
ATO – Ordering the Phoenix

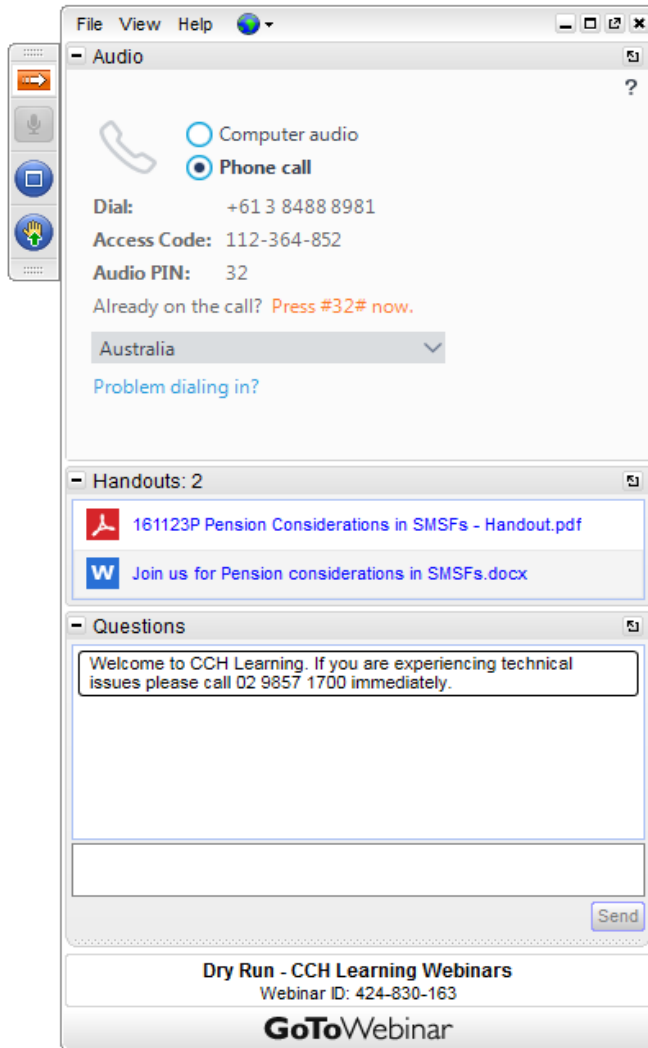
Bruce Collins

Tuesday 21 November 2023

 Wolters Kluwer



How to participate today



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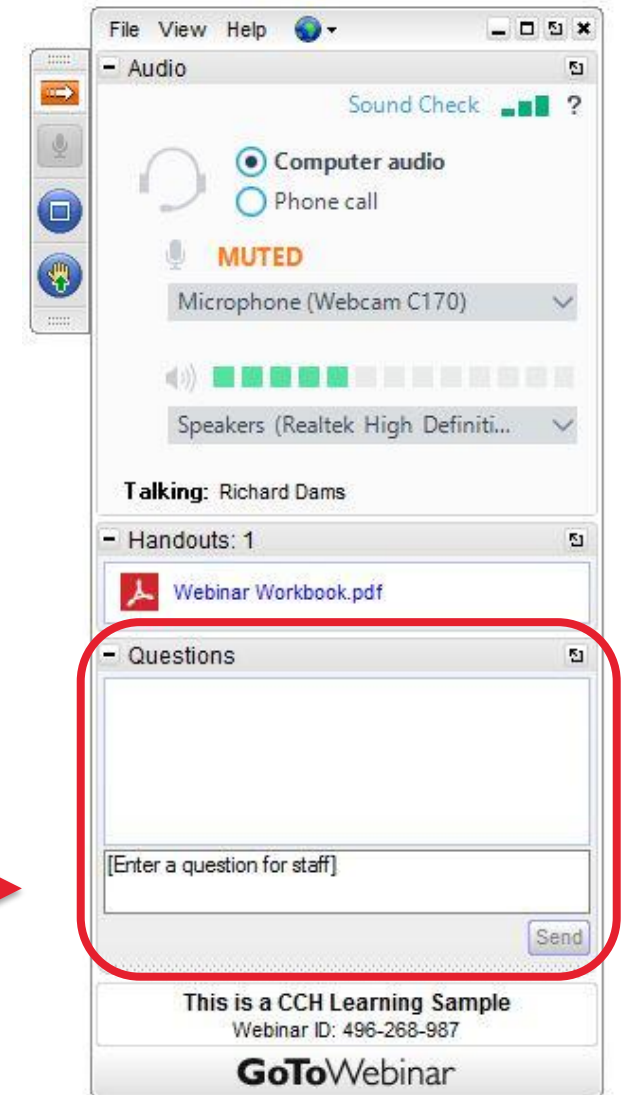
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Susannah Gynther
Moderator



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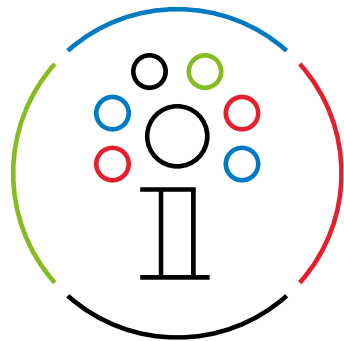
Your Presenter



