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Combating Phoenix Activity in Bangladesh: Insights from Australian Recent Reforms

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Article

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Abstract

Many businesspeople employ deceptive tactics to generate profit. Among the worst offenders are those engaged in illegal phoenixing—a deliberate scheme to evade creditors by transferring company assets before the company is liquidated. The absence of robust legal safeguards against this unethical and economically harmful practice exacerbates creditors' losses, often impacting small depositors. It is, therefore, the state's responsibility to close legal loopholes and strengthen laws to curb phoenixing by unscrupulous corporate directors. Recognising this, Australia reinforced its corporate legal framework in 2020 by amending its corporations legislation to combat illegal phoenixing. The reform imposes statutory duties on corporate officers, including directors, to prevent creditor-defeating dispositions and holds individuals personally liable—both criminally and civilly—for engaging in procuring, facilitating, or encouraging such asset transfers. In contrast, Bangladesh lacks specific legal prohibitions against phoenixing, despite facing a more severe problem than Australia. Instead of tackling corporate misconduct, regulatory efforts have primarily focused on disciplining lenders in loan approvals, leaving delinquent borrowers or indebted companies unchecked. This article primarily examines Australia's recent anti-phoenixing reforms and proposes legal overhauls for Bangladesh to address this persistent issue. The recommendations aim to prevent fraudulent asset transfers, safeguard financial institutions, and hold accountable culpable corporate directors and officers. The findings may also benefit other jurisdictions confronting similar challenges.

INTRODUCTION

Once labelled a "bottomless basket", Bangladesh has made remarkable strides in economic development and is now recognised as an emerging Asian tiger.[1] However, Bangladesh has

[1] Mohammad Main Uddin, Kana Das, and Saruar Alam Sikdar, *Transition of Bangladesh Economy to Tiger Economy from Bottomless Economy: A Fifty Years (1972-2022) Perspective*, 37(1) *International Journal of Science and Business* 32, 32 (2024).

been serving for decades as a safe haven for individuals engaged in offensive phoenix activities, committing serious financial irregularities enabled by legal and regulatory loopholes, and at times, benefiting from political patronage.[2] As a result, non-performing loans (also referred to as defaulted loans, default loans, or bad loans) are rapidly surging in Bangladesh. One of the key factors driving this sharp rise is the frequent granting of unconstitutional and unethical amnesties to black money holders.[3] By June 2024, the total amount of default loans in the country's banking sector surpassed BDT 211,391 crore (approximately US$17.523 billion) for the first time in the nation's history.[4] This underscores the vulnerability of the financial sector, which has been significantly weakened by widespread scams and irregularities over the past 16 years. During this period, default loans have risen from BDT 22,480 crore (around US$1.863 billion) in 2008 to approximately US$17.523 billion in 2024.[5]

Banks in Bangladesh are primarily regulated by the Bangladesh Bank, the nation's central bank, under the *Bank Company Act 1991* (BCA 1991). In response to the ongoing poor performance of the banking sector, particularly among state-owned banks, the Government of Bangladesh introduced reforms through the *Bank Company (Amendment) Act 2023*.[6] However, the amendment seeks to tighten the supply side of the bad loans, leaving the demand side largely unguarded. This is because the borrowing companies are primarily regulated by the *Companies Act 1994* of Bangladesh (CA1994), and no amendments have been made to the CA1994 to prevent or address such bad loans. More importantly, the concept of illegal phoenixing is absent from the CA1994, although phoenix activities are reported to be a root cause of the country's banking sector's appalling performance, compelling the central bank to provide bailout money to rescue several banks.[7] The governor of the central bank admits that "[w]e backtracked from our previous decision of not printing money. We injected money into weak banks by printing money for the short term." [8]

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2 See Michael Levi, Maria Dakolias and Theodore S. Greenberg 2007), *Money Laundering and Corruption* in J. Edgardo Campos and Sanjay Pradhan (eds), *The Many Faces of Corruption* (World Bank, Washington DC) at 389-426; TBS Report, *White Paper Reveals How 15 Years of Corruption Bled the Economy*, The Business Standard, Dhaka, at economy, (2 December 2024), available at: https://www.tbsnews.net/economy/white-paper-reveals-how-15-years-corruption-bled-economy-1007546.

3 See S M Solaiman, *Fighting against Black Money by Offering Amnesty for Economic Development in Bangladesh: A Stigma Can Never be a Beauty Spot*, 29(1) *University of Miami International and Comparative Law Review* 42-129; S M Solaiman, *Black Money, 'White' Owners, and Blue Tenants in the Bangladesh Housing Market: Where Corruption Makes the Difference as Protectors Turn Predators*, 23(2) Journal of Financial Crime 501-26 (2016).

4 As cited in Md Mehedi Hasan, *Default Loans Surpass Tk 200,000cr for First Time*, The Daily Star, Dhaka, at business, (4 September 2024), available at: https://www.thedailystar.net/business/news/default-loans-surpass-tk-200000cr-first-time-3693936.

5 For the gradual increase in bad loans between 2008 and 2024, see ibid.

6 For an overview of the reforms, see Kaium Ahmed, *Brief Overview of the Bank Company (Amendment) Act 2023*, The Daily Star, Dhaka, at Law & Our Rights, available at: https://www.thedailystar.net/law-our-rights/news/brief-overview-the-bank-company-amendment-act-2023-3436716

7 Meraj Mavis, *BB U-turn: Prints 22,500C to Bailout 6 Banks*, The Dhaka Tribune, Dhaka, at Business (28 November 2024), available at: https://www.dhakatribune.com/business/banks/366568/bb-u-turn-prints-22-500c-to-bail-out-6-banks.

8 Meraj Mavis, *BB U-turn: Prints 22,500C to Bailout 6 Banks*.

Wilful loan defaults have been a chronic disease for the nation's moribund banking sector,[9] and the legal reforms brought about thus far do not address this critical issue, without which bringing stability to the financial system will remain a long way off. This article aims to address the issue by proposing the introduction of laws targeting illegal phoenix activities through amendments to the CA1994, which is instrumental in regulating the demand side of such loans and is administered by government authorities[10] other than the central bank. Since the creation and dissolution of companies enable illegal phoenix activities, and their managers and directors are governed by company legislation, legal reforms need to focus on updating the CA1994 and empowering its administrators to address the issue at hand.[11] In recommending to do so, the present research relies mainly on the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) (the 2020 reforms) which incorporated new provisions concerning illegal phoenix activities into the *Corporations Act 2001* of Australia (CA2001) and came into force on 18 February 2020 to address the issue of illegal phoenixing. The 2020 reforms are a product of comprehensive research and public consultations.[12] Hence, their acceptability is well recognised without delving into further investigation into their utility. Having acknowledged this, this article examines the current laws pertinent to illegal phoenixing in Australia aimed at submitting recommendations to introduce similar regulation in Bangladesh. The analysis in this article is structured as follows.

RESEARCH METHODS

This article employs the doctrinal method of legal research, drawing on archival materials that include both primary and high-quality credible secondary sources. Section 1 outlines the key concerns addressed in this research, while Section 2 defines the concepts of illegal and fraudulent phoenixing. Section 3 examines the legal definition of directors, followed by Section 4, which explores the various manifestations of illegal phoenix activity. Section 5 provides a detailed analysis of the legal framework governing illegal phoenixing in Australia, with a particular emphasis on the 2020 amendments to the CA2001 and their implications for directors' duties. Section 6 examines the statutory provisions relating to the prohibition of creditor-defeating dispositions. Section 7 considers the liability and available remedies for involvement in illegal phoenixing, incorporating sections 180–185 and 588G of the CA2001, with an accompanying table. Section 8 discusses regulatory enforcement mechanisms and the

[9] See TBS Report, *Many Wilful Defaulters Exploit Legal Loopholes: BAB Chairman*, The Business Standard, Dhaka, at Bangladesh (18 September 2024), available at: https://www.tbsnews.net/bangladesh/many-wilful-defaulters-exploit-legal-loopholes-bab-chairman-944621; Md Touhidul Alam Khan, *Why is Willful Default a Growing Threat to Bangladesh's Financial Stability?*, Asian Banking & Finance, at Commentary (2024) available at: https://asianbankingandfinance.net/economy/commentary/why-willful-default-growing-threat-bangladeshs-financial-stability#:~:text=Willful%20default%20poses%20a%20serious,to%20curbing%20this%20damaging%20trend.

[10] Two regulatory bodies, namely the Registrar of Joint Stock Companies and Firms (RJSCF) and the Bangladesh Securities and Exchange Commission (BSEC), regulate the registration, deregistration, fundraising, and operations of companies.

[11] See Helen Anderson, *Illegal Phoenix Activity: Practical Ways to Improve the Recovery of Tax* 40(2) Sydney Law Review 255, 255 (2018).

[12] See Australian Government, *Combatting Illegal Phoenixing* (September 2017), available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://treasury.gov.au/sites/default/files/2019-03/170928-final-Phoenixing-Consultation-Paper-1.pdf ; Anderson (2018), *supra* n. 11.

empowerment of the principal regulatory body to enhance public enforcement efforts. Finally, Section 9 presents conclusions with major recommendations.

ANALYSIS AND DISCUSSION

Concepts and Definitions of Legal and Illegal or Fraudulent Phoenix Activities

The concept of the phoenix originates from mythology, which was depicted as a sacred, magnificently coloured fire-bird that lived for 500 to 1,000 years before being consumed by flames in its own nest, and remarkably, the phoenix would then rise from its ashes, reborn in a form similar to its previous life.[13] Therefore, the term "phoenix activity" is derived from the mythical firebird. In company law, phoenix activity refers to the practice where a new company or corporation ("company" and "corporation" are used synonymously in this article) emerges "from the ashes of its failed predecessor."[14] More clearly, a corporate "phoenix activity" refers to the transfer or disposition of one company's property to another by directors of the old company below the market price or the best price reasonably obtainable in the relevant circumstances.[15] Such transfers are executed to restructure the business either with a *bona fide* intention to turn a financially troubled company around or a *mala fide* intention to deprive the company's creditors. Restructuring facilities are sometimes needed to keep the business a going concern and repay its debts. Such an activity is thus not prohibited intrinsically. Notably, when it comes to the duties and liabilities of individuals, directors include all directors as defined in the CA2001, including shadow and *de facto* directors, as explained below.

The voidability of phoenix conduct depends on the law of the place where it occurs, as the court's observations "emphasise the fact-specific analysis which is necessary to identify particular conduct and its relationship with the legal regime with which the conduct engages to enable a conclusion to be reached that the conduct is unlawful, illegal or fraudulent depending on the legal regime engaged."[16] As pronounced by the court, the determination of whether "phoenix conduct" is considered unlawful is entirely based on whether the facts of the conduct breach a provision of the CA2001.[17] There is no concept of "illegal phoenix activity" in itself.[18] Metaphorically called "phoenix conduct", it can only be deemed unlawful if it violates the relevant legal provisions.[19] Phoenix activity is thus deemed "unlawful" in Australia when it violates the duties or obligations of corporate officers under the CA2001 or breaches pecuniary penalty provisions. More specifically, the term "illegal" refers to the conduct that constitutes a criminal offence punishable by conviction, whether the offence is summary or indictable.[20] To differentiate between criminal and unlawful phoenix activities, an "illegal phoenix activity"

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13 Julie E Margret and Geoffrey Peck, *Fraud in Financial Statements*, 108 (*Taylor & Francis Group*, 2014) (internal citations omitted).

