Provisions to combat illegal phoenixing by company directors now in force

By Brett Marshall

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The bill to combat illegal phoenix activity received Royal Assent on 17 February 2020. The bill represents significant changes to company director accountability, which will be rolled out progressively over time.

What is phoenix activity?

Phoenix activity is the practice of stripping assets out of a company into a “clean” entity in an attempt to defeat creditors, including tax obligations. The Federal Government estimates that this activity costs the Australian economy up to $5.13bn each year!

Why have these provisions been introduced?

The provisions aim to crack down on fraud and other crime in the economy which affect a wide group of stakeholders including employees, contractors, and statutory government bodies. The main areas targeted by the now enacted bill include; creditor-defeating transactions, accountability of resigning directors, making directors personally liable for GST and other taxes, being able to collect estimated taxes, and the retention of tax refunds.

What are the changes introduced?

Applicable now:

- The prohibition of a creditor-defeating disposition (transfer of company assets for less than market value) made when the company is insolvent or, if as a result of the disposition the company becomes solvent within the following 12 months. Both civil and criminal penalties are also now applicable where directors fail to prevent a company from making a creditor-defeating disposition;
- The ability for a transaction to be deemed voidable if it is a creditor-defeating disposition made when the company is insolvent and the ability of liquidators to apply to a court for an order in relation to the same.
- Granting of specific powers to ASIC enabling orders to recover for the benefit of a company’s creditors;
- Applicable from 1 April 2020:
- The Commissioner of Taxation (Commissioner) will have the ability to collect amounts to cover estimated company tax liabilities including GST, Luxury Car Tax (LCT) and Wine Equalisation Tax (WET).
- The Commissioner will be able to enforce penalties upon company directors to collect outstanding company tax liabilities, including GST, LCT and WET, including making them personally liable in some circumstances.
- The Commissioner will also have the ability to retain a refund owing to a taxpayer that has other outstanding lodgements, or information that has not been provided to the Commissioner.
- The above changes will be reviewed after 5 years.
- Applicable from 17 February 2021:
- The inability of a director to resign outside of the 28-day ASIC reporting timeframe, i.e. directors can no longer back-date a resignation.
- The inability of a director to resign from a company or to be removed by a resolution of members of a proprietary company, if it would leave a company without a director

(excluding wind-up situations).

What's next?

If you are seeking guidance about your obligations as a Director, or confirmation that your actions will not constitute phoenix activity, please contact one of our Partners for a confidential discussion.