Bruce Collins is the founder and principal solicitor at Tax Controversy Partners, currently helping clients to resolve all types of tax issues with the ATO and SROs. Before moving into private practice in 2017, Bruce worked for over 35 years in the Tax Office, a third of this time as a Senior Executive in what is now Client Engagement Group, covering most ATO functions. Bruce was the leader of the Technical & Case Leadership area in Private Wealth for several years prior to leaving the ATO, as well as having previously been the strategic and technical leader for many of the ATO's compliance programs. Bruce led the Secretariat for the Inter-Agency Phoenix Forum (co-chaired with ASIC) and was the Risk Owner for the ATO's Phoenix Risk and led the Phoenix Taskforce at the ATO from 2012 to 2015.

Bruce Collins
Founder and Principal Solicitor
Tax Controversy Partners

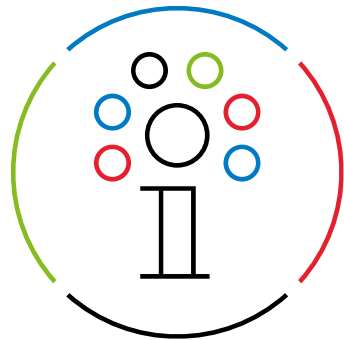
Today's session will cover



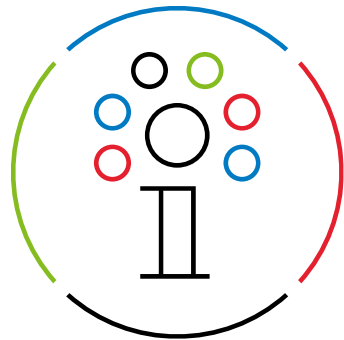
- What is meant by 'Phoenixing'
- Risk areas for the ATO (and other agencies)
- What constitutes illegal phoenix activity?
- ATO detection strategies
- Covert and tax crime audits
- Penalties for making a false statement
- Directors' liability in phoenix "schemes"
- Director penalty notices
- Introduction of DIN
- ATO media release

Who are you?

- a) Accountant or tax agent
- b) Lawyer
- c) Financial planner
- d) Student
- e) Other



Who are you?



- a) In private practice, and have had exposure to ATO compliance action on potential phoenix activity,
- b) In private practice, and have had no exposure to ATO compliance action on potential phoenix activity,
- c) In public practice
- d) Other

What is Illegal Phoenix Activity?

- In its 2023 Annual report, the ATO defined phoenix activity at pg 265 as ‘the systematic process of deliberately incorporating and liquidating operating companies with the intent of having the company avoid its obligations to its employees, to its suppliers, and to the tax system’.
- In a 2014 project between Melbourne Law School and Monash Business School, they identified five types of phoenix activity:
 1. Legal phoenix/business rescue
 2. Problematic phoenix
 3. Illegal type 1 phoenix: intention to avoid debts formed as company starts to fail
 4. Illegal type 2 phoenix: phoenix as a business model
 5. Complex illegal phoenix activity

Risk areas for the ATO

- The impact of illegal phoenix activity results in:
 - Employees missing out on wages, superannuation and other entitlements
 - Other businesses are at a competitive disadvantages
 - Suppliers/subcontractors are left unpaid
 - Community misses out on revenue that could have contributed to community services
- ATO's Phoenix Risk Model
 - Risk rates the population
 - Risk rating is designed to identify those that exhibit high risk and repetitive indicators
 - Based on data available to ATO regarding previous liquidations, outstanding returns and debt, other details of registered entities and information from other agencies such as ASIC and Department of Jobs and Small Business

Risk areas for other agencies

- The same sorts of issues play out for other regulators and revenue agencies, such as:
 - Law enforcement agencies – Many criminal organisations (including outlaw motorcycle gangs) evade regulatory and revenue obligations as part of their wider criminal enterprises
 - Corporate regulation by ASIC often sees directors evading their company law obligations and/or the facilitation of Phoenix conduct by registered liquidators or those in the nebulous ‘business turnaround’ market
 - State Revenue Offices – Payroll tax issues replicate the employer obligation issues for Federal taxes
 - Worker’s Compensation – Work safety agencies encounter similar problems with employment not being properly subjected to worker’s compensation insurance and/or failing to provide properly safe work environments
 - Virtually any area of regulation can see evidence of Phoenix operators probing at that part of the system – wherever there are benefits to be falsely obtained or detriments to be evaded

Inter-Agency Phoenix Forum

- Involves Australian Crime Commission, Australian Federal Police, ASIC, ATO, Clean Energy Regulator, Department of Education, Employment and Workplace Relations, Department of Sustainability, Environment, Water, Population and Communities, Fair Work Building & Construction, Fair Work Ombudsman and State and Territory revenue offices.
- 2 broad roles:
 - Intelligence advisory role
 - Strategic oversight advisory role
- In addition, maintains governance and relationships with other forums

Illegal Phoenix Activities

- This involves a company with debts being liquidated, wound up or abandoned and a new company then being set-up to carrying on the same business activities without the debts.
- Creditors (suppliers and subcontractors) do not get paid the debts owed to them, employees do not get paid their outstanding wages and superannuation entitlements and other loans from unsecured creditors are defaulted.
- It can be difficult to accurately define the difference between the actions that a director of a company that has become insolvent is required to undertake and those same actions being taken by a 'phoenix operator'. The general consensus is that the point of differentiation is around the prior intention to liquidate/deregister/abandon the company.
- The ATO is part of, and leads, the cross-government agency Phoenix Taskforce which was established to detect, deter or disrupt illegal phoenixing through sharing information and using sophisticated data matching tools to identify those engaging in these activities.
- It is VERY common for Phoenix operators to use 'dummy' or 'puppet' directors, while the true controller is a 'de facto' director working behind the scenes.