14 Helen Anderson, *The Proposed Deterrence of Phoenix Activity: An Opportunity Lost?* 34 Sydney Law Review 411, 412 (2012)

15 Sections 9 and 588FDB(1) of the CA2001; Australia Government, *Explanatory Memorandum, Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019* (Australia) at [2.1], [2.7], [2.12].

16 *ASIC v Bettles* [2020] FCA 1568 at [112].

17 *ASIC v Bettles* [2020] FCA 1568 at [87].

18 *ASIC v Bettles* [2020] FCA 1568 at [87].

19 *ASIC v Bettles* [2020] FCA 1568 at [87].

20 *ASIC v Bettles* [2020] FCA 1568 at [88].

which attracts penalties constitutes a crime, while the concept of "unlawful phoenix activity" refers to non-criminal legislative breaches.[21]

In the corporate law context, illegal phoenixing arises from the breach of directors' duties, such as the duty to exercise due care and diligence,[22] the duty to act in good faith and in the best interest of the company,[23] the duty not to misuse of position,[24] the duty not to misuse of information,[25] and the duty to prevent insolvent trading[26]. For example, ASIC outlines the typical characteristics of "phoenix conduct", emphasising the deliberate liquidation of companies for a specified purpose as the defining feature of "illegal phoenix activity".[27] The corporate regulator (ASIC), in *ASIC v Bettles*, alleges breaches of §§180, 181, and 182 of the CA2001, emphasising the element of deliberate action or intent.[28] Section 182 is particularly relevant in this case as it prohibits directors, secretaries, officers, or employees from improperly using their position to benefit themselves or others, or to harm the corporation. This aligns with ASIC's description of the conduct that "usually happens".[29] In *Re Raad and Bazouni* (2018), two directors were convicted of illegal phoenix activity, having breached their duty to refrain from misusing their position under §182 of the CA2001.[30]

Creditor protection is essential to facilitate smooth corporate financing on mutually beneficial and credible terms, while effective and efficient regulation is crucial for maintaining financial stability and promoting fairness within the economy. Regulating phoenixing is a critical tool to prevent corporate irregularities with borrowed money; however, defining illegal phoenix activities is not an easy task.

The proposal to create a dedicated phoenixing offence sparked significant debate in Australia, primarily due to concerns about defining the offence with precision to avoid unintentional inclusion of lawful business transactions and legitimate restructures.[31] Consequently, instead of attempting to create a distinct offence for phoenixing, the Australian Government aimed to address specific types of common illegal phoenix conduct directly.[32] The 2020 amendment aimed to explicitly prohibit the transfer of assets from one company to another company when the primary intent of the transfer is to obstruct, delay, or prevent those assets from being distributed to the creditors of the transferor company.[33]

A legal phoenix activity is often referred to as a measure for "business rescue", and occurs when directors act without intent to deceive creditors, aiming to save the business (though not necessarily protecting the troubled company, rather providing protection to its business by

21 *ASIC v Bettles* [2020] FCA 1568 at [88].
22 CA2001, §180.
23 CA2001, §181.
24 CA2001, §182.
25 CA2001, §183.
26 CA2001, §588G.
27 *ASIC v Bettles* [2020] FCA 1568 at [116].
28 *ASIC v Bettles* [2020] FCA 1568 at [117].
29 *ASIC v Bettles* [2020] FCA 1568 at [117]
30 Australia Securities and Investment Commission, *Media Release* (18-246 MR 24 August 2018), available at: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-246mr-two-former-company-directors-convicted-for-engaging-in-illegal-phoenix-activity/ .
31 Australian Government (2017), *supra* note 12, at 8.
32 Australian Government (2017).
33 Australian Government (2017).

another business entity) as the most beneficial option for all stakeholders involved and also for the broader economy under the given circumstances.[34] This happens when a financially troubled company implements a strategy to achieve a favourable resolution to overcome the problem. No issues arise if the new company acquires the existing company's assets at a fair market value or the highest reasonable price, provided that the appropriate rules are complied with by both old and new companies.

Legal phoenixing requires full transparency, including the disclosure of the cause of financial distress, the plan for settling outstanding debts, and how the restructuring will benefit stakeholders. Reasons for undertaking a business restructure include shrinking profit margins, low operational efficiency, stagnant growth, reduced competitiveness, and changes in the customer base.[35] Hence, honest business restructuring is permitted in law.[36]

The transfer of assets by one company to another in illegal phoenix activities, which aims to prevent creditors from accessing them, is usually orchestrated by the company's directors or key decision-makers. Professor Anderson nicely coined the term "illegal phoenix activity that typically involves closing one debt-laden company and continuing its business through another company minus those debts."[37] Consequently, the old company is left with no assets to repay its debts owed to creditors. Therefore, illegal phoenixing denotes the intentional misuse of corporate structures to defraud or mislead creditors.[38]

In another scenario, a business is transferred to a newly formed company, while the original company is left unmanaged, bypassing liquidation and ultimately being deregistered by ASIC in Australia.[39] The new company typically retains the same officers, operates in the same business, and often uses a trading name that closely resembles the original name and is controlled by the same persons.[40] Unscrupulous business people who control the economically unsustainable company indulge in transferring the company's assets, leveraging or taking advantage of the corporate separate legal personhood and the limited liability of its members, and they carry on the business through a newly formed[41] or a shell company.

This article addresses fraudulent or illegal phoenixing, which is prohibited by law. Although the CA2001 in Australia considers phoenxing to be illegal when it is carried out by directors in breach of their duties under general law (common law and equity) and/or the CA2001, specific prohibitions have been imposed under the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth), effective February 2020 (the 2020 reforms or the 2020 amendments), as part of efforts to curb illegal phoenixing activities across Australia.[42] The reform creates new restrictions and crimes in addition to the existing ones. Further, the law

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[34] Swell & Kettle, *The Complete Guide to Illegal Phoenix Activity*, (3 September 2020), available at https://sklaw.au/blog/phoenix-activity/.

[35] David Hill, *When Should a Business Restructure be Considered?* (18 July 2018), available at https://australiandebtsolvers.com.au/restructure-turnaround/guides/when-should-a-business-restructure-be-considered .

[36] See CA2001, §§453A-455B.

[37] Anderson (2018), *supra* note 11, at 255.

[38] Anderson (2012), *supra* note 14, at 412.

[39] Anderson (2018), *supra* note 11, at 259 (internal citations omitted).

[40] *ASIC v Bettles* [2020] FCA 1568 at [105], [112].

[41] Helen Anderson and Linda Hallert, *Phoenix Activity and the Liability of the Advisor*, 36 Sydney Law Review 471, 471 (2014).

[42] Swell & Kettle (2020), *supra* note 34.

allows creditors, liquidators, and ASIC to sue for compensation for losses caused by those who engage in or are knowingly involved in the proscribed conduct, as outlined in §79[43] of the CA2001.[44]

The reform introduced new phoenixing offences aimed at preventing creditor-defeating dispositions or transfers of company assets, imposing penalties on those who carry out or assist in such transactions, and empowering liquidators and ASIC to recover the improperly transferred assets.[45] It is pertinent to note that the CA2001 is the primary legislation governing the regulation of corporations and individuals responsible for managing corporate businesses.[46]

Whilst legal and illegal phoenix activities are distinguished, both "illegal" and "fraudulent" are used synonymously to describe unlawful phoenix activities.[47] The Federal Court of Australia notes that defining "precisely what constitutes *fraudulent phoenix activity* is *inherently difficult*" [48], then the court, referring to the Commonwealth Treasury Department's published paper entitled "Action against fraudulent phoenix activity" quotes that:

> **"***Fraudulent phoenix activity involves the evasion of tax and other liabilities such as employee entitlements through the deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities* [Italics original].[49]"

The difficulty in defining this vicious conduct becomes further evident in the assertion that:

> "*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 the incorporation of a successor company following a single failure, unless documentary evidence, such as written instructions from advisors, is available. 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* [Italics original]."[50]

Quoting from the same Treasury Department paper mentioned above, the court adds that:

> "*In its most basic form, fraudulent phoenix activity involves one corporate entity carrying on a business, accumulating debts without any intention of repaying those debts (for wealth creation or to boost the cash flow of the business) and liquidating to avoid repayment of the debt. The business then continues in another corporate entity, controlled by the same person or group of individuals*."[51]

Relying on the treasury paper and the experience of the Australian Taxation Authority (ATO), the Federal Court of Australia further stipulates that a typical fraudulent phoenix arrangement is structured as: (i) this scheme involves a closely held private group creating multiple entities, with one designated for hiring labour; (ii) this labour hire entity, typically controlled by a single director without ultimate control over the group; (iii) this entity has

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43 Section 79 defines the 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."

44 Australian Government (2017), *supra* note 12, at 9.

45 *Re Intellicomms Pty Ltd* (In liquidation) [2022] VSC 228 at [7] (internal citation omitted).

46 Maria Nicolae, *The Liability-Sanction Relationship: A Case Study in the Effectiveness Of The Corporate Regulatory Regime,* 31 Company and Securities Law Journal 365, 375 (2013).

47 See *ASIC v Bettles* [2020] FCA 1568.

48 *ASIC v Bettles* [2020] FCA 1568 at [104].

49 *ASIC v Bettles* [2020] FCA 1568 at [104].

50 *ASIC v Bettles* [2020] FCA 1568 at [111].

