

EXPOSURE DRAFT

2016-2017

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT

Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017

No. , 2017

(Treasury)

**A Bill for an Act to amend the law relating to
corporations, and for related purposes**

EXPOSURE DRAFT

EXPOSURE DRAFT

Contents

1	Short title.....	1
2	Commencement.....	1
3	Schedules.....	2
Schedule 1—Amendments		3
Part 1—Safe harbour for insolvent trading		3
<i>Corporations Act 2001</i>		3
Part 2—Stay on enforcing rights merely because of arrangements or restructures		8
<i>Corporations Act 2001</i>		8

EXPOSURE DRAFT

1

2

A Bill for an Act to amend the law relating to corporations, and for related purposes

3

4

The Parliament of Australia enacts:

5

1 Short title

6

This Act is the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017*.

7

8

2 Commencement

9

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

10

11

12

13

Commencement information

Column 1

Column 2

Column 3

Provisions

Commencement

Date/Details

1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table

The day this Act receives the Royal Assent.

2. Schedule 1, Part 1

The day after this Act receives the Royal Assent.

3. Schedule 1, Part 2

The later of:
(a) 1 January 2018; and
(b) the day after this Act receives the Royal Assent.

14

15

16

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

No. , 2017

Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill
2017

1

EXPOSURE DRAFT

EXPOSURE DRAFT

Amendments **Schedule 1**
Safe harbour for insolvent trading **Part 1**

1 **Schedule 1—Amendments**

2 **Part 1—Safe harbour for insolvent trading**

3 *Corporations Act 2001*

4 **1 Paragraph 588E(8)(d)**

5 Omit “section 588H”, substitute “section 588GA or 588H”.

6 **2 After section 588G**

7 Insert:

8 **588GA Safe harbour—taking course of action reasonably likely to**
9 **lead to a better outcome for company and its creditors**

10 *Safe harbour*

11 (1) Subsection 588G(2) does not apply in relation to a person and a
12 debt if:

13 (a) at a particular time after the person starts to suspect the
14 company may become or be insolvent, the person starts
15 taking a course of action that is reasonably likely to lead to a
16 better outcome for the company and the company’s creditors;
17 and

18 (b) the debt is incurred in connection with that course of action
19 during the period starting at that time, and ending at the
20 earliest of any of the following times:

21 (i) when the person ceases to take that course of action;

22 (ii) when that course of action ceases to be reasonably likely
23 to lead to a better outcome for the company and the
24 company’s creditors;

25 (iii) when the company becomes a Chapter 5 body
26 corporate.

27 Note 1: The person bears an evidential burden in relation to the defence in this
28 subsection (see subsection (3)).

29 Note 2: For this defence to be available, certain matters must be being done to
30 a reasonable standard (see subsection (4)).

EXPOSURE DRAFT

Amendments **Schedule 1**
Safe harbour for insolvent trading **Part 1**

1 *Definitions*

2 (5) In this section:

3 ***better outcome***, for the company and the company's creditors,
4 means an outcome that is better for both:

5 (a) the company; and

6 (b) the company's creditors as a whole;

7 than the outcome of the company becoming a Chapter 5 body
8 corporate.

9 ***evidential burden***, in relation to a matter, means the burden of
10 adducing or pointing to evidence that suggests a reasonable
11 possibility that the matter exists or does not exist.

12 **588GB Information or books not admissible to support the defence**
13 **if failure to permit inspection etc.**

14 *When books or information not admissible for the defence*

15 (1) If, at a particular time:

16 (a) a person fails to permit the inspection of, or deliver, any
17 books of the company in accordance with:

18 (i) a notice given to the person under section 477 or
19 subsection 530B(4); or

20 (ii) an order made under section 486; or

21 (iii) subsection 477(3) or 530A(1); or

22 (b) a warrant is issued under subsection 530C(2) because the
23 Court is satisfied that a person has concealed, destroyed or
24 removed books of the company or is about to do so;

25 those books, and any secondary evidence of those books, are not
26 admissible in evidence for the person in a relevant proceeding.

27 Note: For subparagraph (a)(i), a liquidator could give such a notice if this is
28 necessary for winding up the affairs of the company and distributing
29 its property (see paragraph 477(2)(m)).

30 (2) If, at a particular time, a person fails to give any information about
31 the company in accordance with:

32 (a) a notice given to the person under section 477; or

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Safe harbour for insolvent trading

1 (b) subsection 530A(1) or (2);
2 that information is not admissible in evidence for the person in a
3 relevant proceeding.