Legal phoenix-like activity

- Not all phoenix activity is **illegal** – legal phoenix activity is the situation where a similar business is started when the earlier entity fails, in order to rescue the business. Importantly, there is *no intention to exploit the rules*
- Characteristics of legal phoenix-like activity include:
 - Maintaining original company's assets
 - Maintaining employees including their entitlements
- **BUT** repeated resurrection can be problematic – especially where it may be used as a way to repeatedly avoid paying previous creditors (including the ATO)
- In an important sense, every company director is under a statutory duty to place a company which becomes insolvent into liquidation or administration – with no overt restriction on those directors (often shareholders) from then re-commencing business in a new company soon after, sometimes even re-acquiring assets or continuing employees from the previous company.
- As a result, the ability to do this is a central feature of the system of company regulation – with the only problem being when this feature is intentionally being exploited to the detriment of creditors, including the ATO.

ATO Detection Strategies

- The ATO has a range of detection strategies- increasingly involving sophisticated data-matching and data-analytics technologies, including access to:
 - Tax return and activity statement data
 - Property, other asset sales and purchases
 - ASIC
 - Motor vehicle data
 - Share transactions
 - Bank interest payments from financial institutions
 - Dividend payment reporting from Australian companies
 - Domestic and cross-border financial transaction data from AUSTRAC
 - Migration data from Department of Home Affairs
 - Foreign income and asset data obtained from Australia's network of treaty partner countries
 - Access to a wide range of other data from relevant agencies and law enforcement

ATO Detection Strategies

- Taskforces
 - The ATO is a member of several cross-government taskforces through which it can exchange information to detect and address various forms of 'tax crime'. These disclosures create special risks for the ATO's operations in some cases, given that there may be restrictions flowing from the legislative source under which the referring agency obtained the information.
- Law enforcement agency information-sharing
 - In addition, the ATO routinely receives specific information and data-sharing from various Australian law enforcement agencies to detect 'tax crime' and other non-compliance
- Compliance activities
 - The ATO conducts various types of reviews or audits, including covert audits to detect potential 'tax crime'. Compliance activities will extend to associates (business partners, family members and friends) of persons believed by the ATO to be involved in tax crimes. When a covert audit is undertaken, the taxpayer is almost always unaware until they receive a ATO position paper and/or an amended assessment.

Tax Crime Audit (including Phoenix audits)

- The ATO has an understandable tendency to form initial conclusions about the degree of the taxpayer's involvement (and sometimes the advisors) from the initial information – the internal view of the potential ‘tax crime’ risk.
- It can be difficult to shift the ATO’s perception away from the negative first impression.
- There are some fundamental constraints on *whether, what, when* and *how* to provide any such explanatory information:
 1. Whether the taxpayer/client may be involved in conduct similar to what the ATO is concerned with – ‘right to silence’, ‘privilege against self-incrimination’
 - Use of coercive powers to compel answers
 - Proceed with assessments
 - Rely on ATO information in any objection decision in absence of further probative evidence
 - Rely upon the statutory burden of the taxpayer the assessment excessive in any subsequent tax litigation

Tax Crime Audit (including Phoenix audits)

2. Whether any associates of the taxpayer may be affected by any evidence that may be available. Sometimes, taxpayers are reluctant to disclose such evidence if it tends to incriminate their family or close friends- even if it is helpful to their own interests.
3. There will be issues of how such facts/evidence may be evaluated by the ATO case team. There is *perhaps* and understandable tendency for the ATO to be suspicious of evidence from a suspect in such potential Phoenix cases – leading to rejection or overlooking of contrary evidence.

This often results in an over-focus by the ATO team on seeking corroboration if any/all evidence from suspected Phoenix taxpayers and sometimes even their advisors (who may themselves be suspected of facilitating Phoenix conduct).

