



NEWS WITH CLOUT

Chartered Accountants for Business Recovery & Insolvency Services
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“PHOENIX”

The company that arises from the ashes. “Phoenix”, what a dreaded word. The knee jerk reaction is “the bastards are getting away with fraud”, that is if coming from the creditors side of things. The other reaction is “you can’t do that it is illegal” if coming from the debtors angle.

Either way the emotions run high. But what does the law have to say and what does it really mean?

Put simply one company has failed and the business or assets have been transferred to a new entity before the failure is formalised.

The Uncommercial Transaction provision of the Corporations Act (Section 588FB) appears designed to address such transfers.

Insolvent trading actions against directors can be another means of redressing the situation in certain circumstances. There are also actions against directors for breaching their duties to the company which is known to extend to creditors when the company is insolvent.

Fraud may be relevant too where there are repeated phoenix and the same creditor gets caught each time but I would have thought it would be difficult to establish intent. This is one aspect the ATO is strong on as they get caught each time. In fact they have a special division set up to pursue these scams.

But what about the transfer of assets or a business to a new entity for valuable consideration even if the new entity is related? What is the value of a business if it has caused a company to fail? What if the

valuable consideration involves vendor finance and the terms thereof are commercial?

Yes we know each of these questions of themselves provides much scope for debate in commercial and legal terms and beyond the scope of one page. What is relevant if you are advising a debtor is how the Liquidator would look at this situation?

We can tell you a Liquidator looks close and hard at the remedy. That is, what happens if the transaction is reversed?

The Liquidator gets the assets or business back and has to sell them then first he or she has to reimburse the original purchaser the amount they paid. There are other remedies but all are based around the value of the assets/business and the actual amounts paid.

With this in mind one must approach a possible phoenix with the one question of; if we win what is in it for creditors? You do not have to think too far to see the possibilities for debtors but there is always risk.

Whilst it irks us as Liquidators you can no doubt see there is clearly scope for transfers for valuable consideration as part of legitimate restructuring exercises. It may even be of benefit to creditors where values obtained for assets transferred are better than auction which is as good as you get on liquidation. It sounds simple but there is much scope for problems if not handled appropriately. The bitterness is always there.

We have only just touched the surface. There will be more on this issue in later months



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