



Rodgers Reidy
Chartered Accountants

Insolvency · Forensic · Reconstruction

Phoenix Companies

Presented by:

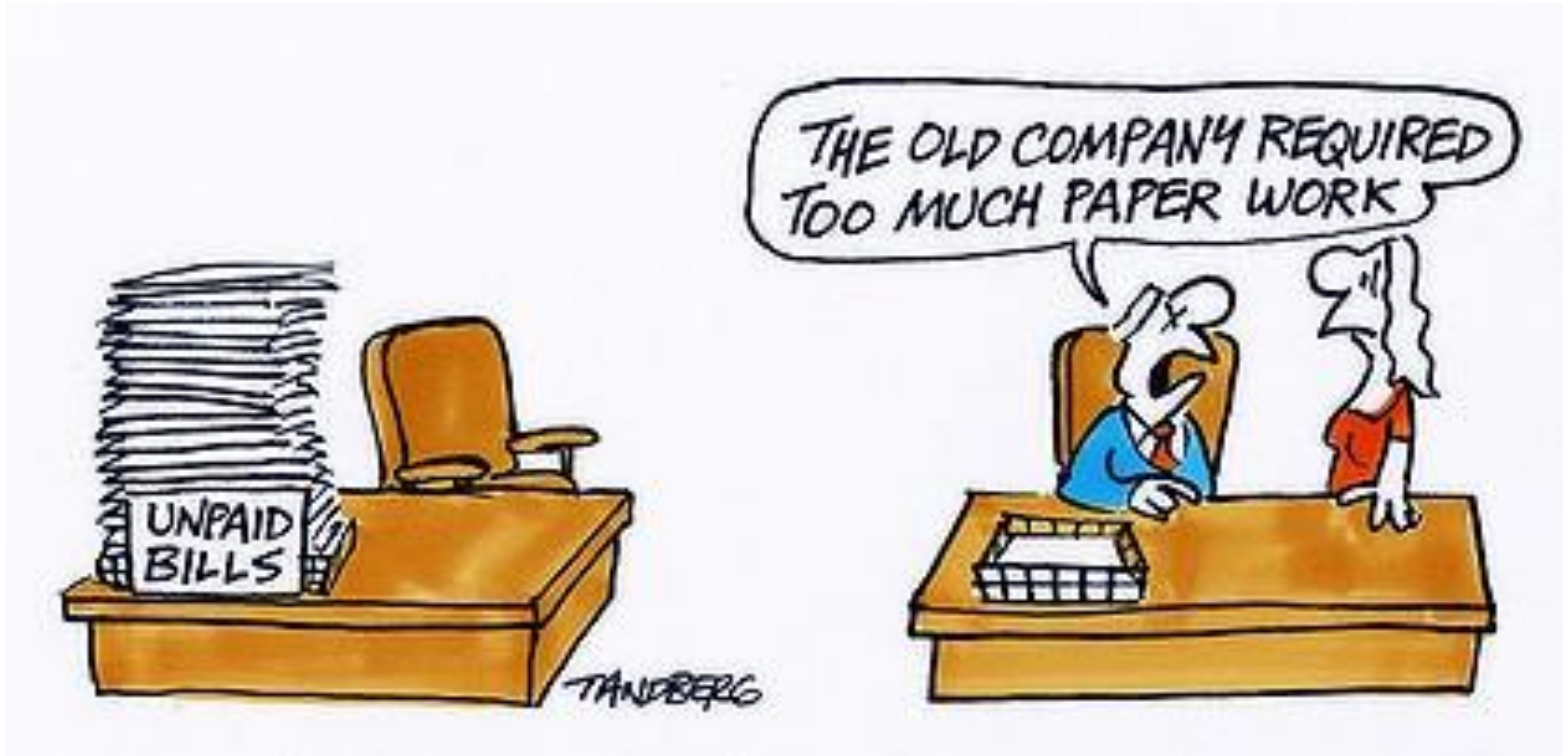
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What is a Phoenix Company?

