

Note: The Phoenix is a mythological bird, said to burst into flames when it died. It would then rise from its own ashes with new life.



Fire Water Burn

PHOENIXING in the Security Industry

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When a business goes bust and liquidates, who do you expect to get burnt? The directors perhaps, or its creditors. But that's not what's happening in the security industry: staff are being pushed aside for profit and there's little they can do, as directors shed the debt and move on.

In mid-July last year, the Security Licensing & Enforcement Directorate (SLED) section of the New South Wales Police Force received a submission about a security company that had so many guises it put Sherlock Holmes to shame. According to the material retrieved, a security company registered as Avessta Management Solutions and a string of failed security businesses, including Perpetual Resources Group, All Ace Security, and MAS Venue Services, had the same two brothers as directors, appearing to alternate as licensees.

A check using the Australian Securities and Investments Commission (ASIC) database, via information broker CreditorWatch, currently lists Perpetual Resources Group as 'Under External Administration and/or Controller Appointed'. How then, could they start another company while Perpetual Resources Group was struggling?

The SLED case did receive some attention from the NSW Police. Cameron Smith, the NSW Police Force's SLED director told ASM that when the SLED received allegations that the company was continuing to provide security services despite having its licence revoked, they wrote

to the company's director requesting "the removal of website references to the company that suggest that it is a current provider of security services". This, as you may realise, is the equivalent of getting a slap on the wrist for a technical breach. The company's Dubai operations are still live and its website accessible, safely away from Australian law.

There is a loophole in company law that limits the liability of directors (and shareholders) when a company goes belly-up. Under the Corporations Act 2001, any debts held by the company die with the company. The Act does not, however, stop directors of a failing company from transferring assets to a new, debt free company, effectively absolving them of any previous credit responsibilities. The practice is known as 'phoenixing' after the mythical bird that bursts into flames and is then reborn from the ashes. Labour intensive industries such as security companies that provide guards, for instance, are often ripe for phoenixing because its biggest creditors—employees and contractors—are unlikely to conduct due diligence on their employer.

The SLED submission alleged that Avessta was merely the latest incarnation of a company that had effectively been liquidated and reborn three times to avoid paying more than \$1 million to employees and contractors, suppliers and the government for wages, entitlements (including superannuation and leave), invoices and tax.

The official regulators in this game are unfortunately somewhat limited and uncoordinated in their powers. The

SLED, for example, only has powers to refuse or revoke a business' master security licence, while ASIC oversees phoenixing and the Australian Tax Office pursues claims of tax evasion. The Fair Work Ombudsman may also intervene in the case of unpaid staff.

Limited powers

"There are no phoenixing related offences under the NSW security industry legislation," says Cameron Smith. The legislation does, however, provide grounds for revocation or refusal of master licences.

According to Clause 16 of the Security Industry Regulation 2007, an individual may be refused a master licence if the applicant or a close associate of the applicant has been involved in the management of a corporation that "was the subject of a winding up order or when a controller or administrator was appointed" within the preceding three years of the application "unless the Commissioner is satisfied that the person took all reasonable steps to avoid the liquidation or administration". It is mandatory for the commissioner to refuse to license a corporation that has been under administration within three years.

Although Smith says the SLED has refused or revoked more than 90 master licences on these grounds since September 2007, it doesn't stop a phoenix-minded director from setting up and acquiring a licence—and a 'clean' licensee—for the next business, prior to having one business fall under administration. Clearly the current legislation does not go far enough for wily phoenix operators.

ASIC similarly has its hands tied as phoenixing directors disappear into the legal loophole. On 20 December 2011, the Australian Treasury released drafts of two Bills specifically targeting phoenix activity, opening them for public comment.

The Corporations Amendment (Similar Names) Bill 2012 aims to make directors personally liable for their company's debts, if: the company's name is the same as or similar to a company/business name of another company that has been wound up; the director was also a director of that other company; and the debts are incurred within five years after the start of the winding up of the other company. "This will stop directors from exploiting the limited liability protections in the corporations law to avoid having to pay any debts, including workers' entitlements, that they incur in a 'phoenix' company," announced David Bradbury, Parliamentary Secretary to the Treasurer.

A prevailing concern is that while this goes some way towards introducing culpability, more brazen directors will simply use a name unlike the company they have phoenixed. In many cases this already happens as the previous name becomes tarnished by a bad debt history.

Under the proposed Corporations Amendment (Phoenixing and Other Measures) Bill 2012, ASIC will attain administrative power to order that a company be wound up if the commission "has reason to believe that the company is not carrying on business". This power will allow employees to claim entitlements under the Government's General Employee Entitlements and Redundancy Scheme. Public comment closed on 24 January 2012 and we await the progress of both Bills.

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Employees burnt

Unfortunately this is too late for the employee victims of phoenixing, many of whom have been defrauded of their superannuation and other financial entitlements and have little power to recover what they're owed. According to the aforementioned SLED submission, a name change from MAS to Perpetual Resources Group meant that about 60 employees collectively lost their hold on three years of entitlements. Apparently the employees' missing superannuation helped to pay for the company's expansion to the United Arab Emirates.

"Any worker who is concerned they have been treated unfairly or is seeking information about minimum entitlements under workplace laws should contact the Fair Work Infoline on 13 13 94. Complaints can be made confidentially," advises a Fair Work Ombudsman (FWO) spokesperson.

And while the FWO liaises with other federal agencies on cases where unlawful phoenix activity may have occurred, it seems that this fragmented approach via SLED, ASIC, the ATO and the FWO still has many gaps the law must fill. In those cases where a director has been found guilty of phoenixing, less than 10% of claims have been pursued, as the assets are no longer worth the legal cost. As an industry, we need to be aware that this is happening on an unacceptable level and advocate the Parliamentary approach to make it worth the legal cost in future cases. ■

What's in a name?

CreditorWatch managing director Colin Porter says if you are a supplier or contractor, it pays to do your due diligence and know who you're dealing with. A credit check of a company will give you its main name (also known as company name) as well as its trading name (also known as business name) and Australian company number (ACN) or business number (ABN), as well as its credit history and current status. Simple things, such as ensuring your invoice includes the correct name and ACN/ABN of your debtor, can give you a leg to stand on when you chase a debt.

This amazing example demonstrates why it's important to know your debtor: a check of Securit-e Holdings (MNC) Pty Ltd shows that this company is currently 'Under External Administration And/Or Controller Appointed'. While Securit-e Holdings is the main name, it uses the trading name Waterfront Security. However, between 2003 and 2007 its main name was Great Lakes Security Response Pty Ltd while other previous trading names include Night-Tek Security Group, Myall Security Center, Night-Tel Security & Protection Services, and Wingham Security Center. Seven names for one company!

