
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

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INSOLVENCY UPDATE

Federal Government announces a crackdown on phoenix activity.

On 13 November 2009 the Assistant Treasurer, Senator Nick Sherry, released a package of new proposals in a bid to crack down on phoenix activity. Senator Sherry cited the marked increase in this type of activity, particularly in the small to medium sized business sectors.

Phoenix activity is considered to be where a company ceases operations one day and, like the mythical bird, the business rises from the ashes of the insolvent company leaving behind certain unpaid creditors, particularly the Australian Taxation Office, the Office of State Revenue, workers' compensation insurers and superannuation.

Given what many have seen as a relaxing of the debt collection process at the Australian Taxation Office, the amounts of unpaid taxes in insolvency matters have increased. The government estimates phoenix activity could be costing as much as \$600 million. However, anecdotal information amongst insolvency practitioners is that it could be much higher.

The package of reforms released included:

- re-instating the failure to remit offence in regard to PAYG withholding amounts;
 - expanding the role of director penalty notices to impose stricter liabilities on directors and to cover a broader range of taxes and to include the superannuation guarantee charge, for which directors will be liable. Under the existing laws directors only face a liability for PAYG withholding and not for company income tax, goods and services tax or the superannuation guarantee charge;
 - removing the ability of directors engaged in phoenix activity to avoid personal liability for tax liabilities;
 - extending the promoter penalty regime to phoenix activity;
 - restricting use of a similar name or trading style by a successor company and making directors personally liable for the debts of a liquidated company where the new company has a same or similar name;
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- allowing the corporate veil to be lifted, where a company fails to provide a subsidiary with sufficient capital;
- expanding the Australian Securities and Investments Commission's powers to disqualify directors;
- ensuring the taxation law contains anti-avoidance provisions to cancel any benefits of phoenix activities;
- making it an offence for directors to claim in their personal tax returns PAYG withholdings that have not been remitted by their company to the Australian Taxation Office; and,

- providing the Australian Taxation Office with the discretion to require a company to provide a bond in relation to taxation liabilities, if it is expected that the company may not be able to pay its taxation liabilities.

Whilst these proposals were open for public comment until 15 January 2010, it is expected they will be adopted in some form. Advisors and their director clients must be aware of the potential widening of the net in relation to personal taxation liability. This announcement follows closely on the heels of *ASIC v Sommerville* where a solicitor was prosecuted for aiding and abetting a company and its directors to breach the *Corporations Act*.

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