51 *ASIC v Bettles* [2020] FCA 1568 at [105].

minimal assets and share capital; (iv) when it accumulates liabilities and becomes insolvent, it is placed into administration or liquidation, often by the ATO; (v) a new labour hire entity is then formed, and workers are transferred to it, allowing business operations to continue uninterrupted; and (vi) this cycle is repeated, enabling the broader group to benefit financially by avoiding liabilities. [52]

The explanatory memorandum introducing the bill prohibiting phoenixing observes that illegal phoenix activity involves transferring assets from one company to another to evade creditor claims. This practice, typically carried out by company directors or controlling persons, aims to defeat creditors' rights. It is often facilitated by unethical pre-insolvency advisers, accountants, lawyers, and business consultants who guide companies in executing these illegal schemes.[53] The Federal Court of Australia held that:

> "*This illegal practice … usually happens when company directors transfer the assets of an existing company to a new company without paying true or market value, leaving debts with the old company. Once the assets have been transferred, the old company is placed in liquidation. When the liquidator is appointed, there are no assets to sell, so creditors cannot be paid. Once the assets are transferred to a new company, the directors continue to operate the business. This gives the new business an unfair advantage when competing for work, because they carry less debt and have lower operating costs*" [emphasis added by the court]."[54]

Having considered the above-stated views, the Federal Court encapsulates the concept of illegitimacy at hand in its own words that:

> "*These textual explanations and the examples contemplate conduct described as 'fraudulent'. The fraudulent conduct is said to involve deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities, and that which makes the underlying 'phoenix activity' fraudulent or illegitimate is the 'intention with which the activity is undertaken*". [55]

Likewise, ASIC describes this deleterious activity as it "occurs when a new company, for little or no value, continues the business of an existing company that has been liquidated or otherwise abandoned to avoid paying outstanding debts, which can include taxes, creditors and employee entitlements."[56]

The CA2001 does not explicitly define the terms "illegal" or "fraudulent" in relation to phoenix activities. Moreover, there was no distinct offence specifically addressing illegal phoenix activities before the introduction of the 2020 reforms.[57] Historically, it has been challenging in Australia to articulate a clear, universally accepted definition of phoenix activity and to distinguish what qualifies as "illegal" or "fraudulent" phoenix activities.[58]

Determining whether a company restructuring constitutes unlawful conduct depends on the specific facts of the case.[59] It requires establishing a link between the conduct and the relevant legal provisions under the CA2001 or other legislation, or general law in Australia.[60] The conduct may be deemed unlawful, illegal, or fraudulent based on the applicable legal

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52 *ASIC v Bettles* [2020] FCA 1568 at [106].
53 Australian Government, *supra* note 15, at [1.3]. Analysing the roles and liability of these professionals is beyond the scope of this article.
54 *ASIC v Bettles* [2020] FCA 1568 at [115] (internal citation omitted).
55 *ASIC v Bettles* [2020] FCA 1568 at [107].
56 ASIC, *Illegal Phoenix Activity*, available at: https://asic.gov.au/for-business/small-business/closing-a-small-business/illegal-phoenix-activity/ .
57 Australian Government (2017), *supra* note 12, at 8.
58 *ASIC v Bettles* [2020] FCA 1568 at [115].
59 *ASIC v Bettles* [2020] FCA 1568 at [109].
60 *ASIC v Bettles* [2020] FCA 1568 at [109].

framework and the norms it engages;[61] and the conduct is deliberately carried out to deprive creditors.[62] This evil practice exploits the corporate form, intending to restart the core business in a new entity, symbolising the concept of a phoenix rising from the ashes.[63]

Illegal phoenix activity, at its core, thus occurs when directors intentionally shut down one company and transfer its business to another, whether a newly established or pre-existing company, with the intention of evading the payment of debts. This leaves those liabilities trapped in the insolvent company, beyond the reach of creditors.[64]

Providing a precise definition of fraudulent phoenix activity is inherently challenging due to the complex and varied nature of the conduct involved.[65] However, as identified by the Federal Court, the key factor distinguishing fraudulent phoenix activity from legitimate corporate restructuring is the intention behind the actions.[66] ASIC differentiates between businesses that become insolvent due to poor management practices, such as inadequate record-keeping or cash flow issues, and those that intentionally structure their operations to evade liabilities through phoenix activity.[67]

The fraudulent or illegitimate nature of the phoenix activity stems from the intention behind the actions, specifically the purpose of avoiding liabilities through repeated liquidation and reorganisation of the business entities.[68] The court further clarifies in *ASIC v Bettles* that in each case, the key questions to determine are: What does exactly constitute the alleged conduct of phoenixing? When and by whom was the conduct carried out? What were the specific duties, obligations, or prohibitions violated by the conduct, leading to a contravention of the relevant legal provision, whether the contravention occurred under the CA2001, or other legislation, or general law?[69]

Although offensive conduct has not been statutorily defined, textual analysis and explanations suggest that illegal or fraudulent phoenixing involves the deliberate, systematic, and sometimes repetitive liquidation of related corporate entities to evade outstanding debt obligations.[70] This concept can also be applied in other jurisdictions, including Bangladesh, to conceptualise such offensive conduct.

Directors of A Company—As Defined in Australia and Bangladesh

Section 9AC(1) of the CA2001 defines a director of a company as an individual who is formally appointed as a director or is appointed as an alternate director and is performing the duties of that role, regardless of the title assigned to their position. Going beyond the appointment, §9AC(1) declares that unless otherwise stated, an individual who has not been

61 *ASIC v Bettles* [2020] FCA 1568 at [109].
62 *ASIC v Bettles* [2020] FCA 1568 at [115] (internal citation omitted).
63 *ASIC v Bettles* [2020] FCA 1568 at [115] (internal citation omitted).
64 Anderson (2018), *supra* note 11, at 256.
65 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake 2004*, (The Commonwealth of Australia, Canberra), par 8.2; as cited in *ASIC v Bettles* [2020] FCA 1568 at [104].
66 *ASIC v Bettles* [2020] FCA 1568 at [104].
67 *ASIC v Bettles* [2020] FCA 1568 at [104].
68 *ASIC v Bettles* [2020] FCA 1568 at [107]
69 *ASIC v Bettles* [2020] FCA 1568 at [110]
70 *ASIC v Bettles* [2020] FCA 1568 at [107]

formally appointed as a director but acts in the capacity of a director called a "de facto director"; or whose instructions or wishes the company's directors habitually follow known as "shadow directors", except where the person's advice is given as part of their legitimate professional responsibilities or their business relationship with the directors or the corporation. Notably, §9AC of the CA2001 does not mention the terms "de facto" or "shadow", although it includes precisely the narratives of their roles. The Full Court of the Federal Court of Australia (FCA) emphasised the significance of a role-based definition of directors in *Grimaldi v Chameleon Mining NL (No 2)*.[71] Hence, courts have introduced these two terms based on the statutory descriptions. In this case, the court ruled that Mr. Grimaldi was a de facto director, highlighting the substantive nature of his role and responsibilities. The court further noted that, although some of his actions were carried out at the request of the company's board of directors, he exercised independent judgment in executing them.[72] Defining shadow directors, the court describes that the appointed directors must habitually follow the instructions or wishes of a shadow director over a period of time, even if those instructions or wishes do not extend to every aspect of the company's operations.[73] The High Court of Australia (HCA), the nation's highest court, effectively determined that an individual acting as a de facto director of a company is considered a director. These principles applied not only to individuals formally appointed, even if their appointment was flawed or invalid, but also to those who continued to perform the duties of the office after their official term had ended, or those who appeared to assume the role of a director without proper authority, acting as a "usurper".[74] So the definition of directors in Australia is broadly focused on the role played by a person rather than any formal appointment to the position. All such individuals are subject to the duties and liabilities of directors, irrespective of the named position or role they officially hold.[75] The HCA, in *ASIC v King*, recently further clarified that an individual may not need to hold a formal position "within" a corporation to be subject to regulatory scrutiny as a director; if their functional role enables them to exert significant influence over the company's financial standing, they can still fall within the scope of director-related regulations.[76] In *ASIC v King*, the HCA reaffirmed that the definition of "director" provided in the CA2001 extends beyond its conventional meaning to encompass additional categories of "officers of a corporation" as directors.[77]

In contrast to the relatively detailed statutory definition of directors provided in Australia's corporate law, the CA1994 of Bangladesh offers a definition that is unreasonably brief, narrowly framed, and overly simplistic, failing to capture the broader spectrum of individuals recognised as "directors" under the CA2001. Notably, the CA1994 has heavily drawn from its predecessor, the *Companies Act 1913* (CA1913), enacted by the Governor-General of India in

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71 [2012] FCAFC 6 [323].

72 *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 at [323].

73 *Re Akron Roads* (2016) 348 ALR 704, 746-47; Helen Anderson, *Shelter from the Storm: Phoenix Activity and the Safe Harbour*, 41(3) Melbourne University Law Review 999, 1025 (2018).

74 See *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 as cited in Robert Baxt AO, *The "Definition" of a "De Facto" Director! Some Further Observations from the Full Federal Court"* 40(3) Australian Business Law Review 209, 210 (2012).

75 See, two leading Australian cases, *ASIC v Meredith Hellicar & Ors* [2012] HCA 17 (*James Hardie* case); *ASIC v Healey* (2011) 278 ALR 618 (*Centro Group* case).

76 *ASIC v King* [2020] HCA 4, at [27] - [28].

77 [2020] HCA 4 at [26]-[28].

Council during the British colonial period. As a result, the CA1994 retains much of the colonial-era content in its provisions.[78] Section 2(1)(f) of the CA1994 defines a "director" as "any person occupying the position of director by whatever name called," a definition directly copied from §2(5) of the CA1913 without any modification. Consequently, the current definition of directors in the CA1994 represents a colonial inheritance, rooted in the text of the repealed CA1913.[79] This outdated definition needs to be revisited immediately to hold all individuals involved in illegal phoenixing accountable. In doing so, emphasis must be placed on the role a person plays in making decisions and managing companies.

Directors are entrusted with the responsibility of safeguarding the company's assets.[80] However, in practice, they are often found misappropriating company funds with little to no accountability in Bangladesh.[81] The definition of "director" under the CA1994 is critically flawed due to its lack of clarity and its narrow focus on individuals "occupying the position" of director. This emphasis on the formal occupation of the position overlooks the functional roles played by individuals involved in the company's management or decision-making, a gap that is effectively addressed under the CA2001 in Australia and pertinent legal interpretations by the judiciary, as stated above. Such a definitional deficiency undermines the regulatory framework governing directors' duties, rendering it ineffective. A revised definition, aligned with the broader and more functional approach of the CA2001, is imperative. It should be ensured that all individuals performing directorial roles, including those operating behind the scenes, can be held accountable for actions that contribute to a company's financial distress, leading to its eventual collapse. It is important to note that, by definition, all directors are "officers" of a company, but not all officers are "directors". [82] It means the duties of officers apply to directors as well.

