ASIC FOI 024-2024

2016-2017-2018

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (COMBATING ILLEGAL PHOENIXING) BILL 2018

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Assistant Treasurer, the Hon. Stuart Robert MP)

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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
Bill	Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018
Commissioner	Commissioner of Taxation
Criminal Code	The Schedule to the *Criminal Code Act 1995*
GIC	General Interest Charge
GST	Goods and Services Tax
GST Act	*A New Tax System (Goods and Services Tax) Act 1999*
ICCPR	*International Covenant on Civil and Political Rights*
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

2.108 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.

2.109 Compensation may be sought against a person who has been found to have contravened a civil penalty provision or committed 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. ***[Schedule 1, items 55 to 59, sections 588J and 588K of the Corporations Act 2001]***

2.110 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. ***[Schedule 1, item 60, subsection 588M(1A) of the Corporations Act 2001]***

2.111 A declaration, conviction or finding made by a court in relation to a person's contravention of the offence or civil penalty provisions may be relied on in proceedings for compensation from the same person. ***[Schedule 1, item 64, subparagraphs 588Q(b)(iv) to (vi) of the Corporations Act 2001]***

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Preventing double recovery

2.112 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. ***[Schedule 1, items 61, 62, 63 and 74, section 588N and paragraph 596AD(b) of the Corporations Act 2001]***

2.113 To the same end, contingent amendments are made to take into account the changes being progressed as part of the Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018, which was introduced into the Parliament on 20 September 2018. Contingent amendments commence differently (or not at all) depending on the sequence in which Bills pass the Parliament.

2.114 Parallel amendments are intended to be made to the definition of the term 'linked'. This Bill makes two amendments to the term, one that amends the existing definition for the purpose outlined in paragraph 2.112 and another amendment that incorporates both the first amendment and the amendment made by the other Bill. If the other Bill has commenced first, the second amendment in this Bill applies. If this Bill commences first, the first amendment applies immediately and the second and final amendment applies on the commencement of the other Bill, incorporating both amendments. ***[Schedule 1, items 97 and 101, section 9 (definition of 'linked') of the Corporations Act 2001, and items 3 and 4 of the table in subclause 2(1) of the Bill]***

2.115 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. ***[Schedule 1, items 99 and 100, subsection 596AI(1) of the Corporations Act 2001, and item 3 of the table in subclause 2(1) of the Bill]***

2.116 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. ***[Schedule 1, items 98 and 102, subsection 596AB(5) of the Corporations Act 2001, and items 3 and 4 of the table in subclause 2(1) of the Bill]***

2.117 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. ***[Schedule 1, items 103 and 104, subsection 596AC(10A), and subparagraphs 596AF(3)(c)(iii) to (vi) of the Corporations Act 2001, and item 4 of the table in subclause 2(1) of the Bill]***

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