COMMERCIAL LITIGATION & INSOLVENCY

The Australian Government gets tough on "phoenixing"

The Australian Government has recently released a discussion paper as part of its' ongoing "anti-phoenix agenda," designed to combat illegal phoenixing. The discussion paper, *"Combatting Illegal Phoenixing"* lists potential amendments to the *Corporations Act 2001* (the Act) and tax laws. The aim is to deter and disrupt illegal phoenix activity, whilst minimising the impact on legitimate business restructuring.

What is phoenixing?

The term "phoenixing" may be unfamiliar. Let's look at a definition:

> "Illegal phoenix activity involves the intentional transfer of assets from an indebted company to a new company to avoid paying creditors, tax or employee entitlements.
>
> The directors leave the debts with the old company, often placing that company into administration or liquidation, leaving no assets to pay creditors.
>
> Meanwhile, a new company, often operated by the same directors and in the same industry as the old company, continues the business under a new structure. By engaging in this illegal practice, the directors avoid paying debts that are owed to creditors, employees and statutory bodies (e.g. the ATO).
>
> Illegal phoenix activity is a serious crime and may result in company officers (directors and secretaries) being imprisoned."

Source: Australian Securities and Investments Commission (ASIC) website.

What are the potential reforms?

The potential reforms are divided between those which will impact the entire framework and reforms for dealing with Higher Risk Entities (HREs). Let's look at each in turn:

PART 1 – Reforms impacting the entire framework

1 The establishment of a single phoenix hotline

This hotline will be accessible by telephone, smartphone, email and mail.

2 A new specific phoenix offence

The proposed new offence prohibits the transfer of property from Company A to Company B, "if the **main** purpose of the transfer was to prevent, hinder, or delay the process of that property becoming available for division amongst creditors" (Similar to s.121 *Bankruptcy Act*).

- The deemed 'main' purpose is if "it can be reasonably inferred from all of the circumstances that at the time of the transfer, the transferor was, or was about to become, insolvent".
- Rebuttable presumptions of insolvency apply.
- The right of creditors, liquidators and ASIC to sue for compensation for loss.

...continued on page 2

Expert advice. Practical solutions. Personal service.

McKEANPARK LAWYERS

...continued from page 1

- Extends liability to those engaged in the conduct and those knowingly involved (under s.79).
- Provides ASIC a right to issue a notice requiring delivery of the property or payment of value. Onus on recipient to apply to court to set aside. Avoid court recovery costs.

3 Existing Act breaches will be designated as phoenix offences
This may result in a director being deemed a "Higher Risk Entity" (See Part 2).

4 Impact on directorships, including appointments and resignations
- A potential new abandoning offence may be created.
- A failure to lodge an ASIC notice in 28 days will deem directors liable to the date of lodgement.
- Resignation of sole directors will be ineffective. This will limit the ability to resign only after replacement director(s) or company affairs are wound up.

5 A restriction on voting rights
External administrators will be required to disregard related creditor votes in relation to resolutions to remove or replace them.

6 Extension of promoter penalties
- Existing laws to deter "tax exploitation schemes" will be extended to include activities designed to avoid tax obligations.
- Extends liability to those involved in the design, marketing and implementation of the activity.

7 The Director Penalty Notice (DPN) regime will be extended
This will give the ATO a right to issue DPNs for unpaid GST liabilities (previously limited to unpaid CGT and SGC liabilities).

McKEANPARK LAWYERS

8 The ATO's right to recover unpaid security deposits will be enhanced
The ATO will be able to recover unpaid security deposits by issuing garnishee notices on third parties (previously only available to recover unpaid actual liabilities).

PART 2 – Dealing with Higher Risk Entities (HREs)

These reforms will target egregious phoenix operators. The focus will be on prevention and early intervention, rather than enforcement "after the event".