While not a Phoenix case, the problem with getting independent third-party evidence of intra-group transactions was recognised in the *Melbourne Corporation of Australia Pty Ltd v Commissioner of Taxation* [2022] FCA 972

Use of 'firmer action' collection strategies on suspected Phoenix cases

- The ATO has a range of tools that may be used to pursue suspected Phoenix cases, including:
 - Garnishee notices
 - Director Penalty Notices
 - Legal collection processes – like Statutory Demands and Winding-Up Notices
 - Liquidation – including indemnifying liquidators to pursue investigations

Special collection powers of the Commissioners - Garnishees

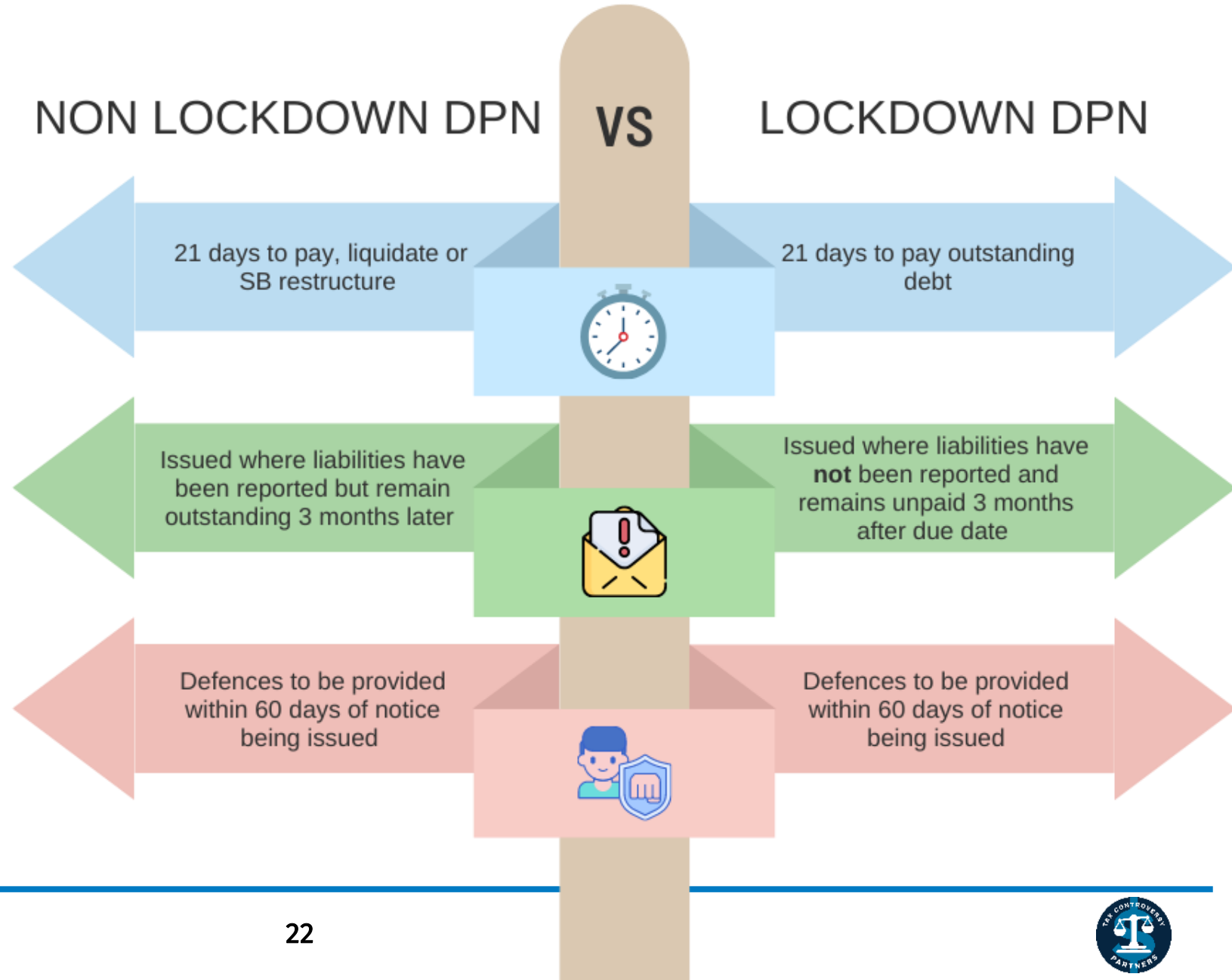
- Section 260-5 of *Schedule 1 of the Taxation Administration Act 1953 (TAA53)* gives the Commissioner the power to collect unpaid tax debts by serving a garnishee on an entity which includes, persons, financial institutions and trade debtors
- This is a statutory power, and the Commissioner does not need approval from a third-party or court
- A garnishee can be issued if there are reasonable grounds to believe that the person:
 - a) Is an entity by whom the money is due or accruing to the debtor or
 - b) Holds the money for or on account of the debtor; or
 - c) Holds the money on account of some other entity for payment to the debtor or
 - d) Has authority from some other entity to pay the money to the debtor
- A person who does not comply with a valid garnishee notice without a lawful excuse commits an offence and may be liable for a penalty of 20 penalty units (a penalty unit is \$222 - 1 July 2020)

Special collection powers of the Commissioner - Director Penalty Notices

- Division 269 of the *TAA53* gives the Commissioner the power to collect certain tax debts incurred by a company directly from the directors of a company by issuing a Director Penalty Notice (**DPN**)
- The notice requires the director to take certain actions or become personally liable for the company's tax debts
- The following company debts can be recovered personally from the director from a DPN:
 - Pay As You Go Withholding
 - Goods and Services Tax
 - Superannuation Guarantee
 - Wine Equalisation Tax
 - Luxury Car Tax
- A DPN can be issued to one or more current or previous directors for the same amounts. Such liabilities can therefore affect both the company and perhaps several individuals who are or were directors at relevant points in time