4 *Exception*

- 5 (3) However, subsection (1) or (2) does not apply to a person, and a
6 book or information, if:
7 (a) the person proves that:
8 (i) the person did not possess the book or information at
9 any time referred to in that subsection; and
10 (ii) there were no reasonable steps the person could have
11 taken to obtain the book or information; or
12 (b) each entity seeking to rely on the notice, order, subsection or
13 warrant referred to in that subsection fails to comply with
14 subsection (4) in relation to the person.

15 *Notice of effect of this section must be given*

- 16 (4) An entity that seeks to rely on a notice, order, subsection or
17 warrant referred to in subsection (1) or (2) must set out the effect
18 of this section:
19 (a) for a notice under section 477 or subsection 530B(4)—in that
20 notice; or
21 (b) for an order under section 486 or for subsection 477(3) or
22 530A(2)—in a written notice given to the person when the
23 entity seeks to rely on that order or subsection; or
24 (c) for a warrant issued under subsection 530C(2)—in a written
25 notice given to the person when the entity seeks to exercise
26 the warrant.
27 This subsection does not apply to an entity that seeks to rely on
28 subsection 530A(1).
29 (5) A failure to comply with subsection (4) does not affect the validity
30 of the notice, order, subsection or warrant referred to in
31 subsection (4).

EXPOSURE DRAFT

Amendments **Schedule 1**
Safe harbour for insolvent trading **Part 1**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

Definitions

(6) In this section:

relevant proceeding means a proceeding:

- (a) for, or relating to, a contravention of subsection 588G(2); and
- (b) in which a person seeks to rely on the defence in subsection 588GA(1).

Example: A proceeding under section 588M.

3 Section 588H (heading)

Repeal the heading, substitute:

588H Other defences

4 Application of amendments

The amendments made by this Part apply in relation to:

- (a) actions taken before, at or after the commencement of this Part; and
- (b) debts incurred at or after that commencement.

EXPOSURE DRAFT

Schedule 1 Amendments

Part 2 Stay on enforcing rights merely because of arrangements or restructures

1 **Part 2—Stay on enforcing rights merely because of**
2 **arrangements or restructures**

3 *Corporations Act 2001*

4 **5 At the end of Part 5.1**

5 Add:

6 **415D Stay on enforcing rights merely because of a proceeding under**
7 **this Part**

8 *Stay on enforcing rights*

- 9 (1) A right under a contract, agreement or arrangement is, by force of
10 this subsection, not enforceable against a Part 5.1 body merely
11 because the Part 5.1 body is the subject of:
12 (a) an application under section 411; or
13 (b) a compromise or arrangement approved under this Part as a
14 result of an application under section 411.

15 Note: This result is subject to subsections (3) and (4).

16 Example: A right to terminate a contract, or a right to accelerate payments by the
17 body under a contract, will not be enforceable to the extent that those
18 rights are triggered by the body becoming the subject of such an
19 application, compromise or arrangement.

20 *Period of the stay*

- 21 (2) The right is not enforceable as described in subsection (1) during
22 the period that:
23 (a) starts when the application under section 411 is made; and
24 (b) ends:
25 (i) when the application is withdrawn or the Court
26 dismisses the application; or
27 (ii) unless subparagraph (iii) applies—at the end of any
28 compromise or arrangement approved under this Part as
29 a result of the application; or

EXPOSURE DRAFT

Amendments **Schedule 1**

Stay on enforcing rights merely because of arrangements or restructures **Part 2**

- 1 (iii) if such a compromise or arrangement ends because of a
2 resolution or order for the Part 5.1 body to be wound
3 up—when the Part 5.1 body is wound up.

4 *Application must be made to avoid insolvency*

- 5 (3) However, subsection (1) only applies if the application under
6 section 411 states it is being made for the purpose of the Part 5.1
7 body avoiding being wound up in insolvency.

8 *Rights not subject to the stay*

- 9 (4) Subsection (1) does not apply to the right if it is:
10 (a) a right under a contract, agreement or arrangement entered
11 into after the day the order (if any) approving a compromise
12 or arrangement as a result of the application takes effect; or
13 (b) a right contained in a kind of contract, agreement or
14 arrangement:
15 (i) prescribed by the regulations for the purposes of this
16 subparagraph; or
17 (ii) declared under paragraph (5)(a); or
18 (c) a right that:
19 (i) manages financial risk (within the meaning of
20 Chapter 7) associated with a financial product (within
21 the meaning of that Chapter); and
22 (ii) is commercially necessary for the provision of financial
23 products of that kind; or
24 (d) a right of a kind declared under paragraph (5)(b).

