

News with Clout

Providing Corporate & Personal Solvency Solutions

Directors' Turn to Beware!

Restructuring is becoming a particularly perilous activity. We have seen where advisors are incurring the wrath of both ASIC and now the Courts where solicitor Timothy Sommerville suffered prosecution for aiding and abetting a variety of clients to break the law.

Now the ATO are coming in on the act.

On 13 November 2009 the Federal Assistant Treasurer, Senator Nick Sherry, released a package of new proposals in a bid to crackdown on fraudulent phoenix activity.

Whilst these proposals were open for public comments until January 2010, it is expected they will be swiftly adopted particularly with comments like this coming from the Assistant Treasurer: "As far as I am concerned, people who engage in this practice deserve the full force of the law brought to bear against them....."

Fraudulent phoenix activity is considered to be where a company ceases operations one day leaving behind unpaid creditors, which almost always includes a considerable amount owed to the ATO and setting up a new entity and continuing to trade.

The new proposals are aimed at protecting employees for unpaid entitlements, particularly superannuation, and the ATO for unremitted taxes. The government estimates phoenix activity could be taking as much as 600 million dollars from national revenue a year; however given that the ATO are creditors in just about all insolvencies, and not all phoenix's are picked up we believe that the figure could be much higher.

The package of reforms released include:-

- **Extending the promoter penalty regime to phoenix activity**

- **Expanding the role of director penalty notices to impose stricter liabilities on directors and to cover a broader range of taxes and SGC payments**
- **Expanding ASIC's powers to disqualify directors**
- **Ensuring that there are anti-avoidance provisions in the taxation law to cancel any benefits of phoenix activity**
- **Make directors personally liable for the debts of a liquidated company where the "new" company adopts a same or similar name.**
- **Allow the corporate veil to be lifted where a company fails to provide a subsidiary with sufficient capital,**
- **Making it an offence for directors to claim in their personal tax returns PAYG credits withheld that have not been remitted by their company to the ATO**
- **Providing the ATO the discretion to require a company to provide a bond in relation to taxation liabilities where it is expected the company may not be able to pay its taxation liabilities.**

Advisors and their director clients need to understand and consider very carefully the potential liability and prosecution that they may face if they advise or embark upon courses of action that fall within the meaning of fraudulent phoenix activity. This kind of legislation may quickly make voluntary administrations and deeds of company arrangements the only legitimate way to restructure where there is insolvency.

As ever we welcome and appreciate all your enquiries which are always kept strictly confidential.