

**Submission to Treasury on the Draft  
Modernising Business Registers and Director Identification Numbers  
legislation  
25 October 2018**

This submission comments on the proposal to create Director Identification Numbers (DIN). Our interest is that the DINs will impact on some 700,000 self-employed, small business people who operate their business as a company.

**Summary**

Self-Employed Australia opposes the creation of the Director Identification Number system as detailed in the draft legislation.

We oppose the DIN system on the following grounds:

- The introduction of the DIN system is allegedly aimed at preventing and addressing the problem of company ‘phoenixing’. Yet the Productivity Commission’s report which the government uses to justify DINs says that DINs will not fix the problem. Crooks will simply get around DINs according to the Productivity Commission. In other words, the DIN legislation, if passed, will be an invasion of privacy of millions of individuals and impose a new red tape regime that will not achieve its stated purpose.

Further, the draft legislation:

- Gives new, unrestrained and unaccountable powers to the ATO (the effective registration authority), to determine who can be a director and who cannot.
- Only provides appeals against the denial of DINs *after* a DIN has been denied/cancelled.
- Transfers to the ATO the authority of Parliament to determine the extension of the ATO’s powers in relation to DINs.

That is, the legislation gives the ATO bureaucracy massive and potentially unrestrained control over who in Australia is allowed to be a company director and therefore who can conduct business in Australia under a company structure. The legislation is profoundly anti-democratic, anti-free market and destructive of the proud tradition of Australian free enterprise.

The proposed legislation represents a stealth-like drift toward a ‘Chinese style’ of centralised control of economic activity under the regime of an unaccountable and dictatorially empowered bureaucracy.

If DINs are to be introduced, the precise powers of the ATO managing bureaucracy must be specifically stated in detail, in the legislation, and include provisions that

- Individuals have a specific entitlement to a DIN.
- A DIN cannot be denied or withdrawn unilaterally by the ATO bureaucracy.
- An independent, no-cost (to the individual) appeals process, external to the ATO, be established to review denial/cancellation *before* denial/cancellation occurs.

### **The detail of the draft legislation**

#### **1. Will the DIN system fix ‘phoenixing’?**

According to the Explanatory Memorandum to the legislation:

“Director Identification Numbers (**DIN**) is intended to target phoenix activities, where company controllers shutdown an existing entity and transfer its assets to a new company as a means to avoid debts and liabilities, leaving creditors out of pocket and estimated to cost the Australian economy over \$3 billion each year.”

The supporting ‘evidence’ cited for the claim that DINs will address phoenixing is a Productivity Commission report of September 2015 *Business Set-up, Transfer and Closure*. <https://www.pc.gov.au/inquiries/completed/business/report>

At page 427 of that Report, however, it states that:

“DINs will not be a ‘magic bullet’ that will eliminate all phoenix activity. Even with director identification and proved offences, sophisticated and legally astute directors may structure their personal affairs in a manner that limits the effectiveness of recovering fines and any incentives for future behaviour.”

Thus it is clear that the proposal, if passed into legislation, can only detract from the liberties and personal freedoms of small and unsophisticated entrepreneurs and not resolve phoenixing.

#### **2. The powers delivered to the ATO bureaucracy under the legislation**

The Explanatory Memorandum states the following. (Numbers are references to statements in the Explanatory Memorandum.)

- *1.18 The new law sets out the functions and powers of the registrar*

#### **Comment**

However the draft law does not set out those functions and powers. It gives wide powers to the Australian Business Registrar (ATO) to give and take away DINs but it does not specify at all how those powers are to be exercised and/or what appeal rights exists for directors if a director has his or her DIN rejected or refused. In other words,

the ABR/ATO is delivered unaccountable power to determine how those powers will be exercised.

- *1.21 The functions and powers of the registrar are largely set out in existing Commonwealth laws.*

#### Comment

This may be an adequate explanation of the powers of the ABR when taking over existing registration functions, but the DIN is totally new. The powers of the ABR in relation to DINs need to be precisely specified.

What is required is a detailed explanation of the new powers and the criteria that the Registrar will apply to applications for DINs. The functions and powers of the Registrar must be properly expressed in unequivocal terms.

- *1.26 Gives the Minister the ability to prescribe additional powers to the Registrar.*

#### Comment

This is unacceptable as it is extremely likely that it will be the bureaucracy that will prescribe additional powers to itself. Instead, the powers of the Registrar must be stipulated in the legislation by Parliament itself and should only be changed by Parliament.

- *1.33 gives the Registrar the power to extend the 'data' it requires of registrants.*

#### Comment

The legislation will give the bureaucracy the capacity to extend its demand for deeper and deeper information about the private details of directors (and others). That is, the legislation will enable the bureaucracy to override individual privacy concerns without the oversight of Parliament.

- *1.60 The new law also provides for other matters designed to support the effectiveness and efficiency of the registry regime. In this respect, the new regime provides for:*
  - *when the Minister can direct the registrar;*
  - *the circumstances in which, and to whom, the registrar may delegate its functions and powers;*
  - *the use of assisted decision making processes by the registrar;*
  - *review rights with respect to decisions made by the registrar;*
  - *the extent to which the registrar and associated persons may be liable for damages in connection with the new regime;*
  - *the admissibility of registry information in court proceedings;*
  - *the information that must be included in the registrar's annual report about the operation of the new regime; and*
  - *what rules may be made by the Minister for the purposes of the new regime.*

### Comment

But, not one of these items is specified. The powers are given but how the powers are exercised is not explained. Again, this amounts to giving further draconian powers to the ATO bureaucracy.

- 1.63 *The new law also enables the Minister to direct the registrar as to particular matters to be dealt with in the data standards or disclosure framework.*

### Comment

Further evidence that ‘Yes Minister’ will prevail.

- 1.71 *All decisions made by the registrar under the new regime are subject to merits review by the Administrative Appeals Tribunal, except decisions made by legislative instrument. [Emphasis added.]*

### Comment

This allows for review of a decision to deny/withdraw a DIN after a DIN has been denied/withdrawn. In other words, an appeal is not possible before a DIN is denied/withdrawn. This gives the ATO bureaucracy further extension of its powers. Further, this carves out significant parts of the Registrar’s activities and puts them beyond review.

- 2.64 *Penalties*

(The penalties follow this sample)

<i>Obligation</i>	<i>Maximum penalty</i>
Requirement to apply for a director identification number within 28 days of appointment	<i>Corporations Act</i> Criminal – 60 penalty units (strict liability) Civil penalty – \$200,000 for an individual; or 1 million for a body corporate <i>CATS Act</i> Criminal – 25 penalty units (strict liability) Civil penalty – \$200,000 for an individual

### Comment

These penalties are extreme for a simple registration requirement. They are even more onerous when it is understood that breaches will be determined by an ATO bureaucracy (Registrar) which effectively decides the extent of its own powers, how it will exercise those powers, is unaccountable and whose decisions are largely unappealable for the ordinary person.

### **Conclusion**

The legislation is a major overreach in the extension of powers to the ATO bureaucracy. The legislation must be opposed in its current form. As it stands the legislation is a huge new red tape imposition on law abiding directors. It is not clear that the DIN system will stop law breaking directors.

If the DIN system is to be introduced the powers of the ABR/ATO must be specified in legislation, such that Parliament dictates how the system will operate. Currently the legislation imposes bureaucracy over democracy.