

DEFINING AND PROFILING PHOENIX ACTIVITY

DECEMBER 2014

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THE PROJECT

This research project, entitled 'Phoenix Activity: Regulating Fraudulent Use of the Corporate Form', is supported under the Australian Research Council's Discovery Projects funding scheme (project number DP 140102277).

The project concerns a subject of real practical significance in Australia. Recently, the issue has become an urgent concern for government because of the apparently growing number of individuals promoting illegal phoenix activity, the significant loss of tax revenue it causes, and the recognition of the potentially devastating impact it has on creditors and employees. This project will provide the first detailed investigation of illegal phoenix activity in Australia and will position Australia within the international debate on its prevention.

A key problem faced by regulators is the difficulty associated with identifying whether particular phoenix activity is illegal or not. This report seeks to profile the characteristics of both legal and illegal phoenix activity to assist regulators (including but not limited to ASIC and the ATO) in formulating education, detection, and enforcement strategies. The difficulties associated with quantifying phoenix activity will be explored further in our companion report *Quantifying Phoenix Activity: Cost, Incidence and Enforcement*, to be published in 2015. A further follow up report will address the regulatory approach taken towards this issue in other jurisdictions.

More information about the project can be accessed through the following website:

<<http://law.unimelb.edu.au/cclsr/centre-activities/research/major-research-projects/regulating-fraudulent-phoenix-activity>>.

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1 INTRODUCTORY OBSERVATIONS

1.1 WHAT IS PHOENIX ACTIVITY?

The concept of phoenix activity broadly centres on the idea of a second company, often newly incorporated, arising from the ashes of its failed predecessor where the second company's controllers and business are essentially the same. It is important to note that phoenix activity can be legal as well as illegal. Legal phoenix activity covers situations where the previous controllers start another similar business when their earlier entity fails in order to rescue its business. Illegal phoenix activity involves similar activities, but the intention is to exploit the corporate form to the detriment of unsecured creditors, including employees and tax authorities.

In a typical phoenix activity scenario, a company in financial difficulties, 'Oldco', is placed into liquidation or voluntary administration, or is simply left dormant (and may then be deregistered). Prior to this occurring, Oldco's assets may be transferred either to a newly incorporated entity, 'Newco', or to an existing entity, such as a related company in a corporate group.

Phoenix activity can be entirely legal, especially if the worth of the failed company's assets is maintained and the employees keep their jobs and entitlements. We describe this behaviour as 'legal phoenix activity, or business rescue'. However, the repeated resurrection of a business can become problematic even with the best of intentions if the returns to creditors and benefits to employees are minimal. The behaviour becomes illegal where the intention of the company's controllers is to use the company's failure as a device to avoid paying Oldco's creditors (who may include the company's employees) that which they otherwise would have received had the company's assets been properly dealt with. The actual illegality involved – in other words, the laws that are breached that render the phoenixing illegal – are set out below under each relevant heading.

Phoenix activity involving the use of successor companies (one after the other) was described as 'basic' phoenix activity in Treasury's 2009 proposals paper entitled 'Action Against Fraudulent Phoenix Activity'.¹ In addition, Treasury defined phoenix arrangements within corporate groups as 'sophisticated' phoenix activity.² Typically, under Treasury's sophisticated form, one entity with few or no assets within a corporate group incurs substantial liabilities by way of wages, superannuation contributions, Pay As You Go (PAYG) withholding or sales tax, and then is deliberately liquidated to avoid paying these debts. If they are 'lucky', the employees may be transferred to a sibling entity in the group to continue their employment. This may or may not involve payment of their entitlements. Together, the two forms were estimated by Treasury to cost the Australian Taxation Office (ATO) in the order of \$600 million per year.³ Its costs to the broader economy were also considered 'significant'.⁴

This report preferences the Australian Securities and Investments Commission's (ASIC) terminology – illegal phoenix activity – as opposed to the Australian Taxation Office's terminology – 'fraudulent' phoenix activity. In this report we identify five categories of phoenixing; two of which are legal, and three of which are illegal. Basic (one after the other) or sophisticated (within corporate groups) phoenixing can take place within all five of our categories.

¹ Treasury (Cth), 'Action against Fraudulent Phoenix Activity' (Proposals Paper, Treasury, Australian Government, 2009) 2.

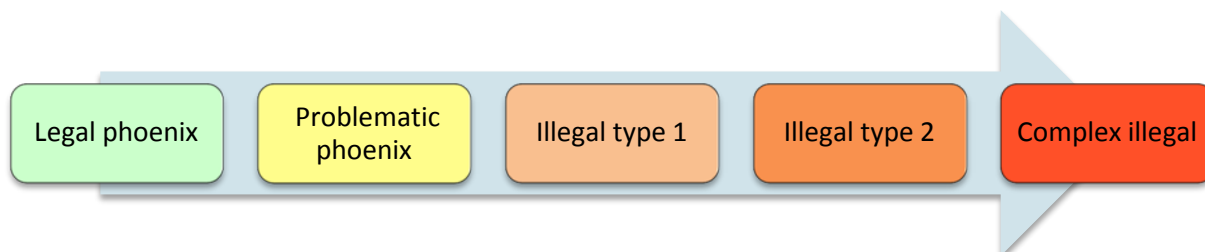
² Ibid 2.

³ Ibid 5.

⁴ Ibid 5.

The five categories are:

1. The legal phoenix, or business rescue
2. The problematic phoenix
3. Illegal type 1 phoenix: intention to avoid debts formed as company starts to fail
4. Illegal type 2 phoenix: phoenix as a business model
5. Complex illegal phoenix activity



The Phoenix Spectrum: legal and beneficial behaviour falls on the far left. Behaviour becomes increasingly harmful to creditors and society at large as the spectrum progresses toward the right.

In this report we profile and categorise the various types of phoenix activity, consider existing legislative responses, and raise important policy questions. We draw no conclusions as to the desirability of any solutions suggested by the substance of our policy questions. We will address these issues in detail in a later report which will contain our recommendations. We also profile the industries that have been identified as being more highly susceptible to illegal phoenix activity, as well as profiling its potential victims. The difficulties associated with quantifying phoenix activity are explored further in our companion report, *Quantifying Phoenix Activity: Cost, Incidence and Enforcement*.

1.2 IDENTIFYING ILLEGAL PHOENIX ACTIVITY

Illegal phoenix activity is not susceptible to precise modelling, such that if certain specified conditions are present, a regulator can determine with certainty that it has taken place. It is virtually impossible to identify illegal phoenix activity from an incorporation of a successor company following a single failure in the absence of documentary evidence such as written instructions from advisors. Rather, the characterisation of illegal phoenix activity is likely to come from the external observation of the conduct of specific individuals involved in multiple corporate failures over a period of time.

Information about companies contained on ASIC's and the ATO's databases render it relatively easy to identify cases that constitute the 'basic' form of phoenix activity, remembering that this could be in its legal or illegal form. This may be because the name of a controller (or related parties) of a failed company can be seen in the incorporation documents of a new company and/or perhaps because the new company has the same or similar name to the old company. It may also be relatively easy to identify potential cases of 'sophisticated' phoenix activity where businesses are conducted by complex corporate groups. However, determining whether the basic or sophisticated phoenix activity in question is legal, or is designed to avoid payment of debts and is therefore illegal, is more difficult.

In seeking to identify illegal forms of phoenix activity, regulators may look to evidence that the same controllers have operated multiple failed companies over a short time period. They may also look to whether a new company is conducting business under substantially the same company name as a failed company in order to retain customer goodwill, or is operating under the same registered business name, even if the company's name has changed markedly. Detection of phoenixing is

rendered more difficult where company names are significantly changed and/or where dummy individuals are placed in directorships.

Nevertheless, what must be acknowledged from the outset is that even where there are multiple failures and a new company has retained the same controllers, name and/or business premises, that this is not in and of itself proof of *illegal* phoenix activity. Where a business person has expertise in a particular field, they are likely to want to commence another business in that same field and possibly the same location if the first is unsuccessful. They are also likely to want to preserve whatever reputation and goodwill their business has generated amongst their customers by retaining a similar company name where possible. If the old company has tax losses, they may need to satisfy the same business test for the carry-forward of those losses. The illegality of phoenix activity instead turns predominantly on the *intention* of the company's controllers, whether the company was phoenixed deliberately in order to avoid debts which may include employee entitlements. The difficulty of proving this intent is the crux of the difficulty in differentiating legal phoenix activity from illegal phoenix activity.

Although it is rarely easy to identify the illegal version of phoenix activity from the outset, the following sections seek to profile the industries and demographics of phoenix activity in order to facilitate the identification process for regulatory bodies. Demographic awareness assists regulators to prevent and deter undesirable behaviour, to detect illegal phoenix activity that has already taken place, and to punish the perpetrators.

1.3 HISTORICAL ATTEMPTS TO DEFINE PHOENIX ACTIVITY

Various parliamentary committees, law reform bodies, and a Royal Commission, have attempted to define phoenix activity. This section of our report provides a summary of those definitions in chronological order according to the year of release. Following this we include details of the definitions of phoenix activity that are provided by the regulators.

1.3.1 1994 VICTORIAN LAW REFORM COMMITTEE

The earliest report dealing exclusively with illegal phoenix activity was that of the Victorian Law Reform Committee (VLRC) in 1994.⁵ It did not seek to define the activity, but rather described it as follows:

The problem is the 'phoenix' company. A limited liability company fails, unable to pay its debts to creditors, employees and the State. At the same time, or soon afterwards, the same business arises from the ashes with the same directors, under the guise of a new limited liability company, but disclaiming any responsibility for the debts of the previous company.⁶

1.3.2 1996 ASC PHOENIX ACTIVITY RESEARCH PAPER

In 1996, the Australian Securities Commission, the precursor to ASIC, produced a research paper into phoenix activity and insolvent trading. The research paper, 'Project One: Phoenix Activity and Insolvent Trading Public Version' (ASC Phoenix Activity Research Paper), drew on a literature review, telephone survey, and in-depth interviews with community leaders and ASC staff.⁷ It clarified and amended the VLRC definition discussed above, pointing out several additional elements or indicators of illegal phoenixing:

⁵ Parliament of Victoria Law Reform Committee, *Curbing the Phoenix Company - First Report on the Law Relating to Directors and Managers of Insolvent Corporations*, Report No 83 (1994).

⁶ *Ibid* 1 [1.1].

⁷ Australian Securities Commission, 'Project One: Phoenix Activity and Insolvent Trading Public Version' (Research Paper 95/01, May 1996) 11.

- Any incorporated form can be involved, not just limited liability companies;
- Phoenixing can include the purposeful wasting of corporate assets prior to insolvency, as well as the transfer of those assets to a new entity;
- In some instances, some creditors are paid but others are not (depending on their likelihood of taking debt recovery action);
- Timeframes are difficult to specify;
- The assets may be transferred to another entity, which may or may not be incorporated, and which may or may not be engaged in the same business; and
- The same directors or managers may not always be involved in the new business because their families or other related parties may assume those roles.⁸

According to the ASC Phoenix Activity Research Paper, a definition of phoenix activity must include ‘an element of intent which separates out those who make Phoenix activities a career from those who accidentally fall foul of the ... definition through ignorance of the law and its requirements’. The ASC Research Paper also specified that not all cases of phoenix activity involve the transfer of assets or the transfer of substantially the same business to the new entity. As such, the paper noted that for a definition to be workable it must take into account the *benefit* derived from any transfer of assets, or else the benefit derived from purposefully wasting the assets, rather than simply stating that the same business is transferred to the new operation.⁹

The ASC Phoenix Activity Research Paper defined phoenix activities as:

[...] those where an incorporated entity either:

1. fails and is unable to pay its debts and/or;
2. acts in a manner which intentionally denies unsecured creditors equal access to the entity’s assets in order to meet unpaid debts; and
3. within 12 months another business commences which may use some or all of the assets of the former business, and is controlled by parties related to either the management or directors of the previous entity.¹⁰

An obvious difficulty with this definition is the use of the word ‘commences’. In many instances of sophisticated phoenix activity, the company to which the business activities of the old company are transferred is already in existence at the time of the demise of the first.

The ASC Phoenix Activity Research Paper identified three types of phoenix operators:

1. ‘Innocent’ operators who lack the awareness that transferring assets from the failed business to the new company may constitute a breach of the law;
2. ‘Occupational hazard’ operators who own a business in an industry where failure is common. Here only a small number of assets may be transferred to the new entity;
3. ‘Careerist’ offenders who deliberately structure their businesses so as to engage in phoenix activity and avoid detection.¹¹

1.3.3 2003 COLE ROYAL COMMISSION

The Royal Commission into the Building and Construction Industry, known as the Cole Royal Commission, was established ‘to inquire into certain matters relating to the building and

⁸ Ibid 35-38.

⁹ Ibid 39-40.

¹⁰ Ibid 39.

¹¹ Ibid 44-47.

construction industry.¹² An entire chapter of its extensive Final Report ('the Cole Report') was devoted to phoenix companies (Chapter 12).¹³ While the Cole Report adopted the ASC definition of phoenix activity without criticism, its approach was to describe in detail the circumstances in which phoenix activity may occur, identify its victims, and provide case studies. Some of these case studies are outlined later in this report.

1.3.4 2004 PARLIAMENTARY JOINT COMMITTEE REPORT

In 2004, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) released a report entitled 'Corporate Insolvency Laws: A Stocktake'. The report looked at a broad range of issues, one of which was phoenix activity.¹⁴ Chapter 8 of the Stocktake Report, devoted to phoenix activity, noted that it was 'almost impossible to define fraudulent phoenix company activity with any precision',¹⁵ although it referred to the approach of the Cole Royal Commission without criticism.

1.3.5 2009 DEPARTMENT OF TREASURY PHOENIX PROPOSALS PAPER

The Australian Department of Treasury released a paper at the end of 2009 entitled 'Action against Fraudulent Phoenix Activity Proposals Paper' (Treasury Phoenix Proposals Paper). The Paper called for public comments and feedback, in particular on the need for legislative amendments to address illegal phoenix activity and on the relative merits of a variety of proposals.¹⁶

As mentioned in paragraph 1.1, the Treasury Phoenix Proposals Paper defined a newly incorporated company taking over the business of a previously liquidated entity that has failed to pay its debts as the 'basic' form of phoenixing,¹⁷ and phoenix activity within corporate groups as the 'sophisticated' form.¹⁸ Taxation authorities, as non-priority unsecured creditors, may be left empty handed as a result of either type of phoenix activity. While the main focus of the Paper was on phoenix activity as it related to non-payment of taxation liabilities, it also made several recommendations for reform of the *Corporations Act 2001* (Cth) (hereinafter "*Corporations Act*").¹⁹

1.3.6 REGULATOR DEFINITIONS

This section contains the definitions of illegal phoenix activity employed by ASIC, ATO, the Fair Work Ombudsman (FWO) and Fair Work Building and Construction (FWBC). Some of these definitions appear on each of these organisation's respective websites, whereas others appear in their publications. The definitions contained in this section are current as at October 2014.

The ASIC website contains the following statement:

Illegal phoenix activity involves the intentional transfer of assets from an indebted company to a new company to avoid paying creditors, tax or employee entitlements. The directors leave the debts with the old company, often placing that company into administration or liquidation, leaving no assets to

¹² Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 2, 3.

¹³ *Ibid* vol 8, 111-219. Note the detailed case study into the phoenix activities at Emerson Industries, 167 – 201.

¹⁴ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (2004). Its terms of reference included '(h) whether special provision should be made regarding the use of phoenix companies' *Ibid* vii.

¹⁵ *Ibid* 131 [8.2].

¹⁶ Above no 1, 22.

¹⁷ *Ibid* [1.1.2].

¹⁸ *Ibid*.

¹⁹ These were allowing the corporate veil to be lifted where a company sets up a subsidiary with insufficient capital to meet the debts that could reasonably be expected to arise; and making directors personally liable for the debts of a liquidated company in circumstances where a 'new' company adopts the same or similar name as its previous incarnation.

pay creditors. Meanwhile, a new company, often operated by the same directors and in the same industry as the old company, continues the business under a new structure. By engaging in this illegal practice, the directors avoid paying debts that are owed to creditors, employees and statutory bodies (e.g. the ATO). Illegal phoenix activity is a serious crime and may result in company officers (directors and secretaries) being imprisoned.²⁰

ASIC identifies the following key characteristics that typically are associated with illegal phoenix activity:

- The company fails and is unable to pay its debts;
- The company acts in a manner that intentionally denies unsecured creditors equal access to the company's assets to meet and pay debts;
- Soon after the failure of the initial company (usually within 12 months), a new company commences which may use some or all of the assets of the former business and is controlled by parties related to either the management or directors of the previous company.²¹

However, the ASIC website notes that:

Not all company failures will involve illegal phoenix activity. Genuine company failures do occur. Where a business has been responsibly managed, but fails, that business may continue after liquidation by using another corporate entity without, necessarily, being involved in illegal phoenix activity.²²

The ATO website states that fraudulent phoenix activity is one of its areas of focus:

Fraudulent phoenix activity occurs when a company goes into liquidation, leaving its debts behind, while the assets are shifted into a new entity that begins trading again, often under a similar name. This deliberate, systematic and sometimes cyclic practice of liquidating related corporate trading entities is a fraudulent exercise to evade tax and other debts built up in the name of the failed company. The practice unfairly disadvantages employees, consumers and other businesses, as well as the broader economic environment and the revenue of Australia.²³

A similar definition was provided by the ATO Deputy Commissioner, Mark Konza in 2009 when he described phoenix behaviour as 'a deliberate attempt to avoid financial obligations'. He further noted that 'liabilities are 'parked' in the liquidated business and the underlying business activity is resumed free of liabilities.'²⁴ Mr Konza further stated that phoenix activity is a type of tax evasion that 'has the potential to severely erode the revenue base and undermine business and community confidence.'²⁵

²⁰ Australian Securities and Investments Commission, *Small Business – Illegal Phoenix Activity* (10 October 2014) <<http://www.asic.gov.au/for-business/your-business/small-business/compliance-for-small-business/small-business-illegal-phoenix-activity/>>.

²¹ Ibid.

²² Ibid.

²³ Australian Taxation Office, *The Fight Against Tax Crime – Fraudulent Phoenix Activities* (16 July 2014) <<https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Fraudulent--phoenix--activities/>>.

²⁴ Australian Taxation Office, *Targeting Tax Crime: a Whole-of-Government Approach - July 2009* (28 January 2010), 15-6 <<https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/Targeting-Tax-Crime-magazine/Archive/Targeting-tax-crime--a-whole-of-government-approach---July-2009/>>. A similar definition is contained in Australian Taxation Office, *Compliance Program 2012–13 – What we will particularly be focusing on in 2012-13* (17 August 2013) <<https://www.ato.gov.au/Print-publications/Compliance-program-2012-13/?page=80>>.

²⁵ Above no 22, 16. A similar definition is contained in Australian Taxation Office, *Compliance Program 2012–13 – What we will particularly be focusing on in 2012-13* (above no 22) which states that fraudulent phoenix activity involves 'the deliberate liquidation of a business entity to avoid financial obligations, including tax and superannuation liabilities, without risking the operator's assets and with the full intention of resuming business operations through a new entity'.

In its 2012-2013 Annual Report the FWO states that phoenixing:

[...] involves a company intentionally accumulating debts to improve cash flow or wealth and then liquidating to avoid paying the debt. The business is then continued as another corporate entity, controlled by the same person or group and free of their previous debts and liabilities.²⁶

FWBC's website identifies phoenix activity as an industry issue. It defines this activity as:

[...] the fraudulent act of transferring the assets of an indebted company into a new company to avoid paying creditors, tax or employee entitlements. The new company, usually operated by the same director, continues the business under a new structure to avoid their responsibilities to their creditors.²⁷

2 PROFILING PHOENIX ACTIVITY

In this section of the report we identify five types of phoenix activity – ranging from legal phoenix activity to complex illegal phoenix activity. We provide examples of each type of phoenix activity and pose a series of policy questions for each type of activity. We commence by outlining definitions of liquidation, voluntary administration and dormant companies to provide the context for our subsequent discussion.

2.1 RELEVANT TERMINOLOGY

2.1.1 LIQUIDATION

Where an existing company, Oldco is wound up, its liquidator is given powers and is subject to duties under the *Corporations Act*. The liquidator becomes an officer of the company and is therefore subject to the same duties as the company's directors, which they replace. The liquidator is also subject to professional duties under codes of conduct relating to conflicts of interest. Enforcement by creditors, other than secured creditors, is stayed. The liquidator takes control of the company's property, carries on its business so far as is necessary for its beneficial winding up, and pays creditors in accordance with specified statutory priorities.

As part of the exercise of these powers and duties, it is therefore open to the liquidator to sell Oldco's business, in whole or in part, to the former controllers of that company, or to a new entity controlled by those same persons. In doing so, the liquidator exercises their own discretion but is subject to any directions given by resolution of the creditors or contributories at any general meeting of creditors.

2.1.2 VOLUNTARY ADMINISTRATION

Voluntary administration (VA) was introduced in 1993 as a result of recommendations contained in the 1988 Harmer Report.²⁸ Section 435A of the *Corporations Act* describes the aims of VA:

²⁶ Fair Work Ombudsman, *Annual Report 2012-2013* (Commonwealth of Australia, 2013) <<http://www.fairwork.gov.au/about-us/reports-and-submissions/annual-reports>>.

²⁷ Fair Work Building and Construction, *Insolvency and Phoenix Activities* (2012) <<http://www.fwbc.gov.au/insolvency-and-phoenix-activities>>.

²⁸ See Australian Law Reform Commission, *General Insolvency Inquiry*, Report No. 45 (1988) vol 1 [52].

The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence--results in a better return for the company's creditors and members than would result from an immediate winding up of the company.²⁹

While VA does not expressly contemplate the business being continued by its former controllers, it does nothing to prevent or discourage that outcome.

One significant feature of VA is that because the process is intended to take place within a short space of time, there is little time for investigation of the controllers' actions. This is in contrast to the more leisurely process of liquidation. This makes VA an attractive proposition for those business people who might fear the superior scrutiny and powers of a liquidator. In particular, liquidators can claw back voidable transactions (for example, preference payments to favoured creditors) or uncommercial transactions, such as the transfer of assets at an undervalue. In contrast to administrators in a VA, liquidators have the power to bring an action for insolvent trading.

2.1.3 DORMANT COMPANY

A dormant company is a company that has ceased to trade and no creditor has sought its winding up, presumably because the costs of doing so exceed the expected return. ASIC has a number of powers in relation to these companies:

- The power to deregister these companies for failure to submit required annual paperwork and to pay fees: s 601AB *Corporations Act*.
- The power to seek a court order to wind up the company where it has suspended its business for a whole year: s 461(1)(c) *Corporations Act*.
- The power to order the winding up of a company where ASIC has reason to believe that the company is not carrying on business: s 489EA(1)(c). This provision was inserted into the *Corporations Act* by the *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth).

In addition to the above, ASIC has the power to reinstate deregistered companies: s 601AH(1) or to seek reinstatement by the court: s 601AH(2) *Corporations Act*. Reinstatement allows a previously deregistered company to be subject to the scrutiny of a liquidator as part of its winding up.

2.2 PHOENIX CATEGORY PROFILES

The following category profiles offer a qualitative view of phoenix activity across the spectrum, beginning with legal business rescues and ending with complex illegal phoenix activity linked to other illegal behaviour including organised crime. Each category profile identifies the circumstances that led to the phoenix activity, the consequences, relevant legislation, and associated policy questions.

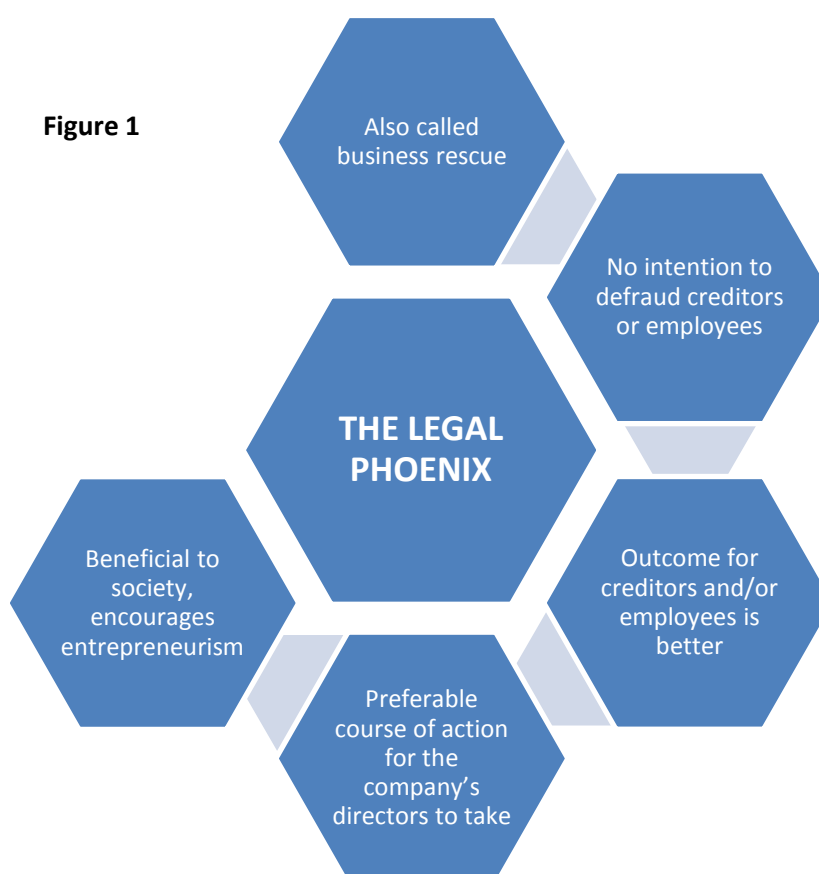
These profiles have been developed by the authors in order to assist regulators to develop a sense of the range of behaviours exhibited by company controllers and the types of actions that might be taken to deal with them.

