

Australia: Risky business: directors on notice once more¹

In brief

The *Treasury Law Amendment (Combating Illegal Phoenixing) Bill 2019* has been passed by the Senate. These amendments aim to combat and deter illegal phoenix activity and reduce the harmful effects of phoenixing on the Australian economy. The term 'phoenixing' refers to winding up a company to avoid paying its creditors while disposing of valuable assets to a new company which can continue the business.

What you need to know

The amendments introduce new offences in the *Corporations Act 2001* that target those who conduct and facilitate illegal phoenix transactions:

- a new class of voidable transaction makes 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.
- liability of pre-insolvency advisers and other facilitators of illegal phoenix activities under a separate offence that penalises those who "procure, incite, induce or encourage" a company to make creditor-defeating transfers of company assets.

The new offences are accompanied by creating extended powers for both liquidators and ASIC to recover property that has been disposed of improperly.

Directors are prevented from:

- back-dating resignations to avoid personal liability (under a provision deeming that a director's resignation occurs no later than 28 days prior to the notification of ASIC); and
- resigning as a director when this would leave the company with no directors.

Additionally, the director penalty provisions are extended to allow the ATO to collect estimates of anticipated GST liabilities and make directors personally liable for their company's GST and related liabilities in some circumstances (following the issue of director's penalty notices for non-payment and a failure to liquidate the company).

The ATO may also retain tax refunds where a taxpayer has failed to lodge a tax return or provide other information that may affect the amount paid by the ATO.

Conclusion

The amendments continue a process whereby legislators seek to pierce the corporate veil and involve further risks for not only directors but their advisors. It is a timely reminder to:

¹ Article by Chris Lillie, Bennett & Philp Lawyers

- review your asset protection strategy – do this early so that any associated restructuring transactions fall outside the relation-back periods under the Bankruptcy Act 1966 (notably four years for related party transactions);
- if your business is facing difficulties don't stick your head in the sand. Obtain specialist advice early and ensure that your efforts are properly documented. This will enable you to ensure that your restructuring efforts are legitimate and strengthen your claims to the 'safe harbour' protections in relation to [insolvent](#) trading.

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