Modes of Playing Out Illegal Phoenix Activities

The CA2001 does not define a "phoenix company".[83] However, it can involve both lawful business rescue efforts and the deliberate use of repeated insolvency as a strategy to evade debts, and in some instances, to enable money laundering.[84] Illegal phoenix operators exploit legal loopholes by ensuring that the ASIC-prescribed appropriate form is lodged, either electronically or on paper, through an agent or directly, indicating a change of director.[85] However, the resignation date is backdated to prevent the outgoing director from being held

[78] See M. Zahir, *Company and Securities Laws*, 180 (University Press Ltd, Dhaka, 2000); Soilur Law Institute, *Company Law*, 32-36 (Soilur Publication, Dhaka, 1997).
[79] M. Zahir, *Company and Securities Laws,* at 7.
[80] *Md Yameen v K A Bashar* (1986) BLD (AD) 305.
[81] For example, see FE Report, *Regulator to Sue UFS MD, Associates for Money Laundering*, The Financial Express, Dhaka, at Bangladesh, (24 March 2023) available at https://thefinancialexpress.com.bd/stock/bangladesh/mir-akhter-hossain-looks-to-cut-finance-cost-by-issuing-preference-shares; TBS Report, *Depositors, Shareholders Storm UCB Head Office Demanding Resignation of Board of Directors*, The Business Standard, Dhaka, (08 August 2024), available at https://www.tbsnews.net/bangladesh/depositors-shareholders-storm-ucb-head-office-demanding-resignation-board-directors .
[82] See §§9AC and 9AD of the CA2001.
[83] Australian Government (2017), *supra* note 12, at 1.
[84] Australian Government (2017).
[85] This notification is required under §205B of the CA2001.

responsible for any offences or irregularities committed after that date.[86] Similarly, the company may falsify records by backdating the appointment of a "dummy" director to a time before the offending conduct occurred, thereby protecting the actual controller or actor.[87] In some instances, this dummy director may be a non-existent, deceased, or transient individual who cannot be located or lacks the financial capacity to face any liability.[88] The legal directors may also use their relatives or friends as dummy directors.[89] Phoenix activities take place when a new corporation rises "from the ashes of its failed predecessor".[90] A Phoenix activity can also occur within corporate groups when a subsidiary with significant debts is liquidated, and its business and assets are transferred to another subsidiary, leaving the debts behind. In both cases, the aim is to evade creditors' claims.[91]

A corporation, an artificial person, cannot do anything without its human agents, and directors are the *de facto* actors who should take the ultimate responsibility for the commission or facilitation of illegal phoenix activities on behalf of the *de jure* actors which are corporations ("company" and "corporation" are used synonymously in the present research corporations although they are sometimes differentiated[92]). Using or abusing the corporate form is not the only way to avoid personal liability in business; individuals can use strategies like transferring assets to a spouse or a family trust. However, such strategies may still result in personal bankruptcy, leading to stigma and financial difficulties. Conducting business through a company helps avoid many of these negative consequences for individuals.[93] The liability and defence provisions seek to deter the improper conduct of individuals when their companies face financial difficulties or insolvency.[94]

The essence of illegal phoenix activity lies in the underlying motivation, with integrity serving as a crucial factor that distinguishes legal phoenix activities from illegal ones.[95] It may occur when a company facing liquidity issues is liquidated, placed into voluntary administration,[96] or deregistered,[97] and its assets are transferred to a new company for inadequate consideration. These illegal activities may actively involve a procedurally legal transfer of assets to another company with good intentions, not to deprive creditors, but are sometimes characterised by the deliberate misuse of the corporate structure to harm unsecured creditors.[98] This typically occurs when an indebted company is quickly liquidated, and its assets are transferred to a new company or another company within a holding company at an

[86] Australian Government (2017), *supra* note 12, at 13
[87] Australian Government (2017).
[88] Australian Government (2017).
[89] Helen Anderson et al, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement*, (University of Melbourne Legal Studies Research Paper, February 2017),172 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924277 .
[90] Anderson (2012), *supra* note 14, at 412.
[91] Anderson (2012). See also Anderson (2018), *supra* note 73.
[92] See §588V of the CA2001.
[93] See Anderson (2018), *supra* n. 11, at 259.
[94] Anderson (2018), *supra* note 73, at 1020.
[95] Anne Matthew, *The Conundrum of Phoenix Activity: Is Further Reform Necessary?* 23 *Insolvency Law Journal* 116, 123 (2015).
[96] Part 5.3A of the CA2001 (eg, §§436A, 436B) covers voluntary administration.
[97] CA2001, §509.
[98] Anderson (2018), *supra* note 73, at 1013.

undervalued price.[99] This *mala fide* transfer of assets constitutes a breach of the directors' multiple duties, including the duty to prevent insolvent trading,[100] the duty to act for a proper purpose,[101] the duty not to misuse of position[102] or information,[103] and the duty to exercise due care and diligence[104].

Illegal phoenixing laws are engineered to frustrate creditor-defeating dispositions.[105] One of the primary considerations for directors in discharging their responsibilities is ensuring the best interests of the company, which inevitably includes maintaining the entity's solvency.[106] These predatory practices harm the economy and undermine public trust in the business community. This activity poses a costly and complex challenge for any legal system, arising from the tension between upholding the principle of separate legal entities and protecting vulnerable creditors. Illegal phoenixing refers to the formation of a new company to take over the operations of an existing, failed, or failing company that undergoes insolvency, with its assets transferred to the newly formed company for a nominal or no price or cost. When done unlawfully, the original company is dissolved to evade settling unpaid debts, such as taxes, employee entitlements, and amounts owed to private creditors. However, as noted earlier, not all phoenix activities are inherently illegal. The illegality stems from the *mala fide* intention of transferring the assets to a new entity that can operate the same business in the same marketplace under a different name, while the old entity will face insolvency and its legitimate stakeholders will be deprived of their entitlements. Illegal phoenixing is thus a deceptive business practice that can occur in various ways.

Irrespective of whether illegal phoenix activities are carried out in a single or a holding company environment, in both scenarios, the primary common purpose of phoenix activity is to evade the claims of the creditors of the transferor entity.[107] The illegality is thus determined based on the actor's intent rather than the form of act.[108]

In determining the illegality in such transactions, the court considers various factors to infer the necessary objective knowledge underlying the facts, that a "perceptible degree of deliberation and prior planning" by the defendants indicates the directors' knowledge of the actual situation.[109] It involves assessing whether there was a "collateral purpose", such as personal gain or the benefit of another corporation.[110] ASIC in *ASIC v Bettles* highlights the typical characteristics of "phoenix conduct" and underscores that the intentional liquidation of companies for a specified purpose is what defines the conduct as "illegal phoenix activity".[111] In other words, the distinction between legal and illegal phoenix activity primarily depends on

99 Anderson (2018).
100 CA2001, §588G.
101 CA2001, §181.
102 CA2001, §182.
103 CA2001, §183.
104 CA2001, §180.
105 CA2001, §§588GAA-588GAC.
106 K M Hayne, *Directors' Duties and a Company's Creditors,* 38(2) *Melbourne University Law Review* 795, 808 (2014).
107 Anderson (2018), *supra* note 73.
108 *R v Heilbron* (1999) 150 FLR 43.
109 *R v Heilbron* (1999) 150 FLR 43, 46.
110 *R v Heilbronn* (1999) 150 FLR 43; *Walker v Wimborne* (1976) 137 CLR 1; *R v Heilbronn* (1999) 150 FLR 43.
111 *ASIC v Bettles* [2020] FCA 1568 at [116].

the intent of the company's controllers; while multiple business failures involving the same controllers, company name, or location may appear suspicious, such circumstances alone do not constitute illegal phoenix activity.[112]

A creditor-defeating disposition occurs when a company transfers property for less than its market value (or the best price reasonably obtainable), thereby preventing or significantly delaying creditors from accessing the asset during the winding-up process.[113] However, for a transaction to be classified as creditor-defeating, it must also be demonstrated that the company received inadequate consideration, both below market value and at a price that is not the best reasonably obtainable.[114] Referring to the explanatory memorandum in respect of §588FDB of the CA2001, the Supreme Court of Victoria suggests the consideration for the determination of creditor-defeating dispositions. *First*, the test for a creditor-defeating disposition is applied when the relevant agreement for the disposition is made. If no such agreement exists, the test is applied when the disposition occurs.[115] *Second*, in this context, market value refers to the price that would be agreed upon in a hypothetical transaction between a knowledgeable and willing (but not anxious) seller and a knowledgeable and willing (but not anxious) buyer, conducted at arm's length.[116] *Third*, the alternative test of "the best price reasonably obtainable" acknowledges that companies may sometimes need to sell assets for less than market value, particularly in cases of legitimate financial difficulty and urgent cash flow needs. In such situations, the urgency of disposal may prevent the company from achieving the same price as a hypothetical, non-anxious seller in an arm's-length transaction.[117] *Fourth*, in such cases, the circumstances of the disposition—including the company's financial situation and the reasonableness of the steps taken to realise the asset's value—are key factors in determining whether it constitutes a creditor-defeating disposition. For instance, if a company sells property through a reasonable process, such as a public auction aimed at securing the best available price, the transaction would not be considered creditor-defeating. *Fifth*, if an asset's market value is reasonably obtainable, then the best price reasonably obtainable should not be lower than the market value. In such cases, proving that the company received less than market value for the asset also demonstrates that the price obtained was less than the best price reasonably obtainable.[118] *Sixth*, a transaction is voidable under §588FE of the CA2001 if it constitutes a creditor-defeating disposition and occurs when the company is insolvent, or if the disposition causes the company to become immediately insolvent or enter external administration within 12 months.[119] These are helpful in identifying creditor-defeating dispositions.

Further, expert businesspersons may restart similar businesses in the same field to leverage their expertise, preserve goodwill, or carry forward tax losses; the key issue is whether the controllers deliberately engaged in phoenix activity to evade debts, including employee

[112] See *ASIC v Bettles* [2020] FCA 1568 at [112] (internal citation omitted).
[113] *Intellicomms Pty Ltd (In Liquidation)* [2022] VSC 228 at [8].
[114] *Intellicomms Pty Ltd (In Liquidation)* [2022] VSC 228 at [8].
[115] *Intellicomms Pty Ltd (In Liquidation)* [2022] VSC 228 at [8].
[116] *Intellicomms Pty Ltd (In Liquidation)* [2022] VSC 228 at [8].
[117] *Intellicomms Pty Ltd (In Liquidation)* [2022] VSC 228 at [8].
[118] *Intellicomms Pty Ltd (In liquidation*) [2022] VSC 228 at [8]; Australian Government*, supra* note 15*,* at [2.12].
[119] *Intellicomms Pty Ltd (In liquidation)* [2022] VSC 228 at [8]; Australian Government*, supra* note 15*,* at [2.26]

entitlements.[120] Proving this intent is challenging and lies at the heart of differentiating between legal and illegal phoenix conduct.[121]

Therefore, phoenixing, representing a fraudulent tactic that allows businesses to evade their legal obligations, causing losses to creditors, employees, and other stakeholders by making the troubled company insolvent, is illegal. This is thus treated as a creditor-defeating activity that affects not only individual creditors but also the government revenue and employees of a failed or failing company. Moreover, it facilitates the accumulation of black money and resultant money laundering, particularly in Bangladesh. In other words, people's savings in banks are eventually siphoned off, risking the banks' ability to repay their customers' money when needed, and the economy suffers a blow due to illegal capital flight.[122] Another facet of phoenixing can be found in the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017*, which introduced safe harbour provisions to protect directors from personal liability for insolvent trading if the company is restructured outside a formal insolvency procedure, intending to have a better outcome.[123]

The policy underpinning insolvent trading liability and its current defences aims to strike a balance between deterring directors from recklessly risking creditors' money and protecting honest directors who have acted responsibly and made genuine efforts to prevent the company's insolvency.[124] The safe harbour provision in §588GA(1)(a) of the CA2001 intends to protect directors from insolvent trading liability under §588G(2) if they develop a course of action reasonably likely to lead to a better outcome for the company after suspecting potential insolvency. This measure aims to encourage directors to attempt to rescue distressed businesses rather than prematurely winding them up. However, concerns have been raised that dishonest directors may misuse these provisions to disguise illegal phoenix activity as legitimate corporate rescue efforts.[125]

Additionally, from 1 July 2018, *ipso facto* (by the fact itself) clauses in the CA2001[126] are rendered unenforceable when a company undergoes a formal restructuring. *Ipso facto* suspension clauses (staying operation) primarily contained in §451E of the CA2001 are contractual provisions that allow one party to terminate or modify a contract if the other party faces an insolvency-related event (e.g., the appointment of an administrator, receiver, or liquidator). A stay on this clause was introduced, restricting the enforcement of *ipso facto* rights of a party to a contract during specified insolvency events, and applies to all contracts, agreements, or arrangements made on or after 1 July 2018.[127] This means a contract cannot be automatically voided merely due to the insolvency event itself (*ipso facto*). The provision aims to support companies undergoing restructuring by safeguarding essential contracts, thereby increasing their chances of recovery and avoiding liquidation.

