



Principal Chris Chamberlain B.Bus., F.C.A.
Registered Liquidator & Official Liquidator
Registered Trustee in Bankruptcy
Mobile: 0412 931 178

Partner Steven Priest B.Bus.(Acc) C.A.
Registered Liquidator
Mobile: 0427 457 416

Manager Brett Dodson B.Bus.(Acc), ARITA
Mobile: 0417 691 356

Manager Graeme Brown ARITA.
Mobile: 0488 435 265

July 2014 Increased ASIC Director Targeting

Background

Section 533 (1) (a) (b) (c) (d) and (e) of the *Corporations Act 2001*, provides as follows;

Reports by liquidator

(1) *If it appears to the liquidator of a company, in the course of a winding up of the company, that;*

(a) *a past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or*

(b) *a person who has taken part in the formation, promotion, administration, management or winding up of the company;*

(i) *may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or*

(ii) *may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company; or*

(c) *the company may be unable to pay its unsecured creditors more than 50 cents in the dollar.*

A Liquidator must;

(d) *as soon as practicable, and in any event within 6 months, after it so appears to him or her, lodge a report in respect to the matter and state in the report whether he or she proposes to make an application for an examination or order under section 597; and*

(e) *give ASIC such information, and give to it such access to and facilities for inspecting and taking copies of any documents, as ASIC requires.*

Current Statutes

With all due respect under the current position ASIC in a majority of instances does not pursue breaches by Directors that are reported by Insolvency Practitioners which at times can be quite frustrating to stakeholders (ie: Creditors, etc) who consider the systems letting them down.

Recent Senate Enquires

As a result of a recent Senate Economics Committee inquiry into the performance of ASIC, a recommendation has been made for ASIC and The Australian Restructuring Insolvency Turnaround Association (and Accounting Profession) to develop a model that assists ASIC in identifying matters that require urgent attention and investigation.

It is accepted that in most corporate insolvency cases, offences may have been committed that are minimal and do not warrant the expending of limited resources however, in matters where we the Insolvency Practitioner recommend consideration to further investigation or prosecution there needs to be a follow up.

In summary there continues to be those few that are willing to test the system via phoenix activity and blatant insolvent trading, that the rest of the community need to have protection from.

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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CHAMBERLAIN'S S.B.R. OFFICES –

WAGGA WAGGA
Tel 02 69 383800
Fax 02 6921 5492
DX 5427
Email admin@chamberlainssbr.com.au

DUBBO
Tel 02 6884 1077
Fax 02 6884 1072
Email graeme@Chamberlainssbr.com.au

WANGARATTA
Tel 1300 887 687
Fax 1300 798 825
Email admin@chamberlainssbr.com.au