9 A 2-tiered approach to targeting HREs will be implemented

1st Tier: Designation as HRE
- An objective threshold test is proposed.
- An automatic HRE designation will be made if a previous disqualification exists from managing a corporation, being an officer of 2 or more companies in liquidation in last X number of years (*no. of years not yet determined), a failure to produce adequate books and records, or where a s.533(1) report has been lodged.

2nd Tier: Declaration as High-Risk Phoenix Operator (HRPO)
- This will be assessed on a case by case basis, with a right to review the decision.
- Where an individual is deemed an HRPO by the Commissioner of Taxation, there will be discretion to deem an associated company a HRPO as well.

10 Appointment of liquidators on a 'cab rank' basis for companies whose directors are HRPOs
- An independent panel liquidator will be appointed to provide options to HRPO directors on their financial position.
- Alternatively, a government liquidator will be appointed to streamline all SME administrations.
- This will require the allocation of industry funding for low or no-asset companies to enable investigation and reporting.

11 Removal of the 21-day DPN compliance period
This will result in immediate personal liability for HRPOs from the date of issue.

12 Power to not issue ATO refunds to HRPOs
Tax refunds will be withheld until overdue lodgements and notifications capable of affecting liability are received by the ATO.

As at the date of writing, submissions were due to close on 27 October 2017. If implemented, the reforms will have significant implications for directors, creditors, accountants, lawyers and other advisers of companies experiencing financial distress. If you have any queries or wish or to discuss the potential impacts, please contact our Litigation & Insolvency team.

Chantal Reigo, Partner
chantal.reigo@mckeanpark.com.au

STOP PRESS

One year Bankruptcy Bill introduced
A Bill to reduce the period of bankruptcy from three years to one year was introduced into Federal Parliament on 19 October 2017. As a part of the National Innovation Statement, this change hopes to strike a better balance between encouraging entrepreneurship and protecting creditors. This will have impacts for both bankrupts and creditors. Our Commercial Litigation & Insolvency team are available should you require advice in this area.

The meaning of "retail" continues to grow

Most agents and landlord clients assume that the words "retail" and "retail premises" apply to what could be described as a retail shop. These are premises where goods or services are sold to ordinary domestic or household consumers.

A new case redefines "retail"

However, following the decision of Justice Croft of the Supreme Court (confirmed by the Court of Appeal) in *CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd*, agents and landlords now need to very carefully consider whether the intended permitted use of their premises falls within the operation of the *Retail Leases Act 2003* (the Act).

The "ultimate consumer" test

The recent CB Cold Storage case and a growing body of case law confirms that the test for determining whether a particular supply is a retail supply is the "ultimate consumer test". That is, whether the goods or services are supplied to the ultimate consumer of those goods or services.

The Court noted that:

1. The goods or services can still be supplied on a retail basis if they are supplied business to business; and
2. Most (possibly all) services are retail.

The CB Cold Storage case

The CB Cold Storage case involved a gigantic warehouse with freezer storage capacity. The tenant held goods for various retailers in cold storage and arranged for delivery of batches of frozen products to those retailers, upon receipt of a delivery request.

The Court held that the logistical services offered by the tenant were retail services. This is on the basis that the ultimate consumers of those logistical services were the large retailers, who had their own frozen products stored at the premises.

What does this mean for agents and landlords?

Accordingly, the Act can apply to premises from which goods or services are supplied business to business. This is provided that those goods or services are supplied to the ultimate consumer of those goods or services.

This may apply to services supplied business to business, provided that the services are not on-supplied. It may also apply to goods that are supplied business to business, which are used as an input in the second person's business. As a result of the CB Cold Storage case, unless another statutory exclusion applies, warehousing and logistical businesses are likely to be treated as retail premises in the future.

What should you do?

There is likely to be a significant number of leases in the community that are regulated by the Act without the parties knowing. This may lead to a number of actions by tenants against landlords, where leases have been entered into with unintended consequences. If you are in any doubt, we advise that you contact our lawyers for clarification of your individual circumstances.