Types of DPNs

- The Commissioner can issue either/both types of DPN, dependant on the circumstances of non-compliance:
 - Non-lockdown DPN
 - Lockdown DPN



Legal collection processes & Liquidations

- From previous history, the ATO is statistically the largest petitioning creditor in the Australian debt collection system.
- Current indications are that the ATO has returned to pre-COVID-19 levels of debt collection litigation
- The impact of this for companies (including corporate trustees) is that the ATO is therefore quite likely to pursue debts via commencement of litigation, which for companies will involve issue of Statutory Demands and, if unpaid, Winding-Up.
- Taxpayers can oppose such Winding-Up where there is a ‘genuine dispute’ and can even apply for the ‘Setting Aside’ of a Statutory Demand after-the-fact where there is a sound basis for doing so.
- However, the ATO regards raising a dispute late-in-the-piece as being an indicator of a potentially frivolous delaying tactic – so they may choose to contest any such late dispute in the Federal Court proceedings
- It is therefore far better for taxpayers to oppose such liabilities as early as possible through relevant objections being prepared and pursued, leaving the ‘last minute’ channel for emergencies.

ATO indemnification of liquidator costs for investigations

- One of the things that may happen with higher frequency in suspected Phoenix cases is for the ATO provide funding for a liquidator to conduct investigations into the company's dealings with related parties through providing 'indemnification' to the liquidator of their costs
- Where this occurs, the Commissioner is in a sensitive position of being both a petitioning creditor and also indemnifying the liquidator for their activities. Some cases may involve risks of the Commissioner's staff improperly releasing protected information in such cases – requiring special care for practitioners whose clients may be affected.
- Where there are adverse reports of director conduct and/or related party dealings that may be challenged, the liquidator's report may result in referrals to ASIC and/or litigation on behalf of the company to pursue questionable dealings
- The following slides outline some of those adverse consequences ...

Other potential tax consequences for a Director

- Where a company commits a taxation offence (s8Y TAA53) it pierces the corporate veil:
... a person... who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.
- The *Crime (Taxation Offences) Act 1980* (Cth) (**CTOA80**) creates criminal offences for fraudulently evading a range of taxes administered by the ATO.
- Section 21B CTOA80 makes a director convicted under s8Y personally liable for the tax owed to the ATO.
- A director who breaches their duties by entering into a tax evasion scheme on behalf of the company may also be liable to compensate liquidators for the tax debt – see *BCS Finances Pty Ltd (in liq) v Binetter (No 4)* [2016] FCA 1351 (noting potential ‘claw backs’ on insolvency discussed later)

Insolvent trading and liquidation risks

- Section 588G of *Corporations Act 2001* states that it is a duty of a director to prevent the company from incurring debts if it is insolvent
- A director is required to ensure that the company can pay its debts
- A director can be personally liable for paying for company debts incurred when the company was trading insolvent. This overlaps with the DPN regime
- When a company is placed into liquidation, the relevant liquidator appointed is required to prepare a report for ASIC about their administration of the company's affairs and the result of their investigation of the conduct of the previous directors
- An adverse finding in such a report can be very damaging for the relevant director/s – both in terms of the liquidator pursuing claw-back transactions and also the potential for ASIC to consider disqualifying that director for the future

'Creditor-defeating disposition' issue

- A creditor-defeating disposition is a disposal of company property that prevents, hinders or significantly delays that property from becoming available for the benefit of creditors in the winding up of the company.
- ASIC or a Court may undo this disposition if it is considered a 'voidable transaction' under the s588FE(6B) of the *Corporations Act 2001*
- A liquidator may recover a voidable creditor-defeating disposition by:
 - Applying to a court for orders to void the disposition, or
 - Asking ASIC to make an order undoing the disposition
- See ASIC [Information Sheet 261](#)

Capacity to act as a Director in the future

- Where a director is made personally liable for relevant tax/super debts, such as via the penalty in a DPN, the ATO can initiate bankruptcy proceedings against the director
- If successful (and the director becomes bankrupt), then the consequences for the director include the director being automatically disqualified from acting as a director of any company for the period of the bankruptcy
- In addition, matters referred to ASIC for director misconduct may also result in the relevant director being disqualified from being a director.
- While such a disqualification may be challenged, the general trend in case law is that it is extremely difficult for such a challenge to succeed in practice

Introduction of Director Identification Numbers (DIN)

- To assist regulators and external administrators investigate involvement in unlawful Phoenix activity, a DIN system was introduced as part of what was the Modernising Business Registers program (now ceased)
- Legislative requirement for new and existing directors to obtain a DIN commenced on 4 April 2021
- The DIN is a unique identifier for each person who consents to being a company director
- The DIN system is intended to enable traceability of a director's involvement across companies, ensuring better tracking of directors of failed companies and preventing the use of fictitious identities

Case Study – Transport operator

- Coordinated Phoenix Taskforce action disrupted the business model of a road transport business with a long history of illegal phoenix behaviour. Working together, several Phoenix Taskforce member agencies issued simultaneous garnishees to trade debtors to collect a substantial amount of unpaid tax debt.
- As a result, the operator entered into payment arrangements with each agency, and has returned more than \$1 million to the community.
- The director was also issued with a series of director penalty notices for non-payment of employee entitlements, which could make him personally liable for any further dishonest behaviour.
- The taskforce action also prompted the operator's major fuel supplier to change its credit terms, limiting the supplier's risk of being impacted by further phoenix behaviour.

