



# NEWS WITH CLOUT

Offering Corporate & Personal Solvency Solutions

June 2007

ASIC have a great definition for a phoenix:-

*“phoenix activity can be regarded as typically involving:*

*(a) the transfer of assets (such as the business) of a company (the ‘previous company’) to a subsequent company in circumstances where the previous company:*

- was unable to pay its debts; and*
- may have been conducted in a manner so as to deprive unsecured creditors equal access to its assets; and*

*(b) there is a connection between the management or shareholding of the previous company and the subsequent company.”*

Many of you will know that in some circles it was almost standard operating procedure for the use of phoenix structures.

This has worked well. Why? With all professions there is a general rule that if there is no pay there is no work. Whilst many fail to see the sense in this the law is such that if there are no funds in a liquidation the liquidator only needs to comply with the most basic of investigations and reporting. So historically many unscrupulous directors, when they have seen the writing on the wall have gutted their companies of assets to keep themselves safe from unwanted investigation and resulting litigation.

As a result of this epidemic, ASIC introduced the Assetless Administration Fund (“AAF”). It was originally an attempt to close the regulatory gap and try to deter phoenix activities. Since then it has continued to evolve in an effort to ensure that officers of companies act in a proper manner and that unscrupulous directors are dealt with appropriately and banned from management for extended periods.

To prop up the scheme, the Federal Government has allocated \$23 million over the next 4 years to fund the investigations and their resulting prosecutions.

The AAF finances preliminary investigations and reports by liquidators into the failure of companies where it appears that enforcement action may result from the investigations and report.

Since its inception in 2005, ASIC have approved 164 applications, which has resulted in 30 directors being banned for a total of 107 years with a further 56 banning matters in progress.

In addition, 10 other applications have been approved, at around \$72,500 per application, for liquidators to conduct further investigations and report on potential breaches of the *Corporations Act, 2001*. These applications have been approved on the basis that ASIC believe that it is likely that these proceedings will result in civil and criminal prosecutions.

By utilising the AAF, ASIC successfully banned 15 directors in 2006. However, to show how seriously ASIC view phoenix activities they were also successful in banning a further 25 directors without the need to delve into the AAF.

As a result of ASIC’s crackdown the 40 directors were banned for a total 144 years.

This we believe is only the tip of the iceberg and is cold comfort for creditors who really only want their cash back. One can only hope that with more convictions and adequate publicity of successes, that sufficient pressure will mount on company officers to behave themselves.



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