



ASIC

Australian Securities & Investments Commission

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# Illegal phoenix activity

This information sheet (INFO 212) explains what you can do if you are concerned about phoenix activity. It explains:

- [What is phoenix activity?](#)
- [What is illegal phoenix activity?](#)
- [ASIC's approach to illegal phoenix activity](#)
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## What is phoenix activity?

Company phoenix activity involves registering a new company to takeover (rebirth) the failed or insolvent business of a predecessor company.

Phoenix activity may not involve illegal (e.g. fraudulent) conduct. Genuine company failure and liquidation (where a director responsibly manages a company and its business subsequently continues after liquidation using another company), is a legitimate use of the corporate form.

Through the concept of limited liability, the law generally excuses directors and shareholders from personal liability for the failed company's debts. For example, directors might run a company responsibly but, despite this, the company cannot pay its debts. The directors meet their obligation to hand the insolvent company over to an external administrator (registered liquidator) who then realises the company's assets to pay liquidation costs and creditors (including employees). The directors start a new company which operates a similar business.

## What is illegal phoenix activity?

Illegal (e.g. fraudulent) phoenix activity generally involves company directors deliberately trying to avoid paying the company's creditors. For example, directors may have run a company responsibly but, despite this, the company cannot pay its debts. The directors transfer the company's assets to another company with the same or similar name (and for no or little value) **before** handing the company over to an external administrator (registered liquidator). In this way, the directors seek to avoid paying any creditors including employees through the failed company's liquidation.

## Illegal conduct that may relate to phoenix activity – example

Hypothetical Plumbing is a contractor who supplies plumbing services to Big Building Pty Ltd, a construction company specialising in housing developments. Over the course of 12 months Hypothetical Plumbing sends invoices to Big Building totalling \$60,000. All of these invoices are outstanding. Hypothetical Plumbing has spoken with Big Building director, Ms Big to let her know that Hypothetical Plumbing will not continue to provide its services until Big Building pays the outstanding invoices. Ms Big reassures Hypothetical Plumbing that Big Building will pay shortly.

The following week, a company called Bigger Building contacts Hypothetical Plumbing to contract its services. Its director is listed as Ms Big. Bigger Building works out of the same offices as Big Building, and is completing Big Building's developments, using Big Building's contract, machinery and materials.

Shortly after Hypothetical Plumbing's meeting with Bigger Building, XYZ Liquidators contacts Hypothetical Plumbing notifying it that Big Building is in liquidation. XYZ Liquidators advises Hypothetical Plumbing that it is one of many unsecured creditors and there are currently no assets available to pay creditors.

At the first meeting of Big Building's creditors, XYZ Liquidators advises Hypothetical Plumbing that their preliminary investigations show that:

- Ms Big had transferred Big Building's assets to the company, Bigger Building, just days before the liquidator's appointment (while this may not be illegal at this point, it is an indicator of illegal phoenix activity).
- Bigger Building 'bought' the assets from Big Building, but paid nothing for them (by not paying for the assets, Ms Big as the director of Big Building may have breached her director's obligations).
- Ms Big emailed her assistant before she transferred the assets saying that Big Building had a lot of debts. The email explained that she needed to register a new company to hold Big Building's assets which were needed to complete unfinished developments (by leaving the debts in Big Building, Ms Big may have breached her director's obligations).

The liquidators' investigations suggest likely directors' duties offences so they submit a statutory report to ASIC. Their report outlines their concerns about Big Building's conduct and the evidence they have identified. If necessary, ASIC can assist XYZ Liquidators (through its Liquidator Assistance Program) to help them obtain the company's books and records and a report from Big Building's directors about the failed company's affairs.

ASIC's role is to protect all Australians from the potential for director misconduct to cause harm. It does this by disqualifying directors who have acted fraudulently so that they may not do so again in future.

In some circumstances, ASIC may take court action against directors who have acted illegally which may result in the recovery of assets of a failed company from a 'phoenixed' company.

Hypothetical Plumbing may benefit from the above actions but can also pursue private action with the benefit of legal advice.

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## ASIC's approach to illegal phoenix activity

We rely on liquidators to provide us with reports about illegal (e.g. fraudulent) phoenix activity. Therefore, if you are concerned about such conduct, the best course of action is to contact the liquidator where one has been appointed: see [REP 456](#) *Insolvency statistics: External administrators reports (July 2014 to June 2015)*.

