

# News with Clout

Providing Restructuring, Insolvency & Turnaround Solutions

## **COMBATING ILLEGAL PHOENIX BILL PASSES / DIRECTORS PERSONAL LIABILITY EXTENDED TO INCLUDE GST**

The Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2019 has just passed both houses of Parliament. This legislation is a major step forward in combatting illegal phoenix operations.

According to a report prepared for the Phoenix Taskforce by PricewaterhouseCoopers, the estimated direct cost in 2015/2016 to businesses, employees and Government of potential illegal phoenix activity was between \$2.85 billion and \$5.13 billion.

The legislation is scheduled to take effect from the beginning of the first quarter after receiving Royal Assent which is expected to be from 1 April 2020.

The key measures implemented by this legislation can be summarised as follows:

1. The Director Penalty Notice ("DPN") regime is now extended to include GST along with Wine Equalisation Tax and Luxury Car Tax. As you will be aware, prior to the passing of this legislation, the DPN regime only allowed for directors to become personally liable for outstanding PAYGW and SGC.

The DPN regime will continue to operate in the same way. There are two types of DPNs that can be issued on directors.

- a. Non-lockdown is a DPN issued when a return is lodged within three months but the PAYGW and SGC remains unpaid.

To avoid personal liability, the director has 21 days to either:

- i. Pay the outstanding amounts; or
- ii. Place the company in either voluntary administration or liquidation.

- b. Lockdown is a DPN issued when no return has been lodged within three months of the due date and failed to pay the PAYGW and SGC amounts.

The director becomes automatically personally liable in this situation.

Importantly, the three months from due date rules does not apply to superannuation. Instead SGC amounts

must be reported by their due date i.e. within 28 days of the end of each quarter to avoid personal liability.

The legislation does not allow any grace period with the Commissioner of Taxation being entitled to declare a GST liability estimate from commencement (i.e. 1 April 2020). This would then give the director 21 days to ensure that any outstanding amount is dealt with to avoid personal liability.

2. The Commissioner of Taxation is authorised to withhold any tax refunds in the event that the taxpayer has failed to comply with their statutory lodgements and reporting obligations.
3. Introduction of new criminal offences and civil penalty provisions for company officers that fail to prevent the company from making creditor-defeating dispositions i.e. transfers of company assets that prevent, hinder or significantly delay creditors' access to the company's assets in liquidation.

Liquidators will now be entitled to apply for a Court order to recover assets or other consideration in relation to voidable creditor-defeating dispositions.

In addition, liquidators will also be entitled to recover compensation from a company's officer and other persons responsible for a company making a creditor-defeating disposition.

ASIC will now be entitled to make orders to recover, for the benefit of the company's creditors, company property disposed of or benefits received under voidable creditor-defeating dispositions.

It must be noted that specific safeguards have been inserted into the legislation to ensure that legitimate business and commercial transactions are unaffected.

4. Directors will now be prohibited from improperly backdating resignations or ceasing to be a director when this would leave the company with no directors.

Overall, it is our opinion that despite these measures being well overdue and still needing some work, this is a significant and positive step forward.



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