2.2.1 THE LEGAL PHOENIX, OR BUSINESS RESCUE

²⁹ *Corporations Act* s 435A.

Legal phoenix activity is often termed 'business rescue'. Typically, a company 'Oldco' is in financial trouble and is placed in liquidation or VA, or becomes dormant. In this scenario, following the failure of Oldco, the same controllers or their associates transfer the assets of Oldco to a newly incorporated or existing entity, 'Newco', through which they carry on Oldco's business.

The company's controllers in this scenario have no intention to defraud creditors, including employees. In this scenario, considering all options, saving the business but not the company is the preferable course of action for the company's controllers to take. Legal phoenixing presupposes that the outcome for the company's creditors and/or employees is better than it would have been had the business not been resurrected. Legal phoenixing is also beneficial to society at large because it encourages entrepreneurship. Based on these features, regulators should permit this type of phoenixing.



Whether the decision to sell the business assets is taken by the controllers of Oldco or by a liquidator, there will be issues about finding arm's length purchasers. This may be because third parties may be unwilling to buy the business 'lock, stock and barrel'; may therefore pay less for individual assets such as machinery; or may not exist.

It is therefore likely that the former controllers:

- May have the desire and incentive to try again with the business;
- May have existing relationships with clients or customers that can be exploited by Newco;
- May have the required knowledge of products, equipment and markets to have the best chance of succeeding with the business the second time around;
- May be willing to buy the whole business, rather than individual assets.

2.2.1.1 Possible legal phoenix scenarios

- The hapless business person who revives a business that previously failed due to factors outside their control - for example, the tourist operator whose first company is forced into liquidation or VA by an airline strike;
- A viable business is prematurely liquidated by an overly cautious controller who fears insolvent trading liability during a period of poor liquidity; nonetheless, the fundamental business is sound;
- A business fails but valuable lessons have been learnt by the business's controllers that assist in later successful business ventures;
- A management buyout scenario - for example, senior managers of a business that is being poorly run by its owner buy out that business, bringing new ideas and better business acumen to the table;
- A creditor of Oldco becomes an equity owner in Newco in exchange for the debts unpaid by Oldco, resulting in better management of the resurrected business and possibly an injection of further funds to Newco that assist its survival and prosperity.

2.2.1.2 *Relevant legislation*

By defining this as a legal phoenix, we are assuming the following:

- That Oldco's controllers have not breached any directors' or officers' duties; and
- That the external administrator – whether a liquidator or administrator – has discharged their duties in accordance with the *Corporations Act* and their professional obligations.

Even in the absence of any intention to avoid the payment of Oldco's debts by its controllers, the following legislative tools are nevertheless available to regulators in the legal phoenix scenario.³⁰

Corporations Act

1. ASIC may wind up a dormant company

A company can be wound up under [s 489EA](#) where it becomes apparent that it is not carrying on business, evidenced for example by the non-return of ASIC forms or the non-payment of fees. ASIC may then appoint a liquidator to wind up the affairs of the company. It is presumed that the liquidator will uncover any breaches of the law, including illegal phoenix activity, and bring appropriate action. The liquidation of the company also gives employees access to the government safety net the Fair Entitlements Guarantee (FEG), formerly known as the General Employee Entitlements and Redundancy Scheme (GEERS).³¹

Taxation Administration Act 1953 (Cth) ("TAA")

2. Director Penalty Notices

[Section 269-15](#) sets out the director/s' obligation to 'cause the company to comply with its obligation' to pay its tax liability, which continues until the company has paid that tax or is wound up or placed in VA. Directors become liable for a penalty through the issuance of a director penalty notice (DPN) if they do not cause the company to pay its liabilities by the due date.

Note that from 29 June 2012, amendments to s 8Y extended the DPN regime to make directors personally liable for their company's unpaid superannuation guarantee charge (SGC) and PAYG

³⁰ The Appendix contains the complete provisions.

³¹ The General Employee Entitlements and Redundancy Scheme ('GEERS') was the taxpayer-funded safety net scheme for unpaid wages and other entitlements for employees of insolvent employers. This was replaced by the Fair Entitlements Guarantee in 2012.

withholding amounts. They also limit the circumstances in which directors can discharge a director penalty by placing their company into VA or liquidation. The measures were contained in the *Tax Laws Amendment (2012 Measures No.2) Act 2012* (Cth).

Fair Work Act 2009 (Cth) (“FWA”)

3. Accessory liability for company’s breaches of the FWA

[Section 550](#) treats involvement in a contravention of the FWA in the same way as the actual contravention. If a company fails to pay wages in contravention of a modern award, for example, it contravenes s 45, which is a civil remedy provision. By treating involvement in the civil remedy contravention in the same way as the actual contravention, the orders set out in s 545 of the FWA become available against the company’s controllers. These include pecuniary penalties and compensation orders.

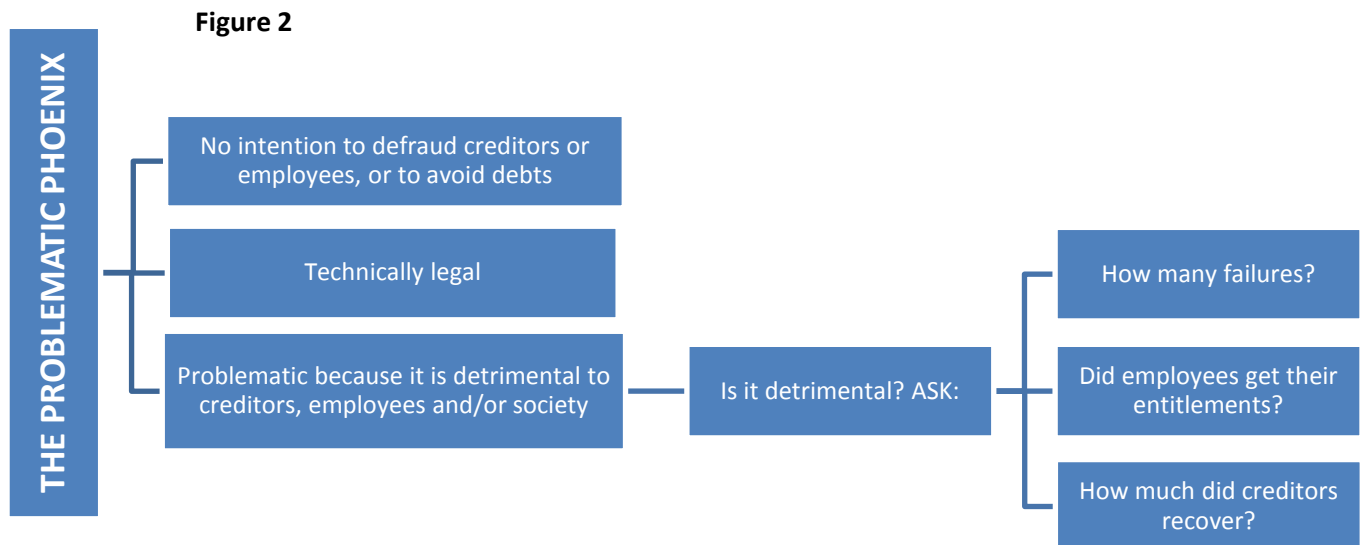
2.2.1.3 *Policy questions*

- Should the first corporate failure attract scrutiny by regulators or is it better to wait until multiple failures occur?
- Should there be a limit to the number of corporate failures by a controller that are tolerated?
- When should the controllers of failed companies be warned that their behaviour could be illegal?

2.2.2 THE PROBLEMATIC PHOENIX

As in the legal phoenix scenario, a failing business in the problematic scenario may be liquidated, placed into VA, dormant, or deregistered after remaining dormant for a period of time. The problematic phoenix is technically legal and evidences no intention on the part of the company controllers to defraud creditors or avoid other debts. However, the phoenixing becomes problematic because the resurrection of the business is not beneficial to creditors or wider society. One way of determining whether or not the resurrection of the business is beneficial is to look at the number of business failures associated with the same controller/s, and within each failure, to determine how much creditors receive of what they are owed.

Problematic phoenix activity may involve a business person with poor business skills who refuses to learn a lesson. Each of his or her businesses inevitably collapses, and in the meantime, the number of creditors impacted by the harmful behaviour increases. The impetus for placing the company into VA might be to avoid liability for breach of director’s duty or insolvent trading; and while the owner does not have the intention of starting a new company to avoid the debts of the last, nonetheless he or she does so repeatedly. The problematic phoenix can also be differentiated from the legal phoenix on the basis that it may be appropriate in this situation for ASIC to intervene to stop this business person creating yet another company.



2.2.2.1 Relevant legislation

The same legislative tools listed at 2.2.1.2 relevant to legal phoenixing are relevant to problematic phoenixing, in addition to the following:

Corporations Act

1. Disqualification of the company's directors (s 206F)

This is the only enforcement mechanism that ASIC can utilise against the company's directors and officers in the absence of any illegality. Section 206F allows ASIC to disqualify a person from managing companies for up to five years if, within the past seven years, the person has been an officer of two or more companies and the companies were wound up and the liquidator lodged a report under s 533(1) about the company's inability to pay its debts (ie, the companies were unable to pay their unsecured creditors more than 50 cents in the dollar). ASIC must be satisfied that the disqualification is justified.

2. Court ordered winding up (s 461)

Section 461 lists several grounds upon which a court may order the winding up of a company, including if:

- The court is of opinion that it is just and equitable that the company be wound up;
- Directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members; or
- ASIC has stated in a report that, in its opinion:
 - (i) the company cannot pay its debts and should be wound up; or
 - (ii) it is in the interests of the public, or the members, or of the creditors, that the company should be wound up.

TAA

3. The requirement to pay a security bond in respect of tax liabilities (Schedule 1, s 255-100)

The Commissioner of Taxation may obtain security from a taxpayer for any existing or future tax liability; including the superannuation guarantee charge, if the Commissioner considers that the

taxpayer intends to carry on an enterprise for a limited time only, or if it is otherwise appropriate. Failure to pay the security is an offence, punishable by a fine: s [255-110](#).

2.2.2.2 Cases

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Beynon (2013)³²

This case was brought by two unions on behalf of a group of workers for unpaid redundancy entitlements. The respondent in this case, Mr Beynon, was a management consultant in the manufacturing industry. He advised, and later became a director, of the company Forgecast Australia Pty Ltd (“Forgecast”). In 2001, he became the managing director, and the same year new owners bought into the company. In 2003, these new owners decided that they wanted to sell their interests, and ‘[i]n the absence of any other willing purchaser, Mr Beynon decided to acquire control of the business’.³³ Mr Beynon entered into a share sale agreement in April 2004 through a company owned and run by himself named Ideal. Under the agreement, Ideal ‘paid \$300,000 to acquire the shares in Forgecast and also to acquire a charge over the assets of Forgecast, which secured a substantial debt that had been owed to other secured creditors’.³⁴

The majority of the workers in this case were members of either the first applicant, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU), or the second applicant, the Australian Workers Union (AWU). According to the judgment:

Each of the AMWU and the AWU had entered into a collective agreement with Forgecast, in respect of the terms and conditions of employment of those employees whose industrial interests each was entitled to represent. Each of those collective agreements contain provisions entitling the employees to payments, calculated according to the respective agreements, if they should be dismissed by reason of redundancy.³⁵

Forgecast went into VA on 1 July 2004. The company was in debt to the ATO and had not been paying employees’ superannuation contributions. A DOCA was executed under which a number of staff members were made redundant. The employees only received 50% of their redundancy entitlements, prompting the AMWU to enter into negotiations with My Beynon in an attempt to ensure than any further redundancies would be paid out at the full rate. Initially compliant, Mr Beynon backed out of the agreement with the AMWU upon discovering ‘that it was not possible to pay redundant employees the difference between what they would recover under the Commonwealth’s General Employee Entitlements and Redundancy Scheme (GEERS) and their full entitlements’.³⁶ Forgecast ran into financial turmoil again in mid-2009.

Forgecast had three secured creditors, the largest of whom was Ideal Pty Ltd (“Ideal”), which was owed \$3,938,000. As Ideal’s sole director, Mr Beynon appointed Mr Dixon and Laurence Fitzgerald as joint and several receivers and managers of Forgecast in November 2009. Attempts to sell the business failed, with Mr Beynon the only party expressing interest in the purchase. Employees became aware that on any sale of the business there were insufficient funds to meet their redundancy entitlements, and that Mr Beynon would not guarantee their payment. The employees decided to strike, but a few days later the receivers treated them as having been made redundant.

According to the judgment:

On 14 December 2009, Mr Beynon sent an email to Mr Dixon, containing a proposal that a new company of his would recommence the business of Forgecast in the same premises and re-employ approximately 30 of the previous employees of Forgecast. He proposed that he would liquidate

³² *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Beynon* [2013] FCA 390

³³ *Ibid* [23].

³⁴ *Ibid*.

³⁵ *Ibid* [1].

³⁶ *Ibid* [25].

Forgecast, so that employees who were not to be re-employed could apply for payments from GEERS. On 18 December 2009, Mr Beynon on behalf of Ideal made a formal offer to purchase from the receivers Forgecast's plant, equipment, tooling and intellectual property. On the same day, Forgecast received statutory demands from some of the former employees as creditors.³⁷

Mr Beynon proceeded to register a new company, naming himself the sole director and shareholder, and made an offer to buy the business of Forgecast in January 2010. The receivers accepted the offer. Forgecast subsequently went into liquidation. It ignored its agreement with the AMWU and the AWU, failing to pay the employees any redundancy entitlements.

The applicants needed to demonstrate that as the directing mind and will of Forgecast, Mr Beynon's state of mind was such that he intended, with full knowledge of the facts of the contravention, to deny the employees their entitlements. However, Justice Gray found that since the contraventions occurred while Forgecast was in receivership, the directing mind and will at the relevant time belonged to the receivers. Therefore, in order for the contraventions to be made out, the director and receivers would have had to be "linked in purpose" with a common intention of denying the employees their entitlements. While Justice Gray found that Mr Beynon (and therefore Ideal) possessed this intention, he held that the receiver did not, and therefore ultimately the applicants' claims failed.

Fair Work Ombudsman v Happy Cabby Pty Ltd (2013)³⁸

This case was brought by the FWO against Happy Cabby Pty Ltd ("Happy Cabby") and Mr Graeme Thomas Paff, its sole director and secretary, for underpayment of drivers' wages. Happy Cabby offered airport shuttle services. On 10 April 2013 it ceased operating, leaving over \$26,000 worth of wages unpaid. Shortly afterwards, another company within the same group of companies controlled by Mr Paff - Happy Cabby Shuttles - took over the business. The judgment noted that the respondents failed to provide a credible explanation for the organisational restructure, and that they also failed to 'explain the impact of the change on the assets or income of the Company'.³⁹ The FWO submitted that it was 'open to the Court to form the view that the restructure has been undertaken in order to avoid the financial consequences of the Company's admitted contraventions'.⁴⁰ While the judge agreed that this inference was available to him, he made no finding on this point.

Re Quinlivan and Australian Securities and Investments Commission (2010)⁴¹

ASIC disqualified Mr Quinlivan from managing corporations for three years under s 206F of the *Corporations Act*. This case was an appeal by Mr Quinlivan against his banning. His disqualification specifically related to 15 companies which had failed and been wound up, although it should be noted that at the time proceedings commenced he was also the director – usually the sole director – of numerous other entities, some 70 in total.

Mr Quinlivan's companies were arranged in a vertically integrated business structure. All of the companies within the group broadly related to the marketing and sale of properties. Some of the activities undertaken by various entities within the group included:

- offering seminars promoting investment opportunities;
- operating call centres promoting the seminars;
- arranging travel or accommodation for seminar participants;
- acquiring and refurbishing homes for sale;
- offering real estate services for interested investors;
- financing loans.

³⁷ Ibid [38].

³⁸ *Fair Work Ombudsman v Happy Cabby Pty Ltd* [2013] FCCA 397

³⁹ Ibid [3].

⁴⁰ Ibid [81].

⁴¹ *Re Quinlivan and Australian Securities and Investments Commission* (2010) 113 ALD 599. See also *Quinlivan v ASIC* (2010) 81 ACSR 522; [2010] FCAFC 161

According to the judgment, '[a]ll of the companies charged each other for the services they provided. Most of them dealt exclusively with other group members. As a result, each company ran up large debts owed to other companies in the group. Many of them had no other clients or debts, apart from those owed to the Commissioner of Taxation'.⁴² Companies within the group started failing in 2002 with significant debts but no assets to pay these off because all of the group's assets were owned by other entities within the group.

While it was open to the AAT to infer that Mr Quinlivan deliberately set up the corporate group structure to avoid the payment of debts and protect himself from liability to creditors, the AAT did not do so due to lack of evidence. Nevertheless, the AAT affirmed ASIC's decision and increased Mr Quinlivan's disqualification from three years to five years.

2.2.2.3 Policy questions

- This type of business person needs to be educated about possible illegal phoenix activity. Should this education be compulsory?
- Should there be some restrictions placed on this person incorporating another company?
- Should consideration be given to the introduction of measures to restrict the sale of a failed business to its previous owner?
- The omission by local and international governments to mandate minimum capitalisation rules for newly incorporated companies typically shifts the risk of loss from the controllers of the company to the company's unsecured creditors. Should minimum capitalisation legislation be introduced?
- Should the controllers face a reverse onus of proof with respect to directors' duty breaches?
- Should the controllers be required to lodge bonds with respect to corporate, as well as tax, debts?
- Should Newco be required to lodge financial statements, even where the *Corporations Act* does not presently require it (ie small proprietary limited ('pty ltd') companies)?
- Should there be additional funding for liquidators to investigate these sorts of repeated insolvencies thoroughly?

2.2.3 THE ILLEGAL PHOENIX TYPE 1- INTENTION TO AVOID DEBTS VIA PHOENIXING IS FORMED AS COMPANY STARTS TO FAIL

The first type of illegal phoenixing occurs where a company was set up with the best of intentions but nonetheless finds itself in financial difficulties. This could be as a result of bad luck or bad business practice. The intention to engage in the phoenixing behaviour is formed at a later time, at, or immediately prior to, the failure of the business. The controllers in this scenario deliberately seek to separate the business from its debts, including loans, tax debts, trading debts, judgment debts, or employee entitlements. As above, this can be done via liquidation, voluntary administration or by allowing the company to remain dormant. As in all other cases of phoenix activity, the business is then continued through a newly created entity or through an existing entity controlled by the same people or their associates.

The illegality of the behaviour turns on the improper intention of the company's controllers, which inevitably involves a contravention of one or more laws such as the directors' duties or the provisions governing the fraudulent removal of company property, for example. Often a feature of this behaviour is the transfer of assets at below market value. Relevant cases and statutory provisions are outlined below. The fact that there is no express 'phoenix offence' presents difficulties in classifying these cases, because courts often describe the typical circumstances of a phoenix but do not use that actual term. We have therefore included in paragraph 2.2.3.2 cases

⁴² Ibid [17].

where courts have made adverse findings in circumstances that meet the phoenix scenario outlined here.

Its external indicators include the transfer of Oldco's assets to Newco for inadequate consideration, which can take place prior to or during the external administration of Oldco, or during the company's period of dormancy. However, assessing the adequacy of the consideration is difficult, and the fact that Oldco's controllers were the purchasers, or the controllers of the purchaser Newco, is not determinative. There may be a limited or non-existent alternative market for the company's assets. Obtaining an independent valuation of the assets is problematic where assets are specific to a particular business.

Figure 3



2.2.3.1 *Relevant legislation*

The legislation noted in 2.2.1.2 and 2.2.2.1 is also relevant where illegal phoenixing type 1 has taken place, in addition to the following:

Corporations Act

1. Voidable transactions ([s 588FE](#)) [uncommercial transactions ([s 588FB](#)); insolvent transactions ([s 588FC](#)); unreasonable director-related transactions ([s 588FDA](#))];
2. Director's duty to prevent insolvent trading by company ([s 588G](#)) via an uncommercial transaction ([s 588FB](#) or [s 588G1A](#));
3. Offences by officers of certain companies ([s 590](#)):
 - a. Failing to disclose property of the company, improper disposition or fraudulent concealment of property, or the concealment of debts ([s 590](#));
 - b. Incurring of certain debts; fraudulent conduct ([s 592](#));
 - c. Frauds by officers ([s 596](#)).
4. Entering into agreements or transactions to avoid employee entitlements ([s 596AB](#)) [person who contravenes s 596AB liable to compensate for loss ([s 596AC](#))];
5. Order against person concerned with corporation ([s 598](#));
6. Court power of disqualification--insolvency and non-payment of debts ([s 206D](#));

7. Directors' and officers' duties:
 - a. Duty of care and diligence ([s 180](#));
 - b. Duty to exercise powers and discharge duties in good faith in the best interests of the corporation; and for a proper purpose ([s 181](#));
 - c. Duty to not use position improperly to gain an advantage for oneself or someone else, or to cause detriment to the company ([s 182](#));
 - d. Duty to not use information improperly to gain an advantage for oneself or someone else, or to cause detriment to the company ([s 183](#)).
8. Court power of disqualification--contravention of civil penalty provision ([s 206C](#));
9. Court power of disqualification--insolvency and non-payment of debts ([s 206D](#));
10. Compensation orders-- a court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if that person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme and damage resulted from the contravention ([s 1317H](#));
11. Court ordered pecuniary penalties where a contravention materially prejudices the interests of the corporation or scheme, or its members; or materially prejudices the corporation's ability to pay its creditors; or is serious ([s 1317G](#));
12. ASIC may apply for a declaration of contravention, a pecuniary penalty order or a compensation order ([s 1317J](#));
13. Criminal breach of directors' duties ([s 184](#));
14. Liability of the advisor as an accessory to directors' duty breaches ([s 79](#));
15. Breaches of the company's obligation to correctly record and explain transactions and the financial position and performance of the company ([s 286](#));
16. Falsification of books ([s 1307](#));
17. A court may set aside a resolution where the outcome of voting at a creditors' meeting was determined by a related entity ([s 600A](#)).

TAA

18. Failure to comply with requirements under taxation law ([s 8C](#));
19. Failure to answer questions when attending before the Commissioner or another person pursuant to a taxation law ([s 8D](#));
20. Making false or misleading statements to a taxation officer ([s 8K](#)) or recklessly making false or misleading statements ([s 8N](#));
21. Incorrectly keeping records ([s 8L](#)) or recklessly incorrectly keeping records ([s 8Q](#));
22. Incorrectly keeping records with intention of deceiving or misleading ([s 8T](#));
23. Falsifying or concealing identity with intention of deceiving or misleading ([s 8U](#));
24. Directors and officers are liable for taxation offences committed by the company ([s 8Y](#)).

Criminal Code Act 1995 (Cth)

25. Dishonestly obtaining Commonwealth property ([s 134.1\(1\)](#));
26. Obtaining financial advantage by deception ([s 134.2\(1\)](#));
27. Dishonestly causing a loss to the Commonwealth ([s 135.4\(3\)](#)).

2.2.3.2 Cases

Here we include cases where courts have made adverse findings in circumstances that meet the illegal phoenix type 1 scenario outlined in paragraph 2.2.3 above.