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120 See *ASIC v Bettles* [2020] FCA 1568 at [112] (internal citation omitted).
121 See *ASIC v Bettles* [2020] FCA 1568 at [112] (internal citation omitted).
122 Mavis (2024), *supra* note 7.
123 CA2001, §§588GA-588HA
124 Anderson (2018), *supra* note 73, at 1007.
125 Anderson (2018)
126 CA2001, §§451E-451-G.
127 Baker McKenzie, *The "Ipso Facto" Prohibition in the Corporations Act Applicable to Corporate Insolvency*, available at https://www.bakermckenzie.com/-/media/files/insight/publications/2020/03/ipso_facto__may_2020.pdf

Section 451E of the CA2001, which establishes the stay on contract termination, was recently examined by the Federal Court of Australia in *Rathner, Citius Property Pty Ltd (Admins Appointed)*.[128] The facts of the case indicate that Citius, a consultancy and project management company that has been in voluntary administration since December 2022, relied on its contract with Dexus Wholesale Management Limited (*the Dexus Agreement*) to pay creditors. This contract contained an *ipso facto* clause allowing termination upon insolvency.

Although Dexus had not acted on this clause, Citius' administrator sought Federal Court clarification on whether the *ipso facto* stay under §451E of the CA2001 would remain in effect if Citius entered liquidation. The administrator also requested a one-year extension for the creditors' meeting. The court heard the case unopposed in January 2023. In its decision, the court did not issue specific orders on the *ipso facto* stay (such as order was not necessary because *Dexus* did not attempt to terminate the contract); however, it provided important confirmation for insolvency practitioners regarding its operation that: (i) the *ipso facto* stay does not prevent termination rights triggered by liquidation or non-performance; (ii) it remains in effect throughout the voluntary administration period (before liquidation commences); and (iii) courts will consider its impact when deciding on extensions of convening periods for creditor meetings. Overall, the decision offers clarity and reassurance on how the *ipso facto* stay functions in insolvency proceedings.[129] The interpretation has attempted to strike a balance between the rights of both parties to the contract. While directors are the drivers of their company, their binding duty can help prevent deleterious actions by corporations that leverage the camouflage of the corporate separate personality.

Central to the Reform 2020—Regulating Phoenixing by Preventing Creditor-Defeating Disposition

Section 588FDB[130] of the CA2001 defines this critical concept of impermissible dispositions of a financially troubled company's property. A disposition of property by a company is considered a creditor-defeating disposition if: (a) The consideration received by the company is less than the lesser of: (i) the *market value* of the property at the time of the agreement (or at the time of disposition if no agreement existed); (ii) the *best price reasonably obtainable* for the property given the circumstances at that time; and (b) the disposition results in: (i) preventing the property from being available for the benefit of creditors during the company's winding up; or (ii) hindering or significantly delaying the process of making the property available for creditors in the winding up.[131]

Section 588FDB(2) provides for extensions of the concept of disposition to the creation of new property. It postulates that if a company's action results in another person owning property that (ownership) did not previously exist, the company is deemed to have made a disposition of that property. Section 588FDB(3) outlines the rules governing dispositions involving third parties. It ordains that, for the purposes of §588FDB and the other provisions of

[128] [2023] FCA 26.
[129] [2023] FCA 26.
[130] Section 588FDB was incorporated into the CA2001 by the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth).
[131] CA2001, §588FDB(1).

the CA2001 relevant to a creditor-defeating disposition, if: (a) a company disposes of property to another person; and (b) the consideration (or part of it) is paid to a third party instead of the company which is considered to have made a disposition of property equivalent to the amount of consideration given to the third party. Hence, such a disposition by the company will be scrutinised under creditor-defeating dispositions.

Pre-existing Duties of Directors in Relation to Creditor-Defeating Dispositions

While the general duties of directors and officers imposed under §§180-183 of the CA2001 apply to illegal phoenixing,[132] the pre-existing duty directly related to corporate insolvency under §588G (added to the CA2001 in 2017) applies to the illegal offensive conduct at issue. Section 588G imposes the director's duty to prevent insolvent trading, which contains directly a creditor-defeating disposition, and imposes both civil[133] and criminal liability[134] on errant directors. However, §588G imposes the duty exclusively on directors, whereas the new provisions extend the duty to both directors and other officers. The new provisions introduced under §588GAB and §588GAC complement the preexisting duties of corporate officers.

A detailed analysis of §588G of the CA2001 falls outside the scope of this article, which focuses on the 2020 phoenixing reforms. However, precisely §588G imposes a duty on "directors" to prevent a company from incurring debts when it is already insolvent or likely to become insolvent after incurring a further debt. The incurring of debts in such a circumstance is termed "insolvent trading". It applies when a director allows the company to incur a debt, despite reasonable grounds to suspect the company's insolvency at the time of the disputed trading (i.e., incurring the debt). A director contravenes §588G by allowing their company to incur debt while being aware, or when a reasonable person in a similar position would be aware, that the company is or would become insolvent.[135] This contravention is subject to civil penalties only.[136] This civil liability is justified in the absence of dishonesty in the director's conduct, as Barrett J in *ASIC v Edwards* notably stated that "[w]hat constitutes a contravention under section 588G(2) is a failure to act, rather than a deliberate act."[137] The failure to prevent the company from incurring debt through insolvent trading is a criminal offence if a director allows the company to incur debt while suspecting insolvency and acts dishonestly.[138] This is a serious offence as it attracts five years imprisonment, penalty units, or both, as applicable to individuals.[139] One penalty unit equals AU$330, effective from 7 November 2024.[140] Research has identified several reasons behind the enactment of insolvent trading laws, with one key justification for §588G being the absence of adequate contractual protection.[141] Section 588G

[132] See Sections 2 and 7 in this article.
[133] CA2001, §588G(2).
[134] CA2001, §588G(3).
[135] CA2001, §588G(2).
[136] For details about civil penalty provisions, see §§1317E-1317H of the CA2001.
[137] *ASIC v Edwards* [2005] NSWSC 831, at [253].
[138] CA2001, §588G(3).
[139] CA2001, Schedule 3.
[140] As stated in §4AA of the *Crimes Act 1914* (Australia), the term "penalty unit" currently refers to the amount of $330. See also ASIC, *Fines and Penalties—Penalty Unit Values*, available at: https://asic.gov.au/penalties .
[141] Ian Ramsay, *An Overview of the Insolvent Trading Debate* in Ian Ramsay (ed), *Company Directors' Liability for Insolvent Trading* 9-13 (The Centre for Corporate Law and Securities Regulation and CCH Australia Limited, 2000).

introduces liability that acts as a statutory exception to the principle of the company's separate legal personality, thereby enabling the lifting or piercing of the corporate veil to hold directors personally liable for corporate debts.[142] In addition to the duty to prevent insolvent trading, the duty and corresponding liability are imposed separately under the 2020 amendments to the CA2001.

Duty Specifically to Prevent Creditor-Defeating Dispositions

Alongside the preexisting duties of directors,[143] specific duties to prevent creditor-defeating dispositions have been created, which came into effect in February 2020. The amendment inserts three sections related to duties to prevent certain phoenix activities aimed at defeating creditors. These are §588GAA (Object of this Subdivision), §588GAB (officer's duty to prevent creditor defeating disposition) and §588GAC (Procuring creditor-defeating disposition).[144]

As the heading suggests, §588GAA sets forth the object of the 2020 reforms as to deter the practice—sometimes referred to as phoenixing—of disposing of a company's assets to evade its obligations to creditors. The duty is imposed under §588GAB on officers, which include both directors and non-director officers.[145] Section 588GAB(1) provides that an officer of a company must not engage in conduct leading to a creditor-defeating disposition of company property if: (a) the company is insolvent; (b) the disposition or several dispositions cause the company to become insolvent, or (c) external administration begins within 12 months as a direct or indirect result of the disposition, or (d) the company ceases business within 12 months as a direct or indirect consequence of the disposition.

Referring to subsection (1) of §1311 of the CA2001, §588GAB(1) notes that an officer's failure to comply with this subsection is an offence. Section 1311(1) prescribes general penalty provisions and spells out that a person commits an offence if they: (a) do something prohibited by the CA2001, or (b) fail to do something required or directed by the CA2001, or (c) otherwise contravene any provision of the CA2001—guilty of an offence by §1311(1) unless that or another provision of the legislation (CA2001) explicitly states that the person is either guilty or not guilty of an offence in that situation. After identifying the conduct element of the offence, note 2 attached to §588GAB(1) declaring that recklessness is the fault element for the result of the company making the creditor-defeating disposition and for paragraphs (1)(a), (b), (c) and (d) of the same section (§588GAB).

Recklessness is thus the required fault element for the outcome of the company making a creditor-defeating disposition and for the conditions listed in paragraphs (1)(a), (b), (c), and (d) of §588GAB. This means the person must have been subjectively aware of a substantial risk that their conduct could lead to the specific result or conditions of the company; nevertheless,

[142] Jason Harris, *Director Liability for Insolvent Trading: Is the Cure Worse than the Disease*? 23(3) *Australian Journal of Corporate Law* 1, 2 (2009).
[143] See CA2001, §§180-183, 588G.
[144] CA2001, Division 3—Duties to prevent insolvent trading and creditor-defeating dispositions, Subdivision B—Duties to prevent creditor-defeating dispositions.
[145] See §§9AC and 9AD of the CA2001.

they proceeded and engaged in the creditor-defeating disposition.[146] The duty to prevent such dispositions is imposed separately.

Apart from criminal liability for engaging in creditor-defeating dispositions as above, the 2020 amendments also include civil liability for such a failure under §588GAB(2) of the CA2001. Section 588GAB(2) provides that an officer of a company must not engage in conduct causing the company to transfer property if any one or more of the following situations apply: (a) the company is insolvent; (b) the disputed transfer of property causes the company to become insolvent; (c) within 12 months of the transfer, the company is placed under an external administration as a direct or indirect result of the disposition; (d) within 12 months of the transfer, the company ceases operations entirely due to the transfer in question or as a direct or indirect result of that disposition.[147] Additionally, as stated in §588GAB(2)(b), the officer must avoid such conduct if they are aware, or a reasonable person in their position would be aware, that the transfer defeats creditors' claims.