Source: <https://www.ato.gov.au/General/The-fight-against-tax-crime/News-and-results/Case-studies/Illegal-phoenix-case-studies/>

Case Study – Information sharing

- The arrest of a man suspected of running a phoenix operation in the property and construction industry led to the return of revenue to the community.
- During the man's arrest, police uncovered financial records and cash. Information sharing between Phoenix Taskforce members helped us confirm more than \$1.6 million in unpaid tax debts, and allowed police to seize the cash.

Source: <https://www.ato.gov.au/General/The-fight-against-tax-crime/News-and-results/Case-studies/Illegal-phoenix-case-studies/>

Case Study – Labour Hire syndicate

- A labour hire syndicate who used illegal phoenix behaviour to cyclically liquidate businesses has been ordered to pay back more than \$2 million.
- A tip-off from investigations into GST refunds exposed the phoenixing syndicate, who were regularly liquidating business entities after they had racked up significant debt.
- Investigations found more than 100 people were employed by the syndicate's businesses, none of whom were paid any superannuation while working for the companies. In total, over \$5.6 million in liabilities were raised. Not paying tax and superannuation debts gives illegal phoenix operators an unfair advantage over honest businesses that do the right thing.
- The group has now been brought back into the tax and superannuation system, and are now paying their employee's superannuation on time. They have payment arrangements in place to repay previous debts, with more than \$2 million repaid to date.

Source: <https://www.ato.gov.au/General/The-fight-against-tax-crime/News-and-results/Case-studies/Illegal-phoenix-case-studies/>

Case Study – Former property developer

- Collaboration between Phoenix Taskforce agencies resulted in a property developer losing his building licence and being disqualified as a company director. The property developer had liquidated entities six times in five years, leaving creditors, including business partners, with more than \$160 million in unpaid debts.
- The development group had been subjected to 46 previous ATO compliance activities and owed more than \$7 million in current and written-off debt to the ATO alone.
- The Supreme Court found the man, along with his wife and their associated entities, guilty of falsification of bank statements, appointment of shadow directors, and unauthorised withdrawal of funds.
- For their dishonest behaviour the taxpayer lost their NSW and Queensland building licences, and were ordered to pay over \$9.4 million. As a result, the taxpayer entered into bankruptcy, and was disqualified from being a company director.

Source: <https://www.ato.gov.au/General/The-fight-against-tax-crime/News-and-results/Case-studies/Illegal-phoenix-case-studies/>

Case Study – Liquidator

- Sydney-based Mr David Iannuzzi was disqualified from practising as a registered liquidator for a period of 10 years. The Federal Court found he had been systemically negligent in his responsibilities as liquidator over an extended period of time and across more than 23 companies.
- This case marked the first time the ATO initiated Federal Court proceedings using *Corporations Act 2001* provisions to seek orders against a liquidator.
- The Federal Court found that Mr Iannuzzi's:
 - ‘systemic conduct was certainly reckless; it fell very far short of the conduct that was to be expected of him; it demonstrates that he failed to observe the obligations of candour on him with regard to disclosing relevant circumstances to creditors; it reflects poorly on his character; and it demonstrates that he is not a fit and proper person to remain registered as a liquidator.’

Source: <https://www.ato.gov.au/General/The-fight-against-tax-crime/News-and-results/Case-studies/Illegal-phoenix-case-studies/>

ATO Media release

9 September 2021

[Cycle ends in jail time for illegal phoenix operators](#)

- 3 men were sentenced to jail for conspiring to defraud the Commonwealth of \$4,632,355
- The men established multiple labour hire companies to provide workers to vineyards, fruit and vegetable growers, and meat processers around South Australia and in Queensland
- The companies failed to remit both GST and PAYGw to the ATO, despite charging their clients GST and including figures supposedly withheld for PAYG on employee payslips
- Over a 25-month period, across all six entities, \$23,131,414 was withdrawn in cash by the three men

2023 ATO Annual Report

- In the Commissioner's overview, at pg II:

In addition to our Tax Avoidance Taskforce work, we continued to achieve valuable outcomes through our other funded taskforces, raising billion of dollar in tax. This includes the Serious Financial Crime Taskforce (\$139 million in cash collections); the Shadow Economy (\$1.4 billion in collections); and the joint-agency Phoenix Taskforce (\$108 million in cash collections).

- At pg 16:

The Phoenix Taskforce raised \$304 million in liabilities and \$108 million in cash collections. This taskforce is led by the ATO and unites the capabilities of key federal, state and territory agencies to share intelligence, exchange data and combat illegal phoenix activity. The task force's activities included letter and communication campaigns, engagement visits with company directors and targeted compliance activity with nearly 3,000 reviews and audits completed.