ASIC v Somerville (2009)⁴³

ASIC v Somerville is a case dealing with both accessorial liability and illegal phoenix activity. It represents the only occasion on which a lawyer has been bought to account in this way. ASIC issued

⁴³ *ASIC v Somerville* [2009] NSWSC 934.

civil penalty proceedings against Mr Somerville and eight directors of companies advised by him, seeking declarations that the directors had acted in breach of the statutory directors' duties contained in *Corporations Act* ss 181(1), 182(1) and 183(1).⁴⁴

The action related to advice provided to the directors by Mr Somerville in relation to fifteen Oldco companies that were either insolvent or likely to become insolvent. On each occasion Mr Somerville wrote a letter of advice to the director⁴⁵ in very similar⁴⁶ terms. After pointing out the disadvantages and impracticalities of entering a scheme of arrangement or selling the business on the open market, the letters advised the directors that 'the only viable alternative open ... is to transfer the business to a solvent entity'⁴⁷ and to pay Oldco for assets transferred to Newco with 'V' class shares. These shares carried the right to receive dividends from Newco up to the agreed value of the assets transferred. However, the court found that Mr Somerville and the directors considered payment of any such dividends 'optional or discretionary' [and] 'there was no proper purpose in any of the transactions other than to keep the benefit of the assets in another company without the burden of liabilities.'⁴⁸

Mr Somerville's involvement was unquestioned. In addition to the encouraging letters of advice that advised directors of the 'only' way forward, once clients gave instructions to proceed, Mr Somerville prepared the necessary agreements between Oldco and Newco, registered Newco, prepared Newco's returns and resolutions for the 'V' class shares and made sure Oldco was wound up at the right time so as to avoid exposing the directors to personal liability.⁴⁹ Hence Mr Somerville was held liable under ss 181(2), 182(2) and 183(2) as a person involved in the directors' breaches of duty.⁵⁰

ASIC sought Mr Somerville's disqualification as a director for 12 years. However, Windeyer AJ considered that 'excessive and unnecessarily punitive' and that 'to some extent deterrence and punishment would be achieved by the publicity resulting from the case and the eventual costs order.'⁵¹ He instead disqualified Mr Somerville from managing corporations for six years, which prevented him from continuing as a director of his incorporated legal practice.

Windeyer AJ had made it clear that he did not believe Mr Somerville's sworn affidavit evidence,⁵² considered the arrangements a 'subterfuge'⁵³ and Mr Somerville's conduct serious.⁵⁴ However, despite the findings of Windeyer AJ as to Mr Somerville's character, no disciplinary action ever eventuated against him, either by the Law Society of NSW or Legal Services Commissioner.⁵⁵

Canadian Solar v ACN 138 535 832 Pty Ltd (2014)⁵⁶

In this case the Federal Court of Australia terminated a DOCA executed by Redset Group Pty Limited (Redset), and issued a winding up order. The DOCA was terminated because the Court was satisfied

⁴⁴ Ibid [6].

⁴⁵ Most companies were sole director companies: ibid [8].

⁴⁶ The letters only varied in relation to the stated fee for a deed administrator and the consideration for the transfer of assets from Oldco to Newco, ibid at [8].

⁴⁷ Ibid Annexure A.

⁴⁸ Ibid [42].

⁴⁹ Ibid [47].

⁵⁰ Ibid [46].

⁵¹ Ibid [36].

⁵² Ibid [31].

⁵³ Ibid.

⁵⁴ Ibid [35].

⁵⁵ Any cancellation of his practising certificate would need to have been recorded on the Register of Disciplinary Action: *Legal Profession Act 2004* (NSW) s 577. The register can be found here: Office of the Legal Services Commissioner, *Register of Disciplinary Action*, Lawlink <<http://www.lawlink.nsw.gov.au/olsc/nswdr.nsf/ListByName?OpenAgent&Start=S>>.

⁵⁶ *Canadian Solar v ACN 138 535 832 Pty Ltd, In the Matter of ACN 138 535 832 Pty Ltd (Subject to a Deed of Company Arrangement)* [2014] FCA 783.

that a number of transactions surrounding its execution were suspicious and potentially voidable, it was clearly contrary to the interests of the creditors as a whole and there was evidence that there had been material contraventions of its terms. One of the reasons given for issuing the winding up order was that it would allow the transactions surrounding the DOCA to be investigated by a court appointed liquidator.

Prior to the entering of the DOCA, Redset was owned and controlled by Ross Young. Following advice that the company was distressed, Young entered into an agreement with a firm of business advisers to identify a buyer for the whole of Redset's business and assets. On 7 August 2013, AJK Group Pty Ltd was incorporated. Its sole director and secretary was an employee or officer of the same firm of business advisors. Redset executed an asset sale agreement with AJK under which AJK paid the business advisory firm \$300,000 as part of its fee for brokering the deal. The sale agreement was structured in a way that no money actually passed between AJK and Redset for the assets. Perry J noted that:

[...] while the beneficial owners of the shares in AJK are not yet known, Mr Young appears to have assumed the role of manager of the business now undertaken by AJK. On its face, therefore, it is fair to observe, as did the plaintiff, that the transaction has the appearance of a so-called 'phoenix' transaction to which Mr Young 'committed' the company in breach of his fiduciary duties.⁵⁷

Emerson Industries⁵⁸

Gregory Harkin was a farm worker who operated his business through two companies. When Harkin started having financial difficulties, he restructured his business to operate through three new companies, and transferred all employees, contracts and assets into these new entities:

- . a trading company;
- . an assets-owning company; and
- . a labour-employing company.

His family trust company was a shareholder of the assets-owning company. His debts, particularly to the ATO for payroll tax and workers compensation premiums increased and his original two companies went into administration. One was then deregistered and the second was liquidated.

Out of the three new entities he created, the labour-supply company failed first. Harkin went on to replace it with a new company with his wife as director. In October 2000, Harkin was made bankrupt. Nevertheless, he continued operating through the two remaining companies because of an administrative failure to ascertain his financial history by the head contractors on the companies' projects. In mid-2001, Harkin was no longer able to pay his employees as a result of a building contract dispute. His two remaining companies went into administration thereafter and all contracts were cancelled. The Construction, Forestry, Mining and Energy Union (CFMEU) intervened, leading to an agreement by the major builders on the project to pay the employees their outstanding entitlements; however no action was ever taken against Harkin by ASIC because the matter was 'in the hands of liquidators'.⁵⁹

According to the 2003 Cole Report:

This case demonstrates, as do the other case examples that it is possible for phoenix company activities involving a series of companies owned by the same or related persons to continue for a number of years, unchecked by any action by Commonwealth or State regulatory authorities.⁶⁰

Fair Work Ombudsman v Foure Mile Pty Ltd (2013)⁶¹

⁵⁷ Ibid [15].

⁵⁸ Referred to in the Cole Report. Above no 10, vol 8, 121-123.

⁵⁹ Ibid 122 [39].

⁶⁰ Ibid 123 [41].

⁶¹ *Fair Work Ombudsman v Foure Mile Pty Ltd* [2013] FCCA 682.

Four Mile Pty Ltd was a transport and road freight company run by a husband and wife team, the former actively and the latter in name only. Before entering liquidation in 2011, its assets were stripped and sold for inadequate consideration to a newly incorporated company, Four Mile Holdings Pty Ltd, allowing the business to continue operating under the same ownership, debt-free.

This case was brought by the Fair Work Ombudsman (FWO) on behalf of a former employee denied wages as a result of the illegal phoenix activity. FWO claimed contraventions of the Pre-Modern Award,⁶² the FWA and the Modern Award.⁶³ While the judge noted that he was not persuaded that the directors' actions were deliberate in the sense of 'setting out to exploit the employee', he was persuaded that they were 'a product of recklessness'.⁶⁴ In finding against the respondents, Judge Riethmuller of the Federal Circuit Court stated the following:

It does not appear to me that the Second Respondent has shown any real remorse or contrition, nor has corrective action been taken. Rather, the contrary has occurred in the operation of the business. Its re-structure has been such as to effectively deny the employee the capacity of suing the First Respondent with any real expectations of recovering the amount owing. There is clearly a need for deterrence, not only with respect to the specific conduct in the underpayments and with respect to the conditions but also with respect to the conduct in operating the business in such a fashion as to result in an employee being left without any practical remedies for the underpayment.⁶⁵

The respondents were ordered to pay \$41,303.21 directly to the applicant, pursuant to s 841(b) of the *Workplace Relations Act 1996* (Cth) (hereinafter '*Workplace Relations Act*') and s 546(3)(c) of the FWA.

FWO v Ramsey (2006 and 2011)⁶⁶

The FWO sought a freezing order over Newco's assets as a consequence of the conduct of Stuart Ramsey. Ramsey attempted to avoid Ramsey Food Processing Pty Ltd's liability for workers' entitlements by setting up a company called Tempus Holdings Pty Ltd ("Tempus"). Tempus employed workers and supplied them to Ramsey Food Processing Pty Ltd to work at its abattoir under a labour-hire arrangement. After the employment of eleven abattoir workers was terminated, Tempus was drained of funds and placed into liquidation in an effort to prevent the workers from recovering their termination entitlements. In 2006, Ramsey had shut down four companies he controlled to avoid paying more than \$200,000 in fines and back-payment orders imposed by the Federal Court for underpayment of \$125,000 in termination entitlements of South Grafton abattoir workers in 2002.⁶⁷

In the 2011 proceedings, Ramsey Food Processing was found to be the true employer, rather than Tempus. By failing to pay to the employees payments in lieu of notice, severance pay and untaken annual leave entitlement under the provisions of the Federal Meat Industry (Processing) Award 2000, Ramsey Food Processing breached s 235 of the *Workplace Relations Act*. Mr Ramsey was involved in the contraventions of Ramsey Food Processing within the meaning of s 728 of the *Workplace Relations Act*.

Grossman v ASIC (2011)⁶⁸

⁶² A modern award is 'a legal document that outlines the wages and conditions of employment for employees that are covered by it within a particular industry or occupation'. See Fair Work Ombudsman, *Dictionary* <<http://www.fairwork.gov.au/dictionary.aspx?exactterm=Award>>.

⁶³ A term used by FWO to refer to awards that existed before 1 January 2010.

⁶⁴ Above no 61, [33].

⁶⁵ Ibid [34].

⁶⁶ *FWO v Ramsey* (2011) 198 FCR 174, 176–7 [3]; *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (No 2) [2012] FCA 408; [2011] FCA 1176.

⁶⁷ *McIlwain v Ramsey Food Packaging Pty Ltd* [2006] FCA 828; 154 IR 111; *McIlwain v Ramsey Food Packaging Pty Ltd* (No. 4) [2006] FCA 1302.

⁶⁸ *Grossman v ASIC* [2011] AATA 6.

ASIC disqualified Mr Grossman from managing corporations for five years in February 2009 under s 206F of the *Corporations Act*. This case was an appeal to the AAT by Mr Grossman against his disqualification. Mr Grossman was an officer of three corporations that had been wound up, Hot Metal Pty Ltd (“Hot Metal”), Vahuzun Pty Ltd (“Vahuzun”) and Bico Designs Pty Ltd (“Bico”).

Hot Metal, a jewellery design and casting company, was incorporated in 1999. Mr Grossman was the sole director and secretary of the company from May 2001 until October 2004, and his wife its sole shareholder. Hot Metal went into VA in 2003. Vahuzun was incorporated in March 1987. Mr Grossman was appointed as its sole director and secretary from June 2003 until May 2005. Vahuzun went into VA in November 2003 and was deregistered in May 2005. Vahuzun's shareholders when it entered administration were all relatives of Mr Grossman. Bico was incorporated in June 1998. Mr Grossman was one of Bico's three directors from July 2003 until September 2007, and an employee from July 2002. When Bico went into VA in 2007, his wife owned 30 per cent of the company's shares. However, this did not insulate Mr Grossman's other businesses from Bico's actions.

Bico had a factory that carried out the finishing, coating, and packaging of the jewellery sent to it by Hot Metal, which only carried out the casting and dressing of the jewellery. Between July 2000 and July 2002, 80 per cent of Hot Metal's business related to orders placed by Bico. In March 2002, Bico started importing castings from Asia at a cheaper price, and Hot Metal stopped turning a profit. According to the judgment, in mid-2002 Bico approached Mr Grossman ‘to assist in their production, and to assume control of its factory operations’.⁶⁹ Mr Grossman subsequently ‘worked out a scheme in order to maximise the return for Hot Metal’,⁷⁰ which included Bico taking over Hot Metal's business, some of Hot Metal's employees moving to Bico, and Bico moving into Hot Metal's premises and taking over its lease. Bico did not assume responsibility for any of Hot Metal's debts.

Vahuzun's primary business was the rental of property leased by Hot Metal. When Hot Metal went into VA in 2003, Vahuzun lost its main client. It sold the property and ceased trading. From the proceeds of sale of the property \$180,000 was paid to Mr Grossman in wages and \$165,832 was paid to his wife, Linda Grossman. Hot Metal, Vahuzun and Bico all failed owing substantial amounts in superannuation, tax, and other debts, totalling \$1,338,787. Upon entering VA, each of the company's gave preference to the interests of some unsecured creditors, including Mr Grossman's wife, himself, and his other relatives, over the payment of each company's respective debts.

The Member presiding over the case, Ms Ettinger, held that Hot Metal's business was transferred to Bico for the purpose of avoiding its statutory responsibilities. The Member also concluded the following in relation to the sale of Bico's business to a fourth company, Bico Australia Pty Ltd, in 2006:

Further activity ASIC held to be Phoenix-like was Bico Designs entering into an Agreement for Sale of Business with Bico Australia Pty Ltd (Bico Australia), on 9 June 2006 five days prior to the appointment of the administrator on 14 June 2006. [...] ASIC considered that Mr Grossman may have breached his duties under ss 180, 181, and/or 182 of the Act as the Agreement for Sale gave unfair preference to particular unsecured creditors of Bico Designs to the exclusion of other unsecured creditors of the company. [...] ASIC drew the inference that the sale of the business was done to transfer the business of Bico Designs, and to avoid paying the ATO and its other statutory liabilities. Given the date of incorporation of Bico Australia (1 June 2006), its directors being Joseph Biton and Mr Grossman (also Bico Designs directors), and the exclusion of responsibility for liabilities, in particular to the ATO, leads me to strongly come to that same conclusion as ASIC.⁷¹

Ms Ettinger stated that she was satisfied that Mr Grossman ‘engaged in Phoenix-like activity in transferring the business of Bico Designs to Bico Australia in 2006’.⁷² In upholding the disqualification, she stated that ‘Mr Grossman is not a suitable person to be concerned in the

⁶⁹ Ibid [47].

⁷⁰ Ibid.

⁷¹ Ibid [91-92]; [98].

⁷² Ibid [108].

management of corporations. Taking into account the protection of the public, and the interests of the public, and in terms of general deterrence, he should be disqualified pursuant to s 206F of the Act from managing corporations'.⁷³

Jeffree v National Companies and Securities Commission (1990)⁷⁴

The director of a company that faced an adverse commercial arbitration decision transferred the company's business name and assets to another company. The consideration paid to the company for the transfer was sufficient to meet trade creditor claims but left nothing to pay the debt created by the arbitration award. This was held to be an improper use of information acquired in his position as a director, contrary to the equivalent of the *Corporations Act* s 183.

R v Heilbronn (1999)⁷⁵

Criminal action was taken against Greig Heilbronn, the director of a company with substantial sales tax liabilities, who stripped the company of its assets and transferred them to a second company, and subsequently to a third company. On each occasion, the same business was conducted under the same trading name. A proper price was not paid for the assets and no effort was made to ensure that liabilities and legal obligations under the predecessor to the *Corporations Act* had been met. The director, Heilbronn, was found to have knowingly and intentionally defrauded the creditors of the second company and, in doing so, made an improper use of his position as officer to cause detriment to that company.⁷⁶ He was sentenced to two years imprisonment.

R v William John Walters (2001)⁷⁷

In 2001, Mr Walters was convicted of having been knowingly concerned in the defrauding of the Commonwealth 'in respect of group tax required to be remitted to the Commissioner of Taxation'.⁷⁸ This was a contravention of s 29D of the *Crimes Act 1914* (Cth), attracting a statutory maximum sentence of imprisonment for 10 years (NB. s 29D has now been repealed).

Mr Walters was a bricklayer who ran apparently successful businesses. However, as the Court noted:

[...] two conflicting but closely intertwined forces became predominant in his personal and business affairs. One was his aspiration to a very high standard of living. The other was the grossly disorganised manner in which he managed what was, on any reasonable reckoning, a major, successful and lucrative business enterprise. An off-shoot of that chaotic business management style was that the prisoner, although he made proper taxation deductions from the weekly pay packet of every employee, failed persistently to account as he was lawfully required to do to the Commissioner of Taxation for the group tax deductions which came into his hands.⁷⁹

In total, Mr Walters' ten companies failed to remit \$7,302,221.58 in group tax payments over a period of nine years and four months. The Court also highlighted the following:

In the case of each company, it was demonstrable that the prisoner had systematically drawn out for his personal use very large sums of money; that he had failed, just as systematically, to remit the amounts of group tax for which he was accountable to the Commissioner of Taxation; and that when a point was reached in the life of the particular company when it was clear that the company had no chance of paying its accumulated arrears of group tax, the company was wound down; and both its employees and its work in progress were simply transferred over to a new company. This approach

⁷³ Ibid [112].

⁷⁴ *Jeffree v National Companies and Securities Commission* [1990] WAR 183.

⁷⁵ *R v Heilbronn* (1999) 150 FLR 43.

⁷⁶ This was a breach of s 232(6) of the *Corporations Law* (Cth), as it then was (now *Corporations Act* s 182). It was therefore a civil penalty breach. Because of Heilbronn's intentionally dishonest behaviour, it became a criminal offence under the equivalent of the present s 184(2).

⁷⁷ *R v William John Walters* [2001] NSWSC 640; [2001] NSWSC 786; [2002] NSWCCA 291.

⁷⁸ Ibid [1].

⁷⁹ Ibid [20].

entailed, of course, that the Commissioner of Taxation had no practical recourse against the remaining, asset-stripped, corporate shell.⁸⁰

Mr Walters also breached a restraining order made on 13 May 1998 pursuant to s 43 of the *Proceeds of Crime Act 1987* (Cth).

From a profiling perspective, it is noteworthy that:

- Each of the companies had a very different name (Lymkom Pty Ltd; Kindby Pty Ltd; Frego Pty Ltd; Taureema Pty Ltd; Budscan Pty Ltd; Milcoy Pty Ltd; Camotray Pty Ltd; Convoy Pty Ltd; Aloprom Pty Ltd; AJ Australia Pty Ltd). As in the case of the Guss family noted in 2.2.4.2, detection based on similar names would be ineffective.
- The periods of time over which the companies failed to remit tax varied from six weeks to three years and six months, although in general, the time periods became shorter as the years went on.

Ferrari v Ferrari Invest (T'ville) P/L (in Liq) (1999)⁸¹

Oldco was a real estate company that had amassed significant customer goodwill through its business of letting property for clients. Oldco became insolvent in June 1987 and ceased trading on 1 July 1987. Before trading ceased, the directors (also sole shareholders) incorporated Newco, and continued on the business utilising the same customer “rent roll” and the same premises as Oldco. Oldco remained dormant for two years before being placed into liquidation. In this case, the liquidators of Oldco were pursuing equitable damages or compensation for the uncommercial transfer of the company’s goodwill. While not specifically stated in the judgment, it can be extrapolated from the facts that the liquidator’s action was brought based on the fact that Oldco’s creditors were not paid in full since the directors conceded at trial that ‘the transfer or gift of the rent roll to the new company was in breach of their fiduciary duty to the original company’.⁸² Justice Thomas held that the directors were personally liable for the breach of their duties, and that since Newco had received the benefits of the transfer with full knowledge of the facts, that it had become accountable to Oldco as a constructive trustee.

Kovacic (2006)⁸³

ASIC brought charges against company director Mr Kovacic in 2006, citing concerns that he had engaged in illegal phoenix activity. The case was prosecuted by the Commonwealth Director of Public Prosecutions. In 2003, Mr Kovacic transferred assets from a failing company of which he was the sole director, Southern Concrete Australia, into an associated company, Southern Concrete (NSW) Pty Limited, before placing the former into administration.

According to ASIC’s media release:

Mr Kovacic placed Southern Concrete Australia into administration due to financial problems. A week later Mr Kovacic personally collected a cheque for \$48,938.45 made payable to Southern Concrete Australia, banked it into an account held by Southern Concrete (NSW) then used these funds to pay the expenses of that company. When confronted by the Administrator and directed to repay the monies Mr Kovacic paid back \$33,000.00 but \$15,938.45 remained outstanding.⁸⁴

According to the ASIC media release, Mr Kovacic was found guilty of fraudulently removing company property, and was disqualified from managing corporations until 10 April 2011. In addition to his

⁸⁰ Ibid [23].

⁸¹ *Ferrari v Ferrari Invest (T'ville) P/L (in Liq)* [1999] QCA 230.

⁸² Ibid [5].

⁸³ Australian Securities and Investments Commission, ‘ASIC takes action against ‘phoenix’ director’ (Media Release 06-125, 21 April 2006) <<http://www.asic.gov.au/asic/asic.nsf/byheadline/06-125+ASIC+takes+action+against+%27phoenix%27+director?openDocument>>.

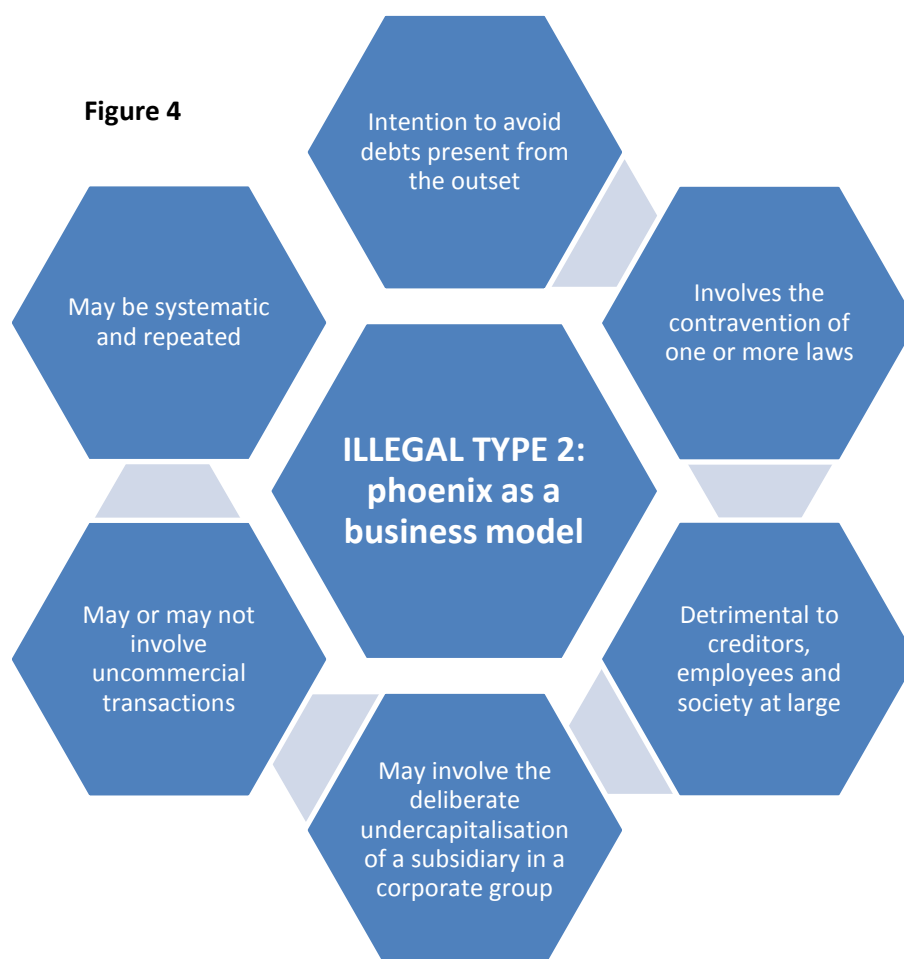
⁸⁴ Ibid.

disqualification, Mr Kovacic was placed on a two-year good behaviour bond and ordered to repay the \$15,938.45.

2.2.4 THE ILLEGAL PHOENIX TYPE 2- PHOENIX AS A BUSINESS MODEL

In the second type of illegal behaviour, the company is deliberately set up to be phoenixed; that is, its controllers never intend the company to succeed. After accumulating tax debts, trading debts, judgment debts or other liabilities, the controllers transfer the assets out of the company and liquidate it or leave it dormant to be eventually deregistered by ASIC. These actions are taken deliberately with the intent of separating the business from its obligations, and may come about as the result of a third party's advice.

Company controllers in the illegal type 2 scenario may facilitate the illegal behaviour through a corporate group structure by deliberately undercapitalising a subsidiary then liquidating it to avoid the payment of tax liabilities and employee entitlements. The subsidiary's assets and employees may have been transferred to another entity in the group prior to the liquidation in an uncommercial transaction, or alternatively, the subsidiary may never have owned any assets, acting simply as the contracting or labour hire arm of the corporate group.



2.2.4.1 *Relevant legislation*

The same legislative tools that come into play in the type 1 illegal phoenix scenario are likely to also be relevant in the type 2 scenario, in addition to the following:

Corporations Act

Where companies in a group are under external administration and are related body corporates of each other, Part 5.6 Division 8 of the *Corporations Act* allows for the pooling of their assets and liabilities. However, these provisions do not allow the creditors of failed companies within a group to access the assets of any solvent companies within the group.

