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Corporations Amendment (Phoenixing and Other Measures) Act 2012

Introduction

The federal government announced measures as part of its 2011 Budget to counter and deter what it deemed 'fraudulent phoenix activities'. These activities relate to directors intentionally accumulating debts with creditors and at a later point, transferring the company's assets and business, often at less than market value, to a related entity. The 'old' company is then liquidated by the directors and by the time a liquidator is appointed, there are no assets left to pay debts. The most common debts avoided relate to tax and superannuation entitlements. By creating a new company, the same business continues free from the existing debt burden to statutory authorities. The ATO estimates that approximately 6000 companies in Australia have gone through a phoenix process.

Specifically, the amendments contained in the *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth) (**Act**) are aimed at assisting employees of companies abandoned by their directors to receive payments from the government funded General Employee Entitlements and Redundancy Scheme (**GEERS**) more expeditiously. This is because a precondition for any payment to employees of a failed company under GEERS is that the company

has been formally placed into liquidation. Where the company has limited or no assets, and has effectively been abandoned by its directors, creditors may have no incentive to fund the winding up of the company. The Act facilitates the process of liquidation by enabling ASIC to order the winding up of a company itself.

Substantive amendments

In summary, the Act amends the *Corporations Act 2001* (Cth) (**Corporations Act**) to:

- provide ASIC with an administrative power to order the winding up of a company to facilitate payment of employee entitlements where a company has been abandoned;
- impose a notification requirement on insolvency practitioners in relation to paid parental leave payments; and
- include a regulation making power to prescribe methods of publication of notices relating to events before, during and after the external administration of the company.



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Winding up by ASIC

The Act provides ASIC with a discretionary power to place a company into liquidation where:

- response to a return of particulars given to a company is at least 6 months late and the company has not lodged any documents required under the Corporations Act in the last 18 months and ASIC has reason to believe that the company is not carrying on business and believes the order is in the public interest (subs 489EA(1));
- the company has not paid its annual review fee within one year of the fee being due (subs 489EA(2));
- ASIC has reinstated the registration of a deregistered company in the last six months, and has reason to believe that making the order is in the public interest (subs 489EA(3)); or

- ASIC has reason to believe that the company is no longer carrying on business and has given to the company and each of its directors at least 20 business days' notice of its intention to make the order and there is no objection (subs 489EA(4)).

Previously, the Corporations Act provided that creditors and ASIC could apply to the court for an order to wind up a company. Before the amendments ASIC did not have the power to order the winding up of a company itself. In exercising its powers under new subsection 489EA(1), ASIC will not be acting in the same way, by the same process, or on the same grounds as does a court in ordering the winding up of a company. ASIC will be able to take into account policy considerations, including the ability for employees to access GEERS, or possible phoenixing behaviour by the directors of the company.

Section 489EB operates so that when ASIC exercises its powers to wind up a company, the company is deemed to have passed a special resolution under existing section 491 of the Corporations Act that the company be wound up voluntarily.

Under section 489EC, if ASIC orders that a company be wound up, it may also appoint a liquidator and determine the liquidator's fees where it makes such an appointment. This may provide an additional mechanism when addressing possible phoenix company behaviour by facilitating the investigation of alleged misconduct and uncommercial transactions entered into prior to deregistration.

Publication requirements

The Corporations Act currently requires petitioning creditors and liquidators to publish notices of certain events in the print media

or the ASIC Gazette, often at a significant cost. The Act amends the Corporations Act to allow for publication of notices by other means. The Explanatory Memorandum clarifies that this will be through publication on a single corporate insolvency notices website to be maintained by ASIC. ASIC will charge a prescribed fee for publication. It is expected that the website will be operational from 1 July 2012.

Paid parental leave

Through section 600AA, the Act now imposes an obligation on external administrators to advise the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs (**FAHCSIA**) where a company to which they are appointed is a paid parental leave employer. As the department responsible for administering the Paid Parental Leave Scheme, the changes allow FAHCSIA to determine whether to continue paying paid parental leave payments to the company or to make the payments directly to the employer.

Future amendments – director penalty regime

The *Tax Laws Amendment (2011 Measures No 8) Bill* introduced into parliament in October 2011 has been put on hold following a number of concerns raised during public consultation. The proposed legislation aims to extend the director penalty notice (**DPN**) regime to make directors personally liable for their company's failure to meet employee superannuation entitlements. The predominant concern raised related to whether the proposed changes would prejudice innocent company directors who do not deliberately cheat the system.



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In its current form the Bill would allow the ATO to pursue directors personally without issuing a DPN if the company's unpaid PAYG withholding or superannuation guarantee liability remains unpaid and unreported for three months after the due date. This represents a significant change because it will impose a personal liability on a director even if they have not been served with a notice requesting payment. The proposed legislation also denies directors and their associates their entitlement to PAYG withholding credits where the company has failed to remit PAYG withholding amounts to the ATO. The government has indicated that it expects to introduce the new Bill before August 2012.

Authored by: **Remziye Hussein**, Cornwall Stodart

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For further information please contact:

Ian Sinclair, Partner
Phone (direct) **+61 3 9608 2166**
Mobile **+61 412 906 896**
Email i.sinclair@cornwalls.com.au