SMART INSOLVENCY SOLUTIONS

PHOENIXING COMPANIES

The tph Difference

The phoenixing of companies is an ongoing problem and challenge after an impacted company is placed into liquidation. If directors of companies engage in blatant asset transfer strategies for their own benefit (or they are assisted to do so by their advisors) we will take the approach that is expected under the corporations law, in particular the recent laws directed at phoenixing behavior.

If however, there have been steps taken that ultimately enhance creditors outcomes and preserve the legitimate business, **tph** will always look at those transactions in a logical fashion and avoid upsetting them. There are legitimate approaches that can be adopted prior to a liquidator being engaged. In many instances' creditors do not like the fact that a director has set up again with similar assets etc, however that does not automatically mean they have done it in a legally indefensible way (sometimes, there is a public interest argument, however they are rare).

Many business owners recognise that to maintain value in an asset, something must happen to it prior to liquidators getting involved as the Liquidation process can severely dampen the value of many business assets. **tph** look very pragmatically at these situations. For example, if a phoenix transaction has taken place but there are no funds to support a liquidator taking action to recover, then creditors will be canvassed for indemnification or litigation funders will be approached if the size of the potential claim is sufficient.

It is rare that **tph** would start an action without either creditor support/litigation funding or sufficient realised funds to support a claim. Regardless, the issue must be reported to the regulator who may take their own action under the new legislation.

Common Alternative Approaches adopted by Insolvency Firms

Recent amendments to the legislation have widened and strengthened the ability for Liquidators to seriously challenge genuine phoenix activity. ASIC now has a more involved role, and it is expected the insolvency industry will utilise the strengthening of the insolvency laws.

Liquidators will not attempt to upset pre-appointment asset transfers unless it is commercially sensible to do. **tph** adopts this approach as do many practitioners. That said, some liquidators will interpret an asset transfer situation quite narrowly and attempt to upset the transaction.

It is however a case-by-case situation and should a director have been party to a transfer of assets prior to a liquidation/ VA then it should be disclosed to the prospective practitioner to understand the hypothetical approach that practitioner will adopt in his/her review of said transaction.

This disclosure and subsequent discussion will assist the director in making his/her decision as to whether to appoint **tph**.

The tph Smart Solution

Creating a clear picture, understanding the facts and how that will ultimately impact the outcomes for directors and the creditors is a critical factor when a decision is made to appoint an insolvency firm. It is commonplace for directors to appoint firms without conducting the due diligence to ensure that all parties will achieve the best outcomes. There is a clear difference in how insolvency firms apply solutions, the solutions should be pragmatic, fair and impartial, that is the **tph** difference.

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