

ACCOUNTANTS SEMINAR

Outline

1. Introduction (from 3pm)
2. Asset protection and the role of the Accountant/Advisor (Geoffrey McDonald/Gavin Parsons);
3. What are the risks for directors and advisors of "safe harbour"? (Dan Rappaport);
4. In what circumstances can a director avoid liability for insolvent trading? (Dan Rappaport);
5. Third Party Liability under the Fair Work Act? (Ryan Owens);
6. 'Casual employee entitlements' & 'Unfair Dismissal and Facebook' (Ryan Owens);
7. Proposed Phoenix company laws and liability of Accountants and Liquidators (Geoffrey McDonald);
8. Insolvency laws affecting Accountants: quick tips (Geoffrey McDonald) (until 5pm); and
9. General Discussion session (until 6pm).

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Geoffrey McDonald Barrister

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Gavin is the Managing Director of the firm and immediately prior to opening his own law firm in April 2014, Gavin refined his legal skills as a Senior Associate at a medium-sized law firm based in the Sydney CBD.

Dan joined the practice in July 2016 as an accomplished and experienced solicitor. He was admitted in 2010 and went on to complete a Masters in Commercial Law in 2013 with a distinction average.

Ryan joined Gavin Parsons and Associates in July 2018. He was admitted in 2013 and has since gained substantial experience in a wide range of matters including civil and commercial litigation, employment law and estate and succession planning.

Geoffrey has been admitted as an accountant since 1986 and a Barrister since 1996.

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1. Asset protection and the role of the Accountant/Advisor

What is "asset protection"?

[14] About the same time, Mr Schultz's accountant advised that 50 Kawanna Street should be transferred into Mrs Schultz's name only. The purpose was "asset protection", presumably meaning that if the property were held in Mrs Schultz's name it might be protected from Mr Schultz's separate creditors.

Schultz v Bank of Queensland Ltd [2014] QSC 305 (12 December 2014)

Not Estate Planning, nor Family Law

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1. Asset protection and the role of the Accountant/Advisor

140. Cummins is authority for the proposition that, in s 12(1), the term "creditors" encompasses future creditors and is not confined to those persons who, at the time of the relevant disposition, had claims susceptible to proof pursuant to s 82 of the Bankruptcy Act. The relevant debt need not be due and owing as at that date. It is sufficient if it is "impending".

Donnelly (Trustee) v Windoval Pty Limited (Trustee) In the Matter of Donnelly (Trustee) [2014] FCA 80 (14 February 2014)

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1. Asset protection and the role of the Accountant/Advisor

<http://epalaw.com.au/people.php>

Question to Gavin:

There are some basic rules about "asset protection". What are they?

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1. Asset protection and the role of the Accountant/Advisor

Basic rules about "asset protection"

2. There is the balance between control and ownership, which is why the standard practice is to have a family trust (no ownership by any individual) controlled by a sole director trustee company who is the "appointor" (and has full control).

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1. Asset protection and the role of the Accountant/Advisor

Basic rules about "asset protection"

1. There is a best time to protect assets (at the beginning) and a worst time (towards the end, when being pursued by creditors and/or being sued).

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1. Asset protection and the role of the Accountant/Advisor

Basic rules about "asset protection"

3. There is a balance between risk taking and asset owning; which is why the standard practice is to have an asset owning entity (including IP) which takes no risks and has a charge/security interest over the assets of the other companies in the group, separate to a trading entity, which is separate to the staff employment entity (caution: ~~rules re~~ Payroll tax grouping and holding company insolvent trading liability)

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Basic rules about "asset protection"

4. There is a balance between costs or taxes (stamp duty, land tax, GCT) and the probability of losing any assets or prioritising which assets are to be protected (e.g. the family home), which is why some clients chose to protect the family home and core business assets first, (knowing that the Bank will take the rest of the assets, on any failure, anyway).

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1. Asset protection and the role of the Accountant/Advisor

Basic rules about "asset protection"

5. Is it ever too late to protect assets?
(there is a balance between taking steps which are criminal or which will result in a 8 year bankruptcy or back dating documents (none of which should be done) (s121 BA, 37A Conveyancing Act, 149D(1)(aa) BA), vs paying or providing security to a legitimate creditor more than 6 months before any bankruptcy (s122).

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1. Asset protection and the role of the Accountant/Advisor

What type of documents are often needed?

- i. Real Property Call Option;
- ii. Deed of Guarantee with Charge over Property;
- iii. Deed of Release for Debtor and Creditor;
- iv. Deed of Transfer;
- v. Loan Agreement with Charging Clause;
- vi. Security Deed;
- vii. Declaration of Ownership;
- viii. Deed of Cross Guarantee and Loan;
- ix. Deed of Gift

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1. Asset protection and the role of the Accountant/Advisor

Another type of Asset Protection:

Proprietary Limited company vs sole trader or partnership

Limited exposure of a director:

- Guarantee
- Taxation Laws
- Insolvent trading
- Industry specific

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Dan Rappoport

<http://epalaw.com.au/people.php#daniel>

3. What are the risks for directors and advisors of "safe harbour"? (see paper)

Australian Restructuring Insolvency and Turnaround Association (ARITA)

"As we have previously highlighted, safe harbour is not a 'state' or 'status' that a company enters. It is a set of actions which may offer protection to directors from insolvent trading liabilities in the event the company ends up in liquidation."