2.2.4.2 Cases

Here we include cases where courts have made adverse findings in circumstances that meet the illegal phoenix type 2 scenario outlined in paragraph 2.2.4 above.

Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd (2004)⁸⁵

The following facts were alleged by the ATO in an application to wind up companies associated with the Guss family in 2004. Although these allegations were ultimately untested by the court, they appear to fit into the illegal type 2 category.

Joseph Guss was a solicitor conducting his own legal practice. He was also an undischarged bankrupt who had failed to file his statement of affairs. Mr Guss, his wife and adult children controlled a succession of companies operating the same furniture business. The Deputy Commissioner of Taxation (DCT) alleged a typical pattern of illegal phoenix activity over 20 years, whereby a Guss controlled company would become indebted to the ATO, and just as proceedings were commenced to wind that company up for the purpose of debt recovery, stock in trade, plant and equipment, employees and other assets were transferred to another Guss company, which carried on the same business, usually from the same premises and in the same manner.

From a profiling perspective, it is important to note:

- The names utilised by Guss family companies, their predecessor entities and associated businesses were significantly different from each other, and included Casualife Furniture International Pty Ltd ('Casualife'), Kencord Pty Ltd, Bongania Pty Ltd, Burwood Retail Pty Ltd, Outdoor Megastore Holdings Pty Ltd, Bendix Consolidated Industries Pty Ltd, Tropitone Furniture Pty Ltd, Scandi Qld Pty Ltd and Buckland Products Pty Ltd. This means that detection mechanisms solely based on similar names would have missed this pattern of behaviour.
- Mr Guss appears to have utilised his legal knowledge to complicate the legal proceedings, through filing numerous affidavits and seeking adjournments. After the initial winding up order was made, and despite overwhelming evidence of illegal phoenix activity, falsification of documents and untrue testimony, the companies applied for a stay to allow an appeal to the Victorian Court of Appeal. This was rejected.
- To avoid being wound up, the defendant companies brought their tax affairs into compliance by the time of the hearings to deprive the ATO of its status as a creditor with standing to apply. However, by the time of the judgment, they were again in default.
- From time to time non-family members were appointed as directors of Guss companies, including Mr Varendran, a former Casualife employee. He considered himself a nominee director with no decision making power.
- Liquidators gave evidence about the difficulties they encountered in obtaining information about the companies they were winding up. They were met with obfuscatory delaying tactics.
- Based on the evidence of an accountant, Hansen J noted 'the way in which Joseph Guss conducts matters which is, in relation to other people, to tell them no more of his business than what he thinks is in his best interests, and that is as little as possible giving himself and his interest the maximum room to swerve and manoeuvre'.⁸⁶
- In terms of character, Hansen J described Mr Guss as follows:

⁸⁵ *Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd* [2004] VSC 157.

⁸⁶ *Ibid* [25].

While evidently intelligent he is by nature a cunning, plotting type of person giving to deviousness. He is the architect of the Byzantine corporate web discussed in this judgment. He seemed to me to lack any moral concern over the trail of unpaid tax and other liabilities left by some of these companies. I found him an unsatisfactory witness, on numerous occasions his evidence being vague, inconsistent, contradictory and untrue.⁸⁷

DCT v Woodings (1994)⁸⁸

In *Woodings*, a company Toucan Display Systems Pty Ltd (“Toucan Display Systems”), which was subject to a DOCA, was one of seven companies controlled by the same directors, Mr Morris and his associates. Mr Woodings was the liquidator of Toucan Display Systems. The assets of each of the preceding companies had been stripped, leaving creditors, including the tax office, unpaid. The court used its powers to set aside the DOCA and order Toucan Display Systems to be wound up. The companies went into VA, followed by a DOCA, and then the ATO applied to have the DOCA set aside because the vote was carried by related parties.

The DCT contended that the respondent and his associates had been ‘directors or de facto directors of a series of companies which companies, having accumulated significant debts to the petitioner have been systematically stripped by the selling of their various undertakings to other companies controlled by Mr Morris and his associates leaving behind an indebtedness to the petitioner, the companies then being extinguished’.⁸⁹ The following amounts were owed to the ATO by each of the companies:

- Bole Consolidated Pty Ltd: \$270,032.51
- Diamond Sky Pty Ltd: \$364,639.79
- Cablewood Holdings Pty Ltd (in liq): \$248,962.00
- Dancroft Holdings Pty Ltd: \$78,648.00
- Pineroft Investments Pty Ltd (liquidator appointed): \$71,933.00
- Undercliff Nominees Pty Ltd (in liq): \$85,794.80
- Toucan Display Systems (Aust) Pty Ltd: \$129,559.44.

In its submission, the DCT alleged that:

[...] certain proxy votes were obtained by equitable fraud, because some of the creditors concerned were offered money additional to that which was to be available to them under the proposed deed of company arrangement. It is contended that the relevant proxy votes were tainted by fraud from the beginning and although there had been mention at the meeting of how they had been obtained, the fraud had not been cleansed, because the proxy votes had also been used at the meeting to obtain the passing of a resolution that the creditors enter into a deed of company arrangement with the company “in the terms set out in the proposal put to the administrator by Mr Morris and put to creditors at today’s meeting...”. It was said that the true effect of the proposed deed of arrangement would be to confer on some creditors an advantage not shared by other creditors of the same class.⁹⁰

In finding for the DCT, the judge noted that it was probable that the creditors had not known the full extent of Mr Morris’ activities and the history of the company when they voted for the DOCA at the meeting of creditors⁹¹. The judge was satisfied on the evidence that the company should ‘not be allowed to continue to operate under Mr Morris’s direct or indirect control’.⁹² Justice Wallwork ordered the DOCA to be set aside and further found that it was in the public interest that the

⁸⁷ Ibid [32].

⁸⁸ *DCT v Woodings* [1994] 13 WAR 189.

⁸⁹ Ibid 191.

⁹⁰ Ibid 192.

⁹¹ Ibid 200.

⁹² Ibid 203.

company be wound up and a provisional liquidator appointed, so as to preclude Mr Morris and his associates from further 'manipulating' the company and its creditors.⁹³

2.2.4.3 *Policy Questions*

- This sort of illegal phoenix activity is a business model and is therefore likely to be repeated numerous times. To aid detection, should regulators ensure that their databases have the capacity to link these incorporations?
- Because these companies were set up with the intention that they fail, preventative measures may be effective here. Should incorporation requirements be tightened in order to assist in discouraging or disrupting this sort of serial activity? Should additional compliance hurdles be introduced when persons are associated with multiple failures?
- Should pre-payments or more frequent payments of taxation be considered? For example, should Newco be required to lodge a bond, or pay taxes and superannuation more frequently?
- Is there a need to address the limitations of the current tax avoidance laws, where the sole or dominant purpose must be tax avoidance?
- How do we address the issue of dormant companies being deregistered with little to no scrutiny?
- Should there be a split system of external administrations, with those involving small amounts of creditor claims being subject to a simplified procedure, but those involving larger amounts being subject to court approval of asset transfers where Oldco's controllers are associated with Newco?
- Should there be a sliding scale of procedural requirements for external administrations, with more stringent procedures required where the same person has been associated with more than a certain number of failed companies?

2.2.5 **COMPLEX ILLEGAL PHOENIX ACTIVITY**

Complex illegal phoenix activity exhibits the same characteristics as the second type of illegal phoenixing in that the company was deliberately set up to avoid payment of debts from the outset. However, complex illegal phoenix activity is also likely to coincide with other forms of illegality, such as:

- The use of false invoices, including GST fraud;
- False identities;
- Fictitious transactions;
- Money laundering;
- Visa breaches and misuse of migrant labour.

⁹³ Ibid.

Figure 5



2.2.5.1 *Relevant legislation*

Legislation relevant to complex illegal phoenix activity encompasses those provisions that are relevant to type 1 and type 2 illegal phoenixing, in addition to the following:

Criminal Code Act

1. Giving false or misleading information ([s 137.1](#));
2. Producing false or misleading documents ([s 137.2](#));
3. Forgery ([s 144.1](#)) and/or using a forged document ([s 145.1](#)) and/or possessing a forged document ([s 145.2](#));
4. Giving information derived from false or misleading documents ([s 145.5](#));
5. Causing a person to enter into debt bondage ([s 271.8](#));
6. Dealing in proceeds of crime (money or property worth any value up to \$1,000,000 or more) (ss [400.3](#), [400.4](#), [400.5](#), [400.6](#), [400.7](#), [400.8](#));
7. Dealing with property reasonably suspected of being proceeds of crime ([s 400.9](#)).

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)

8. Conducting transactions so as to avoid reporting requirements relating to threshold transactions ([s 142](#));
9. The movement of physical currency both in and out of Australia ([s 53](#)).

2.2.5.2 Cases

Here we include a case where the court made adverse findings in circumstances that meet the complex illegal phoenix scenario outlined in paragraph 2.2.5 above.

Fyna Group⁹⁴

The Fyna group was comprised of numerous companies (approximately 25) and operated for some 25 years with a large workforce. Based in Sydney, the group specialised in the erection of formwork on building sites.

In 2004, the group's company accountant Edward Pearce was convicted of defrauding the Commonwealth of over \$6.9 million through the evasion of group tax over a period of five years. The charges laid against Pearce related to several of the companies in the group which were registered to pay group tax. The companies were not profitable and were only able to pay for materials and the net wages of their employees. Pearce devised a scheme designed to prevent the companies from becoming insolvent.

He instructed the finance officers for the companies to issue employees with group certificates bearing a variation of the company's name and an incorrect group tax number. The ATO could not data match the incorrect number with any existing ABN, and was unable to identify that group tax was not being remitted. The Fyna group was able to continue paying wages over a period of some years because of the amount it saved operating this illegal scheme.

In 2005, these tactics eventually caught up with the director of the Fyna group, James Soong. Pursuant to s 206F *Corporations Act* he was disqualified from managing companies for four years by ASIC 'over his role in five construction companies that collapsed in seven years leaving unsecured creditors with less than 50¢ in the dollar'.⁹⁵ Each time a company collapsed, the assets, including employees, were transferred to a new company, leaving the employees' additional entitlements unpaid.⁹⁶

Despite the disqualification of Soong, the Fyna group of companies continued to operate unencumbered under the shadow directorships of a number of Soong's relatives, including James Soong's wife, Desley Soong. It wasn't until June 2010 that Soong was sentenced to three years' imprisonment, and ordered to pay back the \$6.7 million that he had fraudulently deducted from the wages of employees and failed to remit to the ATO (unlikely to ever occur given he was declared bankrupt in 2008).⁹⁷ CFMEU national secretary John Sutton estimated in 2010 that the cost of

⁹⁴ Reported in the Cole Report, above no 10, vol 8, 123-130

⁹⁵ Adele Ferguson, 'The Phoenix Dilemma: How to Stop Rort Artists From Rising From the Ashes', *The Age* (Melbourne, Australia), 11 December 2010 <<http://www.theage.com.au/business/the-phoenix-dilemma-how-to-stop-rort-artists-from-rising-from-the-ashes-20101210-18svy.html#ixzz3GMkr2Vr3>>.

⁹⁶ The Cole Report explained the events as follows: 'The first labour company in the chain was Fyna Formwork Pty Ltd, which changed its name to Concrete Formwork Pty Ltd on 23 June 1995, following a build-up of tax liabilities in the 1992-93 and 1993-94 financial years. On the same day, a new company was incorporated under the name of Fyna Formwork Pty Ltd. Concrete Formwork Pty Ltd entered into a Deed of Company Arrangement in July 1996, and at that time the company directors told Pearce that the employees were being transferred from this company to a new company, Build Form Pty Ltd. Concrete Formwork Pty Ltd was deregistered on 11 November 1998. Build Form Pty Ltd was placed into administration on 29 January 1999. On 5 February 1999, a meeting of the company's creditors was told that a new company, Metroform Pty Ltd, would handle the labour. The majority of creditors voted in favour of liquidation of the company on 26 February 1999'. See above no 10, vol 8, 124 [49-51].

⁹⁷ Adele Ferguson, 'A Free Rise from the Ashes of Others' *Sydney Morning Herald* (Sydney, Australia) 11 December 2010 <<http://www.smh.com.au/business/a-free-rise-from-the-ashes-of-others-20101210-18std.html#ixzz3Cvx6FVbn>>.

Soong's illegal phoenixing, to employees, trade creditors, the ATO, and the community at large exceeded \$100 million.⁹⁸

According to an on-line tax newsletter published by F J Morgan, Barrister:

Tax Commissioner Michael D'Ascenzo said this case was an example of a "phoenix" arrangement which involves the deliberate liquidation of a company to avoid paying outstanding debts. "A typical phoenix arrangement sees a company continue to operate through another company without paying the debts owed. They take deliberate steps to disguise themselves from creditors such as the ATO", Mr D'Ascenzo said. "Phoenix activities can be hard to identify and prosecute, so our main focus is stopping the activity before it occurs."⁹⁹

2.2.5.3 Policy Questions

- Should the external administrator report compiled at the end of the insolvency engagement be strengthened?
 - Might it include specific questions about possible illegal phoenix activity?
 - Might it include questions about possible breaches of Acts other than the *Corporations Act 2001* such as taxation laws and workplace laws?
 - Should there be a section asking about the possible involvement of accessories?
- Should the privacy and confidentiality rules be changed so that ASIC can divulge information about suspected phoenix activity to external parties such as banks and trade unions after making an initial investigation?
- Should the regulator models be overhauled? For example:
 - Does there need to be a separate office, located within the ATO or ASIC, dealing with illegal phoenix activity?
 - Should more resources be devoted to preventative measures, including scrutiny of new applications to incorporate companies? Should persons only be only allowed to be appointed a director if they establish their identity to the satisfaction of ASIC with 100 points of identification?

2.3 ROLE OF ADVISORS IN PHOENIXING

2.3.1 BACKGROUND

Illegal phoenix activity may occur as a result of advice from a solicitor, barrister, accountant, insolvency practitioner, or business advisory/turnaround specialist. Professional assistance from an insolvency practitioner will be required¹⁰⁰ where Oldco is placed into VA or liquidated and its assets are bought by either Oldco's current controllers or Newco. In providing advice and conducting this work, the insolvency practitioner becomes an officer of the company and has a duty to achieve the

⁹⁸ Ibid.

⁹⁹ F J Morgan, *Phoenix operator jailed for 3 years - \$6.7m fraud – withheld tax from wages without remitting amounts then did same thing in second company [C18]*, Tax Newsletter Issue 25, 24/6, F J Morgan Tax Barrister, Lawyer and Mediator <<http://www.fjmtax.com/tax-newsletter/1338-phoenix-operator-jailed-for-3-years-67m-fraud-withheld-tax-from-wages-without-remitting-amounts-then-did-same-thing-in-second-company-c18.html>> citing ATO Media Release 2010/11, 21 June 2010 (NB. the ATO media release has been removed from the ATO website in accordance with its policy of removing prosecutions media releases after six months).

¹⁰⁰ Powers are only given to liquidators to conduct liquidations: *Corporations Act* s 477. According to ASIC Regulatory Guide 186 *External Administration: Liquidator Registration*, only certain qualified people, such as qualified accountants and members of accounting professional bodies, may apply to become liquidators, at [7]. Application for registration as a liquidator is made to ASIC pursuant to *Corporations Act* s 1279(1)(b).

best return for Oldco's creditors¹⁰¹ as the result of powers and responsibilities¹⁰² imposed under the *Corporations Act*. These duties include acting with care and diligence,¹⁰³ acting in good faith in the best interests of the company and for a proper purpose,¹⁰⁴ and not misusing their position to make a gain for themselves or someone else, or cause a loss to the company.¹⁰⁵

Where an insolvency practitioner transfers assets owned by Oldco to Newco for less than their proper market value, each of these duties is likely to be breached. At the conclusion of the administration, the insolvency practitioner is required to report to ASIC on the outcome.¹⁰⁶ These duties and the reporting obligation would appear to give the few insolvency practitioners that may be inclined to engage in impropriety a strong incentive not to do so.¹⁰⁷

In contrast to insolvency practitioners, lawyers and accountants who formulate, advocate and even carry out a fraudulent phoenix scheme are likely to escape characterisation as officers. They will only be considered officers of the company where they are 'a person who ... participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation' or 'who has the capacity to affect significantly the corporation's financial standing'.¹⁰⁸ However, it is probable that in many cases, the advisor's involvement in management will fail to be sufficiently 'substantial' or 'significant' to satisfy these requirements.¹⁰⁹ Moreover, in many situations the lawyers will simply be retained to advise the Newco or its controllers, rather than the controllers of Oldco, even though those individuals are one and the same. Here, the status of each of the companies as separate legal entities poses challenges in framing an appropriate action against the advisor. Similarly, the accountability of the legal practitioner or accountant who concocts a fraudulent phoenix scheme but who leaves the implementation to one or more other, possibly unwitting, professionals presents particular difficulties for both detection and enforcement.¹¹⁰

¹⁰¹ The insolvency practitioner becomes an officer of the company (see *Corporations Act* s 9) and is therefore subject to the same duties as directors under Part 2D.1.

¹⁰² In relation to liquidators, see generally *Corporations Act* Part 5.4B, div 2 and Part 5.6, div 3; in relation to administrators, see *Corporations Act* Part 5.3A, divs 3 and 4.

¹⁰³ *Ibid* s 180(1).

¹⁰⁴ *Ibid* s 181(1).

¹⁰⁵ *Ibid* s 182(1).

¹⁰⁶ *Ibid* ss 438D and 533. Reporting is via Form EX01, *Schedule B of Regulatory Guide 16 Report to ASIC under s422, s 438D or s 533 of the Corporations Act 2001 or for statistical purposes*.

¹⁰⁷ Note also that those insolvency practitioners who are members of the Australian Restructuring Insolvency and Turnaround Association (ARITA) (formerly the Insolvency Practitioners Association of Australia) are bound by the Code of Professional Practice for Insolvency Practitioners. Principle 2 of the Code requires the insolvency practitioner to be independent, and the practitioner must complete a Declaration of Independence, Relevant Relationships and Indemnities (DIRRI) before taking the insolvency appointment. In addition, a requirement has been added to the latest version of the Code relating to referrals. A practitioner must disclose the referrer's name and their firm's name. The Code also says that the practitioner should disclose in the DIRRI any connection to the insolvent person: Code [6.6]. The practitioner must also declare in the DIRRI that no information or advice, beyond that outlined in the DIRRI, was provided to the Insolvent, officers of the Insolvent (if the Insolvent was a company) or their advisors: Code [6.8.1B]. See Insolvency Practitioners Association of Australia, *Code of Professional Practice for Insolvency Practitioners*, ARITA <http://www.arita.com.au/docs/about-us-documents/code-20of-20professional-20practice-20-20-20final_1st-ed.pdf?sfvrsn=0>.

¹⁰⁸ *Corporations Act* s 9 - definition of 'officer'.

¹⁰⁹ See *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 238 FLR 384, [126] per White J: '[P]ara (b)(ii) should be taken as referring to a person who, in his or her management of the affairs of the corporation, has the capacity to affect significantly the corporation's financial standing. It does not refer to a person who has that capacity as a third party but is not involved in the management of the corporation's affairs.'

¹¹⁰ See further Helen Anderson and Linda Haller, 'Phoenix Activity and the Liability of the Advisor' (2014) 34(3) *Sydney Law Review* 471.

A professional adviser may be liable as an accessory for illegal activity undertaken by a company's directors or officers. An example is *ASIC v Somerville* (discussed at 2.2.3.2) where a lawyer was held to be liable as an accessory for breaches by directors of their duties when they engaged in phoenix activity. The accessorial liability was based on the advice Mr Somerville provided to the directors.

2.3.2 POLICY QUESTIONS

This role of advisors in facilitating illegal phoenix activity raises several unique policy questions:

- How do we ensure intervention by relevant professional bodies, including legal professional bodies, where an advisor has acted to bring about illegal phoenixing?
- How do we increase communication and referrals between government regulatory bodies and professional bodies?
- Should automatic professional disqualification result where a government regulator has successfully brought proceedings against a practitioner as an accessory to illegal phoenixing?
- Should there be registration requirements for debt negotiators and reconstruction specialists? They may strip the company of assets prior to the intervention of the official external administrator. At present, these types of intermediaries are not regulated. The reconstruction specialist or business advisory service adds to the difficulties faced by liquidators: if the liquidator accepts multiple insolvency engagements referred by these businesses, the liquidator may be disqualified from acting on the basis of a conflict of interest. This is because the conduct of the reconstruction specialist may need to be investigated, and the liquidator may be reluctant to do so, on the basis of 'biting the hand that feeds it'. See for example *ASIC v Franklin* [2014] FCAFC 85.

2.3.3 RELEVANT CASES

ASIC v Somerville (discussed at 2.2.3.2)

Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd (2014)¹¹¹

ASIC v Franklin was a successful action brought by ASIC for the removal of a liquidator on the basis of apprehended bias. The liquidator was engaged by two failing companies through a referral by the pre-insolvency business advisory group of companies (hereinafter referred to as "the Group"). The apprehension of bias arose because the group had previously made a number of referrals to the same liquidator, and ASIC alleged that the liquidator might not make the required 'vigorous' inquiries if this jeopardised future referrals of work. The Full Court agreed with ASIC unanimously, noting that 'a reasonable fair-minded observer might reasonably apprehend that, because of the respondents' interest in not jeopardising future income, they might not discharge their duties with independence and impartiality'.¹¹²

The facts involve two companies in the building and construction industry, WC Pty Ltd (operating in Victoria and NSW) and WCQ Pty Ltd (operating in Queensland). Both companies were run by sole director and secretary Craig Walton. In early 2013, after 18 months of financial difficulties, Mr Walton retained the Group on behalf of each company to secure advice as to the companies' options. The Group comprised a holding company and two subsidiaries. Mr Walton placed the companies into administration on 3 October 2013. The Group 'recommended and facilitated' the appointment of the liquidator, despite some concerns being raised by creditors of the two companies as to the independence and impartiality of the appointment.¹¹³

¹¹¹ *Australian Securities and Investments Commission v Franklin (liquidator), in the matter of Walton Constructions Pty Ltd* [2014] FCAFC 85.

¹¹² *Ibid* [125].

¹¹³ *Ibid* [67].

In the period preceding WCPL and WCQPL entering into administration, large parts of the two companies' businesses were sold to two companies owned and run by the Group in return for the assumption of some of WCPL and WCQPL's liabilities. According to the judgment, ASIC noted that the two Asset Sale Agreements ('ASAs'), 'involved the transfer of contracts for 31 projects with a total estimated completion cost of \$61 million and an estimated revenue of \$56 million, in addition to all relevant assets of WCPL and WCQPL, including business records, intellectual property, plant and equipment, stock and the benefit of statutory licences'.¹¹⁴ It was also noted in the judgment that the director of WCPL and WCQPL provided consultancy services to these two companies. In a further transaction, an inter-company debt of \$18.9 million owed by WCPL to WCQPL was assigned to another company related to the Group for a consideration of only \$30,000. According to ASIC, 'the estimated asset deficiencies of WCPL and WCQPL [were] of the order of \$58 million and \$27 million respectively'.¹¹⁵

The judgment noted ASIC's concerns surrounding the nominal consideration exchanged under both the ASAs and the debt assignment and its beliefs that the pre-administration transactions warranted investigation. ASIC alleged that the transactions might amount to phoenix transactions, 'because they had the effect of shifting assets from an insolvent company into a new company, of transferring some of the creditors of the insolvent company into the new company, and of leaving little or no assets for distribution to the remaining creditors of the insolvent company'.¹¹⁶ ASIC urged the liquidators to investigate the following:

[...] whether some or all of these transactions are voidable as uncommercial transactions under s 588FB of the Corporations Act, or voidable as unreasonable director-related transactions under s 588FDA of the Corporations Act; whether Mr Walton, as director of each of WCPL and WCQPL, breached his duties under ss 180-184 of the Corporations Act and as imposed by the common law; and whether members of the ...Group were involved in such breaches (under s 79 of the Corporations Act, or under either limb of *Barnes v Addy* (1874) 9 LR Ch App 244).¹¹⁷

Dae Boong International Pty limited v Dae Boong Australia Pty Limited (2008)¹¹⁸

This case was an unsuccessful negligence action brought by the plaintiff company's liquidator against a barrister based on his alleged negligent advice. The company in question owed a judgment debt of over \$100,000 that it had not satisfied, and was thus issued with a summons on 8 March 2005 seeking its winding up. Advice was solicited from a barrister, Mr Gray, who advised via fax that there were two options that the company could pursue, '[t]o avoid the control of the company and its assets passing into the hands of a liquidator on 8 March 2005'.¹¹⁹ The first option, in Mr Gray's words, was the following:

No later than 10 am on 8 March, the company must transfer by way of sale the whole of the company's undertaking and assets to a new company. If the new company assumes liability for all the existing company's debts (except the judgment debt on which the winding up summons is based) then there would be no need for any significant sum of money to change hands, but the transaction must be completed (ie transfer of title of assets be actually completed) by 10 am Tuesday 8 March; the consequence of this course will be that the existing company will be wound up by the court and the directors of the company will have to comply with their obligations under the Corporations Act and assist the liquidator in his winding up of the company. On the other hand, control of the company's assets and the continuing conduct of its business will pass to the new company. If the

¹¹⁴ Ibid [51].