Stephen Roache, Partner
stephen.roache@mckeanpark.com.au

Crown land leases – look before you leap

Public land (more correctly Crown land) is leased by clubs, associations, individuals and corporations more frequently than most people realise. This occurs because Government and various committees of management cannot develop and operate all Crown land sites. Rental funds also assist in the development of sites the Government operates.

Who makes the rules?

The Department of Environment Land Water and Planning (DELWP) publishes papers outlining the policies to be adopted in Crown land leases. These papers also detail warnings to potential Crown land tenants as to what a lease of Crown land may require of them.

The governing legislation

The key legislation relating to commercial leases is the *Retail Leases Act 2003* (the Act). The Act is a relatively new scheme designed to enhance the certainty and fairness of retail leasing arrangements.

The Act outlines the dispute resolution mechanisms available on leases of retail premises. It also controls or prevents landlords from requiring a wide range of outlays from their tenant, in addition to the payment of commercial rent. This includes key money, lease premiums and acceptance of responsibility for all repairs. It outlawed unconscionable conduct by either party. The Act gave the Small Business Commission strong powers and made many other reforms.

The leasing of Crown land

In 2004, the Responsible Minister made a change to leases of Crown land. In short, these leases were exempted from the Act if they were for a term of at least 15 years and if they imposed "substantial financial obligations on the tenant".

This exemption enabled the "landlord" (i.e. the agency responsible for the Crown land) to revert to the previous law. Consequently, these lease conditions become far more onerous. If you have been leasing Crown land and request a renewal of your existing lease, the terms of a new lease may be substantially more onerous than those of the lease you previously operated under.

Issues for the unwary

At first glance these conditions may not seem unreasonable. Particularly, if a tenant wants a long-term lease and wishes to improve the business. However, it is important to realise that the lease will exclude the benefits the tenant would have enjoyed had the lease fallen under the Act.

This increases the cost of the lease and the complexity of lease negotiations. For example, it may be best to accept a lease with a term of 14 years if the land, as a result then falls under the provisions of the Act. This would provide you with protection from the legislation, as outlined above.

What should you do?

It is important to obtain expert legal advice before signing a lease for Crown land. We can advise you of any lease requirements and their estimated cost. This will put you in the best possible position - **before** you commence negotiations.

Ross Blair, Special Counsel
ross.blair@mckeanpark.com.au

Expert advice. Practical solutions. Personal service.

McKEANPARK LAWYERS

Security of payment – FAQs for contractors

The ability to get progress payments paid on time and in full has significant financial ramifications for contractors in the building and construction industry. Unfortunately, many contractors do not realise that the *Building & Construction Industry Security of Payment Act 2002 (Vic)* (the Act) can be an effective tool to enforce progress payments.

It is important to note that the Act relates only to progress payments and is designed to protect contractor's cashflow during the project. Progress payments may still be subject to later adjustment under the contract. The Act has strict requirements that must be followed, failing which, otherwise good claims may go unpaid.

Each State has its own version of the Act. This article will focus on the Victorian regime and how a contractor will have the best opportunity to ensure a successful claim.

Is my work covered by the Act?

The Act covers all construction works and the supply of goods or services. It even extends to the hire of plant and equipment, landscaping and professional services (e.g. design, architecture and surveying). However, there are some important exclusions, including domestic building contracts between a builder and a homeowner - as well as contracts for mining, oil and gas exploration.

When and how do I make a payment claim?

Payment claims must be made on the date specified in the contract. This is known as a reference date. If there is no reference date specified in the contract, payment claims can be made pursuant to the Act, being every 20 business days. If a payment claim is not made within 3 months or other period specified in the contract, the right to make a claim will lapse.

The payment claim must clearly state:

- the work done or the goods or services supplied;
- the amount claimed; and
- that it is made pursuant to the Act with the words "This payment claim is made under the *Building and Construction Industry Security of Payment Act 2002*".