2023 ATO Annual Report

- At pg 12:

*The **Deliver innovative business registry services** key focus are sought to make it simpler for businesses to interact with government, strengthen the integrity of registry data and introduce the director identification number (director ID) regime.*

- At pg 101 on **Crime in the tax and superannuation system**:

We lead and participate in taskforces that provide a whole-of-government response to serious financial crime and related non-compliant behaviour that may undermine the integrity of our tax and superannuation systems. The ATO is the lead agency for the Serious Financial Crime, Phoenix and Shadow Economy (formerly Black Economy) taskforces and contributes to the outcomes of the Illicit Tobacco Taskforce by targeting, disrupting and dismantling organised crime syndicates that deal in illicit tobacco.

- Table 7.31 Requesting agency and ATO-initiated disclosures, 2022-23

Agencies	On hand 1 July 2022	New requests			Processed requests			On hand 30 June 2023
		External	ATO-initiated	Total new requests	Withdrawn	Rejected	Total requests disclosed	
Subsection 355-70(1)(Item 4) – Phoenix Taskforce								
Attorney-General’s Department	0	0	30	30	0	0	30	0
AUSTRAC	0	0	24	24	0	0	24	0
Australian Border Force	0	1	26	27	0	0	27	0
Australian Building and Construction Commission	0	0	11	11	0	0	11	0
Australian Competition & Consumer Commission	0	1	11	12	0	0	11	1
Australian Criminal Intelligence Commissioner	0	0	13	13	0	0	13	0
Australian Federal Police	0	0	13	13	0	0	13	0
Australian Finance Security Authority	0	0	16	16	1	0	15	0
Australian Securities & Investments Commission	0	26	49	75	0	0	75	0
Clean Energy Regulator	0	0	11	11	0	0	11	0
Consumer Affairs - Victoria	0	0	11	11	0	0	11	0
Department of Agriculture, Fisheries and Forestry	0	0	11	11	0	0	11	0
Department of Climate Change, Energy, the Environment and Water	0	5	0	5	3	0	2	0
Department of Employment and Workplace Relations	0	0	4	4	0	0	4	0
Department of Health	0	0	11	11	0	0	11	0
Department of Home Affairs	0	0	1	1	0	0	1	0
Department of Industry, Science and Resources	0	0	11	11	0	0	11	0

• Table 7.31 Requesting agency and ATO-initiated disclosures, 2022-23 cont.

Agencies	On hand 1 July 2022	New requests			Processed requests			On hand 30 June 2023
		External	ATO-initiated	Total new requests	Withdrawn	Rejected	Total requests disclosed	
Subsection 355-70(1)(Item 4) – Phoenix Taskforce								
Department of Mines, Industry Regulation and Safety - WA	0	0	11	11	0	0	11	0
Department of Treasury and Finance – South Australia	0	0	14	14	0	0	14	0
Environment Protection Authority - Victoria	0	0	11	11	0	0	11	0
Fairwork Ombudsman	0	0	25	25	0	0	25	0
Labour Hire Authority - Victoria	0	40	23	63	0	0	63	0
Labour Hire Licensing Queensland	0	2	1	3	0	0	3	0
NSW Fair Trading	0	2	11	13	1	0	11	1
NSW Long Service Corporation	0	0	11	11	0	0	11	0
NSW Police Force	0	0	13	13	0	0	13	0
Office of Industrial Relations - Queensland	2	6	19	25	0	0	27	0
Office of State Revenue – Australian Capital Territory	0	0	11	11	0	0	11	0
Office of State Revenue – New South Wales	0	1	14	15	0	0	14	1
Office of State Revenue – Northern Territory	0	0	11	11	0	0	11	0
Office of State Revenue - Queensland	0	1	20	21	0	0	21	0
Office of State Revenue – South Australia	0	0	5	5	0	0	5	0
Office of State Revenue - Tasmania	0	1	11	12	0	0	12	0
Office of State Revenue - Victoria	0	9	17	26	0	0	5	0

- Table 7.31 Requesting agency and ATO-initiated disclosures, 2022-23 cont.

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		External	ATO-initiated	Total new requests	Withdrawn	Rejected	Total requests disclosed	
Subsection 355-70(1)(Item 4) – Phoenix Taskforce								
Office of State Revenue – Western Australia	2	2	12	14	0	0	15	1
Queensland Building & Construction Commissioner	0	1	11	12	0	0	12	0
Return to Work SA	0	3	22	25	0	0	25	0
State Insurance Regulatory Authority - NSW	0	0	12	12	0	0	12	0
Treasury	0	0	3	3	0	0	3	0
Victoria Police	0	0	11	11	0	0	11	0
Victorian Building Authority	1	1	16	17	1	0	17	0
Victorian Legal Service Board + Commissioner	0	0	11	11	0	0	11	0
WorkCover Queensland	0	1	4	5	0	0	5	0
WorkCover WA	0	1	11	12	0	0	12	0
WorkSafe ACT	0	0	11	11	0	0	11	0
TOTAL	5	104	605	709	6	0	704	4