¹¹⁵ Ibid [52].

¹¹⁶ Ibid.

¹¹⁷ Ibid [53].

¹¹⁸ *Dae Boong International Pty limited v Dae Boong Australia Pty Limited* [2008] NSWSC 357.

¹¹⁹ Ibid [3].

existing company be wound up, the directors of the new company can be expected to be examined by the liquidator of the existing company.¹²⁰

On 7 March, a contract was purported to be entered into for the sale of the business to a non-existent company of a similar name, Dae Boong Australia Pty Ltd, for a maximum sum of \$555,000. The new company was incorporated the next day. In the contract, the goodwill of the company was 'shown to have no value'.¹²¹ Newco also assumed liability for creditors to a total of \$2,309,751.18. On this basis, the judge held that a substantial consideration had been exchanged for the assets of Oldco, meaning that they were not uncommercial transactions.

The liquidators nevertheless alleged that Mr Gray 'gave the advice that the assets be placed beyond the reach of the liquidator and that the petitioning creditor's claim be avoided'.¹²² They further alleged that the advice was negligent because it did not specify that the transfer would have to be bona fide and for proper commercial value. The judge found against the applicants, however, stating: 'I do not consider that it was part of [Mr Gray's] responsibility; neither is there any evidence which would show that had such a warning been given, it would have made any difference as to the events which took place'.¹²³

ASIC v Fiorentino (2014)¹²⁴

This case was an Illegal Type 1 Phoenix. It involved a successful application by ASIC to the Companies Auditors and Liquidators Disciplinary Board ('CALDB'), the disciplinary body that oversees liquidators, to cancel the registration of Sydney-based insolvency practitioner Mr Pino Fiorentino. The allegations centered on his conduct overseeing the liquidation of a company named ERB International Pty Ltd ('ERB') in April 2008. Another liquidator, Mr William Hamilton, was also appointed, although it was Mr Fiorentino who had primary day-to-day control over the liquidation.

ASIC alleged that a director of ERB contacted Mr Fiorentino prior to the liquidation asking whether ERB might transfer its business to a related third party before liquidation proceedings commenced, leaving debts in the company, including state revenue debts. The director and Mr Fiorentino sought advice from a barrister, who indicated that such a transfer would be illegal unless undertaken for proper commercial value. This advice was ignored and ERB's assets were transferred to a related party 'BWI' controlled by ERB's directors for no cash consideration. ERB then went into liquidation with outstanding debts.

Mr Fiorentino executed a Deed of Settlement and Release between ERB's directors and BWI in January 2009, which ensured unsecured creditors received nothing under the liquidation. ERB was deregistered in 2010, and the \$536,929.15 realised during the liquidation, went for the most part, towards paying the liquidators. The CALDB was satisfied that Mr Fiorentino failed to carry out or perform adequately and properly his duties as a liquidator, and moreover, that his failings were 'significant and extensive'¹²⁵, involving 'dishonest use of position, failure to act in good faith in the best interests of ERB and its creditors, lack of competence and failure to comply with statutory

¹²⁰ Ibid [5].

¹²¹ Ibid [7].

¹²² Ibid [12].

¹²³ Ibid [15].

¹²⁴ *ASIC v Fiorentino* [2014] CALDB 240614.

¹²⁵ Ibid [1008].

provisions'.¹²⁶ In April 2014, Mr Hamilton's liquidator's license was also cancelled for six months based on his contribution to the liquidation.¹²⁷

2.4 UNCLASSIFIED CASES

One of the consequences of the lack of a phoenix offence or clear definition of phoenix activity is that many 'cases' in the public domain are not susceptible to classification. Courts may not need to make any findings based on allegations of illegal phoenixing as they are peripheral to the issues before it, and as such, allegations of impropriety relevant to our purposes and questions relating to intention remain unproven or untested.

What follows are alleged instances of phoenix activity, or descriptions of phoenix-like behaviour, drawn from ASIC press releases, media investigations and other sources. We do not suggest that these instances involve illegality, nor do we claim that the behaviour involved in each case was legal. Nevertheless, we have included these examples to offer as broad a selection of profiling cases as possible.

Afmepkiu, New South Wales Branch v David (2006)¹²⁸

This case concerned an application brought by a union relating to unfair contract provisions under s 106 of the *Industrial Relations Act 1996* (NSW) on behalf of a number of employees of failed company David Graphics Ltd ("David Graphics"). The respondent in this case, Mr David, was a director and major shareholder in the company, which went into liquidation. Mr David had not paid his employees their superannuation contributions for a number of years, but had informed staff that the contributions would be made in due course. Based on this promise, the employees continued to work for Mr David up until the company was liquidated. Upon entering into liquidation, however, the employees received little to no payment of their entitlements.

A new company controlled and co-run by Mr David's children and a close personal associate called Digital Graphics Communications Pty Ltd ("Digital Graphics") was subsequently registered. Digital Graphics purchased David Graphics' assets, and continued to run the business from the same premises. Digital Graphics also employed Mr David as a consultant. The appellants alleged that the assets, including the company's goodwill, were purchased at an undervalue. They sought leave to appeal so as to join Digital Graphics as a respondent in the proceedings. The appellants submitted that the case raised substantial policy considerations in regards to the regulation of phoenix companies, noting that 'the unfair contracts jurisdiction is designed in part to deal with subterfuge'.¹²⁹ The appellants submitted that 'phoenix companies are a modern corporate subterfuge and a decision as to the proper application [of] s 106 [of the *Industrial Relations Act 1996*] to phoenix companies will be of widespread practical application'.¹³⁰

In granting the application to join Digital Graphics as a respondent, the Industrial Court of New South Wales noted that 'there existed a clear linkage between the two companies',¹³¹ stating:

The whole of the business of David Graphics was apparently transferred to Digital Graphics, which appears, at one level, to have a personal connection with the Managing Director of David Graphics, a company that could not comply with its statutory obligations to make superannuation payments on

¹²⁶ Companies Auditors and Liquidators Disciplinary Board, 'CALDB Cancels the Registration of NSW Liquidator' (media release, 8 July 2014) <<https://dv8nx270cl59a.cloudfront.net/media/1248077/caldb-media-release-03nsw13-fiorentino.pdf>>.

¹²⁷ Australian Securities and Investments Commission, 'CALDB suspends NSW joint liquidator for six months' (media release 14-080MR, 16 April 2014) <<http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2014-releases/14-080mr-caldb-suspends-nsw-joint-liquidator-for-six-months/>>.

¹²⁸ *Afmepkiu, New South Wales Branch v David* [2006] NSWIRComm206.

¹²⁹ *Ibid* [17].

¹³⁰ *Ibid*.

¹³¹ *Ibid* [40].

behalf of its employees but whose business was sufficient to generate \$30,000 per week to pay the vendor. The approval of the arrangement rested in the hands of secured creditors, who, only some weeks before, happened to be the same persons who later became directors of Digital Graphics. As such, the situation may arguably come within the description in the judgment of Barwick CJ in *Brown v Rezitis* (at 164) of there being power in the Court to apply a broad concept of restitution and "to make remedial provision for what has taken place or been done under the contract ... [such that] ... there will be persons who are not the parties to the contract but who have in fact participated in its making and there may be persons who have received money indirectly from one of the parties to the contract or who may be holding money derived therefrom for one of the parties."¹³²

Ben Polis (2012)¹³³

According to a report in the *Age* newspaper on 11 April 2012, ASIC was considering laying charges against the director of Energy Watch Ben Polis 'over the collapse of a previous version of the business'.¹³⁴ Allegations that Mr Polis failed to pay \$500,000 in staff entitlements were also reportedly being probed by the FWO. The article reported the following:

Australian Securities and Investments Commission investigators are considering allegations that assets belonging to Mr Polis' old company, Polis Australia, were transferred to the new Energy Watch business without any payment. [...] Company documents show that Polis Australia, which traded under the name Green Energy Watch, owed \$397,000 to creditors when it collapsed in August 2009 after a dispute with power company Red Energy. In a report to creditors, liquidator Brad Tonks said Energy Watch, which was set up in February 2009, was operating with the same contact details as Polis Australia and was using its assets, including its website and phone number. "We are not aware of a sale of [the] company's business or its assets and the director [Mr Polis] has not indicated that a sale has occurred," Mr Tonks said in the report, sent to creditors in May 2010.¹³⁵

Bruck Textiles (2014)¹³⁶

On 11 July 2014, Wangaratta based company Bruck Textile Technologies ("Bruck") went into liquidation, reportedly owing creditors around \$11 million, including \$4 million to employees in unpaid entitlements, an average of almost \$70,000 each. The next day, the business resumed operating as Australian Textile Mills, with the same controllers, from the same premises, with the same equipment, and with approximately 130 of the original 190 staff members. Australian Textile Mills paid only \$1 for Bruck's assets. The 67 employees who were made redundant were informed that they would not be paid any of their entitlements, including long service and annual leave, nor would they receive any redundancy pay. Instead, they were told they would have to rely on the government scheme FEG, which has reportedly since paid out around \$3.5 million of the \$4 million owed.

The Chief Executive Officer of Australian Textile Mills, Geoff Parker, claimed that in addition to retaining the employment of some 130 staff, the company had taken on \$20 million in liabilities,

¹³² Ibid [40]-[41].

¹³³ As referenced by the *Age*: Ben Butler, Lucy Battersby and Rachel Wells, 'Disgraced CEO faces 'phoenix' company claim', *The Age* (Melbourne, Australia) 11 April 2012 <<http://www.theage.com.au/business/disgraced-ceo-faces-phoenix-company-claim-20120410-1wn14.html>>.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ As referenced by ABC Lateline: Emma Younger, 'Bruck Textiles under Investigation', *ABC Lateline*, 16 July 2014. <<http://www.abc.net.au/lateline/content/2014/s4047754.htm>>; Mark Phillips, 'Textile Workers Left High and Dry Again', *Working Life*, 18 July 2014 ; Josh Gordon, 'Wangaratta Textile Maker Shreds Company, Sheds Worker Entitlements', *The Age* (Melbourne, Australia), 13 July 2014. <<http://www.theage.com.au/victoria/wangaratta-textile-maker-shreds-company-sheds-worker-entitlements-20140713-zt65q.html>>; Broede Carmody, *60-Year-Old Regional Manufacturing Giant Collapses* (17 July 2014) Smart Company <<http://www.smartcompany.com.au/finance/cashflow/42866-60-year-old-regional-manufacturing-giant-collapses.html>>; Senator the Hon Eric Abetz, *Government Support for Redundant Employees of Bruck Textiles* (media release, 14 July 2014). <<https://ministers.employment.gov.au/abetz/government-support-redundant-employees-bruck-textiles>>.

indicating his belief that the transfer was therefore at value. The principal shareholder and chairman of both Bruck and Australian Textile Mills, Mr Philip Bart, was also previously the main shareholder of another Newcastle-based company National Textiles, which collapsed in 1998 owing \$11 million to 340 workers, of which it paid only \$7 million. Federal Employment Minister, Eric Abetz, has referred the allegations that the transfer of Bruck's assets was done deliberately so as to avoid paying employees' entitlements to ASIC for investigation.

BVM Group (2014)¹³⁷

The Age newspaper reported on 16 March 2014 that well-known construction firms Brookfield Multiplex and Bovis Lend Lease were implicated in a scandal involving the exploitation of migrant workers to build the new Royal Children's Hospital and the Docklands headquarters of Medibank Private. The article reports that the construction firms were paying Chinese and Afghan workers half the award rate, requiring them to work more than 60 hours a week to receive payment for a standard 36 hour week. Fairfax Media also reported that organised crime gangs were involved in supplying local subcontractors with the migrant workers, most of whom had entered the country on visas without working rights.

Relevantly for the purposes of this report, the article states that both projects engaged a 'rogue subcontractor' who had 'failed to pay millions of dollars in tax after collapsing four times in the past five years'.¹³⁸ The article queries how a subcontracting business subject to repeated failures could continue to be awarded government and corporate jobs. The companies in question were operated and run by the same family, under the BVM group branding. Since 2009, a string of BVM group companies collapsed owing creditors more than \$4.8 million. According to the Age, following each collapse, a new BVM-branded company would step in to buy the failed company's assets, rehire its employees and 'take over any outstanding contracts, leaving the bad debts behind'.¹³⁹ The Age notes that 'Brookfield Multiplex and Bovis Lend Lease have continued to employ the related companies despite being aware of the collapses and concerns about these activities being raised by the ATO, CFMEU and corporate liquidators'.¹⁴⁰

FWO v Francis (2011)¹⁴¹

Mr Robert Michael Francis operated a printing company in Sydney named Beaver Press Sales Pty Ltd ("Beaver Press Sales"). The company underpaid five employees a total of \$55,145 in wages and annual leave entitlements between November 2009 and March 2010 in order to profit from their free labour. Mr Francis subsequently placed the company into VA in April 2010, leaving outstanding wages unpaid. In this case brought by the FWO, he was ordered to pay a penalty of \$8,000 for his contraventions of the FWA with the employees relying on GEERS in order to recoup some of their wages. The Magistrate stated that Mr Francis maintained an 'attitude of denial' concerning the contraventions and showed no remorse or contrition for the losses he caused his employees.¹⁴² Magistrate Smith noted that, '[t]he basic circumstances point to a substantial level of culpability'.¹⁴³

The FWO referred the case on to other regulatory agencies after learning that shortly after placing Beaver Press Sales into administration Mr Francis opened another printing business on the same premises, Goodcrowd Integrated Print Communications Pty Limited ("Goodcrowd"). Mr Francis is the sole director and majority owner of Goodcrowd. In his judgment, Magistrate Smith

¹³⁷ As referenced by the Age: Cameron Houston and Chris Vedelago, 'Chinese plasterers exploited by rogue companies at two big sites', *The Age* (Melbourne, Australia) 16 March 2014 <<http://www.theage.com.au/victoria/chinese-plasterers-exploited-by-rogue-companies-at-two-big-sites-20140315-34u1b.html>>.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ *FWO v Francis* [2011] FMCA 1005.

¹⁴² Ibid [35].

¹⁴³ Ibid [30].

acknowledged 'suggestions in the evidence that there *might* have been aggravating circumstances in relation to all of the contraventions', in relation to Goodcrowd rising from the ashes of Beaver Press Sales. Nonetheless, the Magistrate was unable to make any adverse findings in this regard due to lack of evidence.¹⁴⁴

Lisa Ho (2013)¹⁴⁵

The ATO raised concerns in August 2013 that Australian fashion designer Lisa Ho was attempting to "phoenix' her failed fashion empire',¹⁴⁶ which collapsed owing creditors at least \$17 million. According to the Age newspaper, external administrators 'sold the rights to the Lisa Ho apparel brand for an undisclosed amount to a new company [Lisa Ho IP Holdings] recently founded by the fashionista'.¹⁴⁷ The concerns were raised at a creditors' meeting, but the administrators denied that the deal was a phoenix transaction. The administrators claimed that they had put a tender out for the company and the best offer received was from Lisa Ho herself. According to minutes of the creditors' meeting filed with ASIC, the administrators argued that, '[t]he business was offered for sale to the general public, the transaction ... took place was at arm's length and the business was not continuing to trade'.¹⁴⁸

Simon Myers (2012)¹⁴⁹

According to an article published in the Age newspaper in March 2012, Mr Myers, a theatre producer based in Melbourne, placed two of his companies into VA on 5 March 'leaving angry creditors ... a collective \$1.4 million out of pocket'.¹⁵⁰ One company, Bold Jack Pty Ltd, owed creditors over \$1 million, and the other, Folsom Prison Productions Pty Ltd, almost \$370,000. According to the article, some creditors queried the events leading up to the companies being placed into administration, 'pointing to the fact that the cash-strapped producer appears to have bounced back', staging a new season of a show previously owned by Folsom Prison Productions Pty Ltd, through a new company Bold Jack International Pty Ltd.¹⁵¹ The latter was registered on 30 January 2012, five weeks before its predecessor was placed into administration. The Age noted that '[f]ormer employee Moira Bennett is its sole director' and that '[t]he shares in the company are held equally by Bennett and Myers'.¹⁵²

Other cases:

Numerous other cases exist in which ASIC has raised allegations or concerns that illegal or problematic phoenixing of some variety has taken place. However, since the allegations were untested or because the facts described are unclear, we were not able to classify them within our profile structure. These cases are summarised in the ASIC Media Releases which can be accessed through the following links:

- [ASIC Media Release 07-235: ASIC obtains injunctions and orders against John Georgiadis and his companies](#)
- [ASIC Media Release 05-198: Melbourne woman banned from managing corporations for five years](#)
- [ASIC Media Release 05-350: ASIC bans Sydney director for three years](#)

¹⁴⁴ Ibid [31].

¹⁴⁵ As referenced by the Age: Chris Vedelago, 'Tax Office flags concern at 'phoenix' plan by Lisa Ho', *The Age* (Melbourne, Australia) <<http://www.theage.com.au/business/tax-office-flags-concern-at-phoenix-plan-by-lisa-ho-20130804-2r7k9.html>>.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ As referenced by the Age: Karl Quinn, 'Producer behind Tex Perkins show folds, owing \$1.4 million', *The Age* (Melbourne, Australia) 15 March 2012 <<http://www.theage.com.au/entertainment/theatre/producer-behind-tex-perkins-show-folds-owing-14-million-20120314-1v3lq.html>>.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

- [ASIC Media Release 05-386: ASIC bans three directors involved in the management of failed companies](#)
- [ASIC Media Release 05-408: ASIC bans two NSW directors involved in the management of failed companies](#)
- [ASIC Media Release 06-354: ASIC bans company directors in New South Wales and Victoria](#)
- [ASIC Media Release: 07-02 ASIC bans nine directors](#)
- [ASIC Media Release: 07-64 ASIC bans eleven directors in February](#)
- [ASIC Media Release: 07-182 ASIC disqualifies nine directors](#)
- [ASIC Media Release: 07-270 ASIC disqualifies six directors](#)
- [ASIC Media Release: 08-22 ASIC disqualifies Queensland director from managing corporations](#)
- [ASIC Media Release: 08-45 ASIC disqualifies seven directors](#)
- [ASIC Media Release: 08-57 ASIC disqualifies two directors](#)
- [ASIC Media Release: 08-178 ASIC disqualifies six directors](#)
- [ASIC Media Release: AD09-155 ASIC disqualifies 21 directors from managing corporations](#)
- [ASIC Media Release: 09-247AD Five directors of failed companies disqualified from managing corporations for over 15 years](#)
- [ASIC Media Release: 10-172AD ASIC disqualifies 13 directors of failed companies from managing corporations](#)

2.5 VICTIM PROFILES

The victims of illegal phoenix activity do not form an easily identifiable or homogenous group. They include government, unsecured trade creditors, small businesses, individual employees, and the public at large. While the victims of illegal phoenix activity are multifarious, certain victim groups exhibit characteristics that exacerbate their vulnerability. The following profiles briefly outline the major groups affected by illegal phoenix activity.

2.5.1 GOVERNMENT

Government is affected both through the non-payment of tax, but also through the cost of the employee entitlements safety net scheme FEG (formerly GEERS). FEG is administered by the Department of Employment and currently costs the taxpayer about \$250million per annum. State and federal taxation authorities lose non-remitted payroll tax revenue, and PAYG instalments and superannuation amounts. This loss can cause severe economic repercussions. The government suffers loss and the taxpayer is further burdened where properly levied taxation liabilities are unable to be recovered.

The ATO is likely to be the arm of government most affected in any given illegal phoenixing situation. Since 1993, all debts due to the ATO rank equally with other unsecured creditors. Unlike trade creditors who can choose not to provide goods or services to those who may be at a higher risk of defaulting on payment, the ATO has no power to choose its debtors. To protect the revenue, the ATO has a number of powers at its disposal. Some of these were outlined in paragraphs 2.2.1.2, 2.2.2.1 and 2.2.3.1 above.

2.5.2 UNSECURED TRADE CREDITORS

Once a phoenixed company is stripped of its assets, unsecured creditors are left to compete with other poorly ranked creditors for whatever little remains. They are therefore unlikely to recoup that which was owed to them for goods or services provided. The flow on effects for unsecured creditors

can be severe. Loss of income may in turn render the creditor's business insolvent, or may impact on their customer base, goodwill, or relationships vis-à-vis other suppliers. While it is true that trade creditors may choose not to do business with high-risk companies, the small supplier may not have much choice – they may rely on each and every contract that comes their way in order to keep their business afloat.

2.5.3 EMPLOYEES

When a company fails, its employees may lose their accrued annual and long service leave entitlements, in addition to wages, redundancy and pay in lieu of notice. In addition, superannuation contributions may not have been remitted to their fund. Employees are especially vulnerable because:

- They cannot diversify their risk by working for many employers;
- They lack the market power to demand additional compensation for the risk of non-payment;
- They are particularly vulnerable in times of high unemployment.

However, unlike other unsecured creditors, employees benefit from the government funded safety net scheme – FEG – and are priority unsecured creditors when liquidation takes place.

Illegal phoenix activity may affect employees in one of two ways when Oldco is shut down:

- The employees lose both their jobs and their accrued entitlements. These employees are compensated by FEG but not all their entitlements are met;
- Newco offers the workers jobs but their entitlements are not carried over. The FWA contains rules about 'transfer of business' and 'transferring employees'.

Where the first employer is in liquidation, FEG will pay unpaid wages, subject to other criteria being met. Whether employees can claim other accrued entitlements from FEG depends upon whether the new employer is obliged to take on the accrued leave and redundancy entitlements of the employees.¹⁵³ In terms of retaining accrued entitlements and establishing continuity of service, a 'transfer of employment' occurs when an employee moves from one employer to another within three months,¹⁵⁴ and either there is a 'transfer of business',¹⁵⁵ or the two employers are associated entities, as defined by *Corporations Act* s 50AAA. Where the new employer is an associated entity, it must credit the employee with their period of service to the former employer, unless the former employer has already paid it out. In other cases, the new employer may choose to do so.¹⁵⁶

The entitlement to a redundancy payment under an industrial instrument depends on the particular circumstances. FWA s 119 provides for employee entitlements to redundancy pay upon termination of employment by the first employer. An application by the employer to Fair Work Australia may reduce this obligation where the employer has obtained other acceptable employment for the employee.¹⁵⁷ What amounts to obtaining employment and acceptable employment is a matter for interpretation.¹⁵⁸ If an employee is offered and rejects employment with the second employer on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than their terms and conditions of employment with the first employer, the first employer need not

¹⁵³ See Department of Education, Employment and Workplace Relations, *GEERS OA: 1 January 2011*, cl 16(c); and *Fair Entitlements Guarantee Act 2012* (Cth) ss 16(2)–(4).

¹⁵⁴ FWA s 22(7).

¹⁵⁵ *Ibid* s 311.

¹⁵⁶ *Ibid* s 22(5).

¹⁵⁷ *Ibid* s 120.

¹⁵⁸ See, eg, *Stream Communications Pty Ltd v Bonomo* [2011] FWA 62; *Affinity Risk Partners (Brokers) Pty Ltd* [2011] FWA 295; and *Australian Nursing Federation* [2012] FWA 6460.

pay a redundancy payment.¹⁵⁹ An employer may also apply to Fair Work Australia to pay less or no redundancy pay if the employer cannot afford it,¹⁶⁰ but the onus is on the employer to prove its inability to pay.¹⁶¹

The FEG scheme does not pay advances if:

- (a) the business in which the employer employed the person is transferred to someone else (the transferee) other than the bankruptcy trustee of the employer; and
- (b) within 14 days of the end of the person's employment by the employer, the transferee offers to employ the person:
 - (i) to do work that is the same, or substantially the same, as the work the person did for the employer; and
 - (ii) on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the person's terms and conditions of employment with the employer immediately before the end of that employment: *Fair Entitlements Guarantee Act 2012* s 16(2).

