

update

27 June 2008

Friday Facts: ASIC commences proceedings against 8 company directors and their lawyer for Phoenix trading

In late May 2008, ASIC commenced civil proceedings in the Supreme Court of New South Wales against eight company directors and the companies' lawyer, Timothy Donald Somerville, over their involvement in alleged Phoenix trading.

ASIC claim that the directors of eight non-related companies ("Vendor Companies"), which were all in financial distress, transferred the business and assets of the Vendor Companies to new companies which were all controlled by the same directors for negligible consideration. The effect of these transactions was to remove the assets from the reach of unpaid creditors of the Vendor Companies whilst the businesses continued to operate under the name of the new companies. This is known as "Phoenix trading".

The Vendor Companies were all in financial distress and had unpaid tax debts. Following the sale of the businesses and assets, the Vendor Companies were all placed into liquidation.

It is alleged that Mr Somerville gave advice to each of the directors recommending the transactions, prepared the documentation including the sale agreements, and was involved in forming the new companies.

ASIC have alleged that the eight directors contravened their duties as directors of the Vendor Companies and that Mr Somerville

also contravened the *Corporations Act 2001* though his involvement in the transactions.

ASIC is seeking a declaration from the Court that the eight directors and Mr Somerville have each contravened the provisions of the *Corporations Act 2001*, injunctions and director banning orders. Mr Somerville may also face disciplinary action from the Law Institute of New South Wales for his involvement.

In a media release, ASIC's Executive Director of Enforcement, Jan Redfern, stated that "Phoenix activity is a significant issue and ASIC has broadened its focus in relation to misconduct to include not only company directors but also others who are involved in, or help facilitate, such transactions."

This case serves as a timely reminder to those providing financial and legal advice regarding transactions dealing with the

assets and business of a company to ensure that such transactions do not contravene the provisions of the *Corporations Act 2001*.

For more information

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