# Creditor-Defeating Dispositions and Some Implications: Illegal Phoenixing Amendments 2020 #3

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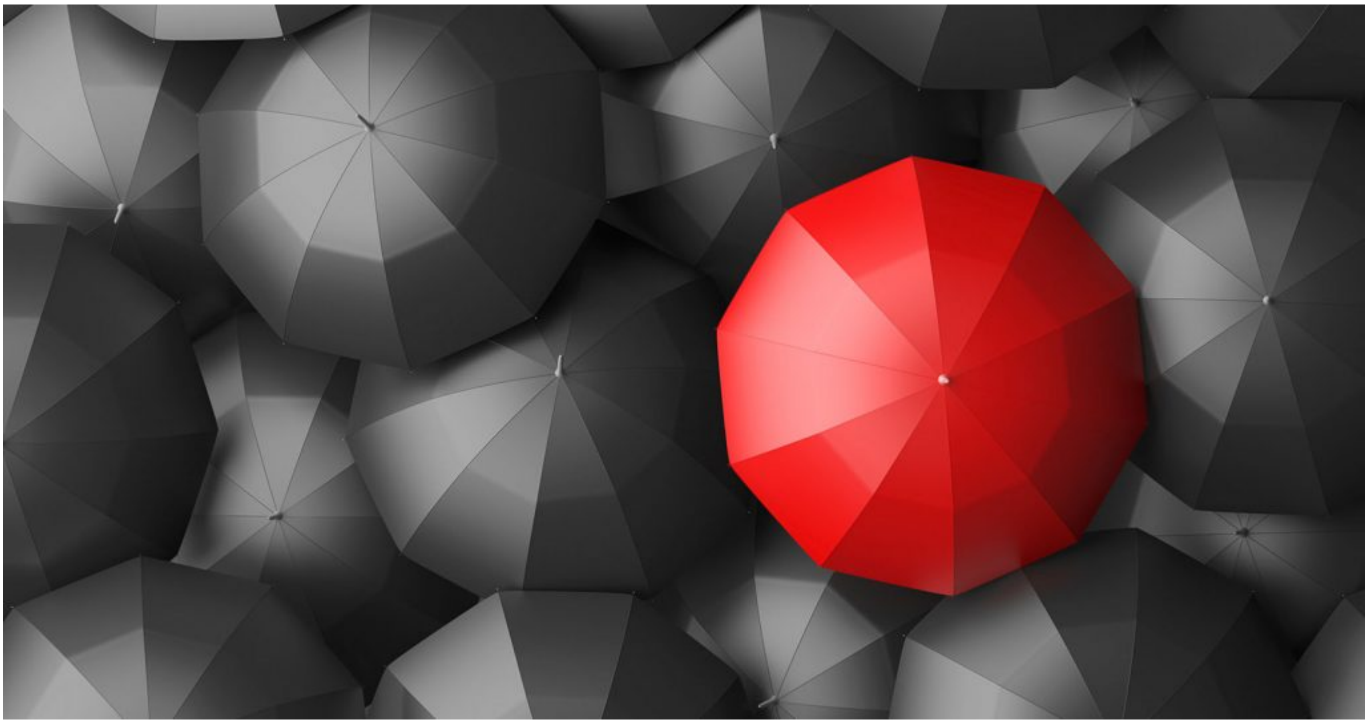

By Andrew Hack, Solicitor, and Stephen Mullette, Principal, of Matthews Folbigg Lawyers, in our Insolvency, Restructuring and Debt Recovery Group.

In this series of blogs we are looking at amendments to the Corporations Act arising from the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) which came into effect as of 18 February 2020. The amendments introduce a new concept, called a "creditor-defeating disposition". This is a transfer of assets for less than the best price obtainable, which hinders assets from being available in the winding up of the company, and where either (according to section 588FE(6B)):

- The company was (or as a result of which it became), insolvent and the transaction occurred (or was given effect to) within 12 months of the relation-back day (a technical term under the Act) before the company was wound up; or
- The company entered external administration within 12 months after the transaction was entered into, **or** an act was done giving effect to the transaction.

As mentioned in our last blog, there are two significant matters arising from this provision.

The first is that the section will not only capture a transfer of a business (for example) if the transfer occurred within 12 months of the company being wound up (and if the company was insolvent at the time). It will also capture a transfer from well before 12 months, if an act was done to give effect to the transaction within that period. So for instance if a business was transferred 2 years before a company was being wound up, but a vehicle was missed, and only transferred in the 12 months when the company was insolvent, then the whole transaction would be susceptible to challenge as a creditor-defeating disposition. Advisers need to ensure that transactions are fully effectuated to avoid this outcome.

The second issue is that if a company enters into external administration within 12 months, it **does not matter** whether the company was solvent at the time the transaction was entered into (or given effect to). Unlike a number of other voidable transactions, the liquidator need not prove the company was insolvent if it entered external administration within 12 months of the transaction (or of an act in support of giving effect to the transaction).

Click here to access the previous blog in this series.

In our next blog, we will discuss the implications the new legislation will have on third party facilitators and pre-insolvency advisers, as well as the implications it may have for innocent external advisers such as accountants, legal practitioners and insolvency practitioners.

If you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact Andrew Hack at andrewh@matthewsfolbigg.com.au or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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