2.5.4 MIGRANT WORKERS

Migrant workers form a subset of employees that are particularly vulnerable to the effects of illegal phoenix activity. There are a number of reasons for this:

- Visa types, visa status uncertainty, and insecure work. Migrant workers often enter the country on 457 visas, working holiday visas, or student visas. Certain visa types tie migrant workers to a specific employer, or the worker may not be allowed to work at all. In this way, an employee who changes to a new employer while in the country, or an employee who is technically not allowed to work, may simply be happy just to have a job and as such be unlikely to speak out. They might also be unwilling to speak out against the suspicion of illegality or the non-payment of their entitlements for fear of losing their job and/or being deported;
- Lack of awareness of workplace rights and worker entitlements (exacerbated within the building and construction industry for migrant workers who are on daily hire to subcontractors);
- Language barriers, which can lead to an unwillingness or inability to complain, and/or a lack of understanding about their situation and rights;
- Unscrupulous employers and advisors targeting migrant workers because they believe that they can get away with it;¹⁶²
- Migrant workers may not possess adequate documentation and identifiers of personal information (including names, dates of birth, addresses, phone numbers, emails), which can

¹⁵⁹ Above no 102, s 122(3).

¹⁶⁰ Ibid s 120(1)(b)(ii).

¹⁶¹ See *Baywood Products Pty Ltd v Inall* [2010] FWA 9303.

¹⁶² The recent decision of the Federal Circuit Court in *Fair Work Ombudsman v Jooine (Investment) Pty Ltd* [2013] FCCA 2144, in relation to an allegation of sham contracting, illustrates the concern: "This can only be seen as a deliberate attempt to avoid the substantial and protective provisions of the FW Act. Consequently, the penalty made in this matter should be a strong and specific deterrent to Mr Lee and to others who seek to pursue this type of contacting [sic] versus employment structure. The deterrent should also extend to the advisors who have facilitated the orchestration of these scams, to prevent their further proliferation of such advice and facilitation. From a limited examination of the contract material and associated documentation, it appears to have been prepared by someone who was familiar with employment law within this country and with a deliberate intention to circumvent the legislative framework that has been put in place to protect vulnerable individuals from exploitation in a labour environment. It would seem unlikely that Mr Lee could have obtained this document and modified it for his own purposes and understanding to avoid the structures of labour law currently in operation".

inhibit regulators and professional bodies from chasing up the payment of migrant workers' entitlements, including superannuation.

2.5.5 COMPETITORS AND FREE MARKET PRINCIPLES

The money that phoenix operators save through their illegal activities gives them the opportunity either to pocket the illegitimate savings, or else to price their products and services lower than their competitors to gain an unethical competitive advantage over them. Where the latter option is chosen, illegal phoenix operators may unfairly gain a larger share of the market than they would otherwise have been able to do, increase their revenue, and augment their customer goodwill. Competitors may be priced out of the market, or may consider illegal phoenixing themselves in order to resuscitate their failed businesses. The unfair competitive advantage gained by the illegal phoenix operator erodes the operation of the free market system because businesses are not able to offer their goods and services on an equal footing.

2.6 INDUSTRY PROFILES

Illegal phoenix activity can potentially occur in any industry. However, some industries are particularly vulnerable to this activity. In this section we identify two industries – the building and construction industry and the financial services industry – where illegal phoenix activity has been identified as a particular concern.

2.6.1 BUILDING AND CONSTRUCTION INDUSTRY

In 2003, the Cole Royal Commission drew attention to the high incidence of phoenix activity in the building and construction industry. The Cole Report identified that it was most likely to occur in 'building sub-industries which have large workforces of semi or unskilled labour, and where labour costs are a significant part of the running costs of the business'.¹⁶³

The at-risk sub-industries identified by the Cole Report included:

- formworking;
- scaffolding;
- concreting;
- bricklaying;
- plastering;
- gyprock fixing; and
- steel-fixing.

Other sub-industries at risk, albeit to a lesser extent included electricians, glaziers and plumbers.¹⁶⁴

Phoenixing is considered to be an occupational hazard in the building and construction industry, because the unique skillsets possessed by company controllers are likely to keep them in the same line of work when their business fails. Illegal phoenix operators who re-enter the same industry are at a higher risk of failing again, thereby perpetuating the phoenix cycle.

NSW is said to be the worst affected of all the states.¹⁶⁵ The 2012 Collins Inquiry into Construction Industry Insolvency in NSW noted the 'inequality of bargaining power' experienced by subcontractors on construction sites, highlighting that phoenix activity is one of the ways this

¹⁶³ Above no 10, vol 8, 115

¹⁶⁴ Ibid.

¹⁶⁵ Bruce Collins QC, 'Independent Inquiry into Construction Industry Insolvency in NSW - Final Report' (NSW Government, November 2012), 34.

inequality can manifest itself. One submission to the Inquiry stated that head contractors were advised “to create a separate company for each project and close it down after the completion of the project” as a “harm minimisation strategy”. The Inquiry noted that this sort of behaviour was by no means solely confined to head contractors.¹⁶⁶

Characteristics of the industry that hinder the detection of illegal phoenixing include the following:

- Record-keeping in the building and construction industry may be minimal;
- Employment conditions are different to other industries:
 - Employees are often hired intermittently for temporary periods of time (“daily hire”);
 - The industry employs high numbers of temporary migrant workers whose knowledge of their entitlements may be low. These workers may not work under their own names;
 - Workers may be paid as independent contractors;
 - While unions have a strong presence on big CBD sites, they don’t exert the same influence on small building sites;
- The trading name of companies that operate in the building and construction industry is not necessarily important and so it is not always reused when a company phoenixes.¹⁶⁷

2.6.2 FINANCIAL SERVICES INDUSTRY

The 2012 Report by Richard St John commissioned by Treasury on the Future of Financial Advice (the ‘St John Report’) noted the incidence of phoenixing in the sector, describing it thus:

A licensed firm may re-emerge by forming a new company and being granted a new financial services licence before it becomes apparent that the misconduct of the prior licensee has resulted in large scale client loss. Retail clients who suffer loss from licensee misconduct where the licensee ceases to trade, disappears or becomes insolvent, will struggle to obtain payment for awards made in their favour. [...] Consumers are unlikely to be aware that much the same financial services business is being run under a different licence. It is difficult for consumers to protect themselves in those circumstances by avoiding dealing with providers who have engaged in prior misconduct. In other instances, directors of an insolvent company move on to become authorised representatives or employees of other licensees.¹⁶⁸

Why the financial services industry?

In 2009, ASIC informed the Parliamentary Joint Committee on Corporations and Financial Services’ Inquiry into financial products and services that regulation of the sector has traditionally been kept to an absolute minimum in order to maximise market efficiency, to the detriment of investors.¹⁶⁹ The Inquiry noted that regulation aimed at protecting investors is limited to minimal conduct and disclosure requirements overseen by the already overstretched and under-resourced ASIC. The Parliamentary Joint Committee outlined several major issues with the sector, stating that, ‘[t]he licensing system is deficient’, and that ‘competency requirements for licensees and/or their authorised representatives are too low, oversight of individual advisers is too diffuse, and consumers are unable to readily identify varying capabilities’.¹⁷⁰

¹⁶⁶ Ibid 63-64.

¹⁶⁷ PWC and Fair Work Ombudsman, 'Phoenix Activity - Sizing the Problem and Matching Solutions' (June 2012), 11-12.

¹⁶⁸ Richard St John, 'Compensation Arrangements for Consumers of Financial Services - Future of Financial Advice' (Australian Government Treasury, April 2012) 44 [2.169 - 2.171].

¹⁶⁹ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (November 2009) 7 [2.2].

¹⁷⁰ Ibid 74 [5.22].

The St John Report described the case of a financial services licensee against whom numerous allegations of misconduct were levelled by clients spanning the period 2008-2010. The licensee's business was liquidated, leaving no assets for unsecured creditors (including those who were still in the process of bringing legal proceedings against the company), nor any professional indemnity insurance to cover their losses. At least one of the directors set up a new company and was still operating from the same office at the time the report was published.¹⁷¹

Deficiencies in the sector that exacerbate its vulnerability to illegal phoenixing include:

- The steps a prospective adviser must undertake to acquire a license are not particularly onerous.¹⁷² According to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry, the 'minimum qualification threshold for [financial] advisers is low',¹⁷³ and there are ongoing concerns 'about the varying competence of a broad range of people able to operate under the same 'financial adviser' or 'financial planner' banner'';¹⁷⁴
- ASIC has limited grounds on which to deny an application for a licence;¹⁷⁵
- ASIC's oversight of the licensing system is arguably lacking;
- Advisers are not required to obtain professional indemnity insurance;
- Professional indemnity insurance is designed to indemnify advisers and not compensate investors who suffer losses as a result of poor/legally deficient advice;¹⁷⁶
- There are inadequate disclosure and conduct standards for managing conflicts of interest;¹⁷⁷
- There is poor financial literacy amongst many consumers.

3 CONCLUSION

This report profiles phoenix activity, categorises that activity, considers existing legislative responses, provides case examples and raises important policy questions. It provides details of the industries that have been identified as being highly susceptible to illegal phoenix activity and the potential victims of that activity. While noting the difficulties associated with identifying and categorising phoenix activity, the report profiles that activity for the purpose of assisting regulators in the formation of strategies designed to educate the regulated community, detect incidences of the activity, and enhance enforcement.

We classify phoenix activity as legal where the outcome for creditors and/or employees is better than it would have been had the business not been resurrected. Legal phoenixing often occurs in the context of a business rescue. Phoenix activity becomes problematic where there are repeated resurrections of failed businesses which result in creditors receiving minimal returns. However undesirable the problematic phoenix is, it is not the same as the illegal phoenix. In order for the

¹⁷¹ Ibid 44 [2.172].

¹⁷² Ibid 7 [2.11].

¹⁷³ Ibid 90 [5.85].

¹⁷⁴ Ibid 90 [5.87].

¹⁷⁵ The Inquiry noted that, 'ASIC must grant an AFS licence if:

(a) the application is made properly;

(b) ASIC is satisfied that the applicant or the applicant's responsible managers are of good character;

(c) ASIC has no reason to believe that the applicant will not comply with licensee obligations; and

(d) the applicant has provided ASIC with any additional information requested for the purposes of assessing the application. ASIC cannot refuse an application for an AFS licence for reasons beyond the above-specified criteria (e.g. ASIC cannot refuse to grant a licence on the basis of the licensee's proposed business model). ASIC cannot refuse to grant a licence without giving the applicant an opportunity to be heard and a refusal to grant a licence can be appealed to the Administrative Appeals Tribunal (AAT). Ibid 7 [2.12].

¹⁷⁶ Ibid 74 [5.22].

¹⁷⁷ Ibid.

behaviour to be classified as illegal, there must be more than multiple failures followed by the formation of new companies, or the use of other existing companies, with the same controllers, business name, and/or business premises.

Phoenix activity is classified as illegal where there is evidence of an intention on the part of the company's controllers to use the company's failure as a device to avoid paying its creditors amounts which they otherwise would have received had the company's assets been properly dealt with. Proving the required intent is the crux of the difficulty in differentiating illegal phoenix activity from the legal and problematic types. We identify three categories of illegal phoenix activity. Type one occurs where the intention to avoid debts is formed as the company starts to fail; type two, where the phoenix is a business model; and type three, where there is complex illegal phoenix activity.

This report has demonstrated that the victims of illegal phoenix activity are widespread and that the harm it can cause is significant. Illegal forms of phoenix activity have been linked to certain industries in particular, two of which were profiled in this report – the building and construction industry and the financial services industry.

The issues raised in this report demonstrate the need for further study in order to minimise the harmful consequences of problematic and illegal forms of phoenix activity. In our future companion report *Quantifying Phoenix Activity: Cost, Incidence and Enforcement*, we explore the difficulties associated with quantifying the costs of phoenix activity and the enforcement activity undertaken by regulators. A separate future report will address the issues raised in the policy questions contained in this report and will detail our recommendations.

4 GLOSSARY OF COMMON ABBREVIATIONS

ASC – Australian Securities Commission

ASIC – Australian Securities and Investments Commission

ATO – Australian Taxation Office

CALDB - Companies Auditors and Liquidators Disciplinary Board

DCT - Deputy Commissioner of Taxation

DOCA - Deed of Company Arrangement

DPN - director penalty notice

FEG – Fair Entitlements Guarantee

FWA - *Fair Work Act 2009* (Cth)

FWBC – Fair Work Building and Construction

FWO – Fair Work Ombudsman

GEERS - General Employee Entitlements and Redundancy Scheme

PAYG - Pay As You Go

TAA – *Taxation Administration Act 1953* (Cth)

VA – voluntary administration

VLRC - Victorian Law Reform Committee

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6 APPENDIX OF RELEVANT LEGISLATION

6.1 ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING ACT 2006

SECTION 53: REPORTS ABOUT MOVEMENTS OF PHYSICAL CURRENCY INTO OR OUT OF AUSTRALIA

Offence

- (1) A person commits an offence if:
 - (a) either:
 - (i) the person moves physical currency into Australia; or
 - (ii) the person moves physical currency out of Australia; and
 - (b) the total amount of the physical currency is not less than \$10,000; and
 - (c) a report in respect of the movement has not been given in accordance with this section.

Penalty: Imprisonment for 2 years or 500 penalty units, or both.

- (2) Strict liability applies to paragraph (1)(c).

Note: For strict liability, see section 6.1 of the Criminal Code .

Civil penalty

- (3) A person must not:
 - (a) move physical currency into Australia; or
 - (b) move physical currency out of Australia;

if:

- (c) the total amount of the physical currency is not less than \$10,000; and
 - (d) a report in respect of the movement has not been given in accordance with this section.
- (4) Subsection (3) is a civil penalty provision.

Commercial carriers

- (5) Subsections (1) and (3) do not apply to a person if:
 - (a) the person is a commercial passenger carrier; and
 - (b) the physical currency is in the possession of any of the carrier's passengers.
- (6) Subsections (1) and (3) do not apply to a person if:
 - (a) the person is a commercial goods carrier; and
 - (b) the physical currency is carried on behalf of another person; and
 - (c) the other person has not disclosed to the carrier that the goods carried on behalf of the other person include physical currency.
- (7) A person who wishes to rely on subsection (5) or (6) bears an evidential burden in relation to that matter.

Requirements for reports under this section

- (8) A report under this section must:
 - (a) be in the approved form; and
 - (b) contain such information relating to the matter being reported as is specified in the AML/CTF Rules; and
 - (c) be given to the AUSTRAC CEO, a customs officer or a police officer; and
 - (d) comply with the applicable timing rule in subsection 54(1).

SECTION 142: CONDUCTING TRANSACTIONS SO AS TO AVOID REPORTING REQUIREMENTS RELATING TO THRESHOLD TRANSACTIONS

- (1) A person (the first person) commits an offence if:
 - (a) the first person is, or causes another person to become, a party to 2 or more non-reportable transactions; and
 - (b) having regard to:
 - (i) the manner and form in which the transactions were conducted, including the matters to which subsection (3) applies; and

- (ii) any explanation made by the first person as to the manner or form in which the transactions were conducted;

it would be reasonable to conclude that the first person conducted, or caused the transactions to be conducted, in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property involved in the transactions was transferred in a manner and form that would not give rise to a threshold transaction that would have been required to have been reported under section 43.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

- (2) Subsection (1) does not apply if the defendant proves that the first person did not conduct the transactions, or cause the transactions to be conducted, as the case may be, for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property involved in the transactions was transferred in a manner and form that would not give rise to a threshold transaction that would have been required to have been reported under section 43.

Note: A defendant bears a legal burden in relation to the matters in subsection (2)--see section 13.4 of the Criminal Code.

- (3) This subsection applies to the following matters:
 - (a) the value of the money or property involved in each transaction;
 - (b) the total value of the transactions;
 - (c) the period of time over which the transactions took place;
 - (d) the interval of time between any of the transactions;
 - (e) the locations at which the transactions took place.

6.2 CORPORATIONS ACT 2001

SECTION 79: INVOLVEMENT IN CONTRAVENTIONS

A person is involved in a contravention if, and only if, the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

SECTION 180: DIRECTORS' AND OTHERS' OFFICERS DUTY OF CARE AND DILIGENCE-- CIVIL OBLIGATION ONLY

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (a) were a director or officer of a corporation in the corporation's circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

- (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
 - (a) make the judgment in good faith for a proper purpose; and
 - (b) do not have a material personal interest in the subject matter of the judgment; and
 - (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
 - (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing

liability for negligence)--it does not operate in relation to duties under any other provision of this Act or under any other laws.

- (3) In this section: "business judgment" means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

SECTION 181: GOOD FAITH--CIVIL OBLIGATIONS: DIRECTORS AND OTHER OFFICERS

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
 - (a) in good faith in the best interests of the corporation; and
 - (b) for a proper purpose.
- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

SECTION 182: USE OF POSITION--CIVIL OBLIGATIONS

Use of position--directors, other officers and employees

- (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
 - (a) gain an advantage for themselves or someone else; or
 - (b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

SECTION 183: USE OF INFORMATION--CIVIL OBLIGATIONS: DIRECTORS, OTHER OFFICERS AND EMPLOYEES

- (1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:
 - (a) gain an advantage for themselves or someone else; or
 - (b) cause detriment to the corporation.

Note 1: This duty continues after the person stops being an officer or employee of the corporation.

Note 2: This subsection is a civil penalty provision (see section 1317E).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

SECTION 184: DIRECTORS AND OTHER OFFICERS - GOOD FAITH, USE OF POSITION AND USE OF INFORMATION--CRIMINAL OFFENCES

- (1) A director or other officer of a corporation commits an offence if they:
 - (a) are reckless; or
 - (b) are intentionally dishonest;

and fail to exercise their powers and discharge their duties:

- (c) in good faith in the best interests of the corporation; or
- (d) for a proper purpose.

Note: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

Use of position--directors, other officers and employees

- (2) A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:
 - (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
 - (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

Use of information--directors, other officers and employees

- (3) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:
 - (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
 - (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

SECTION 206C: COURT POWER OF DISQUALIFICATION--CONTRAVENTION OF CIVIL PENALTY PROVISION

- (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
 - (a) a declaration is made under:
 - (i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or
 - (ii) section 386- 1 (civil penalty provision) of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 that the person has contravened a civil penalty provision (within the meaning of that Act); and
 - (b) the Court is satisfied that the disqualification is justified.
- (2) In determining whether the disqualification is justified, the Court may have regard to:
 - (a) the person's conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.
- (3) To avoid doubt, the reference in paragraph (2)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

SECTION 206D: COURT POWER OF DISQUALIFICATION--INSOLVENCY AND NON-PAYMENT OF DEBTS

- (1) On application by ASIC, the Court may disqualify a person from managing corporations for up to 20 years if:
 - (a) within the last 7 years, the person has been an officer of 2 or more corporations when they have failed; and
 - (b) the Court is satisfied that:
 - (i) the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; and
 - (ii) the disqualification is justified.
- (1A) To avoid doubt, the references in paragraphs (1)(a) and (b) to a corporation include references to an Aboriginal and Torres Strait Islander corporation.
- (2) For the purposes of subsection (1), a corporation fails if:
 - (a) a Court orders the corporation to be wound up under:
 - (i) section 459B of this Act; or
 - (ii) section 526-1 of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 because the Court is satisfied that the corporation is insolvent; or
 - (b) the corporation enters into voluntary liquidation and creditors are not fully paid or are unlikely to be fully paid; or
 - (c) the corporation executes a deed of company arrangement and creditors are not fully paid or are unlikely to be fully paid; or
 - (d) the corporation ceases to carry on business and creditors are not fully paid or are unlikely to be fully paid; or
 - (e) a levy of execution against the corporation is not satisfied; or
 - (f) a receiver, receiver and manager, or provisional liquidator is appointed in relation to the corporation; or
 - (g) the corporation enters into a compromise or arrangement with its creditors under Part 5.1 (including that Part as applied by section 45-1 of the Corporations (Aboriginal and Torres Strait Islander) Act 2006); or
 - (h) the corporation is wound up and a liquidator lodges a report under subsection [533\(1\)](#) (including that subsection as applied by section 526-35 of the Corporations (Aboriginal and Torres Strait Islander) Act 2006) about the corporation's inability to pay its debts.

Note: To satisfy paragraph (h), a corporation must begin to be wound up while the person is an officer or within 12 months after the person ceases to be an officer. However, the report under subsection [533\(1\)](#) may be lodged by the liquidator at a time that is more than 12 months after the person ceases to be an officer. Sections 513A to 513D contain rules about when a company begins to be wound up.

- (2A) The reference in paragraph (2)(c) to a deed of company arrangement includes a reference to a deed of corporation arrangement (within the meaning of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 .
- (2B) For the purposes of subsection (1), a person is an officer of an Aboriginal and Torres Strait Islander corporation if the person is an officer of that corporation within the meaning of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 .
- (3) In determining whether the disqualification is justified, the Court may have regard to:
 - (a) the person's conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.
- (4) To avoid doubt, the reference in paragraph (3)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

SECTION 206F: DISQUALIFICATION OF THE COMPANY'S DIRECTORS FOR A MAXIMUM PERIOD OF FIVE YEARS

- (1) ASIC may disqualify a person from managing corporations for up to 5 years if:
 - (a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):
 - (i) the person has been an officer of 2 or more corporations; and
 - (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection [533\(1\)](#) ... about the corporation's inability to pay its debts; and
 - (b) ASIC has given the person:
 - (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and
 - (ii) an opportunity to be heard on the question; and
 - (c) ASIC is satisfied that the disqualification is justified.

Grounds for disqualification

- (2) In determining whether disqualification is justified, ASIC:
 - (a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and
 - (b) may have regard to:
 - (i) the person's conduct in relation to the management, business or property of any corporation; and
 - (ii) whether the disqualification would be in the public interest; and
 - (iii) any other matters that ASIC considers appropriate.

SECTION 286: OBLIGATION TO KEEP FINANCIAL RECORDS

- (1) A company, registered scheme or disclosing entity must keep written financial records that:
 - (a) correctly record and explain its transactions and financial position and performance; and
 - (b) would enable true and fair financial statements to be prepared and audited.

The obligation to keep financial records of transactions extends to transactions undertaken as trustee.

Note: Section 9 defines financial records.

Period for which records must be retained

- (2) The financial records must be retained for 7 years after the transactions covered by the records are completed.

Strict liability offences

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

SECTION 461: GENERAL GROUNDS ON WHICH COMPANY MAY BE WOUND UP BY COURT

- (1) The Court may order the winding up of a company if:

- (a) the company has by special resolution resolved that it be wound up by the Court; or
 - (c) the company does not commence business within one year from its incorporation or suspends its business for a whole year; or
 - (d) the company has no members; or
 - (e) directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members; or
 - (f) affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole; or
 - (g) an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole; or
 - (h) ASIC has stated in a report prepared under Division 1 of Part 3 of the ASIC Act that, in its opinion:
 - (i) the company cannot pay its debts and should be wound up; or it is in the interests of the public, of the members, or of the creditors, that the company should be wound up; or
 - (ii) the Court is of opinion that it is just and equitable that the company be wound up.
- (2) A company must lodge a copy of a special resolution referred to in paragraph (1)(a) with ASIC within 14 days after the resolution is passed.

SECTION 489EA: ASIC MAY ORDER THE WINDING UP OF A COMPANY

- (1) ASIC may order the winding up of a company if:
 - (a) the response to a return of particulars given to the company is at least 6 months late; and
 - (b) the company has not lodged any other documents under this Act in the last 18 months; and
 - (c) ASIC has reason to believe that the company is not carrying on business; and
 - (d) ASIC has reason to believe that making the order is in the public interest.
- (2) ASIC may order the winding up of a company if the company's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment.
- (3) ASIC may order the winding up of a company if:
 - (a) ASIC has reinstated the registration of the company under subsection 601AH(1) in the last 6 months; and
 - (b) ASIC has reason to believe that making the order is in the public interest.
- (4) ASIC may order the winding up of a company if:
 - (a) ASIC has reason to believe that the company is not carrying on business; and
 - (b) at least 20 business days before making the order, ASIC gives to:
 - (i) the company; and
 - (ii) each director of the company;
 a notice:
 - (iii) stating ASIC's intention to make the order; and
 - (iv) informing the company or the director, as the case may be, that the company or the director may, within 10 business days after the receipt of the notice, give ASIC a written objection to the making of the order; and
 - (c) neither the company, nor any of its directors, has given ASIC such an objection within the time limit specified in the notice.
- (5) Paragraphs (4)(b) and (c) do not apply to a person if ASIC does not have the necessary information about the person's identity or address.
- (6) Before making an order under subsection (1), (2), (3) or (4), ASIC must:
 - (a) give notice of its intention to make the order on ASIC database; and
 - (b) both:
 - (i) publish notice of its intention to make the order; and
 - (ii) do so in the prescribed manner.

- (7) ASIC must not order the winding up of a company under subsection (1), (2), (3) or (4) if an application is before the Court for the winding up of the company.
- (8) Paragraph (b) of the definition of director in section 9 does not apply to subsection (4) of this section.
- (9) To avoid doubt, subsections (1), (2), (3) and (4):
 - (a) have effect independently of each other; and
 - (b) do not limit each other.