Subsections (1) and 2(a) of §588GAB are identical, however, its subsection 2(b) is absent from subsection (1). It means the conduct element remains the same in both subsections, but the mental elements differ. Subjective recklessness is required to commit an offence under subsection (1), whereas subsection 2(b) refers to either subjective or objective awareness to encounter civil liability. This is so because §588GAB(2)(b) adds two notes. *First*, a breach of this subsection will attract a civil penalty; and *second*, §588E of the CA2001 sets out legal presumptions regarding a company's insolvency and factors related to whether a particular disposition qualifies as a creditor-defeating disposition. This civil liability is justified on the premise that the satisfaction of either subjective or objective awareness of the disposition being a creditor-defeating one will suffice, if proven on the balance of probability, to impose civil liability, even if the prosecution fails to prove beyond a reasonable doubt the director's recklessness to convict them.

More flexibilities are allowed to ensure fairness for defendants, as §588GAB(3) contains certain exceptions where subsections (1) and (2) stated above do not apply. These exceptions apply or prevail if the disposition was made: (a) under a court-approved compromise or arrangement permitted in §411 of the CA2001;[148] or (b) under a deed of company arrangement;[149] or (ba) under a restructuring plan made by the company;[150] or (c) by the company's liquidator;[151] or (d) by a provisional liquidator of the company.[152] Another exception is mentioned, referring to §588GA[153] (safe harbour—taking a course of action reasonably likely to lead to a better outcome for the company), that subsections (1) and (2) of §588GAB do not apply if the disposition was part of a course of action reasonably likely to result in a better outcome for the company. Whether the intended better outcome is achieved or

[146] For the statutory meaning of "recklessness", see §§5.4—5.6 of the *Criminal Code 1995* (Australia).
[147] CA2001, §588GAB(2)(a).
[148] Section 411 pertains to the administration of compromises etc.
[149] The rules regarding deeds of company arrangements are described in §§435A-435C of the CA2001.
[150] The rules concerning the restructuring plan are contained in §§455A-455B.
[151] See §468 of the CA2001.
[152] See §468 of the CA2001.
[153] This section provides for a director's safe harbour for taking a course of action reasonably likely to lead to a better outcome for the company, and directors can avoid liability even if the reasonably expected better outcome (compared to winding up) is not achieved.

not has no impact on this exception. The duty to avoid creditor-defeating dispositions and the corresponding liability are further strengthened by extending the provisions to include procuring such prohibited dispositions.

Procuring Creditor-Defeating Disposition

Section 588GAC of the CA2001 contains rules about procuring, inciting, inducing, or encouraging a company to make a disposition of property that results in the company making the disposition of the property. Section 588GAC(1) provides that a person must not engage in the conduct of procuring, inciting, inducing or encouraging the making by a company of a disposition of property if any of the following conditions apply: (i) the company is insolvent; (ii) the company becomes insolvent due to the disposition or multiple dispositions made at that time; (iii) an external administration begins within 12 months as a direct or indirect result of the disposition; (iv) the company ceases business within 12 months as a direct or indirect result of the disposition. All these apply if the disposition is creditor-defeating.[154]

This mirrors the provisions incorporated into §588GAB(1) as presented above; however, the context differs. Section 588GAC(1) extends the prohibitions prescribed in §588GAB(1) to any kind of legally recognised complicity[155] in breaching the prohibitions or engaging in creditor-defeating dispositions.[156] Consistent with §588GAB(1), §588GAC(1) also makes the liability for complicity criminal under §1311(1), as mentioned in Note 1 and Note 2, clarifies that recklessness is the sole fault element of the offence.[157]

Subsection (2)(a) of §588GAC prohibits a person from engaging in the conduct of procuring, inciting, inducing or encouraging to make a disposition of property by a company if any of the following conditions are met: (i) the company is insolvent; (ii) the company becomes insolvent as a result of the disposition or multiple dispositions made at the same time; (iii) an external administration begins within 12 months as a direct or indirect result of the disposition; (iv) the company ceases to carry on business within 12 months as a direct or indirect result of the disposition. This complicity of a person in the prescribed conduct is legally enforceable when the person knows, or a reasonable person in their position would know, that the disposition is creditor-defeating.[158] It means either subjective knowledge of the prohibited nature of the disposition or objective knowledge would suffice to hold the person liable. As applicable to §588GAB(1), §588GAC(2) adds identical notes that this subsection is a civil penalty provision and that the presumptions regarding insolvency and whether a disposition qualifies as a creditor-defeating disposition, included in §588E, apply.

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[154] CA2001, §588GAC(1)(b).

[155] For criminal complicity rules, see David Brown et.al., *Criminal Laws* 1171-1260 (Australia: The Federation Press, 7th ed, 2020).

[156] For criminal complicity concerning a company and its directors, see S M Solaiman and Lars Bo Langsted, *Crimes Committed by Directors Attributed to Corporations - Why Should Directors be Accessory?: Viewing through the Complicity Rules in Common Law* 28 (1) Criminal Law Forum pp 129-161 (2017).

[157] Section 588GAC(1) contains two notes: Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1). Note 2: Recklessness is the fault element for the result of the company making the disposition and for subparagraphs (1)(a)(i), (ii), (iii) and (iv) and paragraph (1)(b): see §5.6 of the *Criminal Code* (Australia).

[158] CA2001, §588GAC(2)(b).

Section 588GAC(3) is identical to §588GAB(3) in permitting exceptions to its subsections (1) and (2), and these exceptions are logical.

In addition to the duty to prevent a creditor-defeating disposition, the 2020 reforms prohibit improper backdating of directors' resignations. Prior to 2020, directors (potentially of illegally phoenixed companies) could easily backdate their resignations. This allowed them to falsely claim that they were no longer directors at the time of any illegal phoenix activity. However, the incorporation of §203AA into the CA2001 has changed this. Under the new law, a director's resignation only takes effect once ASIC is properly notified; exceptions are made in exceptional circumstances. To determine the exact time when a director's resignation takes effect, §203AA outlines several rules as follows.

Rule 1: a director's resignation takes effect on: (a) the day they stopped being a director if ASIC is notified within 28 days under §§205A(1) or 205B(5); or (b) if not notified within 28 days, the day ASIC receives written notice of the resignation stating that the person has stopped being a director of the company.[159]

Rule 2: if the resignation date does not match the day the director ceased to act due to delayed notification: (a) the director or company may apply to ASIC or to the court to fix the actual resignation day as the effective date, and (b) the application must meet certain requirements and deadlines in compliance with subsection (5) of §203AA[160] which requires the application to be submitted within 56 days, in the prescribed form when applied to ASIC; and within 56 days or a longer period allowed by the court, in the prescribed form if the application is lodged with the court.[161]

Rule 3: The court can only set the resignation day as the effective resignation date if it determines that doing so is just and equitable. In other words, the court must ensure that changing the effective date is fair and reasonable in the circumstances.[162]

Rule 4: ASIC must not set the resignation day as the effective resignation date unless it considers the applicant's conduct, actions, omissions, or representations made by the applicant regarding the notification of the resignation to ASIC, and the reasons provided for the delay in notifying ASIC about the resignation—ASIC must evaluate these factors before making decision to adjust the resignation date.[163]

Rule 5 is about the limitation period for lodging an application with ASIC or the Court when the director fails to do so within the prescribed 28 days, as mentioned in *Rule 2* above.

Rule 6: If the court sets the resignation day as the effective resignation date, the applicant must submit a copy of the court's order to ASIC within two business days of the order being issued—this ensures timely notification to ASIC.[164]

Rule 7 makes a director's failure to comply with *Rule* 6 an offence of strict liability. [165]

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[159] CA2001, §203AA(1).

[160] Section 203AA(5) reads: For the purposes of paragraph (2)(c), the application: (a) if made to ASIC—must: (i) be made within 56 days after the day the person stopped being a director of the company; and (ii) be lodged in the prescribed form; or (b) if made to the court—must be made within either: (i) 12 months after the day the person stopped being a director of the company; or (ii) such longer period as the court allows.

[161] CA2001, §203AA(2).

[162] CA2001, §203AA(3).

[163] CA2001, §203AA(4).

[164] CA2001, §203AA(6).

[165] CA2001, §203AA(7).

Rule 8 makes the enforcement of §203AA subject to the rules and limitations set out in §203AB of the CA2001, which may impose additional conditions or restrictions. For example, §203AB seeks to ensure that a company must always have at least one director, and this requirement takes precedence over the provisions in §203AA. To this effect, §203AB spells out that a director's resignation will not take effect if the company is left without at least one director at the end of the resignation day. This ensures that every company always has at least one director in office. However, subsection (1) of §203AB does not apply if the director's resignation is set to take effect on or after the day the company begins its winding up.[166] In that case, the resignation remains effective even if it leaves the company without directors, as the company is in the process of dissolution.

All these rules aim to prevent directors from receiving unfair benefits or evading legal sanctions by causing harm to the company and unfairly depriving creditors of their repayments. This is intended to be achieved by imposing prohibitions on various types of creditor-defeating conduct by directors, including certain actions or opportunistic resignations from directorial positions to avoid personal liability.

Liability for Getting Involved in Illegal Phoenix Activities

Although the conduct is not well defined, actions constituting illegal phoenix behaviour typically result in civil and/or criminal violations of directors' statutory duties[167] depending on the mental element.

Although new prohibitions on illegal phoenixing were imposed in February 2020, liability could still arise from the breach of directors' preexisting duties.[168] Having considered those duties that include the duties under §§180-183 and 588G as alluded to earlier,[169] prohibitions on illegal phoenix activities have been widened by §§588GAA—588GAC. All these duties of directors, except §180 carry both civil penalty and criminal liabilities.[170]

Remedies Under the Civil Penalty Regime

Civil penalties represent a hybrid form of sanction, combining features of both civil and criminal remedies.[171] In Australia, the civil penalty regime was incorporated into corporate legislation on 1 February 1993,[172] following the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs.[173] Prior to this reform, breaches of directors'

[166] See Division 1A of Part 5.6 of the CA2001, which stipulates that the winding up is taken to have begun on the day when an order that the company or body be wound up was pronounced.
[167] Australian Government (2017), *supra* note 12, at 8.
[168] See, for details, Anderson (2018), *supra* n. 11, at 279.
[169] Detailed discussions of these duties are beyond the scope of this article.
[170] See CA2001, §184, §588G(3), §588GAB(1)-(2), §588GAC (1)-(2).
[171] George Gilligan, Helen Bird, Ian Ramsay, *Regulating Directors' Duties - How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?* Research Report, 1 (The University of Melbourne, Australia, 1999): https://law.unimelb.edu.au/__data/assets/pdf_file/0004/1710256/145-CivilPenaltiesFinal2.pdf
[172] *Corporate Law Reform Act 1992* (Australia) §§2(3), 17, inserted Pt 9.4B into *Corporations Act 1989* (Australia). See also Michelle Welsh, *Civil Penalties and Responsive Regulation: The Gap between Theory and Practice*, 33 Melbourne University Law Review 909, 909-10 (2009).
[173] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (commonly known as

duties were governed by provisions imposing criminal liability.[174] The principal aim of implementing civil penalty provisions was to overcome weaknesses in enforcing directors' statutory duties.[175] These provisions were designed to give regulators a flexible enforcement framework consistent with responsive regulation theory,[176] which prioritises legal compliance and outlines the most effective strategies for achieving it.[177]

Since their introduction into corporate law, civil penalty provisions have become a widely adopted tool in Australian legislation at both state and federal levels to enhance compliance with critical statutory requirements. [178] Inspired by the United States, where the civil penalty regime has proven highly effective, Australia has increasingly integrated these provisions into its legal framework.[179] A key advantage of civil penalty provisions is that they allow a plaintiff to succeed in a civil case even if the Government is unable to secure a criminal conviction for the same violation of law using the same evidence.[180] This is because the standard of proof in criminal cases is "beyond reasonable doubt", whereas in civil litigation, it is "on the balance of probabilities". Key advantages of civil penalty provisions include trials conducted in civil courts following civil standards, the potential for penalties that exceed civil compensation (punitive), and the ability to pursue criminal cases independently of civil enforcement. Additionally, only the regulator (ASIC, in the Australian context) can initiate criminal proceedings, either independently or in collaboration with the federal Director of Public Prosecutions (DPP). Furthermore, under §1317J of the CA2001, not only ASIC but also affected companies and their liquidators are entitled to seek compensation under civil penalty provisions.