Generally, we do not act on behalf of individuals to help them recover lost money, including money lost through illegal phoenix activity. You should seek advice about your own remedies.

While ASIC does not take action in every instance of alleged misconduct, we will take action where it will likely result in greater market impact and benefit the public more broadly (see Information Sheet 151 *ASIC's approach to enforcement* ([INFO 151](#)) for full details of what we consider in deciding whether to take action). ASIC will generally only take action when evidence shows that directors intentionally misused company assets, or acted in a way that is contrary to the company's best interests.

We currently have a number of initiatives to combat illegal phoenix activity. These are:

- Enforcement action: ASIC takes enforcement action against those who facilitate or aid and abet illegal phoenix activity, including against directors who breach their duties.
- Disqualifying directors: ASIC can disqualify directors from managing corporations where they have been involved in two or more companies placed into liquidation in the past seven years. In determining whether or not to disqualify a director, and for how long, we will take into account any Statutory Reports lodged by the liquidator, as well as other evidence of misconduct.
- The Assetless Administration Fund (AA Fund): In certain circumstances, ASIC may provide a monetary grant to a liquidator to help them compile a report into the failure of a company. This is only available in circumstances where there are not enough assets to fund the investigations needed to prepare the report. ASIC may use statutory reports for enforcement action, director disqualifications and for market intelligence purposes.
- The Liquidator Assistance Program: If directors don't give books and records to the liquidators or a report about the failed company's affairs, ASIC can assist the liquidators to obtain them and prosecute the directors.
- Education programs: ASIC periodically engages with the market to identify companies potentially at risk of engaging in phoenix activity to ensure they are aware of their legal obligations.

- Engagement: ASIC meets with industry representatives to raise awareness of illegal phoenix activity. ASIC also works closely with other agencies including the Australian Taxation Office, Fair Work Ombudsman and the Department of Employment to exchange intelligence and information.

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## What you can do if you suspect phoenix activity

### If you are considering supplying goods or services to a company

Ask them questions and then verify the information by using [ASIC Business Checks](#) and doing credit checks. ASIC Business Checks helps you:

- identify companies that you should not deal with
- determine whether the company you are dealing with is registered
- check whether the owners/operators of the business are banned or bankrupt
- find out about the company's credit history
- find out how to protect yourself against default on payment by registering your interest in the company's assets on the [Personal Property Securities Register](#) (PPSR).

You should not assume that, because a company or business is registered, it is safe to conduct business with it.

### If you have already supplied a company with goods or services and it has since gone into liquidation

Report your concerns to the liquidator or administrator as they are best placed to investigate them. Provide any relevant supporting documentation. ASIC relies on reports lodged by liquidators/administrators about illegal phoenix activities.

See also our list of [Insolvency information sheets](#) which includes Information Sheet 46 *Liquidation: A guide for employees* ([INFO 46](#)) and Information Sheet 75 *Voluntary administration: A guide for employees* ([INFO 75](#)).

To check if a company is in liquidation or external administration, you can do a business names or organisations search on [ASIC Connect](#).

### If you are an employee of a company and the company owes you entitlements (outstanding wages and superannuation)

Contact the [Fair Work Ombudsman](#) or call 13 13 94.

Contact the [Australian Taxation Office](#) or call 13 28 61.

If the company is in liquidation you should report your concerns to the liquidator.

You may be able to claim unpaid entitlements through either the Fair Entitlements Guarantee ([FEG](#)) or the General Employee Entitlements and Redundancy Scheme ([GEERS](#)). For further information on FEG and GEERS see the [ASIC website](#).

### If you are an employee of a company and you have evidence that the company cannot pay its debts or has transferred assets to another, related company

Report your concerns to ASIC. Information on how to report your concerns is available on the [ASIC website](#).

Note that we generally do not act for individuals and will only take action where it will result in a greater market impact and benefit the general public more broadly. For more information see Information Sheet 151 *ASIC's approach to enforcement* ([INFO 151](#)).

### If you are a director of a company experiencing financial difficulty

Consider your obligations as a company director and seek professional advice if you are in doubt. For more information, read Information Sheet 42 *Insolvency: a guide for directors* ([INFO 42](#)).

## Where can I get more information?

- More information about [our role](#) and the [laws we manage](#).
- A list of our [insolvency information sheets](#).

For further information contact **ASIC** on **1300 300 630**.

## Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances may be taken into account when determining how the law applies to you.

This is **Information Sheet 212 (INFO 212)**, issued in March 2016. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.