GREENGATE ADVISORY
Restructuring & Solvency Accountants

INDEPENDENT.
CONCISE.
EFFICIENT.

The Insider – Industry Expertise

Directors Beware - New Phoenixing Legislation Extends Personal Liability for Company Directors to unpaid GST

27 February 2020

RESTRUCTURING INSOLVENCY ADVISORY DISPUTE RESOLUTION

On 5 February 2020, the Treasury Law Amendment (Combating Illegal Phoenixing) Bill 2019 ('**the Bill**') become effective. The Bill focuses on stamping out phoenixing activities that costs the Australian Economy anywhere between $2.85 billion to $5.13 billion per year according to *The Economic Impacts of Potential Illegal Phoenix Activity Report.*

What is Illegal Phoenixing?

There is no legal definition for the term "phoenixing or phoenix" in legislation and there are no laws explicitly stating that you must not engage in phoenix activities but it is the interaction of a number of laws which prohibits illegal phoenixing. New laws have recently been passed that will assist with deterring the cash economy from using phoenix companies and under reporting taxes that are due and payable.

Broadly speaking, "phoenixing" is the transfer or taking of a business and/or its assets from one company (old company) to another company. It is illegal if that transfer or taking of the asset is completed without paying market value for the business and/or its assets and avoiding payment of its debts including taxes, trade creditors and employees. These debts are left behind in the old company and the new company receives the assets effectively for no consideration/free. From 5 February 2020, new laws have been introduced to combat phoenix activities. The new laws and their effects are summarised below.

Item 1 – Extend Director Penalty Notices (DPN) to GST

The Senate has passed the Bill, with Royal Assent, to make Directors **personally** liable for unpaid PAYG, **GST, WET, LCT** and superannuation within 21 days after the DPN is issued.

The "lockdown provision" also extends to GST. A company director can automatically become personally liability for GST if it not reported and unpaid from three (3) months after the due date. The application of this new provision is not retrospective and will become effective from 1 April 2020.

Also, the Commissioner can retain tax refunds where a taxpayer has failed to lodge a return or provide other information that may affect the amount the Commissioner refunds. This ensures that taxpayers satisfy their tax obligations and pay outstanding amounts of tax before being entitled to a tax refund.

Item 2 – New powers of Australian Securities & Investments Commissions ('ASIC') and Liquidators to recover creditor-defeating dispositions

The Bill provides new powers to ASIC and the Liquidator to combat "creditor-defeating dispositions". This means disposition of property/assets of the company that:

- Are for less than market value (or the best price reasonably obtainable); and
- Have the effect of preventing, hindering or significantly delaying property/assets becoming available to meet the demands of the company's creditors in a winding-up.

The disposition of property needs to have been made when the company was insolvent (or became insolvent as a result of the disposition) or 12 months prior to the company entering administration or liquidation. ASIC can apply these powers under its own initiative or following an application made by a liquidator.

ASIC Powers Extended

Under the Bill, ASIC now has the powers to make an order that:

- returns the property to the company for distribution to its creditors;
- pay an amount equal to the benefit received from the "creditor-defeating disposition"; or
- transfer any subsequent property that was purchased with the proceeds of sale of a "creditor-defeating disposition".

Consequences being involved with a creditor-defeating disposition

The Bill creates new criminal offences and civil penalty provisions for company officers that fail to prevent the company from making creditor-defeating dispositions and **other persons (including, lawyers, accountants, advisers)** that facilitate such conduct.

Item 3 – Making the directors accountable

Part 2D.3 of the *Corporation Act* will make it more difficult for directors to "backdate" their resignation and ceasing to be a director when this would leave the company with no directors. This will ensure that directors are held accountable for misconduct.

How can Greengate Advisory help?

We recommend that companies, directors and business advisers seek professional advice regarding risks to their clients' businesses during the early stages of financial distress.

Our team works together with you and your client to provide tailored solutions at a time of uncertainty. We can assist with determining options available to you and creating a practical solution for your circumstances.

Greengate Advisory **Insolvency | Restructuring | Dispute Resolution**

Experts **Patrick Loi | Andrew Jo | John Chand**

Level 4, 130 Pitt Street
Sydney NSW 2000

p. 1300 521 161 | e. info@ggadvisory.com.au