- Generic Definition: A commercial entity which emerges from the collapse of another through insolvency. The new company is set up to trade in the same or similar trading activities as the former, and is able to present the appearance of "business as usual" to its customers.
- Statutory Definition - Section 386B Companies Act 1993
in relation to a failed company, a company that, at any time before, or within 5 years after, the commencement of the liquidation of the failed company, is known by a name that is also—
 - (a) a pre-liquidation name of the failed company; or*
 - (b) a similar name*





Phoenix Company Provisions

- Sections 386A to 386F were introduced from 1 November 2007
- Based on Sections 216 and 217 of the UK Insolvency Act
- Section 386A

A director of a failed company must not, for a period of 5 years after the date of commencement of the liquidation

(a) be a director of a phoenix company; or

(b) be concerned in or take part in the promotion, formation, or management of a phoenix company; or

(c) directly or indirectly be concerned in or take part in the carrying on of a business that has the same name as the failed company's pre-liquidation name or a similar name.

Definitions - Section 386B

- **Director of a failed company** - a person who was a director of a failed company at any time in the period of 12 months before the commencement of its liquidation.
- **Pre-liquidation name** - any name (including any trading name) of a failed company in the 12 months before commencement of liquidation.
- **Similar name** - a name that is so similar to a pre-liquidation name of a failed company as to suggest an association with that company.



Similar Name

- Guidance as to what will constitute a similar name had already been provided by the UK courts.
- The test which has been applied is one of the context of the circumstances in which the names are used. Products, locations, types of customers and those involved in the operation of the two companies are all factors to consider.

Similar Name

- *Ricketts v Ad Valorem Factors Ltd* – Was Air Equipment Co Ltd a similar name to The Air Component Co Ltd? Two companies dealt in the same product and a similar market.
- *Commissioners for HM Revenue and Customs v Walsh* – Was Walsh Construction Limited a similar name to SG & T Walsh Company Ltd? Both building and civil engineer contractors, traded from the same address, similar clients, similar letterhead. The fact that Walsh was a common name was not enough.



Penalties

- Civil penalty (s386C)
 - the person becomes personally liable for the liabilities of the Phoenix Company therefore losing the benefit of limited liability
 - applies to a director or a person involved in management who willingly acts on the instructions of another knowing that they are contravening s386A.
 - CIR v Wright – coy is still the primary debtor
- Criminal penalties (s373(4))
 - imprisonment for a term not exceeding 5 years, or
 - a fine not exceeding \$200,000

Exceptions Provided

- Provision of a successor company notice where the business of a failed company is acquired under an arrangement with a liquidator, receiver or administrator (S 386D)
- Temporary exemption for a period of 6 weeks if application is made to the court within 5 days of the liquidation. (S 386E)
- Exception for a non-dormant company that has used the name of the failed company for a period of 12 months or more. (S 386F)

Reasons for introduction

As per third reading of the Amendment Bill

- To promote innovation, responsible risk taking, and entrepreneurialism by not excessively penalising business failure.
- To promote business investment, greater innovation, and economic growth by providing effective and efficient ways to deal with the financial failure of both individuals and companies.
- To restrict the abuse of phoenix company structures by directors of failed companies, with the intent to defeat the legitimate interest of creditors.



Criminal Prosecutions

- 8 successful prosecutions since 2010 have been reported by the Companies Office Integrity and Enforcement Unit
- Four convicted and discharged
- One fined \$5,000
- One given 80 hours community work
- One given 8 months home detention
- One given 10 months home detention, 300 hours community work and ordered to pay reparation of \$5000



Other Actions Possibly Available

- The Phoenix Company provisions are easily avoided by using a new company name which is not similar to that of the old company. Recovery actions in such cases may still include:
 - Reckless Trading
 - Transactions at an undervalue
 - Asset pooling with the new company

What are Australia doing?

- Inter-Agency Phoenix Taskforce - 20 Federal, State and Territory government agencies.
- The Corporations Amendment (Similar Names) Bill 2012 was released as an exposure draft for comment in December 2011 but never enacted – the main criticism being that it only dealt with phoenix companies with a similar name.
- In 2015-16 the ATO conducted 1,000 audit and review cases involving phoenix behaviour and raised additional assessments of \$250 million.
- <https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/>



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Questions

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