25 Note: For paragraph (a), subsection 411(10) sets out when the order takes
26 effect.

- 27 (5) For the purposes of subsection (4), the Minister may, by legislative
28 instrument:
29 (a) declare kinds of contracts, agreements or arrangements
30 referred to in a specified law of the Commonwealth; or
31 (b) declare kinds of rights that are commercially necessary for a
32 specified kind of contract, agreement or arrangement to be
33 entered into.

EXPOSURE DRAFT

Amendments **Schedule 1**

Stay on enforcing rights merely because of arrangements or restructures **Part 2**

- 1 (ii) a compromise or arrangement approved under this Part
2 as a result of a section 411 application; and
3 (b) the Court is satisfied that:
4 (i) the rights are being exercised; or
5 (ii) the rights are likely to be exercised; or
6 (iii) there is a threat to exercise the rights;
7 merely because the Part 5.1 body is the subject of the
8 section 411 application, or is the subject of the compromise
9 or arrangement; and
10 (c) an application for the stay order is:
11 (i) included in the section 411 application; or
12 (ii) if a compromise or arrangement has been approved
13 under this Part as a result of the section 411
14 application—made by the person appointed to
15 administer the compromise or arrangement; and
16 (d) the section 411 application states it is being made for the
17 purpose of the Part 5.1 body avoiding being wound up in
18 insolvency.
- 19 (3) An order under subsection (1) must specify the period for which it
20 applies, which must not exceed the period referred to in
21 subsection 415D(2).
- 22 (4) Subsection (1) does not apply to a right referred to in
23 subsection 415D(4).
- 24 *Interim orders*
- 25 (5) Before deciding an application for a stay order, the Court may
26 grant an interim order for one or more rights under a contract,
27 agreement or arrangement not to be enforced against a Part 5.1
28 body.
- 29 (6) The Court must not require an applicant for a stay order to give an
30 undertaking as to damages as a condition of granting an interim
31 order.

6 At the end of Division 17 of Part 5.3A

Add:

EXPOSURE DRAFT

EXPOSURE DRAFT

Amendments **Schedule 1**

Stay on enforcing rights merely because of arrangements or restructures **Part 2**

1 The extension order ceases to be in force when the order under
2 section 444F ceases to be in force.

3 *Rights not subject to the stay*

4 (4) Subsection (1) does not apply to the right if it is:

5 (a) a right under a contract, agreement or arrangement entered
6 into after the day the administration of the company begins;
7 or

8 (b) a right contained in a kind of contract, agreement or
9 arrangement:

10 (i) prescribed by the regulations for the purposes of this
11 subparagraph; or

12 (ii) declared under paragraph (5)(a); or

13 (c) a right that:

14 (i) manages financial risk (within the meaning of
15 Chapter 7) associated with a financial product (within
16 the meaning of that Chapter); and

17 (ii) is commercially necessary for the provision of financial
18 products of that kind; or

19 (d) a right of a kind declared under paragraph (5)(b).

20 (5) For the purposes of subsection (4), the Minister may, by legislative
21 instrument:

22 (a) declare kinds of contracts, agreements or arrangements
23 referred to in a specified law of the Commonwealth; or

24 (b) declare kinds of rights that are commercially necessary for a
25 specified kind of contract, agreement or arrangement to be
26 entered into.

27 *Stay on company's right to additional credit*

28 (6) If one or more rights of an entity against a company are not
29 enforceable for a period because of subsection (1), any right under
30 a contract, agreement or arrangement that the company has against
31 the entity for the provision of additional credit is, by force of this
32 subsection, not enforceable during the same period.

EXPOSURE DRAFT

Amendments **Schedule 1**

Stay on enforcing rights merely because of arrangements or restructures **Part 2**

1 contract, agreement or arrangement not to be enforced against a
2 company.

3 (6) The Court must not require an applicant for an order under
4 subsection (1) to give an undertaking as to damages as a condition
5 of granting an interim order.

6 **7 Application of amendments**

7 The amendments made by this Part apply in relation to rights arising
8 under contracts, agreements or arrangements entered into at or after the
9 commencement of this Part.

EXPOSURE DRAFT