

Sheridans' View



Combating Illegal Phoenixing

The Government's new Bill

The Federal Government has recently issued its Exposure Draft of the *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018*, which was open for comment until 27 September 2018.

This proposed Bill is part of the Government's ongoing reform of Australia's corporate insolvency regime and is the Government's third tranche of insolvency law reforms.

The first tranche was the *Insolvency Law Reform Act 2016*, the stated purpose of which was to modernise the corporate reorganisation framework around the registration, remuneration and regulation of insolvency practitioners. The second tranche, the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017*, introduced the safe harbour provisions for directors, and the ipso facto clauses restriction.

Phoenix activity, not defined in legislation, can encompass both legitimate business rescue activities and the illegitimate opportunistic or systemic stripping and transferring of assets out of a company.

The Government has long been concerned with and inquiring into the nature and consequences of illegal phoenix activities, and undertook extensive public consultation in 2017. In the 2018/19 Budget the Government announced a package of reforms to the corporations and tax laws to combat illegal phoenix activity. The proposed Bill is the next step.

The exposure draft legislation includes reforms to:

- Introduce new phoenix offences that target those who conduct and those who facilitate illegal phoenix transactions (which introduces the concept of Creditor-defeating Dispositions).
- Prevent directors from backdating their resignations to avoid personal liability.
- Prevent a sole director from resigning and leaving a company as an empty corporate shell with no director.
- Extend the director penalty provisions to make directors personally liable for their company's GST liabilities.
- Expand the ATO's existing power to retain refunds where there are tax lodgements outstanding.
- Restrict the voting rights of related creditors of the phoenix operator at meetings regarding the appointment or removal and replacement of an external administrator.

Clearly the objective of the proposed legislation is to tackle the damage or cost to those affected by illegal phoenix activity: legitimate businesses, employees, contractors and the Government (in particular, the ATO). It appears to many that one of the main drivers for this keen interest and action now by the Government is the pressure on the Government to minimise the loss of tax revenue.

Illegal Phoenixing (Footnote)

Arguably there were already adequate measures available to tackle phoenix operators, and their advisors. Has part of the problem in the past been a lack of resources and resolve? I refer to ASIC's Annual Reports for 2015/16 and 2016/17.

	Note	2016/17	2015/16
Initial reports from external administrators	1	8,075	9,951
Initial reports alleging misconduct	2	6,915	8,258
Referred for action by ASIC	3	164	129

1. From liquidators, administrators and receivers
2. Initial reports alleging misconduct from the total initial reports
3. Of the initial reports, following supplementary reports, those reports referred for action by ASIC i.e. compliance, investigation or surveillance

FOREWORD

"We're blind to our blindness. We have very little idea of how little we know. We're not designed to know how little we know."
Daniel Kahneman

"...thanks to a plethora of cognitive biases, faulty heuristics, and common fallacies of thought, you are probably deluding yourself minute by minute just to cope with reality."
David McRaney

"Each of your brains creates its own myth about the universe."
Abhijit Naskar

"Oh, the irony. Cognitive biases prevent us from understanding cognitive biases."
Eric Barker

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Debt Agreements legislative update

On 19 September 2018 the Senate passed the *Bankruptcy Amendment (Debt Agreement Reform) Bill 2018*, being a fairly comprehensive reform of Australia's debt agreement system.

Debt agreements are an increasingly popular alternative to bankruptcy. Between 2007 and 2016, new debt agreements increased from 6,560 to 12,640 per year. Over the same period, new bankruptcies declined from 25,754 to 16,842 per year.

The significant measures in the Bill make provision for:

- The types of practitioners authorised to be debt agreement administrators (the measures include express prohibition of a debtor from self-administration of their own debt agreement);
- Registration, deregistration and obligations of debt agreement administrators;
- Formation, administration, variation (including the ability to vary the agreement up to five years) and termination of debt agreements;
- Protections against debt agreements that cause financial hardship or have other defects; and
- Power of the Inspector-General with respect to debt agreements and debt agreement administrators.

The majority of amendments in the Bill will commence nine months after Royal Assent.

Recent Assignments

- **Liquidation of an Australian Financial Services Licence holder involved in a significant property development in Newman, W.A.**
- **Personal insolvency administrations, including individuals involved with:**
 - Events management consultancy
 - Adventure touring
- **Informal insolvency advice to various businesses, including those involved in a restaurant, transport, metal fabrication and automobile repair**
- **Litigation support, including:**
 - Valuation of a physiotherapy practice
 - Expert report regarding a compensation claim
 - Valuation of a local W.A. security business
 - Investigations and sundry advice regarding various Family Court matters including qualification of the parties' asset pool

"If there's something you really want to believe, that's what you should question the most."

Penn Jillette

DID YOU KNOW?

There is no such thing as a 'sugar high' or 'sugar rush'.

Despite the prevalent urban legend-turned-diagnosis used to describe purported energetic behaviour experienced after eating sugary foods, there is no link between sugar and hyperactivity. Sugar does not cause hyperactivity in children, or adults.

The case for the putative sugar rush was essentially closed and extinguished in 1995. How did the myth start?

Bad science, basically. And how is it perpetuated? Expectation causing cognitive biases, which clouds judgement.



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EDITORIAL

The Halo Effect

The Halo Effect is a type of cognitive bias in which our overall impression of a person influences how we feel and think about his or her character.

Put simply, our overall impression of a person impacts our evaluation of that person's specific traits. The effect causes us to make judgements about something or someone by (often unconsciously) evaluating characteristics as though they are related to each other, when in fact they have nothing to do with each other. It is the tendency to use global evaluations to make judgements about specific traits.

A simple example: The physical attractiveness stereotype – attractive people are perceived to be smarter, funnier and more likeable than less attractive people. The "what is beautiful is good" principle.

Another example: How we rate our favourite celebrities, whom we have never met and really know little about. Because we perceive them as attractive, successful and often likeable, we also tend to see them as intelligent, kind and funny.

The term Halo Effect was coined by psychologist Edward Thorndike in his 1920 paper "A Constant Error in Psychological Ratings". Thorndike's study involved military commanding officers' evaluation of their subordinate soldiers. The soldiers were evaluated in terms of physical qualities (including physique), intellect, leadership skills and personal qualities. Thorndike found high ratings of one particular quality correlated to high ratings of other characteristics, and vice versa.

The term "halo" is used in analogy with the religious depiction of saints and refers to the overestimation of the worth of something or someone because of the presence of a quality that adds light on the whole, like a halo. One patent characteristic leads to generalisation on judgement of character.

Researchers have continued studies regarding the Halo Effect in many areas, in particular attractiveness and its bearing on the judicial and educational systems, and brand marketing. Jurors can be less likely to believe that attractive people are guilty of criminal behaviour; teachers are subject to the Halo Effect when evaluating their students; marketers take advantage of the Halo Effect to sell products and services. Imagine the potential effects in business, including recruitment and evaluation of both individuals and overall business performance.

The Halo Effect affects us all in our everyday lives at work, at leisure and in our personal relationships and interactions with the world. It is extremely useful to be aware of the Halo Effect but it is nevertheless very difficult to avoid its influence on our perceptions and resulting actions. Pay attention and you will undoubtedly notice the Halo Effect in play sometime today, probably many times, for better or worse.

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