified in the MBIE Discussion Paper, other reasons in the University of Melbourne Report are that with individual's DINs, it would be easier for the regulator (ASIC in Australia) to determine if the same DIN is being used for the directorships of numerous companies and therefore that "the person is unlikely to be managing or supervising in compliance with their legal obligations".³ In addition, a DIN would assist other regulators to perform their functions better (such as the ATO in Australia). It could also be useful to assist those who monitor those associated with organised crime and complex illegal phoenix activity.⁴

3 Do you think a director identification number is the best way to address the issues identified?

I consider that a DIN will be a useful disruptor to those who seek to abuse the privilege of separate legal entity and limited liability. It will never stop all of the issues identified, but can assist in reducing the impact of recidivist 'bad' directors. Other measures, including Report 1's proposed recommendations to regulate insolvency practitioners and remove the 10-day window for companies to appoint a liquidator (after they receive notice of a creditor's application to liquidate), will also assist in the objective of reducing phoenix company abuse.

4 What are your views on the proposed objectives for assessing whether to introduce a director identification number?

I agree with the objectives in as far as they go. An additional objective could be to enhance confidence in business by reducing the fraudulent use of the corporate form.

5 What are your views on the benefits and costs of a director identification number? Are there any other benefits, costs or risks?

In the 21st century, with checks and controls required under the anti-money laundering and countering the finance of terrorism regime being part and parcel of living in New Zealand, operating a bank account, having a passport etc, requiring a person to prove their identity through 100 points of identification is an acceptable cost for being director.

University of Melbourne, December 2014) identified five categories of phoenix activity. Three categories of illegal phoenix activity depending on whether it involves an unpremeditated intention to defraud creditors or a premeditated intention, a fourth category of problematic phoenix activity where a business is resurrected by inept entrepreneurs and a fifth legal category encompassing a valid business rescue.

³ Anderson, Ramsay et al, above n 1, p 3.

⁴ Ibid.

The vast majority of directors would recognise that reducing the incidence of repeated company failure caused by inept or fraudulent entrepreneurs will benefit creditors, taxpayers, employees and society alike.

It is a system that can be phased in...for example for existing company directors, they would need to apply for a DIN when a company files its next annual return. For any other company for which that person is also a director, then all that would be needed is for the DIN to be recorded. For any new company or new directorship, the entering of the DIN will pre-populate the form with the person's details.

For the DIN to be more valuable, evidence of directorships of deregistered companies should also be obtained. This information should be required to be provided when a DIN is applied for. Fines for failure to provide accurate information would need to be imposed.

I consider that the benefits of incorporation are such that it will not be discourage persons from being appointed directors. As stated above, under corporate law theory limited liability and separate legal entity are privileges, which in New Zealand which are enshrined in statute. Requiring persons who manage companies and make entrepreneurial decisions to prove their identity, with the concurrent advantage of being able to track (and potentially) exclude persons who have been involved in numerous corporate failures, is a legitimate cost.

6 Do you support the introduction of a director identification number?

Yes

7 If a director identification number is introduced, what are your views on how a number could work?

I have no substantial comments about the possible design of the use of a DIN. I agree that it needs to be phased over a period (12 months). It also should require directors to state their directorships of companies that are now deregistered. Fines should be imposed for any person who incompletely or inaccurately completes details on a FIN.

While amending historic documents to include DIN may be considered to be too costly, requiring directors to list all previous companies would be useful. The cost then is on the director. There may need to be exceptions, for example a person who has set up shelf companies, may have been a director of hundreds of companies (at least for a short period of time).

One concern about the proposal to not require consent forms to be provided to the Companies Office is that measures would need to be taken to prevent a promoter falsely listing the names and DINs of reputable directors as the proposed directors of a company. Accordingly, there would need to an email check or other method of verification if promoter/person incorporating company is not the only director of the new company and lists the DINs of the other directors and states that they are to be the directors of the new company.

8 Do you have any other comments?

No