Third Party Facilitators and Pre-Insolvency Advisers: Illegal Phoenixing Amendments 2020 #4

Date : April 29, 2020

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

In our last blog we discussed some of the implications of the new legislation designed to prevent 'creditor-defeating dispositions'.

In addition to it being it being a voidable transaction, the new legislation puts a duty on the company's director to prevent the company from entering into a creditor-defeating disposition. Section 588GAB of the *Corporations Act 2001* (Cth) creates a personal liability on directors for damages and pecuniary fines, as well as being a criminal offence. In respect of pre-insolvency advisers, section 588GAC is a similar provision applying to any third party who 'procures, incites, induces or encourages' a company to make a creditor-defeating disposition of property. The explanatory memorandum states:

"The purpose of this prohibition is to address the actions of unscrupulous facilitators and pre-insolvency advisers, and other entities that, while not formally responsible for the management of a particular company, are responsible for designing and implementing illegal phoenix schemes."

This will provide another avenue for liquidators to recover funds or assets for the benefit of creditors through the use of compensation orders. No doubt, liquidators will look to

compensation orders where the voidable transaction provisions cannot be utilised because the property has been dissipated or put too far out of reach.

The list of potential targets could be quite broad. This will almost certainly have implications for a variety of external advisers, including accountants, legal practitioners and even insolvency practitioners, who are advising companies in financial difficulty. It is often perfectly reasonable, even a necessity, to advise a company to sell off its assets (sometimes whole businesses) in order to generate cash flow or pay creditors. It can be difficult for the company to do this quickly while attempting to realise assets at full market value while under time constraints.

This necessity has been foreshadowed in the amendments which broaden the scope of the ‘market value’ concept to include the ‘best price reasonably obtainable’, which takes into consideration any time constraints to generate urgent cash-flow.

It would seem important now more than ever that, for the company’s legitimate external advisers, they have appropriate processes to ensure compliance. They would be well advised to make thorough records of their advice, recording all of the relevant considerations towards entering into the transaction, particularly including any evidence obtained as to the market value of the property disposed of.

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:

Jeffrey Brown on (02) 9806 7446 or jeffreyb@matthewsfolbigg.com.au

Stephen Mullette on (02) 9806 7459 or stephenm@matthewsfolbigg.com.au.