If a court determines that a director has breached the civil penalty provision under §588G(2), it may impose one or more of the three penalties prescribed for the contravention. First, a compensation order: The director may be required to personally compensate the company for losses resulting from their failure to prevent the company from incurring debts while insolvent (§§588J and 1317H). Second, a pecuniary penalty order: If the director's conduct is considered serious or has caused significant harm to the company or its creditors,

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the "Cooney Report"), 191 (1989), available at: https://nla.gov.au/nla.obj-1928589902/view?partId=nla.obj-1935229496#page/n0/mode/1up .

174 *Corporations Law* §232, later amended by *Corporate Law Reform Act 1992* (Australia) §11. The *Corporations Law* is the predecessor to the CA2001.

175 Australian Law Reform Commission (ALRC), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, 77 (Report No 95, 2002), available at https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC95.pdf . See also Roman Tomasic, *Corporate Crime* in Duncan Chappell and Paul Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s,* 253, 267–8 (Butterworths, Australia, 1994).

176 George Gilligan, Helen Bird and Ian Ramsay, "Civil Penalties and the Enforcement of Directors' Duties" (1999) 22 *University of New South Wales Law Journal* 417, at 425; Michael Gething, "Do We Really Need Criminal and Civil Penalties for Contraventions of Directors' Duties?" (1996) 24 *Australian Business Law Review* 375, at 379–80.

177 For a discussion of responsive regulation, see generally John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (University of New York Press, 1985); Ian Ayres and John Braithwaite (1992), *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992).

178 Michael Gillooly and Nii Lante Wallace-Bru, *Civil Penalties in Australian Legislation*, 13(2) *University of Tasmania Law Review* 269, 269 (1994).

179 See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law,* 101 *Yale Law Journal* 1796 at 1800,1844 (1992).

180 Kenneth Mann, *Punitive Civil Sanctions*, at 1811.

they may face a financial penalty. This penalty is the higher amount between 5,000 penalty units[181] and three times the benefit gained or loss avoided through the breach (§1317G). The penalty is payable to the Federal Treasury as a Commonwealth debt. Third, a disqualification order: Under §206C of the CA2001, the court may disqualify the director from managing a corporation for a period it considers appropriate based on the circumstances.

It is worth noting that only ASIC is empowered to seek all three remedies for a breach of a civil penalty provision, but this requires obtaining a judicial declaration of contravention of a civil penalty provision under §1317E of the CA2001.[182] However, such a declaration is not a prerequisite for pursuing a compensation order. This allows both the company and its creditors to independently claim compensation without relying on a declaration of contravention, which only ASIC can seek and obtain. Additionally, a creditor's right to sue depends on obtaining consent from either the liquidator (§588R) or the court (§588T(3)). Creditors can seek compensation only for the losses arising from the breach (RG 217.119). The above highlights that civil penalty provisions impose significant penalties, including financial fines and professional disqualification. These measures are designed to hold directors accountable for permitting their company to accumulate debts while insolvent.

The persuasive factors supporting a civil penalty regime, as discussed earlier, are applicable across various jurisdictions, including Bangladesh, which follows the common law tradition. While Australia implemented the civil penalty regime over three decades ago, such provisions are still absent in Bangladesh. This recommendation urges Bangladesh to adopt a civil penalty regime as soon as possible to mitigate frequent corporate failures, particularly those involving excessive and unmanageable borrowing from financial institutions, followed by insolvency, which often serves as an excuse for avoiding debt repayment. A law requiring directors to take preventive measures could significantly reduce corporate collapses.[183] It is essential to recognise that prudent risk-taking is more important than merely managing risks that were taken unwittingly. [184] Further, many directors engage in borrowing money under the guise of their companies with the hidden intent of misappropriating the funds, which is a key factor contributing to the ongoing failure of Bangladesh's banking sector. In addition to civil penalties, violations of these duties may also result in criminal penalties in Australia.

Criminal Liability for Illegal Phoenix Activities

Creditor-defeating activities are illegal due to their contravention of well-established directors' duties, as stated previously. All of the duties except for the duty of care and diligence (which is

[181] Since 7 November 2024, one penalty unit is valued at AU$330: *Crimes Act 1914* (Australia), §4AA.

[182] *ASIC v Vizard* (2005) 23 ACLC 1309; [2005] FCA 1037 Federal Court of Australia; *ASIC v McDonald (No 11)* [2009] NSWSC 287, affirmed by the High Court of Sustralia in *ASIC v Hellicar* (2012) 286 ALR 501; [2012] HCA 17; CA2001, §§1317E, 1317J; ASIC, Information Sheet 151 (INFO 151).

[183] For details of enforcement actions and outcomes thereof, see Paul James, Ian Ramsay and Polat Siva, *Insolvent trading – An Empirical Study*, 12(4) Insolvency Law Journal 210 (2004); Stacey Steele and Ian Ramsay, *Insolvent Trading in Australia: A Study of Court Judgments from 2004 to 2017*, 27 Insolvency Law Journal 156, 161 (2019).

[184] S M Solaiman , *Revisiting Securities Regulation in the Aftermath of the Global Financial Crisis: Disclosure – Panacea or Pandora's Box?* 14(4) Journal of World Investment & Trade 646, 669 (2013).

only civil)[185] attract criminal liability. The elements of criminal liability for breaching directors' duties[186] are contained in §184 of the CA2001.

Section 184(1) makes a breach of the duty to act in good faith in the best interest of the corporation under §181 a criminal act by providing that:

> "(1) A director or other officer of a corporation commits an offence if they: (a) are reckless; or (b) are 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."

The breach of the duty not to misuse the position held in the corporation imposed by §182 of the CA2001 is criminalised under §184(2), which spells out that:

> "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."

The mental elements of the offence are dishonesty exercised in self-interest or to promote the interest of another person. Any actual gaining of such a personal or someone else's interest in effect is not needed, but doing something with the intent to achieve this will suffice to constitute the offence. Regardless of gaining any interest, causing detriment to the corporation alone will constitute the offence. This emphasises the overarching expectation that directors will not cause harm to the corporation. The sense of criminality becomes intense when they exploit corporate positions for self-serving purposes at the cost of the company's interest.

Suppose, a director's dishonesty cannot be proven beyond a reasonable doubt. In that case, they may still be convicted if it is proven that they were reckless as to whether their alleged misuse of position or actions could result in personal or third-party gain or cause harm to the corporation, directly or indirectly. This highlights the need for carefulness in their actions when holding a directorial position.

Section 184(2A) of the CA2001 clarifies that it is not a valid defence in proceedings for an offence under subsection (2) of §184 that a director, officer, or employee of the corporation used their position dishonestly intending to secure an advantage, directly or indirectly, for the corporation; or that conduct results in the corporation gaining an advantage, directly or indirectly. This reinforces the importance of directors' honesty in discharging their duties.

Section 184(3) is concerned with the potential misuse of corporate information obtained by directors and others in identical terms as prescribed in §184(2) concerning misuse of position. It declares that a person who acquires information due to their position as a current or former director, officer, or employee of a corporation commits an offence if they use that information dishonestly or recklessly intending to directly or indirectly gain an advantage for themselves or another person or to cause harm to the corporation; or acting recklessly about whether such use could result in themselves or another person gaining an advantage, or causing harm to the corporation.

Similar to the note added to §184(2) by subsection (2A) discussed above, subsection (4) of §184 includes a note for the clarity of §184(3) that it is not a defence in proceedings for an offence under subsection (3) that the person dishonestly used the information with an intention

[185] CA200, §180

[186] Duties imposed under §§181-143 of the CA2001.

of securing an advantage, directly or indirectly, for the corporation; or disputed conduct results in the corporation gaining an advantage, directly or indirectly. In general, it is a criminal offence for a director to act recklessly or intentionally dishonestly in their failure to comply with these duties. However, §588G, which applies exclusively to directors, considers only dishonesty as the mental element of the offence defined in §588G(3).

Section 588G relates more directly to illegal phoenix activities compared to §§181-184. Section 588G(3) creates criminal liability for directors who fail to prevent insolvent trading. Defining the offence, §588G(3) provides that:

> "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."

Section 588G(3A) stipulates that for an offence based on subsection (3), absolute liability[187] applies to paragraph (3)(a), which prohibits incurring debt dishonestly at the relevant time. However, offences committed in breach of paragraphs (3)(aa) and (b) as quoted above are strict liability offences,[188] as stated in §588G(3B).

The punishment for a contravention of any of these duties is severe. The punishments are prescribed in Schedule 3 of the CA2001, as described in table 1.

Table 1: The punishments According to the CA2001

CA2001	Duty Imposed on Directors	Terms of Imprisonment	Fines/Pecuniary Penalty
§181:	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.	Subsection 184(1):15 years imprisonment	No mention
§182	(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.	Subsection 184(2):15 years imprisonment	No mention
§183	(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.	Subsection 184(3):15 years imprisonment	No mention
§§180-183 individually mention that these are civil liability provisions; however, §184 makes the breaches of these three sections a criminal offence subject to certain fault or mental element as explained below the Table.			
§588G(3)	The director's duty to prevent insolvent trading by a 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.	(a) for an individual—5 years imprisonment	2,000 penalty units, or both
§588GAB(1)	Officer's duty to prevent creditor-defeating disposition	10 years imprisonment	No mention
§588GAC(1)	588GAC Procuring creditor-defeating disposition	10 years imprisonment	No mention

[187] see Section 6.1 of the *Criminal Code Act* 1995 (Cth).
[188] Section 6.1 of the *Criminal Code Act* 1995.

§203AA(6)-(7)	An offence based on subsection noncompliance with the court's order fixing the defective date of a director's resignation to submit to ASIC within 2 days –an offence of strict liability.	No mention	120 penalty units

The severity of the criminal breach of directors' duties is evident in the punishments, the lowest of which is 5 years' imprisonment. As defined in §15GE(1) of the *Crimes Act 1914* (Cth), an offence under federal law is serious if it is punishable by imprisonment of 3 years or more; whereas the prescribed penalties for violation of a director's duty may extend from 5 years to 15 years' imprisonment as shown in the table 1. The severity of the offences signifies the magnitude of the requirement to comply with directors' duties.

