

1992

THE PARLIAMENT OF THE COMMONWEALTH OF  
AUSTRALIA

SENATE

CORPORATE LAW REFORM BILL 1992

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of  
the Government

(Circulated by authority of the Attorney-General, the Hon Michael Duffy)





## **CORPORATE LAW REFORM BILL 1992**

### **OUTLINE**

1. The amendments and new clauses to be added to the Bill relate to:
  - related party transactions; and
  - corporate insolvency.
2. A new clause is proposed to be added, providing for the Australian Securities Commission in appropriate cases to exempt directors from the operation of proposed section 232A (Voting by interested director of public company).
3. The proposed new clauses and amendments dealing with corporate insolvency deal with four matters:
  - the definition of 'transaction' for the purposes of proposed Part 5.7B (Recovering property or compensation for the benefit of creditors of an insolvent company) is to be expanded to include 'a guarantee given by the body';
  - proposed section 443A is to be replaced by a provision which will confine the personal liability of an administrator of a company;
  - a new proposed section 446B is to be inserted to allow regulations to provide for a transition from administration to voluntary winding up in certain cases; and
  - proposed section 588FA is to be amended to make it clear that a liquidator may not pursue as a preference a transaction in respect of a secured debt, except to the extent that the security is inadequate to support the transaction.

### **FINANCIAL IMPACT STATEMENT**

4. The new clauses and amendments will not have any significant financial impact.

## CLAUSE BY CLAUSE COMMENTARY

### Amendment 1 - Effect of certain contraventions of this Law

5. This amendment will insert a reference to proposed section 232B in section 103 of the Corporations Law. Section 103 provides that an action is not rendered invalid merely because there has been a contravention of one of a number of specified provisions.

6. Amendment 2 proposes the insertion of a new section 232B into the Corporations Law. Proposed section 232B will allow the Australian Securities Commission to exempt companies from proposed section 232A, to be inserted into the Corporations Law by clause 25. Proposed section 232A establishes a prohibition on directors of public companies voting or being present at Board meetings in relation to matters in which they have a material personal interest. Section 232B will enable the Commission to grant an exemption from compliance with section 232A.

7. The amendment means that a failure to comply with any condition imposed by the Commission pursuant to section 232B will not render invalid anything done by the directors or the company pursuant to the exemption from compliance with section 232A. This will protect innocent third parties relying on the validity of the actions of the company and its directors.

### Amendment 2 - Insertion of new section 232B

8. Clause 25 of the Bill proposes the insertion of a new section 232A into the Corporations Law. Proposed section 232A establishes a prohibition on directors of public companies voting or being present at Board meetings in relation to matters in which they have a material personal interest. The section provides that where as a result of the prohibition there is no quorum of directors the matter may be considered by the company in general meeting. However, there may be circumstances where, for reasons of urgency or some other compelling reason, the matter should be dealt with by the directors, even though the directors have a material personal interest in the matter.

9. Amendment 2 therefore proposes the insertion of a new section 232B which will enable the Australian Securities Commission to exempt directors from section 232A in these circumstances. The Commission will be able to exempt companies from section 232A subject to conditions.

### Amendment 3 - Definition of 'transaction'

10. Clause 29 of the Bill inserts a definition of 'transaction' for the purposes of proposed Part 5.7B of the Corporations Law. This proposed Part deals with the recovery of property or compensation by the liquidator of a company for the benefit of unsecured creditors. This will typically arise from situations where transactions entered into prior to the winding up order can be attacked as unfair preferences or uncommercial transactions. Amendment 3 inserts paragraph (ba) 'a guarantee given by the body' into the definition of 'transaction' so as to make it quite clear that guarantees are transactions.

#### Amendment 4 - Liability of administrator

11. Proposed subsection 443A(1) presently proposes the imposition of personal liability on an administrator for all debts, liabilities and obligations he or she incurs as administrator.

12. Amendment 4 omits proposed subsection 443A(1) and substitutes a new proposed subsection 443A(1). The liability to be imposed on an administrator by the new proposed subsection 443A(1) will be narrower than that originally proposed and will impose personal liability for debts an administrator incurs for services rendered, goods bought and property hired, leased, used or occupied during the performance of his or her functions and powers as administrator. This proposed liability is in the same form as that imposed on receivers by section 419 of the Corporations Law.

#### Amendment 5 - Right of indemnity

13. Amendment 5 amends proposed section 443D by omitting from paragraph 443D(a) the expression 'liabilities and obligations'. This is consequential on the amendments introduced by amendment 4. Proposed section 443D provides for an administrator to be indemnified in respect of his or her liability.

#### Amendment 6 - Insertion of new section 446B

14. Where a company is under voluntary administration, but its prospects are seen to be hopeless, proposed Division 12 of Part 5.3A of the Bill provides for a smooth transition to a winding-up, without the need for a formal court process. Proposed subsection 446A(1) of the Bill identifies three situations where this summary form of winding-up will be available.

15. There may also be other circumstances in which a simple transmission to winding up may be appropriate that have not yet been identified. Amendment 6 thus inserts proposed section 446B which will make provision for the regulations to prescribe other circumstances in which a company may move from administration to winding up, in addition to the circumstances already detailed in proposed subsection 446A(1). This provision will allow consultation with the Courts and other interested parties on the exact circumstances in which such a simple transmission would be appropriate and for those circumstances to be detailed in the regulations.

#### Amendment 7 - Insertion of 'unsecured debt' in proposed section 588FA

16. Amendment 7 amends proposed section 588FA by omitting the word 'debt' in line 21 and substituting 'an unsecured debt'. Proposed section 588FA defines an 'unfair preference'. The definition sets out in the Corporations Law the concept of an unfair preference specifically in terms applicable to corporate insolvency. At present the term is defined for the purposes of individual bankruptcy in the Bankruptcy Act 1966 and incorporated by reference into the Corporations Law. At present a payment in respect of a secured debt does not amount to an unfair preference except to the extent that it exceeds the value of the security. This amendment and the following amendment to proposed section 588FA seek to make it clear that the operation of the law is not being altered in this regard.

Amendment 8 - Insertion of new subsection 588FA(1A)

17. Amendment 8 inserts a new subsection 588FA(1A). This amendment will enable liquidators to attack payments in respect of secured debts as unfair preferences but only where the security's value does not reflect the size of the payment made or extent of the obligation incurred by the company. This reflects the operation of the present law, and is necessary because the amendment of proposed subsection 588FA(1) by amendment 7 will now generally prevent the liquidator pursuing payments in respect of secured debts, as preferences.

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