SECTION 533: REPORTS BY LIQUIDATOR

- (1) If it appears to the liquidator of a company, in the course of a winding up of the company, that:
 - (a) a past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or
 - (b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:
 - (i) may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or
 - (ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company; or
 - (c) the company may be unable to pay its unsecured creditors more than 50 cents in the dollar; the liquidator must:
 - (d) ..., lodge a report with respect to the matter ...; and
 - (e) give ASIC such information, and give to it such access to and facilities for inspecting and taking copies of any documents, as ASIC requires.

SECTION 588FA: UNFAIR PREFERENCES

- (1) A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
 - (a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
 - (b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;

even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

- (2) For the purposes of subsection (1), a secured debt is taken to be unsecured to the extent of so much of it (if any) as is not reflected in the value of the security.
- (3) Where:
 - (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including such a relationship to which other persons are parties); and
 - (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;

then:

- (c) the transaction referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor if, because of subsection (1) as applying because of paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.

SECTION 588FB: UNCOMMERCIAL TRANSACTIONS

- (1) A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
 - (a) the benefits (if any) to the company of entering into the transaction; and
 - (b) the detriment to the company of entering into the transaction; and

- (c) the respective benefits to other parties to the transaction of entering into it; and
 - (d) any other relevant matter.
- (2) A transaction may be an uncommercial transaction of a company because of subsection
- (a) whether or not a creditor of the company is a party to the transaction; and
 - (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

SECTION 588FC: INSOLVENT TRANSACTIONS

A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and:

- (a) any of the following happens at a time when the company is insolvent:
 - (i) the transaction is entered into; or
 - (ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction; or
- (b) the company becomes insolvent because of, or because of matters including:
 - (i) entering into the transaction; or
 - (ii) a person doing an act, or making an omission, for the purpose of giving effect to the transaction.

SECTION 588FDA: UNREASONABLE DIRECTOR-RELATED TRANSACTIONS

- (1) A transaction of a company is an unreasonable director-related transaction of the company if, and only if:
- (a) the transaction is:
 - (i) a payment made by the company; or
 - (ii) a conveyance, transfer or other disposition by the company of property of the company; or
 - (iii) the issue of securities by the company; or
 - (iv) the incurring by the company of an obligation to make such a payment, disposition or issue; and
 - (b) the payment, disposition or issue is, or is to be, made to:
 - (i) a director of the company; or
 - (ii) a close associate of a director of the company; or
 - (iii) a person on behalf of, or for the benefit of, a person mentioned in subparagraph (i) or (ii); and
 - (c) it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
 - (i) the benefits (if any) to the company of entering into the transaction; and
 - (ii) the detriment to the company of entering into the transaction; and
 - (iii) the respective benefits to other parties to the transaction of entering into it; and
 - (iv) any other relevant matter.

The obligation referred to in subparagraph (a)(iv) may be a contingent obligation.

Note: Subparagraph (a)(iv)--This would include, for example, granting options over shares in the company.

- (2) To avoid doubt, if:
- (a) the transaction is a payment, disposition or issue; and
 - (b) the transaction is entered into for the purpose of meeting an obligation the company has incurred;

the test in paragraph (1)(c) applies to the transaction taking into account the circumstances as they exist at the time when the transaction is entered into (rather than as they existed at the time when the obligation was incurred).

- (3) A transaction may be an unreasonable director-related transaction because of subsection (1):
- (a) whether or not a creditor of the company is a party to the transaction; and
 - (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

SECTION 588FE: VOIDABLE TRANSACTIONS

- (1) If a company is being wound up:
- (a) a transaction of the company may be voidable because of any one or more of subsections (2) to (6) if the transaction was entered into on or after 23 June 1993; and

- (b) a transaction of the company may be voidable because of subsection (6A) if the transaction was entered into on or after the commencement of the Corporations Amendment (Repayment of Directors' Bonuses) Act 2003 .
- (2) The transaction is voidable if:
 - (a) it is an insolvent transaction of the company; and
 - (b) it was entered into, or an act was done for the purpose of giving effect to it:
 - (i) during the 6 months ending on the relation-back day; or
 - (ii) after that day but on or before the day when the winding up began.
- (2A) The transaction is voidable if:
 - (a) the transaction is:
 - (i) an uncommercial transaction of the company; or
 - (ii) an unfair preference given by the company to a creditor of the company; or
 - (iii) an unfair loan to the company; or
 - (iv) an unreasonable director-related transaction of the company; and
 - (b) the company was under administration immediately before:
 - (i) the company resolved by special resolution that it be wound up voluntarily; or
 - (ii) the Court ordered that the company be wound up; and
 - (c) the transaction was entered into, or an act was done for the purpose of giving effect to it, during the period beginning at the start of the relation-back day and ending:
 - (i) when the company made the special resolution that it be wound up voluntarily; or
 - (ii) when the Court made the order that the company be wound up; and
 - (d) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done, on behalf of the company by, or under the authority of, the administrator of the company.
- (2B) The transaction is voidable if:
 - (a) the transaction is:
 - (i) an uncommercial transaction of the company; or
 - (ii) an unfair preference given by the company to a creditor of the company; or
 - (iii) an unfair loan to the company; or
 - (iv) an unreasonable director-related transaction of the company; and
 - (b) the company was subject to a deed of company arrangement immediately before:
 - (i) the company resolved by special resolution that it be wound up voluntarily; or
 - (ii) the Court ordered that the company be wound up; and
 - (c) the transaction was entered into, or an act was done for the purpose of giving effect to it, during the period beginning at the start of the relation-back day and ending:
 - (i) when the company made the special resolution that it be wound up voluntarily; or
 - (ii) when the Court made the order that the company be wound up; and
 - (d) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done, on behalf of the company by, or under the authority of:
 - (i) the administrator of the deed; or
 - (ii) the administrator of the company.
- (3) The transaction is voidable if:
 - (a) it is an insolvent transaction, and also an uncommercial transaction, of the company; and
 - (b) it was entered into, or an act was done for the purpose of giving effect to it, during the 2 years ending on the relation-back day.
- (4) The transaction is voidable if:
 - (a) it is an insolvent transaction of the company; and
 - (b) a related entity of the company is a party to it; and
 - (c) it was entered into, or an act was done for the purpose of giving effect to it, during the 4 years ending on the relation-back day.
- (5) The transaction is voidable if:
 - (a) it is an insolvent transaction of the company; and
 - (b) the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and
 - (c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.

- (6) The transaction is voidable if it is an unfair loan to the company made at any time on or before the day when the winding up began.
- (6A) The transaction is voidable if:
 - (a) it is an unreasonable director-related transaction of the company; and
 - (b) it was entered into, or an act was done for the purposes of giving effect to it:
 - (i) during the 4 years ending on the relation-back day; or
 - (ii) after that day but on or before the day when the winding up began.
- (7) A reference in this section to doing an act includes a reference to making an omission.

SECTION 588G: DIRECTOR'S DUTY TO PREVENT INSOLVENT TRADING BY COMPANY

- (1) This section applies if:
 - (a) a person is a director of a company at the time when the company incurs a debt; and
 - (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
 - (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
 - (d) that time is at or after the commencement of this Act.
- (1A) For the purposes of this section, if a company takes action set out in column 2 of the following table, it incurs a debt at the time set out in column 3.

[NB. table only partially included...]

	Action of company	When debt is incurred
7	entering into an uncommercial transaction (within the meaning of section 588FB) other than one that a court orders, or a prescribed agency directs, the company to enter into	when the transaction is entered into

- (2) By failing to prevent the company from incurring the debt, the person contravenes this section if:
 - (a) the person is aware at that time that there are such grounds for so suspecting; or
 - (b) a reasonable person in a like position in a company in the company's circumstances would be so aware.

Note: This subsection is a civil penalty provision (see subsection 1317E(1)).

- (3) A person commits an offence if:
 - (a) a company incurs a debt at a particular time; and
 - (aa) at that time, a person is a director of the company; and
 - (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
 - (c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and
 - (d) the person's failure to prevent the company incurring the debt was dishonest.

- (3A) For the purposes of an offence based on subsection (3), absolute liability applies to paragraph (3)(a).

Note: For absolute liability, see section 6.2 of the Criminal Code.

- (3B) For the purposes of an offence based on subsection (3), strict liability applies to paragraphs (3)(aa) and (b).

Note: For strict liability, see section 6.1 of the Criminal Code.

- (4) The provisions of Division 4 of this Part are additional to, and do not derogate from, Part 9.4B as it applies in relation to a contravention of this section.

SECTION 590: OFFENCES BY OFFICERS OF CERTAIN COMPANIES

- (1) A person who, being a past or present officer or employee of a company to which this section applies:

- (a) does not disclose to the appropriate officer all the property of the company, and how and to whom and for what consideration and when any part of the property of the company was disposed of within 10 years next before the relevant day, except such part as has been disposed of in the ordinary course of the business of the company; or
- (c) has, within 10 years next before the relevant day or at a time on or after that day:
 - (iii) engaged in conduct that resulted in the fraudulent concealment or removal of any part of the property of the company to the value of \$100 or more; or
 - (iv) engaged in conduct that resulted in the concealment of any debt due to or by the company; or
 - (v) engaged in conduct that resulted in the fraudulent parting with, alteration or making of any omission in, or being privy to fraudulent parting with, altering or making any omission in, any book affecting or relating to affairs of the company; or
 - (vi) by any false representation or other fraud, obtained on credit, for or on behalf of the company, any property that the company has not subsequently paid for; or
 - (vii) engaged in conduct that resulted in the fraudulent pawning, pledging or disposal of, otherwise than in the ordinary course of the business of the company, property of the company that has been obtained on credit and has not been paid for;
- (d) fraudulently makes any material omission in any statement or report relating to affairs of the company; or
- (e) engaged in conduct that prevented the production to the appropriate officer of any book affecting or relating to affairs of the company; or
- (f) has, within 10 years next before the relevant day or at a time on or after that day, attempted to account for any part of the property of the company by making entries in the books of the company showing fictitious transactions, losses or expenses; or
- (g) has, within 10 years next before the relevant day or at a time on or after that day, been guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to affairs of the company or to the winding up;

contravenes this subsection.

- (2) Absolute liability applies to so much of an offence based on paragraph (1)(c), (g) or (h) as requires that an event occur within 10 years next before the relevant day or at a time on or after that day.

Note: For absolute liability, see section 6.2 of the Criminal Code.

- (3) Paragraph (1)(a) does not apply to the extent that the person is not capable of disclosing the information referred to in that paragraph.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3), see subsection 13.3(3) of the Criminal Code.

- (4) A person who, being a past or present officer or employee of a company to which this section applies, does not deliver up to, or in accordance with the directions of, the appropriate officer:
 - (a) all the property of the company in the person's possession; or
 - (b) all books in the person's possession belonging to the company (except books of which the person is entitled, as against the company and the appropriate officer, to retain possession);

contravenes this subsection.

- (4A) A person who, being a past or present officer or employee of a company and knowing or believing that a false debt has been proved by a person, fails for a period of one month to inform the appropriate officer of his or her knowledge or belief contravenes this subsection.
- (4B) A person must not intentionally or recklessly fail to comply with subsection (4) or (4A).
- (5) Where a person pawns, pledges or disposes of any property in circumstances that amount to a contravention by virtue of subparagraph (1)(c)(v), a person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in those circumstances contravenes this subsection.
- (6) A person who takes in pawn or pledge or otherwise receives property in circumstances mentioned in subsection (5) and with the knowledge mentioned in that subsection is taken to hold the property as trustee for the company concerned and is liable to account to the company for the property.

- (7) Where, in proceedings under subsection (6), it is necessary to establish that a person has taken property in pawn or pledge, or otherwise received property:
- (a) in circumstances mentioned in subsection (5); and
 - (b) with the knowledge mentioned in that subsection;

the matter referred to in paragraph (b) of this subsection may be established on the balance of probabilities.

SECTION 592: INCURRING OF CERTAIN DEBTS; FRAUDULENT CONDUCT

- (1) Where:
- (a) a company has incurred a debt before 23 June 1993; and
 - (b) immediately before the time when the debt was incurred:
 - (i) there were reasonable grounds to expect that the company will not be able to pay all its debts as and when they become due; or
 - (ii) there were reasonable grounds to expect that, if the company incurs the debt, it will not be able to pay all its debts as and when they become due; and
 - (c) the company was, at the time when the debt was incurred, or becomes at a later time, a company to which this section applies;

any person who was a director of the company, or took part in the management of the company, at the time when the debt was incurred contravenes this subsection and the company and that person or, if there are 2 or more such persons, those persons are jointly and severally liable for the payment of the debt.

- (1A) An offence based on subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

- (2) In any proceedings against a person under subsection (1), it is a defence if it is proved:
- (a) that the debt was incurred without the person's express or implied authority or consent; or
 - (b) that at the time when the debt was incurred, the person did not have reasonable cause to expect:
 - (i) that the company would not be able to pay all its debts as and when they became due; or
 - (ii) that, if the company incurred that debt, it would not be able to pay all its debts as and when they became due.

Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (2), see section 13.4 of the Criminal Code.

- (3) Proceedings may be brought under subsection (1) for the recovery of a debt whether or not the person against whom the proceedings are brought, or any other person, has been convicted of an offence under subsection (1) in respect of the incurring of that debt.
- (4) In proceedings brought under subsection (1) for the recovery of a debt, the liability of a person under that subsection in respect of the debt may be established on the balance of probabilities.
- (5) Where subsection (1) renders a person or persons liable to pay a debt incurred by a company, the payment by that person or either or any of those persons of the whole or any part of that debt does not render the company liable to the person concerned in respect of the amount so paid.
- (6) Where:
- (a) a company has done an act (including the making of a contract or the entering into of a transaction) with intent to defraud creditors of the company or of any other person or for any other fraudulent purpose; and
 - (b) the company was at the time when it does the act, or becomes at a later time, a company to which this section applies;

any person who was knowingly concerned in the doing of the act with that intent or for that purpose contravenes this subsection.

- (6A) For the purposes of an offence based on subsection (6), absolute liability applies to paragraph (6)(b).

Note: For absolute liability, see section 6.2 of the Criminal Code .

(7) A certificate issued by the proper officer of an Australian court stating that a person specified in the certificate:

- (a) was convicted of an offence under subsection (1) in relation to a debt specified in the certificate incurred by a company so specified; or
- (b) was convicted of an offence under subsection (6) in relation to a company specified in the certificate;

is, in any proceedings, prima facie evidence of the matters stated in the certificate.

(8) A document purporting to be a certificate issued under subsection (7) is, unless the contrary is established, taken to be such a certificate and to have been duly issued.

SECTION 596: FRAUDS BY OFFICERS

(1) A person who, while an officer or employee of a company:

- (a) by false pretences or by means of any other fraud, induces a person to give credit to the company or to a related body corporate; or
- (b) with intent to defraud the company or a related body corporate, or members or creditors of the company or of a related body corporate, makes or purports to make, or causes to be made or to be purported to be made, any gift or transfer of, or security interest in, or causes or connives at the levying of any execution against, property of the company or of a related body corporate; or
- (c) with intent to defraud the company or a related body corporate, or members or creditors of the company or of a related body corporate, engages in conduct that results in the concealment or removal of any part of the property of the company or of a related body corporate after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or a related body corporate;

contravenes this section.

(2) Absolute liability applies to so much of an offence based on paragraph (1)(c) as requires that an event occur after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or a related body corporate.

SECTION 596AB: ENTERING INTO AGREEMENTS OR TRANSACTIONS TO AVOID EMPLOYEE ENTITLEMENTS

(1) A person must not enter into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of:

- (a) preventing the recovery of the entitlements of employees of a company; or
- (b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.

(2) Subsection (1) applies even if:

- (a) the company is not a party to the agreement or transaction; or
- (b) the agreement or transaction is approved by a court.

(3) A reference in this section to a relevant agreement or a transaction includes a reference to:

- (a) a relevant agreement and a transaction; and
- (b) a series or combination of:
 - (i) relevant agreements or transactions; or
 - (ii) relevant agreements; or
 - (iii) transactions.

(4) If a person contravenes this section by incurring a debt (within the meaning of section 588G), the incurring of the debt and the contravention are linked for the purposes of this Act.

SECTION 596AC: PERSON WHO CONTRAVENES SECTION 596AB LIABLE TO COMPENSATE FOR LOSS

(1) A person is liable to pay compensation under subsection (2) or (3) if:

- (a) the person contravenes section 596AB in relation to the entitlements of employees of a company; and

- (b) the company is being wound up; and
- (c) the employees suffer loss or damage because of:
 - (i) the contravention; or
 - (ii) action taken to give effect to an agreement or transaction involved in the contravention.

The person is liable whether or not the person has been convicted of an offence in relation to the contravention.

- (2) The company's liquidator may recover from the person an amount equal to the loss or damage as a debt due to the company.

Note: Because employee entitlements are priority payments under paragraphs 556(1)(e) to (h), employees have priority to any compensation recovered by the liquidator in proceedings brought under this section.

- (3) If an employee of the company has suffered loss or damage because of:
 - (a) the contravention; or
 - (b) action taken to give effect to an agreement or transaction involved in the contravention;

the employee may, as provided in section 596AF to 596AI (but not otherwise), recover from the person, as a debt due to the employee, an amount equal to the amount of the loss or damage. Any amount recovered by the employee under this subsection is to be taken into account in working out the amount for which the employee may prove in the liquidation of the company.

- (4) Proceedings under this section may only be begun within 6 years after the beginning of the winding up.

SECTION 598: ORDER AGAINST PERSON CONCERNED WITH CORPORATION

- (2) Subject to subsection (3), where, on application by an eligible applicant, the Court is satisfied that:
 - (a) a person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation to a corporation; and
 - (b) the corporation has suffered, or is likely to suffer, loss or damage as a result of the fraud, negligence, default, breach of trust or breach of duty;

the Court may make such order or orders as it thinks appropriate against or in relation to the person (including either or both of the orders specified in subsection (4)) and may so make an order against or in relation to a person even though the person may have committed an offence in respect of the matter to which the order relates.

- (3) The Court must not make an order against a person under subsection (2) unless the Court has given the person the opportunity:
 - (a) to give evidence; and
 - (b) to call witnesses to give evidence; and
 - (c) to bring other evidence in relation to the matters to which the application relates; and
 - (d) to employ, at the person's own expense, a solicitor, or a solicitor and counsel, to put to the person, or to any other witness, such questions as the Court considers just for the purpose of enabling the person to explain or qualify any answers or evidence given by the person.
- (4) The orders that may be made under subsection (2) against a person include:
 - (a) an order directing the person to pay money or transfer property to the corporation; and
 - (b) an order directing the person to pay to the corporation the amount of the loss or damage.
- (5) Nothing in this section prevents any person from instituting any other proceedings in relation to matters in respect of which an application may be made under this section.

SECTION 600A: POWERS OF COURT WHERE OUTCOME OF VOTING AT CREDITORS' MEETING DETERMINED BY RELATED ENTITY

- (1) Subsection (2) applies where, on the application of a creditor of a company or Part 5.1 body, the Court is satisfied:
 - (a) that a proposed resolution has been voted on at:
 - (i) in the case of a company--a meeting of creditors of the company held:
 - (A) under Part 5.3A or a deed of company arrangement executed by the company;

or

- (B) in connection with winding up the company; or

- (ii) in the case of a Part 5.1 body--a meeting of creditors, or of a class of creditors, of the body held under Part 5.1; and
- (b) that, if the vote or votes that a particular related creditor, or particular related creditors, of the company or body cast on the proposed resolution had been disregarded for the purposes of determining whether or not the proposed resolution was passed, the proposed resolution:
 - (i) if it was in fact passed--would not have been passed; or
 - (ii) if in fact it was not passed--would have been passed;
 or the question would have had to be decided on a casting vote; and
- (c) that the passing of the proposed resolution, or the failure to pass it, as the case requires:
 - (i) is contrary to the interests of the creditors as a whole or of that class of creditors as a whole, as the case may be; or
 - (ii) has prejudiced, or is reasonably likely to prejudice, the interests of the creditors who voted against the proposed resolution, or for it, as the case may be, to an extent that is unreasonable having regard to:
 - (A) the benefits resulting to the related creditor, or to some or all of the related creditors, from the resolution, or from the failure to pass the proposed resolution, as the case may be; and
 - (B) the nature of the relationship between the related creditor and the company or body, or of the respective relationships between the related creditors and the company or body; and
 - (C) any other relevant matter.
- (2) The Court may make one or more of the following:
 - (a) if the proposed resolution was passed--an order setting aside the resolution;
 - (b) an order that the proposed resolution be considered and voted on at a meeting of the creditors of the company or body, or of that class of creditors, as the case may be, convened and held as specified in the order;
 - (c) an order directing that the related creditor is not, or such of the related creditors as the order specifies are not, entitled to vote on:
 - (i) the proposed resolution; or
 - (ii) a resolution to amend or vary the proposed resolution;
 - (d) such other orders as the Court thinks necessary.
- (3) In this section:

"related creditor" , in relation to a company or Part 5.1 body, in relation to a vote, means a person who, when the vote was cast, was a related entity, and a creditor, of the company or body.

SECTION 1307: FALSIFICATION OF BOOKS

- (1) An officer, former officer, employee, former employee, member or former member of a company who engages in conduct that results in the concealment, destruction, mutilation or falsification of any securities of or belonging to the company or any books affecting or relating to affairs of the company is guilty of an offence.
- (2) Where matter that is used or intended to be used in connection with the keeping of any books affecting or relating to affairs of a company is recorded or stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person who:
 - (a) records or stores by means of that device matter that the person knows to be false or misleading in a material particular; or
 - (b) engages in conduct that results in the destruction, removal or falsification of matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling or recovering other matter to be recorded or stored by means of that device; or
 - (c) having a duty to record or store matter by means of that device, fails to record or store the matter by means of that device:
 - (i) with intent to falsify any entry made or intended to be compiled, wholly or in part, from matter so recorded or stored; or
 - (ii) knowing that the failure so to record or store the matter will render false or misleading in a material particular other matter so recorded or stored;
 contravenes this subsection.

- (3) It is a defence to a charge arising under subsection (1) or (2) if the defendant proves that he, she or it acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

Note: A defendant bears a legal burden in relation to the matter mentioned in subsection (3), see section 13.4 of the Criminal Code.

SECTION 1317G: PECUNIARY PENALTY ORDERS: CORPORATION/SCHEME CIVIL PENALTY PROVISIONS

- (1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to \$200,000 if:
- (a) a declaration of contravention by the person has been made under section 1317E; and
 - (aa) the contravention is of a corporation/scheme civil penalty provision; and
 - (b) the contravention:
 - (i) materially prejudices the interests of the corporation or scheme, or its members; or
 - (ii) materially prejudices the corporation's ability to pay its creditors; or
 - (iii) is serious.

Financial services civil penalty provisions

- (1A) A Court may order a person to pay the Commonwealth a pecuniary penalty of the relevant maximum amount if:
- (a) a declaration of contravention by the person has been made under section 1317E; and
 - (b) the contravention is of a financial services civil penalty provision not dealt with in subsections (1E) to (1G); and
 - (c) the contravention:
 - (i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or
 - (ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or
 - (iii) is serious.
- (1B) The relevant maximum amount is:
- (a) \$200,000 for an individual; or
 - (b) \$1 million for a body corporate.

Responsibilities of secretaries etc. for certain corporate contraventions

- (1BA) Without limiting subsection (1), if a declaration of contravention by a person of subsection 188(1) or (2) has been made under section 1317E, a Court may order the person to pay the Commonwealth a pecuniary penalty of up to \$3,000.

Market integrity rules

- (1C) A Court may order a person to pay the Commonwealth a pecuniary penalty if:
- (a) a declaration of contravention by the person has been made under section 1317E; and
 - (b) the contravention is of subsection 798H(1) (complying with market integrity rules).
- (1D) The maximum amount that the court may order the person to pay for contravening a market integrity rule is the penalty amount set out in the market integrity rules for the rule.

Derivative transaction rules and derivative trade repository rules

- (1DA) A Court may order a person to pay the Commonwealth a pecuniary penalty if:
- (a) a declaration of contravention by the person has been made under section 1317E; and
 - (b) the contravention is of:
 - (i) section 901E (complying with derivative transaction rules); or
 - (ii) section 903D (complying with derivative trade repository rules).
- (1DB) The maximum amount that the court may order the person to pay for contravening a derivative transaction rule, or a derivative trade repository rule, is the penalty amount specified in those rules for the rule that has been contravened.