ATO Phoenix Taskforce results

- The ATO has publicly reported that up until 31 August 2023, the ATO has raised more than \$2.11 billion in liabilities from audits and reviews of illegal phoenix activities
- In 2022-23, the ATO:
 - Completed 2,967 audits and reviews
 - Collected more than \$107 million in cash, contributing to government spending on essential services
 - Received more than 2,500 referrals of suspected illegal phoenix activity through the Tax Integrity Centre
 - Banned or disqualified 5 directors from being involved in the management of a corporation
 - Shared 567 disclosures of information between agencies, helping identify those engaging in or promoting illegal phoenix activity

Parliamentary Committee report

- In 2015, the Parliamentary Committee into insolvencies in the construction industry made the following observations:
 - The Committee is concerned that the construction industry accounts for the second highest number of total alleged criminal and civil contraventions of the Corporations Act.
 - The Committee is particularly concerned at evidence that a culture has developed in sections of the industry in which some company directors consider compliance with the Corporations Act to be optional because the consequences of non-compliance are so mild and the likelihood that unlawful conduct will be prosecuted is so low.

Supporting your client through ATO Phoenix inquiries

- Encouraging a taxpayer to make a full disclosure of any problems as early as possible can be *very* helpful, even in more serious cases. The availability of shortfall penalty reductions may be attractive for making a voluntary disclosure, but it is important to remember that this won't absolutely protect against potential criminal liability – especially for matters involving suspected Phoenix conduct
- Providing a consistent and accurate contrary narrative through the engagement with the ATO case team can also be important – especially in explaining why/how insolvency may have arisen.
- If some errors in that narrative were made early in the piece, then correcting them clearly and explaining the reasons for the errors can also be important in trying to show the taxpayer's desire to comply, which again may decrease the likelihood of harsher collection actions.
- Challenging ATO access & information-gathering powers may also be appropriate in some cases, although those challenges tend to create their own impacts on the relationship with the ATO case team, especially if a Phoenix-risk audit, unless handled very carefully.
- Given the significance of the consequences, getting expert legal advice on such cases as early as possible is always highly advisable – both for the taxpayer and their advisors (mitigating risks of things subsequently going wrong – given the very serious potential consequences).

Questions

You can type them in the “Questions” box now
Or contact me via:



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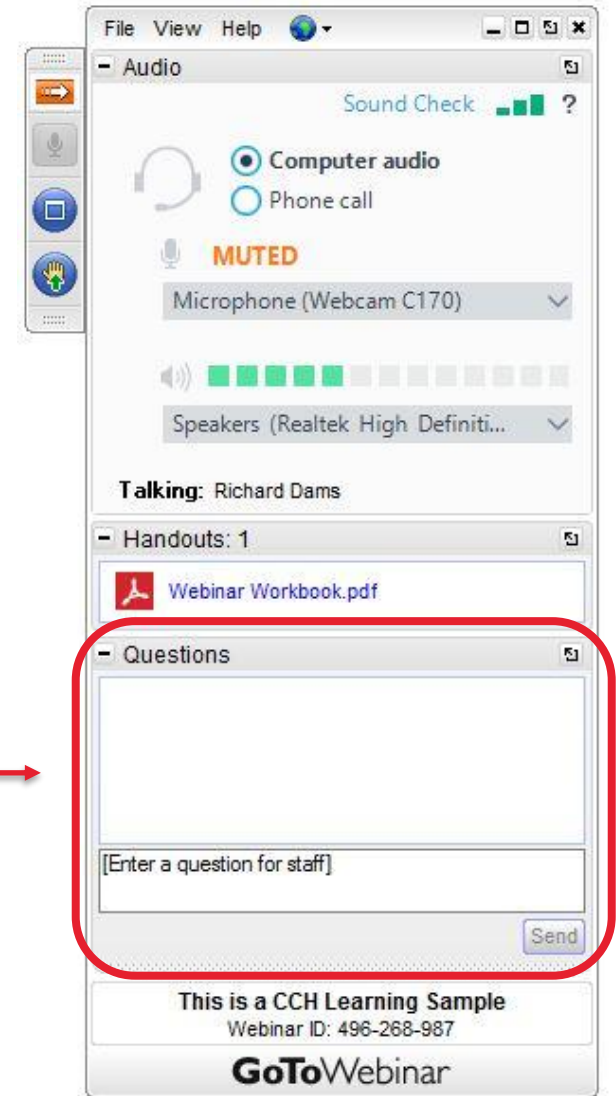
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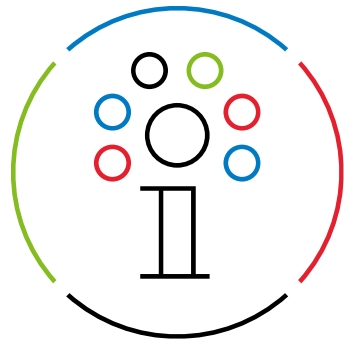
Susannah Gynther,
Moderator



Type your
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- 22 November – Division 7A Update
- 23 November – Legally Assisted Mediation and the Role of Lawyers
- 28 November – Preparing and Participating in Negotiations
- 28 November – Tax Technical Update – November 2023
- 29 November – Insights on the Managing of Termination of Employment

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