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Ryan Owens

<http://epalaw.com.au/people.php#ryan>

5. Third Party Liability under the Fair Work Act?; (see paper) 6. 'Casual employee entitlements' & 'Unfair Dismissal and Facebook' (Ryan Owens); (see paper)

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Dan Rappoport

<http://epalaw.com.au/people.php#daniel>

4. In what circumstances can a director avoid liability for insolvent trading? (see paper on a recent peculiar case and published at <http://www.gavmparsonsandassociates.com.au/blog.php?pid=129>)

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7. Proposed Phoenix company laws and liability of Accountants and Liquidators

- Bipartisan political support
- Tax office empirical evidence: labour hire, phoenix and common accountants
- ATO action v liquidators for role in Phoenix companies
- ATO raid on pre-insolvency advisors for role in Phoenix companies
- Difficulties with legitimate Phoenix activity
- Treasury draft legislation: "Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018"

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7. Proposed Phoenix company laws and liability of Accountants and Liquidators

(The Hon Kelly O'Dwyer, Minister for Revenue and Financial Services)

Create new phoenix offences to target those who engage in and facilitate illegal phoenix transactions;

- o It will now be an offence for company directors to engage in creditor defeating transfers of company assets that prevent, hinder or significantly delay creditors' access to those assets.

- o Pre-insolvency advisers and other facilitators of illegal phoenix activities will also be on the hook, with a separate offence for any person who procures, incites, induces or encourages a company to make creditor defeating transfers of company assets.

- o These will be both criminal and civil offences, attaching the highest penalties available under the law.

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7. Proposed Phoenix company laws and liability of Accountants and Liquidators

- Prevent directors from backdating their resignations to avoid personal liability;

- Prevent sole directors from resigning and leaving a company as an empty corporate shell with no directors.

- Restrict the voting rights of related creditors of the phoenix company at meetings regarding the appointment or removal and replacement of a liquidator;

- Make directors personally liable for GST liabilities, as part of extended director penalty provisions

- Extend the ATO's existing power to retain refunds where there are outstanding tax lodgements.

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- The offences will be supported by an extension of the existing liquidator asset clawback avenues to cover illegal phoenix transactions.

- ASIC will also receive a new regulatory tool to recover property that has been transferred under an illegal phoenix transaction. This tool will be particularly important where a liquidator is complicit in or turning a blind eye to illegal phoenix activity. These supporting measures will assist with the quick and efficient recovery of property, for the benefit of all employees and creditors.

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"Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018"

and

"Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018".

and

Modernising Business Registers and Director Identification Numbers legislation

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7. Proposed Phoenix company laws and liability of Accountants and Liquidators

588FDB Creditor defeating disposition

(1) A disposition of property of a company is a creditor defeating disposition if the disposition has the effect of:

- (a) preventing the property from becoming available for the benefit of the company's creditors in the winding up of the company; or
- (b) hindering, or significantly delaying, the process of making the property available for the benefit of the company's creditors in the winding up of the company

In my opinion, the above definition would result in the proposed laws being applied to each and every sale of a company's business or assets, even *ipso facto* unrelated purchasers for fair value (assuming the vendor company was thereafter wound up). Further, there is no recognition of transactions which occur every day in the ordinary course of business.

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588GAB Procuring creditor defeating disposition

(1) A person must not engage in conduct of procuring, inciting, inducing or encouraging the making by a company of a disposition of property that results in the company making the disposition of the property, if...

- (iii) less than 12 months after the disposition, the start of an external administration (as defined in Schedule 2) of the company occurs as a direct or indirect result of the disposition; and
- (b) the disposition is a creditor defeating disposition.

Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1).

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(6B) The transaction is voidable if:

(a) it is a creditor defeating disposition of property of the company; and

(b) at least one of the following applies:

- (iii) less than 12 months after the transaction... the start of an external administration occurs as a direct or indirect result of the transaction or act; and
- (c) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done:

- (i) under a compromise or arrangement approved by a Court under section 411; or
- (ii) under a deed of company arrangement executed by the company; or
- (iii) by a liquidator of the company; or
- (iv) by a provisional liquidator of the company.

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For more information:

<https://treasury.gov.au/consultation/c2018-t313204/>

<https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/>

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8. Insolvency laws affecting Accountants' quick tips

- Registered Office
- Privileged and confidential documents
- Costs agreements
- Assistance from www.gpalaw.com.au

Gavin Parnis and Associates, Solicitors

Gaelle McDonald Benlier