



HUNTING THE PHOENIX: PROPOSED NEW WEAPONRY

On 13 February 2019 the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 was introduced into Parliament. Its aim is to combat “phoenixing”.

What is “phoenixing”?

Phoenixing is the transfer or taking of a business or assets from one company (old company) to another company. Sometimes the other company has the same directors or shareholders as the old company. It is illegal if that transfer or taking is done without paying full value for the business or assets; creditors are left behind in the old company, and the new company gets the assets for “free”.

There is no law which expressly provides that “*you must not phoenix*”. It is the interaction of a number of laws which prohibits illegal phoenixing.

The proposed amendments

The main proposed amendments are:

1. A new criminal offence for Company officers (e.g. directors) **and their advisers** if they are involved in ‘creditor defeating transactions’ (dispositions for less than market value and which prevent, hinder or significantly delay the making of property available to creditors in a winding up).
2. Power to ASIC to make orders regarding creditor defeating dispositions without the cost and delay of Court proceedings. This includes orders for the return of the property to the old company or payment of full value.



3. Extending the Director Penalty Notice (DPN) regime to GST, such that directors can become personally liable in some circumstances for a company's unpaid GST. At present, the DPN regime only applies to PAYG or SGC (Superannuation Guarantee Charge).
4. Introduction of Director Identifier Numbers. This is aimed at avoiding a situation where a director slightly changes their name when creating a new company, making it more difficult to identify phoenixing conduct.
5. Restricting related creditors' voting power at creditors meeting to the amounts they paid for an assignment of debt, rather than the full amount of the assigned debt. This amendment has already come into effect (7 December 2018). This might avoid the situation where phoenix operators buy debts in order to stack their own votes at creditors meetings and push their own agenda.

Observations

Most of the proposed amendments are welcome, but in order to be effective in reality:

1. Criminal prosecution may be a disincentive, but only if a “*full field*” approach is adopted, to prosecute smaller matters and not only large and high-profile matters. The *disincentive* will only exist if *everyone* knows there is a possibility of prosecution or real consequence, rather than taking calculated risks in favour of phoenixing.
2. ASIC's power to make orders without Court proceedings might increase the number of phoenixes attacked, but ASIC will need to be sufficiently funded in order to both consider applications and make such orders AND enforce the other proposed amendments. Perhaps ASIC should consider funding liquidators out of the Assetless Administration Fund for recovery actions and receive a percentage of the proceeds of successful recovery actions (litigation funding). That way, the Assetless Administration Fund might be self-perpetuating, and could serve a dual purpose; funding ASIC to bring prosecutions.
3. Increased personal liability for directors (e.g. DPN liability for GST) may be less of a disincentive to phoenixing, especially where a director may already be liable for SGC and PAYG and may have depleted their own assets to prop up the company's operations in the lead up to its collapse.
4. Consideration should be given to legislative protections *prior to or during* claims being made against phoenix operators, to protect against “secondary phoenixing” or “further phoenixing” (where a phoenix company being pursued on-transfers assets to yet another phoenix company). Perhaps charges/security interests could be created by



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virtue of ASIC's orders, akin to those which are created in personal insolvency by notices issued by the Official Receiver.

Against all of this it must be remembered that *valid and legal* methods of restructuring exist, which when done properly provide full value for creditors and preserve a business, employment, and contracts. Care must be taken to ensure that disincentives regarding illegal phoenixes do not inadvertently disincentivise valid attempts at restructuring.

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