

## **CORPORATIONS AMENDMENT (PHOENIXING AND OTHER MEASURES) BILL 2012**

The Corporations Amendment (Phoenixing and Other Measures) Bill 2012 (the Bill) amends the Corporations Act to:

- provide ASIC with an administrative power to order the winding up of a company;
- 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 events relating to the external administration of a company.

The ASIC administrative power to wind up a company is an election commitment from the Government's Protecting Workers' Entitlement Package announced in July 2010.

### **WINDING UP BY ASIC**

- A precondition of any payment to employees of a failed company under the General Employee Entitlements and Redundancy Scheme (GEERS) is that the company has been formally placed into liquidation. The Bill provides ASIC with powers to order the winding up of a company. This is particularly relevant when companies are abandoned by their directors.
- The powers contained in Schedule 1 of the Bill would enable ASIC to administratively appoint a liquidator to take over the conduct of a company's affairs, where otherwise deregistered or deregisterable or abandoned.
- In addition ASIC would be able to place abandoned companies into liquidation for the purpose of enabling a liquidator to investigate and report on alleged misconduct; or to investigate and take action in respect of uncommercial transactions entered into prior to deregistration. The appointing of a liquidator when ASIC uses this power may therefore also provide an additional mechanism to aid in addressing possible phoenix company behaviour.
- ASIC can order the winding up of a company in each of the circumstances listed in 489F(1) to 489F(4). These are distinct self contained powers that are separate from each other, and will enable ASIC to order the winding up of a company in circumstances where it currently has powers to deregister a company. [Clause 489F]
- Under Clause 489F(1), ASIC can order the winding up: if the company's response to a return of particulars sent to it by ASIC is over six months late and the company has not lodged any other documents with ASIC in the last 18 months and ASIC considers the company is no longer carrying on business. [Clause 489F(1)]
- Under Clause 489F(2), ASIC can order the winding up: if the company has not paid its annual review fee within 12 months of the due date . [Clause 489F(2)]
- Under Clause 489F(3), ASIC can order the winding up: if ASIC has reinstated the registration of the company under subsection 601AH(1).

- ASIC can currently reinstate a company if it is satisfied that it should not have been deregistered. Under the Bill, they will be able to reinstate and then appoint a liquidator to investigate the company's affairs and wind up the company.
- Under 489F(4), ASIC can also order the winding up if ASIC is of the view that the company is no longer carrying on business and it has provided notice to the directors and there had been no objection received.
- ASIC is not required to give notice to the company before using its powers under clauses 489F(1) to (3). This is because for Clause 489F(1) to (3), there is objective evidence of abandonment in that the company has failed to respond.
- Before ASIC uses its power under Clause 489F(4) it is required to give directors notice as set out in that clause. If the company or its directors object, ASIC cannot use its power under Clause 489F(4).

### ***Review Rights***

- Section 1317B of the Corporations Act provides that the Administrative Appeals Tribunal can conduct a merits review of any decision made by ASIC under the Corporations Act, unless it is an excluded decision as set out in subsection 1317B(2).

### **PUBLICATION REQUIREMENTS**

- There are a range of notices in the course of external administrations that must be published in the print media or in the ASIC Gazette. The Bill would amend the Corporations Act to:
  - require the notices to be published in the prescribed manner;
  - remove the current requirements in the Corporations Act that provide for advertising or gazettal of such events (except in relation the gazettal of class orders relating to companies in external administration in section 250PAA of the Corporations Act); and
  - provide a regulation making power to prescribe methods of publication of events relating to the external administration of a company (including in respect of Court proceedings relating to external administration).

### **MISCELLANEOUS AMENDMENTS**

#### ***Creditors Voluntary Winding Up – Meeting of Creditors***

- Subsection 497(1) of the Corporations Act currently states that the liquidator of the company must cause a meeting to be 'convened' within 11 days after the resolution for the voluntary winding up has passed.
- The use of the word 'convened' has caused confusion as to whether the meeting must be held or just arranged in 11 days. The Explanatory Memorandum for the *Corporations Amendment (Insolvency) Act 2007* provides that the legislative intent was for the meeting to be held within 11 days.

- To avoid confusion, the law will be amended to provide that the subsection 497(1) meeting must be held within 11 days.

### ***Paid Parental Leave***

- The Government introduced Australia's first national Paid Parental Leave Scheme on 1 January 2011 which is administered by the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA).
- As part of the scheme, FAHCSIA funds employers to pay the paid parental leave payments for their employees.
- FAHCSIA will generally be notified by a liquidator's appointment as they will be a creditor. However, FAHCSIA may not be a creditor, even though an insolvent company is a paid parental leave employer, for example when an employee has been paid all funds provided by FAHCSIA owing to them by their employer at the time insolvency occurs.
- The amendment will provide that FAHCSIA be notified of an insolvency practitioner's appointment, even when they are not a creditor.
- The amendment is necessary so that FAHCSIA can determine whether to continue paying paid parental leave payments to the company or to make the paid parental leave payments directly to the employee.

## **APPLICATION PROVISIONS**

### ***Part 1 of Schedule 1***

ASIC powers under this part will apply prospectively and in relation to past failures to provide return of particulars; pay review fees and reinstatements.

### ***Part 2 of Schedule 1***

The amendments to subsection 412(1) will apply in relation to notices published after the commencement of Schedule 1.

The amendments to subsections 436E(3), 439A(3), 449C(5), 497(2), 509(2) will apply in relation to meetings convened after the commencement of Schedule 1.

The amendments to subsections 446A(5), 491(2) will apply to resolutions taken to have passed by a company after the commencement of Schedule 1.

The amendments to subsections 450A(1) will apply in relation to the appointment of an administrator that occurs after the commencement of Schedule 1.

The amendments to section 465A will apply in relation to applications after the commencement of Schedule 1.

The amendments to subsection 498(3) will apply in relation to adjournments that occur after the commencement of Schedule 1.

The amendments to subsection 568A(2) will apply to disclaimers of property occurring after the commencement of Schedule 1.

In relation to notice of deregistrations that occur prior to the commencement of Schedule 1, the notice provisions that applied at the start of the commencement of the deregistration continue to apply.

***Part 3 of Schedule 1***

In relation to subsection 497(1), the amendments will apply to resolutions for winding up passed after the commencement of Schedule 1.

For section 600AA, this applies to appointments from after the commencement of Schedule 1.