ASIC FOI 024-2024

COMBATING ILLEGAL PHOENIX ACTIVITY

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BAS	Business Activity Statement
Commissioner	Commissioner of Taxation
GIC	General Interest Charge
GST	Goods and Services Tax
GST Act	*A New Tax System (Goods and Services Tax) Act 1999*
LCT	Luxury Car Tax
PAYG	Pay-as-you-go
PRRT	Petroleum Resource Rent Tax
RBA	Running Balance Account
TAA 1953	*Taxation Administration Act 1953*
WET	Wine Equalisation Tax

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Chapter 2
Phoenixing offences and property transfers to defeat creditors

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Compensation for breach of offence and civil penalty provisions

2.98 Amendments are made to Division 4 in Part 5.7B of the *Corporations Act 2001* to allow liquidators – and in some cases creditors – to recover compensation from officers and facilitators who have contravened a creditor-defeating disposition offence or civil penalty provision.

2.99 Compensation may be sought against a person who has been found to have contravened a civil penalty provision or an offence in relation to a creditor-defeating disposition. Compensation is available for damage suffered by the company's creditors and may be awarded in the same proceedings that determined the offence or civil penalty. ***[Exposure Draft, Schedule 1, items 45 to 49, sections 588J and 588K of the Corporations Act 2001]***

2.100 Compensation may also be sought against a person that has contravened an offence or civil penalty provision but has not been convicted or been subject to a civil penalty order. In these cases, proceedings must be brought within six years of the start of the company's winding up. ***[Exposure Draft, Schedule 1, item 50, subsection 588M(1A) of the Corporations Act 2001]***

2.101 A declaration, conviction or finding made by a court in relation to a person's contravention of the offence of civil penalty provisions may be relied on in proceedings for compensation from the same person. ***[Exposure Draft, Schedule 1, item 54, subparagraphs 588Q(b)(iv) to (vi) of the Corporations Act 2001]***

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Preventing double recovery

2.102 Amendments are made to ensure creditors cannot obtain compensation to the extent compensation is obtained under another provision of the *Corporations Act 2001* such as Part 5.8A. Part 5.8A protects employee entitlements and allows for compensation to be paid by persons who enter agreements or transactions to avoid companies paying employee entitlements. ***[Exposure Draft, Schedule 1, items 51 to 53, and 65, section 588N and paragraph 596AD(b) of the Corporations Act 2001]***

2.103 To the same end, contingent amendments are made to take into account the changes being progressed as part of the forthcoming Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018, a draft of which was released for public consultation on 12 June 2018. Contingent amendments commence differently (or not at all) depending on the sequence in which Bills pass the Parliament and commence.

2.104 Parallel amendments are intended to be made to the definition of the term 'linked'. The Exposure Draft makes two amendments to the term, one that amends the existing definition for the purpose outlined in paragraph 2.102 and another amendment that incorporates both the first amendment and the amendment made by the other Bill. If the other Bill has commenced first, both amendments in the Exposure Draft apply simultaneously. If the Exposure Draft commences first, the second and final amendment in the Exposure Draft applies on the commencement of the other Bill, incorporating both amendments. ***[Exposure Draft, Schedule 1, items 2 and 77, section 9 (definition of 'linked') of the Corporations Act 2001, and section 2 of the Exposure Draft]***

2.105 Amendments are made to subsection 596AI(1), which will be repealed under the other Bill. These amendments are unnecessary and do not commence at all if that Bill commences first. ***[Exposure Draft, Schedule 1, items 75 and 76, subsection 596AI(1) of the Corporations Act 2001, and section 2 of the Exposure Draft]***

2.106 An amendment is made to insert a provision into section 596AB that becomes unnecessary when the other Bill commences. Another amendment is made repealing that provision when the other Bill commences. If the other Bill commences first, the provision is inserted and repealed instantly and does not operate. ***[Exposure Draft, Schedule 1, items 64 and 78, subsection 596AB(5) of the Corporations Act 2001, and section 2 of the Exposure Draft]***

2.107 Other amendments are made to provisions inserted by the other Bill. These amendments are only necessary and only commence after both Bills have otherwise commenced. ***[Exposure Draft, Schedule 1, items 79, 80 and 81, subsection 596AC(5), and paragraphs 596AG(1)(b), (ba), (bb) and (c) of the Corporations Act 2001, and section 2 of the Exposure Draft]***

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