Is there anything that cannot be claimed?

In short; yes. The Act refers to specific exclusions when making a payment claim, these include:

- amounts due to events such as latent conditions;
- time-related costs and changes in law;
- damages for breach of the contract; and
- any claim arising at law other than under the contract.

If claimed, the superintendent is entitled to (and likely will) reject those amounts or reject the progress claim in its entirety.

My payment claim is ready, what happens next?

The payment claim must be served in accordance with the terms of the contract. If the contract does not specify a method of service, you can deliver it to the superintendent personally or by lodging it during normal office hours at the superintendent's ordinary place of business. You can also send it by post or facsimile addressed to the superintendent's ordinary place of business.

...continued on page 6

...continued from page 5

I have served the payment claim, how long until I get paid?

Once served, the principal has an opportunity to respond by serving a payment schedule. A payment schedule must be served within 10 days of receiving the payment claim. The payment schedule must identify the payment claim to which it relates, the amount that the principal intends to pay and the reasons for any difference from the amount in the payment claim.

I didn't receive a payment schedule, what happens next?

If no payment schedule is received within time, the payment claim must be paid in full. If a payment schedule has been properly served, the amount of the payment schedule is due and payable.

But I still haven't been paid, what can I do?

If the amount in the payment schedule or payment claim is not paid within time, you may apply to the court for an order. However, court proceedings can be time-consuming and costly. As an alternative, you can file a notice suspending work until such time that the amount is paid, or you can apply for adjudication.

What is adjudication?

Adjudication is a process under the Act to resolve disputes. An adjudicator determines the amount (if any) that must be paid, by whom, by when and at what rate of interest.
An application can be made if:

- the payment schedule amount is less than the payment claim amount;
- the principal has not paid the payment schedule amount by the due date; or
- if the principal has not provided a payment schedule and has not paid the payment claim amount by the due date.

An adjudication has strict timelines, including when an application can be commenced and when supportive material may be filed.

An adjudicator will charge for their time and expenses, which are to be shared equally between the parties. In the event the adjudicator decides in your favour, you can apply to the court for an order in that amount. This process is more streamlined and provides less legal difficulties.

Summary

The Act contains strict deadlines regarding both content and procedure. However, when used correctly, it can be an effective tool to ensure progress payments are made. Careful attention to the contract and its interaction with the Act will give contractors the ability to make a proper and successful claim.

Angelo Germano, Associate
angelo.germano@mckeanpark.com.au

Angelo Germano promoted to Associate

We are pleased to announce the promotion of Angelo Germano to the position of Associate. Since joining McKean Park in January 2016, Angelo has practised in our Commercial Litigation and Insolvency areas. Angelo acts for individuals, companies, administrators and liquidators in a broad range of commercial disputes.

With a practical, commercial and results-orientated focus he has successfully resolved a number of significant matters for our clients. Due to his success we were delighted to recognise Angelo in this way. Congratulations!

Like us on Facebook & follow us on LinkedIn!

McKean Park has joined social media on Facebook and LinkedIn! We invite you to like us on Facebook to receive our posts on legal developments and new directions within our firm. You can also engage with our practitioners and learn about their specific skills on LinkedIn too!

Our expertise

- Aged Care & Retirement Living
- Building & Construction
- Commercial & Taxation
- Commercial Litigation
- Family Law
- Insolvency
- Leasing
- Property & Owners Corporations
- Rotary
- Wills, Estates, Succession Planning & Estate Litigation
- Workplace Relations

Disclaimer

You should not act on the basis of material in this newsletter as the contents are of a general nature only and may be liable to misinterpretation in particular circumstances. Changes to the law occur quickly. Do not act on the contents of this newsletter without first obtaining advice from McKean Park Lawyers.

If you would prefer to have this newsletter emailed, require more information, permission to reprint or do not wish to receive any marketing material from McKean Park, please email Catherine Nguyen on catherine.nguyen@mckeanpark.com.au