

Selling to Overcome Insolvency: How to Avoid a Phoenix Company



If your company is struggling financially, you have three main options available to you: business turnaround, voluntary administration or sale (followed by liquidation or administration).

The first two are not viable for many small businesses due to available funds and cost. Finding a buyer of a distressed business can be a good option, but is very difficult within the tight frame available to a distressed business.

If you believe your business can be successful, you may be considering the option of buying it back and starting over. You could either seek to buy it from a liquidator appointed to the company, or alternatively you may seek to arrange the sale prior to liquidation. If you opt for a pre-liquidation sale, you must give careful consideration to your director's duties.

Understanding illegal phoenix activity

Phoenix activity has received a lot of press recently due to an increase in its prevalence and economic impact. As a result, ASIC and the ATO have increased prevention and enforcement activity, and the Government has proposed law reform.

Phoenix activity is generally considered illegal where the following is present:

- Your company has various assets and liabilities, including tax and superannuation, that have not been paid for some time.
- Your company sets up a new company and transfers over its business and assets. The purchase price is less than fair value, or not paid.
- If there is a purchase price, the terms for payment are not commercial i.e. payable over an excessive period, or based on conditions which are unlikely to eventuate.
- Your existing company is placed into liquidation without any assets, but still owing significant tax and superannuation debts.

This type of transaction can give rise to claims against you, and your new company, for the unpaid value of the assets transferred. Additionally, ASIC may investigate and, if appropriate, press criminal charges against you and your professional advisors.

Examples of such prosecutions which included jail sentences are available [here](#) and [here](#).

How to ensure restructuring is legal

Sometimes, restructuring can be the most appropriate, or only, option to save your business.

Certain events such as a bad debt or adverse legal action can suddenly lead to unmanageable debts. In addition, the cost, disruption and damage voluntary administration can cause to your reputation may rule it out.

If restructuring is your best option, you need to ensure it remains legal. This involves ensuring that:

1. Your business and asset transfers are done at fair value and on commercial terms. This generally means getting a valuation and entering into a detailed sale agreement.
2. The purchase price is paid in accordance with the sale agreement.
3. Employees and their entitlements are treated as required under the Fair Work Act 2009.
4. Amounts owed by customers to your old company are paid to the old company.
5. Your old company does not incur debts or purchase goods on behalf of your new company.
6. Creditors of your old company are not selectively paid by your new company.

Given the high level of risk and complexity of restructuring transactions, it's a good idea to hire a qualified, [reputable advisor](#) to assist you.

Stay legal and make improvements

Selling and restructuring your business can help you get your debts to a manageable level. However, you do run the risk of becoming a phoenix company if it's managed incorrectly. In addition, it won't necessarily solve the underlying issues.

To avoid committing illegal phoenix activity and sending your new company to a similar financial fate, it's essential you seek professional advice and make improvements to ensure your cashflow is stabilised and your business returns to profitability.

Wondering how to solve your company's financial problems? [Get in touch](#). Our experienced team can help you understand your options and take the right steps to get your business back on track.

For more information on business turnaround and restructuring, check out our information page [here](#).