**Ideascale – Idea No.56**

**Phoenix Labour Companies and Employee Benefits lost or defrauded**

Can Government Fix it

[*This is the chain of emails I referred to in my submission to the Board of Taxation’s ‘ideasscale’ website on Sat, 29 April 2019*]

"On Fri, Apr 28, 2017 at 2:30 PM +1000, "Frederick John Morgan" <f.john.morgan@vicbar.com.au> wrote:

Hi again,

**Re: Superannuation Senate Inquiry [and beyond to hold 'phoenix' operators to account]**

1. The things that have occurred to me, that you could do are as follows.

(a) First, you might check with the ATO whether they have recovered any SGC for you, from your employer, as you can claim that by nominating a fund into which to put it.

(b) You might report this phoenix operator to both the ATO - they have a ‘complaints’ section you can ask for. They also have a ‘joint taskforce’ with the Federal Police and ASIC to try and stamp out this sort of thing. You ought find out if they’ve looked at prosecutions here.

(c) There might be recompense for you through prosecution, which those behind the ‘sting’ might fear and pay money to avoid (take care to not ‘demand money with menaces - viz: blackmail them). Also under ‘Sentencing Acts’ there is often capacity for the presiding judge to award damages to the victim.

(d) Phoenix activity is difficult because it’s not automatically illegal, but deliberately depriving people of their money is fraud, punishable by up to 10 years jail and perhaps also for civil damages.

(e) Also, directors have been held liable for breach of director’s duties - again, with both criminal and civil consequences.

(f) Any professional advisers could be guilty as accomplices with similar criminal and civil accomplices.

(g) And, if any advisers were negligent, they could be liable to the company, to the directors, or directly to you, in negligence.

(h) Further, their their professional indemnity insurance might fund their liability (if they’re not disqualified from cover by any direct or indirect criminal conduct). Having such insurance might give you a ‘pocket’ to sue, if all the others were ‘men of straw’.

(i) You could contact the Inspector General of Taxation, to similar effect. He is also, now, the Federal Taxation Ombudsman, with express jurisdiction to deal with individual complaints. He too is, I think, a member of this ‘joint taskforce’ to tackle phoenix operations. He might be a place to start, as his people ought know the right places to go.

(j) Liquidators must be registered with ASIC and you could inquire of ASIC what investigations of this Liquidator’s behaviour, given the phoenix activity he was called in to put to bed. It could be, if he was ‘accommodating’ the phoenix operators, he should be struck off. It might be that there is also some basis for compensation from him. He might even be guilty of some offences (at common law or some statute, eg. the Corporations Act or the ASIC Act).

(k) Directors are personally liable for a company’s debts if they trade whilst insolvent (Corporations Act - around s588G from memory). The can also be prosecuted and the two often go together. I would have thought that the directors must have been guilty of this in the last few months of trading, at least.

(l) It is usually the liquidator who presses for Directors for liability under these provisions. You should be trying to find out if the liquidator did do this or did investigate this. It might be that ASIC has to do this for you.

(m) The liquidator might have considered it, but decided there were not the funds in the company to start suing the directors. However, the ATO, often enough, will fund a party (usually liquidators) to pursue directors (as they did recently for hundreds of millions of dollars in the Binneter/Nudie Juice case). This is something they could do and and really should consider, seriously, if they really want to stamp out phoenix activity of this type.

(n) Finally, and perhaps most importantly, you might be eligible for benefits under the section 28 of the Fair Entitlements Guarantee Act 2012. This Act is designed to provide financial assistance (called an 'advance') to former employees, where the end of their employment is linked to the insolvency or bankruptcy of their employer. I think it’s called an ‘advance’ as you probably have to repay it, if you later get paid part or all of your entitlements.

2. I’ll keep thinking about your matter and feel free to email me back or call.

Cheers,

F John Morgan

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On 27 Apr 2017, at 1:54 am, Frederick John Morgan <f.john.morgan@vicbar.com.au> wrote:

I think there are things you can do if you are prepared to press. I'm on leave until Mon 1 May but I'll sleep on it and get back to you. Feel free to email me again if too long has gone by. Are you in Melbourne or elsewhere?

Sent by John Morgan from my mobile.

On 26 Apr 2017, at 10:48 pm, Mxxxxx Bxxxxxx <mxx\_bxxxxxxx@xxxxx.com> wrote:

Dear Mr Morgan,

I hope you don't mind that I contact you but I read your submission to the Senate inquiry into the Superannuation.

I have been a victim of my employer not paying superannuation despite repeated attempts to retrieve that money personally and notifying the ATO.

My employer in response liquidated the company, appointing her own liquidators who are affiliated with her husbands company. The director of this company continues to trade under the same name just under another a different business entity.

Today I received a letter from ATO saying my case has been closed. They have provided absolutely no other information.

I'm very frustrated that the ATO would wash their hands of this when it is clear the director has liquidated for the sole reason to not pay her debts. How can a business continue to trade and a Director continue to do business, without any repercussions?

I am hoping that you can shed light on who I can talk to at this stage as the ATO have been no help at all.

Despite my research - everything and everyone points me back to the ATO. Surely there is another course of action I can take?

I understand that you are very busy and understand that you may not have time to respond, but should you have any suggestions on where else I can look for information, it would be greatly appreciated.

I seem to be coming up against lots of brick walls that only protect the fraudulent behaviour of the Director and know one seems to be able to help me with information on what I can do or who I can talk to, to help retrieve this super.

Thanking you in anticipation,

Mxxxxxx Bxxxxxxxx"