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## September 2015 Phoenix Activity “A context but is it a crime?”

### Please Explain

There are three things that everyone knows about phoenix activity.

- There is no accepted definition of phoenix activity,
- There is no express phoenix offence,
- It allows people to fail at one business and start another one, minus the debts of the first.

Do all of these provide enough legitimate opportunities, or legislative loopholes depending on your perspective, to advise clients that phoenix activity is okay? **NO WRONG.**

It is accepted that a separate legal entity may provide investors and shareholders of a failed business protection from its debts; however, the corporate veil does not provide the directors of failed companies protection from the consequences of their own improper behavior.

Any actions of a failed company's director that are not in the best interest of the Company are a breach of their director duties for example the deliberate transfer of undervalued assets to a related company is one such breach and can see the directors exposed to a civil penalty or criminal prosecution (ie Max penalty 5 years imprisonment and \$340,000 fine).

In addition not only is the Director of the failed entity subject to the Liquidator and ASIC's scrutiny, the ATO lockdown provisions (ie DPN's) in respect to unremitted and unreported withholding taxes is also making it extremely difficult for directors to escape their obligations (P.S those notices are on the rise).

There are also Fair Work Act penalties associated where such actions see breaches to employee entitlements.

### Cross Agency Phoenix Watchlist

There has now been a task force set up between regulators to monitor phoenix activity with the ATO the host of the Cross Agency Phoenix Watchlist which began operation in January 2015.

In summary phoenix activity is wrong and the regulators are now armed and motivated to target this wrongful behaviour. Please ensure your clients don't cross this line.

**Please contact us any time to discuss and note as always we at Chamberlains SBR are more than welcome to review any matter with you or your clients regardless of how trivial it may appear.**

*Chamberlains SBR, Chartered Accountants - Specialises in Personal & Corporate  
Business Reconstruction & Insolvency*

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