Best interests obligations and remuneration

- (1E) A Court may order a person to pay the Commonwealth a pecuniary penalty if:

- (a) a declaration of contravention by the person has been made under section 1317E; and
 - (b) the contravention is of one of the following provisions:
 - (i) subsections 961K(1) and (2) (financial services licensee responsible for breach of certain best interests duties);
 - (ii) section 961L (financial services licensee to ensure compliance with certain best interests duties);
 - (iii) subsection 961Q(1) (authorised representative responsible for breach of certain best interests duties);
 - (iv) section 962P (charging ongoing fee after termination of ongoing fee arrangement);
 - (v) subsection 962S(1) (fee recipient must give fee disclosure statement);
 - (vi) subsections 963E(1) and (2) (financial services licensee must not accept conflicted remuneration);
 - (vii) section 963F (financial services licensee must ensure representatives do not accept conflicted remuneration);
 - (viii) subsection 963G(1) (authorised representative must not accept conflicted remuneration);
 - (ix) section 963J (employer must not pay employees conflicted remuneration);
 - (x) section 963K (financial product issuer or seller must not give conflicted remuneration to financial services licensee or representative);
 - (xi) subsection 964A(1) (platform operator) must not accept volume-based shelf-space fees);
 - (xii) subsections 964D(1) and (2) (financial services licensee must not charge asset-based fees on borrowed amounts);
 - (xiii) subsection 964E(1) (authorised representative must not charge asset-based fees on borrowed amounts);
 - (xiv) section 965 (anti-avoidance of Part 7.7A provisions).
- (1F) The maximum amount that the court may order the person to pay for contravening a provision mentioned in paragraph (1E)(b) (except a provision mentioned in subparagraph (1E)(b)(iv) or (v)) is:
- (a) \$200,000 for an individual; or
 - (b) \$1 million for a body corporate.
- (1G) The maximum amount that the court may order the person to pay for contravening a provision mentioned in subparagraph (1E)(b)(iv) or (v) is:
- (a) \$50,000 for an individual; or
 - (b) \$250,000 for a body corporate.

Penalty a civil debt etc.

- (2) The penalty is a civil debt payable to ASIC on the Commonwealth's behalf. ASIC or the Commonwealth may enforce the order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

SECTION 1317H: COMPENSATION ORDERS--CORPORATION/SCHEME CIVIL PENALTY PROVISIONS: COMPENSATION FOR DAMAGE SUFFERED

- (1) A Court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if:
 - (a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme; and
 - (b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

Damage includes profits

- (2) In determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.

Damage includes diminution of value of scheme property

- (3) In determining the damage suffered by the scheme for the purposes of making a compensation order, include any diminution in the value of the property of the scheme.
- (4) If the responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to scheme property. If anyone else is ordered to compensate the scheme, the responsible entity may recover the compensation on behalf of the scheme.

Recovery of damages

- (5) A compensation order may be enforced as if it were a judgment of the Court.

SECTION 1317J: WHO MAY APPLY FOR A DECLARATION OR ORDER

Application by ASIC

- (1) ASIC may apply for a declaration of contravention, a pecuniary penalty order or a compensation order.

Application by corporation

- (2) The corporation, or the responsible entity for the registered scheme, may apply for a compensation order.

Note: An application for a compensation order may be made whether or not a declaration of contravention has been made under section 1317E.

- (3) The corporation, or the responsible entity for the registered scheme, may intervene in an application for a declaration of contravention or a pecuniary penalty order in relation to the corporation or scheme. The corporation or responsible entity is entitled to be heard on all matters other than whether the declaration or order should be made.

Compensation order relating to financial services civil penalty provision--any other person who suffers damage may apply

- (3A) Any other person who suffers damage in relation to a contravention, or alleged contravention, of a financial services civil penalty provision may apply for a compensation order under section 1317HA.

Note: An application for a compensation order may be made whether or not a declaration of contravention has been made under section 1317E.

- (3B) Subsections (2) and (3) do not apply in relation to a contravention of:
 - (a) section 901E (complying with derivative transaction rules); or
 - (b) section 903D (complying with derivative trade repository rules).

No one else may apply

- (4) No person may apply for a declaration of contravention, a pecuniary penalty order or a compensation order unless permitted by this section.
- (5) Subsection (4) does not exclude the operation of the Director of Public Prosecutions Act 1983.

6.3 CRIMINAL CODE ACT 1995

SECTION 134.1: OBTAINING PROPERTY BY DECEPTION

- (1) A person is guilty of an offence if:
 - (a) the person, by a deception, dishonestly obtains property belonging to another with the intention of permanently depriving the other of the property; and
 - (b) the property belongs to a Commonwealth entity.
 - (c) Penalty: Imprisonment for 10 years.
- (2) Absolute liability applies to the paragraph (1)(b) element of the offence.

SECTION 134.2: OBTAINING A FINANCIAL ADVANTAGE BY DECEPTION

- (1) A person is guilty of an offence if:
 - (a) the person, by a deception, dishonestly obtains a financial advantage from another person; and
 - (b) the other person is a Commonwealth entity.
- Penalty: Imprisonment for 10 years.
- (2) Absolute liability applies to the paragraph (1)(b) element of the offence.

SECTION 135.4(3): CONSPIRACY TO DEFRAUD -CAUSING A LOSS

- (3) A person is guilty of an offence if:
 - (a) the person conspires with another person with the intention of dishonestly causing a loss to a third person; and
 - (b) the third person is a Commonwealth entity.
- Penalty: Imprisonment for 10 years.

SECTION 137.1: FALSE OR MISLEADING INFORMATION

- (1) A person is guilty of an offence if:
 - (a) the person gives information to another person; and
 - (b) the person does so knowing that the information:
 - (i) is false or misleading; or
 - (ii) omits any matter or thing without which the information is misleading; and
 - (c) any of the following subparagraphs applies:
 - (i) the information is given to a Commonwealth entity;
 - (ii) the information is given to a person who is exercising powers or performing functions under, or in connection with, a law of the Commonwealth;
 - (iii) the information is given in compliance or purported compliance with a law of the Commonwealth.
- Penalty: Imprisonment for 12 months.

SECTION 137.2: FALSE OR MISLEADING DOCUMENTS

- (1) A person is guilty of an offence if:
 - (a) the person produces a document to another person; and
 - (b) the person does so knowing that the document is false or misleading; and
 - (c) the document is produced in compliance or purported compliance with a law of the Commonwealth.
- Penalty: Imprisonment for 12 months.

SECTION 144.1: FORGERY

- (1) A person is guilty of an offence if:
 - (a) the person makes a false document with the intention that the person or another will use it:
 - (i) to dishonestly induce a third person in the third person's capacity as a public official to accept it as genuine; and
 - (ii) if it is so accepted, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function; and
 - (b) the capacity is a capacity as a Commonwealth public official.
- Penalty: Imprisonment for 10 years.
- (2) In a prosecution for an offence against subsection

SECTION 145.1: USING FORGED DOCUMENT

- (1) A person is guilty of an offence if:
 - (a) the person knows that a document is a false document and uses it with the intention of:
 - (i) dishonestly inducing another person in the other person's capacity as a public official to accept it as genuine; and

- (ii) if it is so accepted, dishonestly obtaining a gain, dishonestly causing a loss, or dishonestly influencing the exercise of a public duty or function; and
- (b) the capacity is a capacity as a Commonwealth public official.

Penalty: Imprisonment for 10 years.

SECTION 145.2: POSSESSION OF FORGED DOCUMENT

- (1) A person is guilty of an offence if:
 - (a) the person knows that a document is a false document and has it in his or her possession with the intention that the person or another will use it:
 - (i) to dishonestly induce a third person in the third person's capacity as a public official to accept it as genuine; and
 - (ii) if it is so accepted, to dishonestly obtain a gain, dishonestly cause a loss, or dishonestly influence the exercise of a public duty or function; and
 - (b) the capacity is a capacity as a Commonwealth public official.

Penalty: Imprisonment for 10 years.

SECTION 145.5: GIVING INFORMATION DERIVED FROM FALSE OR MISLEADING DOCUMENTS

- (1) A person is guilty of an offence if:
 - (a) the person dishonestly gives information to another person;
- and
- (b) the information was derived, directly or indirectly, from a document that, to the knowledge of the first-mentioned person, is false or misleading in a material particular; and
- (c) the document is:
 - (i) kept, retained or issued for the purposes of a law of the Commonwealth; or
 - (ii) made by a Commonwealth entity or a person in the capacity of a Commonwealth public official; or (iii) held by a Commonwealth entity or a person in the capacity of a Commonwealth public official; and
- (d) the first-mentioned person does so with the intention of:
 - (i) obtaining a gain; or
 - (ii) causing a loss.

Penalty: Imprisonment for 7 years.

SECTION 271.8: OFFENCE OF DEBT BONDAGE

- (1) A person commits an offence of debt bondage if:
 - (a) the person engages in conduct that causes another person to enter into debt bondage; and
 - (b) the person intends to cause the other person to enter into debt bondage.

Penalty: Imprisonment for 12 months.

- (2) In determining, for the purposes of any proceedings for an offence against subsection (1), whether a person (the **first person**) has caused another person (the **second person**) to enter into debt bondage, a court, or if the trial is before a jury, the jury, may have regard to any of the following matters:
 - (a) the economic relationship between the first person and the second person;
 - (b) the terms of any written or oral contract or agreement between the second person and another person (whether or not the first person);
 - (c) the personal circumstances of the second person, including but not limited to:
 - (i) whether the second person is entitled to be in Australia under the *Migration Act 1958*; and
 - (ii) the second person's ability to speak, write and understand English or the language in which the deception or inducement occurred; and
 - (iii) the extent of the second person's social and physical dependence on the first person.

SECTION 400.3: DEALING IN PROCEEDS OF CRIME ETC.—MONEY OR PROPERTY WORTH \$1,000,000 OR MORE

- (1) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime; and
 - (c) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 25 years, or 1500 penalty units, or both.

- (2) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime;and
 - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 12 years, or 720 penalty units, or both.

- (3) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime;and
 - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$1,000,000 or more.

Penalty: Imprisonment for 5 years, or 300 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

SECTION 400.4: DEALING IN PROCEEDS OF CRIME ETC.—MONEY OR PROPERTY WORTH \$100,000 OR MORE

- (1) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime; and
 - (c) at the time of the dealing, the value of the money and other property is \$100,000 or more.

Penalty: Imprisonment for 20 years, or 1200 penalty units, or both.

- (2) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime;and

- (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
- (d) at the time of the dealing, the value of the money and other property is \$100,000 or more.

Penalty: Imprisonment for 10 years, or 600 penalty units, or both.

- (3) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$100,000 or more.

Penalty: Imprisonment for 4 years, or 240 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

SECTION 400.5: DEALING IN PROCEEDS OF CRIME ETC.—MONEY OR PROPERTY WORTH \$50,000 OR MORE

- (1) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime; and
 - (c) at the time of the dealing, the value of the money and other property is \$50,000 or more.

Penalty: Imprisonment for 15 years, or 900 penalty units, or both.

- (2) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$50,000 or more.

Penalty: Imprisonment for 7 years, or 420 penalty units, or both.

- (3) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$50,000 or more.

Penalty: Imprisonment for 3 years, or 180 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

SECTION 400.6: DEALING IN PROCEEDS OF CRIME ETC.—MONEY OR PROPERTY WORTH \$10,000 OR MORE

- (1) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime; and
 - (c) at the time of the dealing, the value of the money and other property is \$10,000 or more.

Penalty: Imprisonment for 10 years, or 600 penalty units, or both.

- (2) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (c) at the time of the dealing, the value of the money and other property is \$10,000 or more.

Penalty: Imprisonment for 5 years, or 300 penalty units, or both.

- (3) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$10,000 or more.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

SECTION 400.7: DEALING IN PROCEEDS OF CRIME ETC.—MONEY OR PROPERTY WORTH \$1,000 OR MORE

- (1) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime; and
 - (c) at the time of the dealing, the value of the money and other property is \$1,000 or more.

Penalty: Imprisonment for 5 years, or 300 penalty units, or both.

- (2) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and

- (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
- (d) at the time of the dealing, the value of the money and other property is \$1,000 or more.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

- (3) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
 - (d) at the time of the dealing, the value of the money and other property is \$1,000 or more.

Penalty: Imprisonment for 12 months, or 60 penalty units, or both.

- (4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

SECTION 400.8: DEALING IN PROCEEDS OF CRIME ETC.—MONEY OR PROPERTY OF ANY VALUE

- (1) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is, and the person believes it to be, proceeds of crime; or
 - (ii) the person intends that the money or property will become an instrument of crime.

Penalty: Imprisonment for 12 months, or 60 penalty units, or both.

- (2) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires).

Penalty: Imprisonment for 6 months, or 30 penalty units, or both.

- (3) A person is guilty of an offence if:
 - (a) the person deals with money or other property; and
 - (b) either:
 - (i) the money or property is proceeds of crime; or
 - (ii) there is a risk that the money or property will become an instrument of crime; and
 - (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires).

Penalty: 10 penalty units.

SECTION 400.9: POSSESSION ETC. OF PROPERTY REASONABLY SUSPECTED OF BEING PROCEEDS OF CRIME ETC.

- (1) A person is guilty of an offence if:
 - (a) the person:
 - (i) receives, possesses, conceals or disposes of money or other property; or

- (ii) imports money or other property into, or exports money or other property from, Australia; and
- (b) it is reasonable to suspect either or both of the following:
 - (i) the money or property is proceeds of crime in relation to a Commonwealth indictable offence or a foreign indictable offence;
 - (ii) the money or property is proceeds of crime, and the person's conduct referred to in paragraph (a) takes place in circumstances referred to in subsection (3).

Penalty: Imprisonment for 2 years, or 50 penalty units, or both.

- (2) Without limiting paragraph (1)(b), that paragraph is taken to be satisfied if:
 - (a) the conduct referred to in paragraph (1)(a) involves a number of transactions that are structured or arranged to avoid the reporting requirements of the Financial Transaction Reports Act 1988 that would otherwise apply to the transactions; or
 - (b) the conduct involves using one or more accounts held with ADIs in false names; or
 - (c) the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure; or
 - (d) the conduct involves a significant cash transaction within the meaning of the Financial Transaction Reports Act 1988, and the defendant:
 - (i) has contravened his or her obligations under that Act relating to reporting the transaction; or
 - (ii) has given false or misleading information in purported compliance with those obligations; or
 - (e) the defendant:
 - (i) has stated that the conduct was engaged in on behalf of or at the request of another person; and
 - (ii) has not provided information enabling the other person to be identified and located.

6.4 FAIR WORK ACT 2009

SECTION 550: ACCESSORY LIABILITY

- (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
- (2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:
 - (a) has aided, abetted, counselled or procured the contravention; or
 - (b) has induced the contravention, whether by threats or promises or otherwise; or
 - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - (d) has conspired with others to effect the contravention.

6.5 TAXATION ADMINISTRATION ACT 1953

SECTION 8C: FAILURE TO COMPLY WITH REQUIREMENTS UNDER TAXATION LAW

- (1) A person who refuses or fails, when and as required under or pursuant to a taxation law to do so:
 - (a) to furnish an approved form or any information to the Commissioner or another person; or
 - (aa) to give information to the Commissioner in the manner in which it is required under a taxation law to be given; or
 - (b) to lodge an instrument with the Commissioner or another person for assessment; or
 - (d) to notify the Commissioner or another person of a matter or thing; or
 - (e) to produce a book, paper, record or other document to the Commissioner or another person; or

- (f) to attend before the Commissioner or another person; or
- (g) to apply for registration or cancellation of registration under the A New Tax System (Goods and Services Tax) Act 1999 ; or
- (h) to comply with a requirement under subsection 45A(2) of the Product Grants and Benefits Administration Act 2000 ; or
- (i) to comply with subsection 82-10F(4) of the Income Tax (Transitional Provisions) Act 1997 ;
- (j) is guilty of an offence.

(1A) An offence under subsection (1) is an offence of absolute liability.

Note: For absolute liability, see section 6.2 of the Criminal Code.

(1B) Subsection (1) does not apply to the extent that the person is not capable of complying with the relevant paragraph.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1B), see subsection 13.3(3) of the Criminal Code.

(2) For the purposes of paragraphs (1)(a) and (d), a person shall not be taken to have refused or failed to furnish information to the Commissioner or another person, or to notify the Commissioner or another person of a matter or thing, merely because the person has refused or failed to quote the person's tax file number to the Commissioner or other person.

SECTION 8D: FAILURE TO ANSWER QUESTIONS WHEN ATTENDING BEFORE THE COMMISSIONER ETC

- (1) A person who, when attending before the Commissioner or another person pursuant to a taxation law, refuses or fails, when and as required pursuant to a taxation law to do so:
- (a) to answer a question asked of the person; or
 - (b) to produce a book, paper, record or other document; is guilty of an offence.

SECTION 8K: FALSE OR MISLEADING STATEMENT

- (1) A person is guilty of an offence if:
- (a) the person makes a statement to a taxation officer; and
 - (b) the statement is false or misleading in a material particular.

(1A) In subsection (1), absolute liability applies to the circumstance, that the statement is false or misleading in a material particular.

Note: For absolute liability, see section 6.2 of the Criminal Code.

- (1B) A person is guilty of an offence if:
- (a) the person makes a statement to a taxation officer; and
 - (b) the person omits any matter or thing from the statement; and
 - (c) the statement is misleading in a material particular because of the omission.

(1C) In subsection (1B), absolute liability applies to:

- (a) the conduct, that the person omits a matter or thing; and
- (b) the circumstance, that the statement is misleading in a material particular.

(2) In a prosecution of a person for an offence against subsection (1) or (1B), it is a defence if the person proves that the person:

- (a) did not know; and
- (b) could not reasonably be expected to have known;

that the statement to which the prosecution relates was false or misleading.

Note: The defendant bears a legal burden in relation to the matter in subsection (2), see section 13.4 of the Criminal Code.

(3) For the purposes of subsection (1B), a person shall not be taken to have omitted a matter or thing from a statement made to a taxation officer merely because the person has, in making the statement, failed to quote the person's tax file number.

SECTION 8L: INCORRECTLY KEEPING RECORDS ETC

- (1) A person is guilty of an offence if:
- (a) the person is required under, or pursuant to, a taxation law to keep any accounts, accounting records or other records; and
 - (b) the person keeps the accounts or records; and

- (c) the accounts or records do not correctly record and explain the matters, transactions, acts or operations to which they relate.

(1A) A person is guilty of an offence if:

- (a) the person is required under, or pursuant to, a taxation law to make a record of any matter, transaction, act or operation; and
- (b) the person makes the record; and
- (c) the record does not correctly record the matter, transaction, act or operation.

(1B) An offence under subsection (1) or (1A) is an offence of absolute liability.

Note: For absolute liability, see section 6.2 of the Criminal Code .

(2) In a prosecution of a person for an offence against subsection (1) or (1A), it is a defence if the person proves that the person:

- (a) did not know; and
- (b) could not reasonably be expected to have known;

that:

- (c) in the case of a prosecution for an offence against subsection (1)--the accounts, accounting records or other records to which the prosecution relates did not correctly record and explain the matters, transactions, acts or operations to which they relate; or
- (d) in the case of a prosecution for an offence against subsection (1A)--the record to which the prosecution relates did not correctly record the matter, transaction, act or operation to which the record relates.

Note: The defendant bears a legal burden in relation to the matter in subsection (2), see section 13.4 of the Criminal Code.

SECTION 8N: RECKLESSLY MAKING FALSE OR MISLEADING STATEMENTS

A person is guilty of an offence if:

- (a) the person makes a statement (whether orally, in a document or in any other way) to a taxation officer; and
- (b) the statement:
 - (i) is false or misleading in a material particular; or
 - (ii) omits any matter or thing without which the statement is misleading in a material particular; and
- (c) the person is reckless as to whether the statement:
 - (i) is false or misleading in a material particular; or
 - (ii) omits any matter or thing without which the statement is misleading in a material particular.

SECTION 8Q: RECKLESSLY INCORRECTLY KEEPING RECORDS ETC.

(1) A person is guilty of an offence if:

- (a) the person is required under, or pursuant to, a taxation law to keep any accounts, accounting records or other records; and
- (b) the person keeps the accounts or records; and
- (ba) the accounts or records do not correctly record and explain the matters, transactions, acts or operations to which they relate; and
- (c) the person is reckless as to whether the accounts or records correctly record and explain the matters, transactions, acts or operations to which they relate.

(2) A person is guilty of an offence if:

- (a) the person is required under, or pursuant to, a taxation law to make a record of any matter, transaction, act or operation; and
- (b) the person makes the record; and
- (ba) the record does not correctly record the matter, transaction, act or operation; and
- (c) the person is reckless as to whether the record correctly records the matter, transaction, act or operation.

(3) In subsections (1) and (2), strict liability applies to the circumstance, that the person is required under, or pursuant to, a taxation law to keep the accounts, accounting records or other records.

SECTION 8T: INCORRECTLY KEEPING RECORDS WITH INTENTION OF DECEIVING OR MISLEADING ETC.

A person who:

- (a) keeps any accounts, accounting records or other records in such a way that they:
 - (i) do not correctly record and explain the matters, transactions, acts or operations to which they relate; or
 - (ii) are (whether in whole or in part) illegible, indecipherable, incapable of identification or, if they are kept in the form of a data processing device, incapable of being used to reproduce information;
- (b) makes a record of any matter, transaction, act or operation in such a way that it does not correctly record the matter, transaction, act or operation;
- (c) engages in conduct that results in the alteration, defacing, mutilation, falsification, damage, removal, concealing or destruction of any accounts, accounting records or other records (whether in whole or in part); or
- (d) does or omits to do any other act or thing to any accounts, accounting records or other records;

with any of the following intentions, namely:

- (e) deceiving or misleading the Commissioner or a particular taxation officer;
- (f) hindering or obstructing the Commissioner or a particular taxation officer (otherwise than in the investigation of a taxation offence);
- (g) hindering or obstructing the investigation of a taxation offence;
- (h) hindering, obstructing or defeating the administration, execution or enforcement of a taxation law; or
- (i) defeating the purposes of a taxation law;

(whether or not the person had any other intention) is guilty of an offence.

SECTION 8U: FALSIFYING OR CONCEALING IDENTITY WITH INTENTION OF DECEIVING OR MISLEADING ETC.

A person who:

- (a) engages in conduct that results in the falsification or concealing of the identity of, or the address or location of a place of residence or business of, the person or another person; or
- (b) does or omits to do any act or thing the doing or omission of which facilitates the falsification or concealment of the identity of, or the address or location of a place of residence or business of, the person or another person;

with any of the following intentions, namely:

- (c) deceiving or misleading the Commissioner or a particular taxation officer;
- (d) hindering or obstructing the Commissioner or a particular taxation officer (otherwise than in the investigation of a taxation offence);
- (e) hindering or obstructing the investigation of a taxation offence;
- (f) hindering, obstructing or defeating the administration, execution or enforcement of a taxation law; or
- (g) defeating the purposes of a taxation law;

(whether or not the person had any other intention) is guilty of an offence.

SECTION 8Y: LIABILITY OF OFFICERS OF CORPORATIONS

- (1) Where a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.

SECTION 255-100: COMMISSIONER MAY REQUIRE SECURITY DEPOSIT

- (1) The Commissioner may require you to give security for the due payment of an existing or future tax-related liability of yours if:
 - (a) the Commissioner has reason to believe that:

- (i) you are establishing or carrying on an enterprise in Australia; and
- (ii) you intend to carry on that enterprise for a limited time only; or
- (b) the Commissioner reasonably believes that the requirement is otherwise appropriate, having regard to all relevant circumstances.

Note: A requirement to give security under this section is not a tax-related liability. As such, the collection and recovery provisions in this Part do not apply to it.

- (2) The Commissioner may require you to give the security:
 - (a) by way of a bond or deposit (including by way of payments in instalments); or
 - (b) by any other means that the Commissioner reasonably believes is appropriate.
- (3) The Commissioner may require you to give security under this section:
 - (a) at any time the Commissioner reasonably believes is appropriate; and
 - (b) as often as the Commissioner reasonably believes is appropriate.

Example: The Commissioner may require additional security if he or she reasonably believes that the original security requirement underestimated the amount of the likely tax-related liability.

SECTION 255-110: OFFENCE

You commit an offence if:

- (a) the Commissioner requires you to give security under section 255-100; and
- (b) you fail to give that security as required.

Penalty: 100 penalty units.

SECTION 269-15: DIRECTORS' OBLIGATIONS

- (1) The directors (within the meaning of the *Corporations Act* of the company (from time to time) on or after the initial day must cause the company to comply with its obligation.
- (2) The directors of the company (from time to time) continue to be under their obligation until:
 - (a) the company complies with its obligation; or
 - (b) an administrator of the company is appointed under section 436A, 436B or 436C of the *Corporations Act 2001* ; or
 - (c) the company begins to be wound up (within the meaning of that Act).

Instalment arrangements

- (2) The Commissioner must not commence, or take a procedural step as a party to, proceedings to enforce an obligation, or to recover a penalty, of a director under this Division if an arrangement that covers the company's obligation is in force under section 255-15 (Commissioner's power to permit payments by instalments).