The existence of law alone is insufficient to achieve legislative objectives without proper enforcement mechanisms in operation. Public enforcement of corporate law is generally effective, and such enforcers must be adequately equipped with powers and competent resources.

Reducing Reliance on Courts and Increasing Regulatory Powers

No law can succeed without robust enforcement. Hence, any breach of law must invite remedies against the actor, and illegal phoenixing should not be any different. Previous reforms have so far failed to generate public confidence that there will be any meaningful impact on illegal phoenixing without an effective enforcement regime.[189] Breaches can be enforced by public authorities or private parties. Empowering public authorities to enforce the law is argued to be more useful in creating deterrence and punishing wrongdoers. From this point of view, ASIC has the authority to enforce corporate law in two ways—it can take punitive measures administratively by itself or can take the transgressors to courts leveraging state resources.

The reforms made in 2020 have enhanced ASIC's capacity to tackle illegal phoenix activities and safeguard legitimate creditors by implementing the creditor-defeating disposition provisions. Under §88FGAA[190] of the CA2001, ASIC can issue an administrative order, either at the request of a liquidator or on its own motion, requiring that property involved in creditor-defeating disposition be returned to the company, the amount of benefit received by a wrongdoer be paid back, or an amount that "fairly represents" the proceeds be paid to the company.[191] ASIC thus may order the undoing of the effect of creditor-defeating dispositions by the company being wound up. Non-compliance with such an order constitutes an offence, punishable by a fine of up to 60 penalty units.[192]

Preceding the 2020 amendments, the *Corporations Amendment (Phoenixing and Other Measures) Act 2012 (Cth)* introduced §489EA into the CA2001, conferring upon ASIC the authority to issue an administrative order for the winding up of a corporation that is no longer carrying on a business. Under this provision, ASIC—rather than the court—is empowered to appoint a liquidator. This administrative mechanism is intended to mitigate the costs and delays traditionally associated with securing a court-ordered winding up. ASIC is required to adhere to specific procedural requirements, including notifying the company and its directors of its

[189] Matthew (2015), *supra* note 95, at 134.
[190] CA2001, §588FGAA.
[191] CA2001, §588FGAA(3).
[192] CA2001, §588FGAC, §588FGAD.

intention to initiate such measures. The detailed procedural framework governing this process is set out in §489EA of the CA2001.[193] The legislative reform seeks to address the issue of dormant corporations with outstanding liabilities, particularly in circumstances where creditors are unwilling or unable to bear the financial burden of initiating court proceedings for liquidation.[194] Further, this measure facilitates the identification and investigation of potential phoenix activity by the appointed liquidator, who may subsequently commence relevant legal actions.[195] Additionally, the liquidation process enables employees of insolvent companies to lodge claims under the *Fair Entitlements Guarantee* (formerly the General Employee Entitlements and Redundancy Scheme), a government-funded initiative designed to compensate employees for unpaid wages and other entitlements.[196]

These measures strengthen the recovery tools available to liquidators and enhance their ability to reclaim assets lost to illegal phoenix activity. This regulatory power exists alongside the regulator's legal authority to pursue civil and criminal remedies against defendants in court.

CONCLUSION

Phoenixing is not inherently blameworthy, as the law admits that businesses may need to undergo restructuring and recalibration to overcome financial difficulties—an occurrence that is not entirely unexpected of corporations. However, when phoenixing is deliberately orchestrated by unscrupulous business actors seeking to evade debt obligations by exploiting legal loopholes, such conduct should not be tolerated. If left unchecked, such practices could erode public confidence in businesses, precipitate a funding crisis, and ultimately contribute to corporate collapses, thereby negatively impacting the national economy. It is therefore imperative for governments to implement effective measures to address and deter such misconduct. The following recommendations have been designed to address the specific needs of Bangladesh; however, they may also be applicable to other jurisdictions facing similar challenges. These recommendations involve defining illegal and fraudulent phoenix activities, defining directors of a company, holding company's liability as a shadow director, restricting the exercise of *ipso facto* termination rights, legislative prohibition on creditor-defeating dispositions, liability and remedies, and facilitating public enforcement of breaches of directors' duties.

Illegal and fraudulent phoenixing should be defined with as much precision as practicable, while allowing exceptions for legitimate corporate restructuring. Without a clear legal definition delineating prohibited conduct, it is difficult to hold individuals or entities accountable for wrongdoing. Bangladesh currently lacks a legal framework to regulate phoenixing and, consequently, does not provide a formal definition of this harmful practice. Addressing this legislative gap is essential to ensuring effective enforcement and deterrence.

[193] For details of this regulatory power, conditions to be met to exercise this power, and the prescribed procedure to be followed by ASIC, see §489EA of the CA2001.
[194] Anderson (2012), *supra* note 14, at 424-426.
[195] Anderson (2012).
[196] ASIC, *Phoenix activity, ASIC Corporate Investigations & Hearings 487644728*, para. 8.740, (29 October 2024) (internal citations omitted).

Directors serve as the decision-makers of a company, as a corporation itself cannot act without its human agents. When the law proscribes certain conduct, it is essential to clearly identify the individuals responsible; otherwise, legal provisions cannot be effectively enforced. Hence, the definition of directors should be broad and inclusive, encompassing all individuals who, directly or indirectly, engage in or facilitate or procure illegal phoenixing. This ensures that accountability extends beyond formal officeholders to include those who exert significant influence over corporate decision-making.

Corporations typically operate in one of the two structures: as standalone entities or as part of a corporate group, where a holding company oversees one or more subsidiaries. Legal frameworks addressing illegal phoenixing should account for both models, ensuring that liability extends not only to individual companies but also to corporate groups where holding companies exert significant influence over subsidiary operations. The recommended law should explicitly recognise the role of holding companies as shadow directors when they effectively control or direct the actions of subsidiaries engaged in phoenixing activities. This approach would close regulatory loopholes and strengthen accountability across corporate structures.

The Australian approach to restricting the enforcement of *ipso facto* clauses—whereby a contract is terminated solely due to a company's financial difficulties—is a logical mechanism to provide distressed businesses with additional time to restructure before liquidation. This principle was interpreted and affirmed in *Rathner, Citius Property Pty Ltd* (Administration Appointed), where the court recognised the necessity of allowing businesses an opportunity to recover. While contractual freedom generally permits parties to include *ipso facto* termination clauses, legislative intervention to restrict or defer their enforcement until liquidation can, in some cases, help struggling companies avoid premature winding up. Accordingly, this article recommends that Bangladesh adopt a similar measure by introducing provisions analogous to §451E of the CA2001, thereby affording financially distressed entities a chance to rehabilitate themselves.

Creditor-defeating dispositions lie at the core of phoenixing activities, enabling directors to strip company assets and evade liabilities. To address this issue, the CA1994 of Bangladesh should incorporate provisions analogous to §§588GAA–588GAC of the CA2001, along with a statutory duty to prevent insolvent trading.[197] This would impose a direct obligation on directors to refrain from engaging in or facilitating or procuring such dispositions under the guise of corporate restructuring. In addition to these statutory obligations, the general law duties of directors—currently codified in the CA2001[198] —should also be integrated into the CA1994. These duties serve as a critical safeguard, deterring directors from orchestrating or enabling creditor-defeating transactions and misappropriating corporate assets. Strengthening the legislative framework in this manner would enhance corporate accountability and mitigate the risks associated with illegal phoenixing.

To effectively deter illegal phoenixing, statutory prohibitions must be accompanied by significant legal consequences, incorporating both civil and criminal sanctions. Bangladesh currently lacks civil penalty provisions, which should be introduced as argued earlier.

[197] Section 588G of the CA2001.
[198] See §§180-184 of the CA2001 discussed above.

Simultaneously, breaches of directorial duties—particularly those related to creditor-defeating dispositions—should be classified as serious offences, warranting severe penalties comparable to those prescribed under the CA2001. When a creditor-defeating disposition is judged voidable by a competent court, various remedies should be made available to creditors and liquidators. The primary remedy should be the recovery of the transferred property to restore the parties to their pre-disposition position. Additionally, courts should have the authority to order compensation payments either directly to affected creditors or to the company, allowing liquidators to distribute funds in accordance with the legal priority in payment. Given practical considerations, liquidators may often prefer claims for monetary compensation over asset recovery considering the liquidity of assets. In cases of criminal prosecution, breaches of the designated statutory duties discussed in this article should be recognised as serious crimes. The introduction and enforcement of stringent penalties—combining substantial fines with custodial sentences—are essential to ensuring compliance and deterring corporate misconduct.

Private enforcement of corporate law is generally weak, particularly in Bangladesh, due to legal restrictions on individual actions in certain instances and the financial constraints faced by individual victims. Further, as in Australia, private litigants can typically seek only civil remedies, limiting the overall effectiveness of enforcement. To address these challenges, it is recommended that the Bangladesh Securities and Exchange Commission (BSEC)—the counterpart to the ASIC—be granted enhanced enforcement powers and provided with sufficient resources to respond to breaches of directors' duties. A well-resourced and proactive regulatory body is essential for ensuring compliance, strengthening corporate accountability, and deterring misconduct. Establishing a robust public enforcement regime would not only enhance regulatory oversight but also contribute to greater confidence in the corporate sector by ensuring that violations are effectively prosecuted, and justice is delivered. To strengthen corporate regulation and enforcement, the BSEC should be granted expanded powers to take administrative actions against corporate misconduct, similar to those conferred upon the ASIC under §489EA of the CA2001. These administrative powers would enable BSEC to impose sanctions and corrective measures without solely relying on the court proceedings, thereby ensuring a more efficient and responsive regulatory framework. In addition to administrative enforcement, the BSEC should retain the authority to initiate legal proceedings against wrongdoers to seek appropriate judicial remedies. A dual-track enforcement approach—combining administrative powers with the ability to pursue civil and criminal actions—would enhance regulatory efficiency, deter misconduct, and strengthen overall corporate governance in Bangladesh.

Finally, this article aligns with the well-established principle that *prevention is better than cure.* Preventing illegal phoenixing is essential for restoring discipline in the corporate sector and fostering confidence among financial institutions to provide funding to eligible corporations. Without effective preventative measures, lenders may become increasingly reluctant to extend credit, thereby stifling entrepreneurship and hindering private sector growth—both of which could have far-reaching negative consequences for the national economy. The recommendations furnished above aim to establish regulatory discipline in the financial sector and eliminate the existing disorder in corporate financing in Bangladesh. By adopting and implementing these measures, Bangladesh can create a more stable and

transparent corporate environment, effectively enhancing investor and creditor confidence while promoting sustainable economic growth. Attempting to confront the increasingly prevalent culture of loan defaults by amending banking laws to tighten the supply side is likely to be futile, as it is akin to guarding the window while leaving the door open. Arguably, these recommendations could benefit other countries facing similar challenges.

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